DEPARTMENT OF EDUCATION

34 CFR Part 303

RIN 1820–AB59

Early Intervention Program for Infants and Toddlers With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues final regulations governing the Early Intervention Program for Infants and Toddlers with Disabilities. These regulations are needed to reflect changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Act or IDEA).

DATES: These regulations are effective on October 28, 2011.

FOR FURTHER INFORMATION CONTACT: Alexa Posny, U.S. Department of Education, 550 12th Street, SW., Potomac Center Plaza, room 5107, Washington, DC 20202–2641. *Telephone:* (202) 245–7605. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay System (FRS) at 1–800–877–8339. Individuals with disabilities may obtain this document in an alternative format (*e.g.,* braille, large print, audiotape, or computer diskette) upon request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: These regulations implement changes in the regulations governing the Early Intervention Program for Infants and Toddlers with Disabilities necessitated by the reauthorization of the IDEA.

On May 9, 2007, the U.S. Department of Education (the Department) published a notice of proposed rulemaking in the **Federal Register** (72 FR 26456) (NPRM) to amend the regulations governing the Early Intervention Program for Infants and Toddlers with Disabilities. In the preamble to the NPRM, the Secretary discussed, on pages 26456 through 26496, the changes proposed to the regulations for this program, which regulations are set forth in 34 CFR part 303.

In these regulations, the Department is amending and finalizing the regulations proposed in the May 2007 NPRM, except in the maintenance of effort (MOE) provisions (proposed § 303.225) (which implement part C's supplement not supplant requirements). The Department plans to obtain additional public input and conduct further rulemaking in this area.

Due to the economic changes that many States have experienced since the publication of the NPRM in May 2007, the Department has received many informal inquiries requesting guidance on the MOE provisions in the part C regulations (which implement the supplement not supplant requirements under part C of the Act). States also have expressed concern about their ability to meet the MOE requirements and their continued participation in the part C program. In response to these concerns, the Department intends to issue a separate NPRM and seek input from the public on the MOE provisions. Accordingly, these final regulations continue in § 303.225 the MOE requirements in current § 303.124.

Major Changes in the Regulations

The following is a summary of the major changes in these final regulations from the regulations proposed in the NPRM (the rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section of this preamble):

Subpart A—General

Definitions

- The definition of *multidisciplinary* in § 303.24 has been revised with respect to the individualized family service plan (IFSP) Team composition to require the parent and two or more individuals from separate disciplines or professions with one of these individuals being the service coordinator.
- Revised § 303.25(a) and new § 303.321(a)(5) and (a)(6) clarify that in the case of a child who is limited English proficient, *native language* means the language normally used by the parents of the child except that when conducting evaluations and assessments of the child, qualified personnel determine whether it is developmentally appropriate to use the language normally used by the child. Additionally, we have removed the requirement in proposed § 303.25(a)(2) that the native language of the parents be used in all direct contact with the child.
- We have revised the definition of *personally identifiable information* in § 303.29 to cross-reference, with appropriate modifications, the definition of that same term contained in the regulations under the Family Educational Rights and Privacy Act (FERPA) in 34 CFR 99.3, as amended.
- New § 303.32 adds to these regulations a definition of *scientifically based research,* which cross-references, with appropriate modifications, the definition of the same term contained in section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

Subpart C—State Application and Assurances

Application Requirements

- Section 303.203(b)(2) clarifies that the State's application must include, as part of coordination of all resources, those methods the State uses to implement the payor of last resort requirements in § 303.511.
- Revised § 303.208(b), regarding public participation policies and procedures, requires lead agencies to hold public hearings, provide at least 30 days' prior notice for the hearings, and provide a public comment period of at least 30 days before adopting any new or revised part C policies or procedures.
- Revised § 303.209(b)(1)(i) (proposed § 303.209(b)(2)(i)) requires that, for toddlers with disabilities who may be eligible for preschool services under part B of the Act, the lead agency notify (consistent with any opt-out policy adopted by the State under § 303.401(e)), not only the local educational agency (LEA) where the toddler resides, but also the State educational agency (SEA), and revise the timeline for the notification to occur not fewer than 90 days before the toddler's third birthday.
- New § 303.209(b)(1)(ii) clarifies that if the lead agency determines a child to be eligible for part C services between 45 and 90 days prior to the toddler's third birthday, the lead agency must notify (consistent with any opt-out policy adopted by the State under § 303.401(e)), not only the LEA where the toddler resides, but also the SEA, as soon as possible after the toddler's eligibility determination.
- New § 303.209(b)(1)(iii) provides that if a child is referred to the lead agency fewer than 45 days before that toddler's third birthday, the lead agency is not required to conduct the initial evaluation, assessment, or IFSP meeting, and if that child may be eligible for preschool services or other services under part B of the Act, the lead agency, with the parental consent required under § 303.414, must refer the toddler to the SEA and appropriate LEA.
- Revised § 303.209(d)(2) clarifies that the transition plan is not a separate document, but is included in the IFSP.
- New § 303.209(e) clarifies that a transition conference under § 303.209(c) or meeting to develop the transition plan under § 303.209(d) must meet the

IFSP meeting requirements in §§ 303.342(d) and (e) and 303.343(a) and that this conference and meeting may be combined.

• New § 303.209(f) clarifies when and what transition requirements in § 303.209 apply to toddlers with disabilities, including toddlers in a State that elects to offer part C services beyond age three under § 303.211.

• Revised § 303.211(b)(6) clarifies the transition requirements that apply to children receiving services under § 303.211 as they transition to preschool, kindergarten or elementary school.

• Proposed § 303.225 has been revised to include the MOE requirements in current § 303.124. The Department intends to issue an NPRM on the MOE provisions and provide an opportunity for the public to comment on the proposed rule.

Subpart D—Child Find, Evaluations and Assessments, and Individualized Family Service Plans

General

• New § 303.300 identifies the major components of the statewide comprehensive, coordinated, multidisciplinary interagency system by specifically distinguishing between pre-referral activities (public awareness and child find), referral, and post-referral IFSP activities (including screening, evaluations, assessments, and IFSP development, review, and implementation).

Pre-Referral Procedures

• Revised § 303.301(c) (proposed § 303.300(c)) requires each lead agency, as part of its public awareness obligation, to provide for informing parents of toddlers about preschool programs under section 619 of the Act not fewer than 90 days prior to the toddler's third birthday.

• Revised new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)) adds the following two programs to the list of programs with which the lead agency must coordinate its child find efforts: (1) The Children's Health Insurance Program (CHIP) and (2) the State Early Hearing Detection and Intervention (EHDI) system. Since the publication of the May 2007 NPRM, the name of the State Children's Health Insurance Program (S-Chip) was changed to the ''Children's Health Insurance Program (CHIP).'' This change is reflected in these final regulations.

• Revised § 303.303(a)(2)(i) requires primary referral sources to refer a child to the part C program ''as soon as possible but in no case more than seven days'' after identification.

Post-Referral Procedures

• New § 303.310 (proposed § 303.320(e)(1)) requires that, within 45 days after the lead agency or early intervention service (EIS) provider receives a referral of a child, the screening (if applicable), initial evaluation, initial assessments (of the child and family), and the initial IFSP meeting for that child must be completed (45-day timeline).

• New § 303.310(b)(2) adds an exception to the 45-day timeline if the parent has not provided consent to the initial screening, evaluation, or assessment of the child, despite documented, repeated attempts to obtain parental consent. Revised § 303.310(c) (proposed § 303.320(e)(2)) requires the lead agency to ensure completion of the initial evaluation, assessments, and IFSP meeting as soon as possible after parental consent is provided.

• Revised § 303.320 (proposed § 303.303) requires the lead agency to provide notice to parents of its intent to screen and clarifies that, at any time during the screening process, a parent may request an evaluation.

• Revised § 303.321(a)(2)(i) (proposed § 303.320) clarifies that (1) the term *initial evaluation* refers to the evaluation of a child that is used to determine his or her initial eligibility under part C of the Act and (2) the term *initial assessments* refers to the assessment of the child and the family assessment that are conducted prior to the child's first IFSP meeting.

• New § 303.322 clarifies that the prior written notice requirements in § 303.421 apply when the lead agency determines, after conducting an evaluation, that a child is not an infant or toddler with a disability.

• Revised § 303.342(e) requires early intervention services to be provided as soon as possible after parental consent.

Subpart E—Procedural Safeguards

Confidentiality of Personally Identifiable Information and Early Intervention Records

• New § 303.404(d) requires that the general notice provided to parents by the lead agency specify the extent to which that notice is provided in the native languages of the various population groups in the State.

• Section 303.405(a), regarding a parent's rights to inspect and review any early intervention records and the timeline the lead agency must follow any time a parent makes such a request, is revised to require that the participating agency must comply with a parent's request without unnecessary delay and in no case more than 10 days after the parent makes the request to inspect and review records.

• New § 303.409(c) requires the participating agency to provide at no cost to the parent, a copy of each evaluation, assessment of the child, family assessment, and IFSP as soon as possible after each IFSP meeting.

• Section 303.414(b) sets forth the specific exceptions to the parental consent required before a participating agency may disclose personally identifiable information under these regulations.

• Proposed § 303.414(d), regarding limited disclosures of personally identifiable information in early intervention records that may be sought by Protection and Advocacy (P&A) agencies, has been removed.

Parental Consent and Surrogate Parents

• Section 303.420(c) is revised to indicate that a lead agency may not use the due process hearing procedures under this part or under part B of the Act to challenge a parent's refusal to provide any consent required under § 303.420(a), which includes consent for evaluations and assessments.

• New § 303.422(g), concerning lead agency responsibility concerning surrogate parents, adds a 30-day timeline requirement regarding the lead agency's obligation to make reasonable efforts to ensure the assignment of a surrogate parent after a public agency determines that the child needs a surrogate parent.

Dispute Resolution Options

• New § 303.437(c) permits the due process hearing officer, in a State that elects to adopt the part C due process hearing procedures under § 303.430(d)(1), to grant specific extensions of time beyond the 30-day timeline at the request of either party.

• Section 303.446 is revised to permit, but not require, the lead agency to establish procedures that would allow any party aggrieved by the findings and decision in the due process hearing to appeal to, or request reconsideration of the decision by, the lead agency.

Subpart F—Use of Funds and Payor of Last Resort

• Section 303.520(a) establishes three new requirements that are designed to provide important protections for parents of infants and toddlers with disabilities balanced against the need for States to have access to public benefits and public insurance to finance part C services while implementing the system of payments, coordination of

funding sources, and payor of last resort requirements under part C of the Act. Under this section, a State must obtain a parent's consent prior to requiring a parent to enroll in a public benefits or insurance program or if the use of funds from a public benefits or insurance program imposes certain costs on the parent. This section also requires a State to provide written notice to parents of applicable confidentiality and no-cost protections if the State lead agency or EIS provider or program uses public benefits or insurance to pay for part C services.

• Section 303.521(a) is revised to provide that the State's system of payments policies must include the State's definition of ability to pay and indicate when and how the agency makes its determination regarding the parent's ability or inability to pay.

• A new § 303.521(e) is added to address a parent's procedural safeguard rights under a State's system of payments.

Subpart G—State Interagency Coordinating Council

• Proposed § 303.601(a), which states that a parent member on the Council may not be an employee of a public or private agency involved in providing early intervention services, has been removed.

• New § 303.605(c) permits the Council to coordinate and collaborate with the State Advisory Council on Early Childhood Education and Care, which is required to be established by States under the Improving Head Start for School Readiness Act of 2007.

Subpart H—Federal and State Monitoring and Enforcement; Reporting; and Allocation of Funds

• Section 303.702(b) has been revised to indicate that the State annual reporting to the public, on the performance of each EIS program in relation to the State's Annual Performance Report (APR) targets must be ''as soon as practicable but no later than 120 days'' following the State's APR submission to the Secretary.

These final regulations contain additional changes from the NPRM that we explain in the following *Analysis of Comments and Changes.*

Analysis of Comments and Changes

Introduction

In response to the invitation in the NPRM, more than 600 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM immediately follows this introduction. The perspectives of parents, individuals with disabilities, early intervention providers, State and local officials, members of Congress, and others were useful in helping identify where changes to the proposed regulations should be made, and in formulating many of the changes. In light of the comments received, a number of significant changes are reflected in these final regulations.

Substantive issues are discussed under their corresponding subpart. References to subparts in this analysis are to those contained in the final regulations. The analysis generally does not address—

(a) Minor changes, including technical changes made to the language published in the NPRM;

(b) Suggested changes the Secretary is not legally authorized to make under applicable statutory authority; and

(c) Comments that express concerns of a general nature about the Department or other matters that are not directly relevant to these regulations, including requests for information about innovative early intervention methods or matters that are within the purview of State and local decision-makers.

Subpart A—General

Purpose and Applicable Regulations

Purpose of the Early Intervention Program for Infants and Toddlers With Disabilities (§ 303.1)

Comment: A few commenters recommended revising the title of § 303.1 to replace ''early intervention program'' with ''early intervention system.'' These commenters stated that the word ''system'' is consistent with the language in the Act, other recent regulatory changes, and the intent of coordinated interagency efforts.

Discussion: The title of this section refers to the overall purposes of the Federal early intervention program that the Department administers under part C of the Act and is being implemented through these regulations. The term is not intended to refer to the early intervention systems that States must develop and implement under part C of the Act. Therefore, the title of this section has not been changed.

Changes: None.

Purpose of the Early Intervention Program for Infants and Toddlers With Disabilities (§ 303.1(d))

Comment: One commenter suggested that the list of historically underrepresented populations in § 303.1(d) be revised to include infants and toddlers with disabilities who are wards of the State and homeless children. Other commenters recommended that we include infants and toddlers in foster care in this list.

Discussion: The historically underrepresented populations listed in § 303.1(d) are the same as those listed in section 631(a)(5) of the Act, which refers to the need to enhance capacity to identify, evaluate, and meet the needs of all children, including historically underrepresented populations, particularly minority, low-income, inner-city, and rural children, and infants and toddlers in foster care.

The list in § 303.1(d) is not exhaustive. Rather, this list provides examples of historically underrepresented populations, for whom State and local agencies and EIS providers need to improve services. For this reason, including children who are wards of the State and homeless children in § 303.1(d) is not necessary. We also note that other sections of the Act and these regulations identify specific child find and other responsibilities of States for identifying, evaluating, and meeting the needs of children who are homeless and wards of the State. For example, § 303.101(a)(1)(ii) through (a)(1)(iii) requires a State, as a condition of receiving part C funds, to provide an assurance that the State has adopted a policy to make appropriate early intervention services available to infants and toddlers with disabilities who are homeless and their families and infants and toddlers with disabilities who are wards of the State.

Concerning the specific comment that infants and toddlers in foster care should be included in the list, we note that the list in § 303.1(d) already includes ''infants and toddlers in foster care.''

Changes: None.

Eligible Recipients of an Award and Applicability of This Part (§ 303.2)

Comment: One commenter indicated that tribal programs and tribal governments should be included in the list of eligible recipients of an award in § 303.2.

Discussion: Section 303.2 provides that the Secretary of the Interior is an eligible recipient of funds under part C of the Act. Under section 643(b)(2) of the Act, the Department of Interior, through the Bureau of Indian Education, distributes part C funds to Indian entities that are eligible to receive services and funding from the United States. Under section 643(b)(1) of the Act, the Department must distribute part C funds that are used by tribal programs and governments to the Secretary of the

Interior and not directly to tribal programs and governments. Therefore, it would be inappropriate to list these entities as eligible recipients.

Changes: None.

Applicable Regulations (§ 303.3)

Comment: Some commenters expressed concern with and were confused by the multiple terms used to refer to early intervention records across the subparts. The commenters noted, for example, that the proposed regulations use the terms ''part C records,'' ''early intervention records,'' ''education records,'' and ''the records.''

Discussion: We agree that using multiple terms to refer to early intervention records is confusing and, therefore, we have changed all references to ''part C records,'' ''education records,'' and ''the records'' in this part to ''early intervention records.'' Additionally, we have added paragraph (b)(2) to § 303.3 to indicate that any reference to ''records'' or ''education records'' in the applicable regulations means the early intervention records under this part.

Changes: We have changed all references to ''part C records,'' ''education records,'' and ''the records'' in this part to ''early intervention records.'' Consequently, the reference to ''part C records'' in § 303.401(b)(2), regarding confidentiality procedures and the parents' opportunity to inspect and review all part C records, has been changed to ''part C early intervention records.'' Also, the proposed phrase ''education records'' has been changed to ''early intervention records'' in § 303.403(b), regarding the definition of early intervention records; § 303.405(a), regarding parents' right to access such records; § 303.405(b), regarding what the right to inspect and review early intervention records includes; § 303.406, regarding the record of access; § 303.407, regarding records on more than one child; § 303.408, regarding the requirement that agencies must provide parents, upon request, a list of the types and locations of early intervention records collected, maintained, or used by the agency; § 303.410(a), regarding amendment of records at the parents' request; and § 303.411, regarding the opportunity for a hearing to challenge information in early intervention records.

Finally, the references to ''the records'' in the following regulations have been replaced with ''early intervention records'': § 303.7(b), regarding the definition of consent; § 303.310(c)(1), regarding the documentation of exceptional circumstances that may delay the evaluation and initial assessment of a child; § 303.405(b)(1), regarding parents' right to a response to reasonable requests for explanations and interpretations of early intervention records; § 303.405(b)(2), regarding parents' right to request that a participating agency provide copies of early intervention records; § 303.405(b)(3), regarding parents' right to have a representative of the parents inspect and review the early intervention records; § 303.406, regarding the maintenance of a record of parties obtaining access to early intervention records; § 303.412(b), regarding the right of parents to place a statement commenting on information or disagreeing with the decision of the agency following a hearing to challenge information in early intervention records; § 303.412(c), regarding the maintenance of any such explanation in the child's record; § 303.412(c)(1), regarding the length of time any explanation must be maintained as part of the early intervention records; § 303.412(c)(2), regarding the disclosure of any explanation placed in the early intervention records, and § 303.414(b)(2) regarding the modification provisions in applying the exceptions under FERPA to the part C program.

Additionally, we have added § 303.3(b)(2) to indicate that any reference to ''education records'' in EDGAR means ''early intervention records'' under this part.

Eligible Recipients of an Award (Proposed § 303.2) and Limitation on Eligible Children (Current § 303.4)

Comment: Many commenters opposed our proposal to remove current § 303.4, which provides that part 303 does not apply to any child with a disability who is receiving a free appropriate public education (FAPE), in accordance with the part B regulations in 34 CFR part 300. The commenters stated that this long-standing provision was an important component of State EIS systems for children who are transitioning from services under part C of the Act to services under part B of the Act. One commenter suggested retaining current § 303.4 because the regulation helped to clarify that children receiving part C services do not also receive FAPE under part B of the Act. The commenter also indicated that it is important to clarify to whom the part C regulations apply.

Discussion: We agree with the commenters and have included the language from current § 303.4 in a new paragraph (b) under § 303.2 to clarify that the regulations in part 303 do not apply to a child with a disability who is receiving FAPE under part B of the Act.

We also have modified this provision to identify the entities that must comply with part 303. Part 303 applies to the lead agency and any EIS provider that is part of the part C statewide system of early intervention required of each State in sections 634 and 635 of the Act, regardless of whether the EIS provider receives funds under part C of the Act. part 303 also applies to each child referred to part C, as well as to infants and toddlers with disabilities (*i.e.,* children determined eligible for services under part C of the Act) and the families of these children, consistent with the definitions of *child* in § 303.6 and *infant or toddler with a disability* in § 303.21.

Changes: We have revised the title of § 303.2 to read ''Eligible recipients of an award and applicability of this part.'' We have added a new paragraph (b) to provide that the provisions of part 303 apply to the lead agency and any EIS provider that is part of the part C statewide system of early intervention services, regardless of whether that EIS provider receives funds under part C of the Act, and to all children referred to the part C program and infants and toddlers with disabilities and their families. New paragraph (b) also provides that part 303 does not apply to a child with a disability receiving a free appropriate public education or FAPE under 34 CFR part 300.

At-Risk Infant or Toddler (§ 303.5)

Comment: Two commenters supported the proposed definition of *at-risk infant or toddler* in § 303.5. Other commenters recommended revising the definition to expand the list of factors that could cause an infant or toddler to be considered at-risk. The suggested factors included exposure to lead paint, alcohol abuse, fetal alcohol syndrome, abandonment, post-natal drug exposure, homelessness, and family violence. One commenter suggested the list of factors be preceded by the phrase ''including, but not limited to.''

Discussion: The list of factors that may contribute to an infant or toddler being considered at-risk for a developmental delay included in § 303.5 is not meant to be exhaustive. We have not expanded this list further because § 303.5 provides a sufficient number and range of factors that a State may include in its definition of *at-risk infant or toddler* for each State to understand the scope of the regulation. Further, § 303.5 provides discretion and flexibility for each State to define *at-risk infant or toddler* and determine the factors that may contribute to an infant or toddler being considered at-risk for a

developmental delay in light of the unique needs of the State's at-risk population. Therefore, revising the definition of *at-risk infant or toddler* to expand the list of factors included in the definition is not necessary.

For clarity, we have replaced the phrase ''such as,'' which precedes the list of factors, with the word ''including.'' We note that the definitions of *include* and *including* in § 303.18 clarify that the items named in a particular list are not all of the possible items that are covered, whether like or unlike the ones named. This change clarifies that the list of factors is not exhaustive.

Changes: We have replaced the phrase ''such as'' with the word ''including.''

Comment: A few commenters expressed concern that Federal funding of part C of the Act is not sufficient to serve at-risk infants and toddlers and that the inclusion of § 303.5 may give parents the impression that early intervention services are available for at-risk infants and toddlers, when these services are not always available.

Discussion: The statute permits, but does not require, States to offer services to at-risk infants and toddlers. A definition of *at-risk infant or toddler* is necessary to guide implementation by States that choose to provide early intervention services to at-risk infants and toddlers. If a State chooses to provide these services, the State, pursuant to § 303.204(a), must provide a definition of at-risk infant or toddler and a description of the services available to these children in the information the lead agency provides to parents and primary referral sources through the State's public awareness program, as required under § 303.301. For those States that choose to provide part C early intervention services to at-risk infants and toddlers, the definition of *at-risk infant or toddler* in § 303.5, which aligns with the statutory definition, provides the information States need to meet the part C requirements.

Changes: None.

Comment: None.

Discussion: As proposed, the definition of *at-risk infant or toddler* provided that, at the State's discretion, an at-risk infant or toddler may include an infant or toddler who is at risk of experiencing developmental delay because of biological *and* environmental factors, including those listed in the proposed definition. We have determined that this language should be clarified to provide that the term *at-risk infant or toddler* may include an infant or toddler who is at risk of experiencing developmental delays due to biological *or* environmental factors. We have made this change to clarify that States are not required to ensure that an at-risk infant or toddler is at risk due to meeting both types of factors.

Changes: We have replaced the phrase ''biological and environmental'' with ''biological or environmental'' in the definition of *at-risk infant or toddler.*

Child (§ 303.6)

Comment: One commenter expressed concern that the definition of *child* in § 303.6 could be misinterpreted to mean that an infant or toddler under age three would not meet the definition. Another commenter stated that § 303.6 should not be included in the regulations because there is no requirement that early intervention programs serve children over the age of three.

Discussion: The term *child,* as used in part C of the Act, means an individual under the age of six. This is a broad definition that includes children with or without disabilities under the age of three (including infants and toddlers with disabilities) and children with or without disabilities ages three and older. While the commenter is correct that States are not required to provide early intervention services under part C of the Act to a child over the age of three, a State may elect, under § 303.211, to make early intervention services available to children ages three and older who are eligible for services under section 619 of the Act and previously received early intervention services under § 303.211 until the child enters, or is eligible under State law to enter, kindergarten or elementary school. Nothing in § 303.6 or these regulations requires a State to serve children with disabilities beyond age three under part C of the Act.

Additionally, requirements in these regulations, such as the evaluation and assessment requirements in § 303.321, apply to a child who is referred to the State part C program but is determined not to be eligible as an infant or toddler with a disability. Thus, including a definition of *child* in the regulations is necessary, and this definition is clear in its inclusion of infants and toddlers under the age of three.

Changes: None.

Developmental Delay (§ 303.10)

Comment: A few commenters suggested amending the definition of *developmental delay.* One commenter recommended that the definition be revised to specifically reference infants and toddlers with mild disabilities. Another commenter recommended that the regulations clarify that any definition of developmental delay that the State adopts in response to public comments should not exclude from eligibility children who are eligible under the State's pre-existing definition of developmental delay.

Discussion: These comments are addressed in our discussion of the comments on § 303.111.

Changes: None.

Early Intervention Service Program (§ 303.11) and Early Intervention Service Provider (§ 303.12)

Comment: A few commenters expressed concern with the use of the term *early intervention service program* throughout the proposed regulations. One commenter suggested that the terms ''early intervention service program'' (EIS program) and ''early intervention service provider'' (EIS provider) were not used consistently throughout the proposed regulations, that the use of these terms was confusing, that the terms were sometimes used incorrectly, and that the terms did not align with the reporting requirements outlined in §§ 303.700 through 303.702. Another commenter recommended changing all references to ''EIS'' in the regulations to ''EI'' because ''EIS'' is a term used in part B of the Act and has a different meaning under the part B regulations.

Discussion: We do not agree that the terms ''early intervention service program'' and ''early intervention service provider'' are used inconsistently or incorrectly throughout the regulations, or that the terms do not align with the reporting requirements outlined in §§ 303.700 through 303.702. An *early intervention service program,* as defined in § 303.11, is the entity designated by the lead agency for reporting purposes under sections 616 and 642 of the Act and under §§ 303.700 through 303.702; whereas an *early intervention service provider,* as defined in § 303.12, is an entity (whether public, private, or nonprofit) or individual that provides early intervention services under part C of the Act, whether or not the entity or individual receives Federal funds under part C of the Act.

Changing the abbreviation ''EIS'' for purposes of referencing early intervention services is not necessary. ''EIS'' is the long-standing, commonly accepted abbreviation used in the field of early intervention and we do not anticipate any confusion by the abbreviation's continued use in programs administered under part C of the Act.

Changes: None.

Early Intervention Service Provider (§ 303.12)

Comment: One commenter requested that the Department revise the regulations to clarify the distinction between ''early intervention service providers'' as used in part C of the Act and ''related services providers'' as used in part B of the Act.

Discussion: Parts B and C of the Act have different purposes, eligibility criteria, and requirements and the services required by each program are already defined in each part respectively. Part C of the Act requires States to make available to infants and toddlers with disabilities early intervention services to meet their developmental needs. The terms *early intervention services* and *EIS provider* are defined in the part C regulations, respectively, in § 303.13 and § 303.12.

Part B of the Act requires States to make available to children with disabilities a free appropriate public education or FAPE, which includes special education and related services. The term *related services* is defined in the part B regulations in 34 CFR 300.34 as supportive services that are required ''to assist a child with a disability to benefit from special education'' and includes transportation and developmental, corrective, and other supportive services. The term ''related services provider'' is not defined in the part B regulations.

While many examples of early intervention services under part C of the Act, including occupational therapy and speech-language pathology services, are the same as the examples of related services under part B of the Act, there are potential differences between related services and early intervention services, based on differing ages of the populations served and purposes of the programs. Therefore, it is the Department's position that the regulations for part B and part C of the Act, and specifically the definitions of *related services, early intervention services,* and *early intervention service provider,* distinguish sufficiently between the roles and functions of a related services provider under part B of the Act and an early intervention service provider under part C of the Act.

Changes: None.

Early Intervention Services, General (§ 303.13(a))

Comment: One commenter recommended changing the defined term *early intervention services* to ''early intervention'' so that readers would not confuse early intervention services under part C of the Act with the early intervening services described in 34 CFR 300.226 of the part B regulations.

Discussion: The term *early intervention services,* defined in § 303.13(a), mirrors the term ''early intervention services'' referenced throughout part C of the Act. In order to remain consistent with the statutory language, we have not changed the term *early intervention services* within this part.

Changes: None.

Comment: One commenter recommended that we modify the definition of *early intervention services* to reflect the provisions in 34 CFR 300.324(a)(2) of the part B regulations, which require a child's individualized education program (IEP) Team consider special factors when developing a child's IEP.

Discussion: We address this comment in our discussion of the comments on § 303.342.

Changes: None.

Comment: Two commenters recommended that, when describing the purpose of early intervention services in general, we retain the language that these services must be designed to serve ''the needs of the family related to enhancing the child's development'' that is in current § 303.12(a)(1). The commenter stated that meeting family needs is a key component of an early intervention system and should be addressed routinely in IFSP development, rather than only upon family request.

Discussion: Proposed § 303.13(a)(4) provided that early intervention services are developmental services that are designed to meet the developmental needs of an infant or toddler with a disability, and, ''as requested by the family, the needs of the family.'' We agree with the commenters that our inclusion of the language ''as requested by the family'' could be interpreted to mean that addressing the needs of a family of an infant or toddler with a disability is not an essential component of early intervention services under part C of the Act. This was not our intention in proposing this language. Therefore, for clarity we have removed this phrase from § 303.13(a)(4).

Changes: We have removed the phrase ''as requested by the family'' from § 303.13(a)(4).

Comment: A few commenters recommended adding the word ''language'' in § 303.13(a)(4)(iii) regarding communication development because communication and language have separate meanings and the regulations should make that distinction.

Discussion: The list of developmental areas in § 303.13(a)(4) reflects the requirements in section 632(4)(C) of the Act. The Department's position is that communication is a broader developmental area than language but that it includes language, and thus no further change is necessary.

Changes: None.

Comment: One commenter recommended clarifying in § 303.13(a)(4)(iv), which identifies social or emotional development as an area in which early intervention services may be provided, the differences between the terms social development and emotional development because they are separate developmental processes. Another commenter recommended adding ''social skills'' to the list of developmental areas in § 303.13(a)(4).

Discussion: Social and emotional development are two distinct developmental areas. Therefore, section 632(4)(C)(iv) of the Act and § 303.13(a)(4)(iv) use the term ''or'' to make clear that early intervention services may address a child's needs in either developmental area. Consequently, we do not agree that further clarification of these areas is necessary. Concerning the request to add social skills to § 303.13(a)(4), the term social or emotional development includes the acquisition of developmental skills, such as social skills. Thus, adding ''social skills'' to the developmental areas identified in § 303.13(a)(4) is not necessary.

Changes: None.

Comment: None.

Discussion: We realize that the term ''early intervention'' should have been included before the word ''services'' in § 303.13(a)(5), which provides that developmental services must meet the standards of the State in which the services are provided, including the requirements of part C of the Act. We have added the phrase ''early intervention'' before the word ''services.''

Changes: We have revised § 303.13(a)(5) to include the phrase ''early intervention'' before the word ''services.'' Where appropriate, we have made similar changes throughout the regulations.

Comment: One commenter requested that the Department amend § 303.13(a)(8) to require that specific services and methods be provided in natural environments to the maximum extent appropriate. Additionally, the commenter suggested that we add the phrase ''and based on the child's developmental needs and chronological

age'' to § 303.13(a)(8) after the word ''appropriate.''

Discussion: Section 303.13(a)(8) references the definition of natural environment in § 303.26, which provides that *natural environments* are settings that are natural or typical for a same-aged infant or toddler without a disability and may include the home, community, or other settings that are typical for an infant or toddler without a disability. Additional natural environment requirements are in §§ 303.126 and 303.344(d)(1)(ii) and we have added, in § 303.13(a)(8), a cross-reference to both of these regulations. Section 303.126 requires that each State's system include policies and procedures to ensure that early intervention services are provided in natural environments to the maximum extent appropriate. Section 303.344(d)(1)(ii), regarding IFSP content, requires that the IFSP Team include on the child's IFSP a statement that each early intervention service is provided in the natural environment for that child or service to the maximum extent appropriate or a justification, based on the child's outcomes, when an early intervention service is not provided in the natural environment for that child. In light of these other regulatory provisions, amending the language regarding natural environments in § 303.13(a)(8) to reference specific early intervention services or methods of delivering early intervention services is not necessary.

With regard to the commenter's suggestion that we add the phrase ''and based on the child's developmental needs'' to § 303.13(a)(8) after the word ''appropriate,'' § 303.13(a)(4) already provides that early intervention services must be designed to meet the developmental needs of an infant or toddler with a disability. Therefore, adding ''and based on the child's developmental needs'' would be repetitive and thus not necessary. Adding the phrase ''and based on the child's chronological age'' to § 303.13(a)(8) also is not necessary because the definition of *natural environments* in § 303.26 includes environments that are ''natural or typical for a same-aged infant or toddler without a disability.'' This definition takes into account the comparability to same-aged peers as well as the chronological age of the child in the context of natural environments. The Secretary believes that the natural environments provisions in these regulations address sufficiently and appropriately the issues raised by the commenter.

Changes: We have added in § 303.13(a)(8) a cross-reference to § 303.344(d).

Comment: One commenter requested that we clarify in the definition of *early intervention services* that EIS providers who work with infants and toddlers with disabilities and their families should focus their services on ensuring that family members and children have the tools needed to continue developing the skills identified in the IFSP whenever a learning opportunity presents itself even when a teacher or therapist is not present.

Discussion: Section 303.344(d) requires the IFSP to include the early intervention services that are necessary to meet the unique needs of the child and family to achieve the results or outcomes identified in the IFSP. If the IFSP Team determines that a child or family needs services to help the child learn when a teacher or therapist is not present, then that outcome, and services to meet that outcome, must be included in the IFSP. This individualized approach, in which appropriate outcomes and services are determined by the IFSP Team in light of each child's unique needs, is appropriate and is addressed sufficiently under this part. Therefore, clarifying the definition of early intervention services, as requested by the commenter, is not necessary.

Concerning the comment about providing family members with the necessary tools to help an infant or toddler with a disability learn even when a teacher or therapist is not present, we agree that EIS providers should work with the parents of an infant or toddler with a disability so that the parents can continue to assist the child whenever a learning opportunity occurs. However, in addition to the reasons stated, adding language to § 303.13 as requested is not necessary because the definition of *EIS provider* in § 303.12(b)(3) specifies that such providers are responsible for consulting with and training parents and others concerning the provision of early intervention services described in the IFSP of the infant or toddler with a disability. Additionally, this consultation and training will provide family members with the tools to facilitate a child's development even when a teacher or therapist is not present.

Changes: None.

Types of Early Intervention Services (§ 303.13(b))

Comment: One commenter supported our proposal to remove nutrition services and nursing services from the types of early intervention services identified in § 303.13(b) (current § 303.12(d)(6) through (d)(7)), stating that these services are medical in nature and not consistent with the definition of early intervention as a developmental program.

However, many commenters opposed removing nutrition services from the types of early intervention services identified and requested that nutrition services be specifically included as one of the types of early intervention services identified in the final regulations.

Numerous commenters also opposed the removal of nursing services from the definition of *early intervention services* and requested that these services be specifically included in that definition in the final regulations. Other commenters stated that although they recognized that the Act did not include a specific reference to nursing services, these services could nonetheless be provided, where appropriate, pursuant to § 303.13(d), which recognizes that services other than those listed in the definition may constitute early intervention services under certain circumstances.

Additionally, many commenters requested that music therapy be included in the definition of *early intervention services.*

Other commenters requested that respite care be specifically included in the definition of *early intervention services.* One commenter requested that we include parent-to-parent support as a type of early intervention service because of its value and importance.

Discussion: The specific early intervention services that are listed in § 303.13(b) are those identified in section 632(4)(E) of the Act. While nursing services and nutrition services are not specifically mentioned in the Act, they historically have been included in the definition of early intervention services. For clarity, we have included the previous definitions of nursing services and nutritional services from current § 303.12(d)(6) and (7) in new § 303.13(b)(6) and (b)(7). However, as noted in the preamble to the NPRM and in the definition of *early intervention services* in the regulations, this list is not exhaustive. Specifically, § 303.13(d) states that ''(t)he services and personnel identified and defined in paragraphs (b) and (c) of this section do not comprise exhaustive lists of the types of services that may constitute early intervention services or the types of qualified personnel that may provide early intervention services.'' Further, § 303.13(d) states that ''[n]othing in this section prohibits the identification in the IFSP of another type of service as an

early intervention service provided that the service meets the criteria identified in paragraph (a) of this section.''

Section 303.13(d) clearly conveys that the early intervention services identified in § 303.13(b) are not an exhaustive list and may include other developmental, corrective, or supportive services that meet the needs of a child as determined by the IFSP Team, provided that the services meet the criteria identified in § 303.13(a) and the applicable State's definition of early intervention services. We added the previous definitions of nursing services and nutritional services to these final regulations because these definitions are defined in the current regulations and relied upon by the field. However, adding new definitions of additional services identified by the commenters, such as music therapy and respite care, is not necessary.

Changes: We have added new § 303.13(b)(6) to define nursing services to include the assessment of health status for the purpose of providing nursing care, including the identification of patterns of human response to actual or potential health problems; the provision of nursing care to prevent health problems, restore or improve functioning, and promote optimal health and development; and the administration of medications, treatments, and regimens prescribed by a licensed physician.

We have also added new § 303.13(b)(7) to define nutrition services to include: (i) Conducting individual assessments in nutritional history and dietary intake; anthropometric, biochemical, and clinical variables; feeding skills and feeding problems; and food habits and food preferences; (ii) developing and monitoring appropriate plans to address the nutritional needs of children eligible under this part, based on the findings in paragraph (b)(7)(i) of this section; and (iii) making referrals to appropriate community resources to carry out nutrition goals. Subsequent definitions have been renumbered accordingly.

Types of Early Intervention Services—Assistive Technology Device and Service (§ 303.13(b)(1))

Comment: Two commenters recommended that we modify the definition of *assistive technology device* to include the language from the preamble of the NPRM that, under certain circumstances, part C funds may be used to pay for a hearing aid.

Another commenter requested that the Department explicitly state in the regulations or in a memorandum or policy letter issued to part C lead agencies that hearing aids and appropriate related audiological services may be considered, under certain circumstances, an appropriate early intervention service and an assistive technology device.

Discussion: The definition of *assistive technology device* does not identify specific devices; including an exhaustive list of assistive technology devices in the definition would not be practical. Whether a hearing aid or an appropriate related audiological service is considered an assistive technology device or an early intervention service, respectively, for an infant or toddler with a disability depends on whether the device or service is used to increase, maintain, or improve the functional capabilities of the child and whether the IFSP Team determines that the infant or toddler needs the device or service in order to meet his or her specific developmental outcomes. Therefore, we have not revised this definition.

Changes: None.

Comment: Several commenters requested further clarification of the definition of *assistive technology device and service* in § 303.13(b)(1). These commenters stated that the definition should be revised to specifically exclude prosthetic limbs because these are personal devices for daily use.

Discussion: The definition of *assistive technology device and service* in § 303.13(b)(1) aligns with the definitions of those terms in section 602(1) and (2) of the Act and 34 CFR 300.5 and 300.6 of the part B regulations. These definitions provide sufficient clarity about what types of devices or technologies are included in the definition and, therefore, indicating that a specific device or technology is excluded is unnecessary. Additionally, we note that, while part C lead agencies are not responsible for providing personal devices meant for daily or personal use, such as eyeglasses, hearing aids, or prosthetic limbs, to an infant or toddler with a disability, these devices may be an early intervention service if the device is not surgically implanted (§ 303.13(b)(1)(i) specifically excludes medical devices that are surgically implanted), and the IFSP Team determines that the infant or toddler with a disability requires such a personal device to meet the unique developmental needs of that infant or toddler.

Changes: None.

Comment: One commenter recommended that we modify the definition of *assistive technology device and service* to be consistent with the Assistive Technology Act (Pub. L. 105–394).

Discussion: The definitions of *assistive technology device and service* in § 303.13(b)(1) align with section 602(1) and (2) of the Act. The definitions in section 602(1)(A) and (2) of the Act are substantially similar to the definitions of assistive technology device and assistive technology service in section 3(3) and (4) of the Assistive Technology Act of 1998 (Pub. L. 105–394) (AT Act), but the language in section 602 of the Act is more specific to the needs of children with disabilities. Furthermore, unlike the AT Act, section 602(1)(B) of the Act expressly excludes from the definition of assistive technology device those medical devices that are surgically implanted or the replacement of such devices. Thus, while the definitions are similar, it is not appropriate to include in these regulations the specific language from the AT Act.

Changes: None.

Comment: A few commenters supported our clarification in the preamble to the NPRM that the optimization (*e.g.,* mapping) of surgically implanted medical devices is not the responsibility of the lead agency or the EIS program.

Many commenters, however, opposed our proposal to exclude optimization (*e.g.,* mapping) of surgically implanted medical devices, including cochlear implants, from the definition of *assistive technology device.* Commenters stated that excluding optimization (*e.g.,* mapping) of surgically implanted medical devices, including cochlear implants, from the types of early intervention services that could be provided under the Act contradicts the intent of Congress. Many of these commenters also stated that excluding optimization (*e.g.,* mapping) services from the definition of *assistive technology device* would preclude funding of these services under this part and thus some infants and toddlers with cochlear implants would not receive mapping services, ultimately jeopardizing their ability to hear and learn. Another commenter suggested that setting and evaluating a surgically implanted medical device, particularly a cochlear implant, is the same as setting a listening device, which is a covered service.

Discussion: The term ''mapping'' refers to the optimization of a cochlear implant, and more specifically, to adjusting the electrical stimulation levels provided by the cochlear implant that are necessary for long-term post-surgical follow-up of a cochlear implant. Although the cochlear implant must be mapped properly for the child to hear well while receiving early intervention

services, the mapping does not have to be done while the child is receiving early intervention services in order for the mapping of the device to be effective.

We maintain that excluding optimization (*e.g.,* mapping) of a cochlear implant from the definition of *early intervention services* is consistent with the Act. Section 632 of the Act defines *early intervention services* and specifies categories of these services. The categories of early intervention services that relate to optimization (*e.g.,* mapping) are assistive technology devices and assistive technology services.

Section 602(1)(B) of the Act excludes from the definition of an *assistive technology device* ''a medical device that is surgically implanted, or the replacement of such device.'' Section 602(2) of the Act states that *assistive technology service* ''means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.'' A cochlear implant, as a surgically implanted medical device, is excluded from being an assistive technology device under section 602(1)(B) and, therefore, optimization (*e.g.,* mapping) of a cochlear implant cannot directly assist an infant or toddler with a disability with regard to an assistive technology device that is covered under the Act. Thus, optimization (*e.g.,* mapping) is not an assistive technology service and excluding optimization from the definition of *early intervention service* is consistent with the Act.

We also note that the exclusion of mapping does not prevent the appropriate early intervention service provider from checking to ensure the device is working.

We do not agree that optimization of a cochlear implant is the same as setting a listening device. Unlike a cochlear implant, a listening device is not a surgically implanted device. The Act excludes surgically implanted devices, such as cochlear implants, from the definition of *assistive technology device* but does not exclude listening devices. Therefore, we have not revised § 303.13(b)(1) as requested by the commenters.

Changes: None.

Comment: One commenter recommended that the definition of *assistive technology device* include the phrase ''all related and necessary components of the system'' to make clear that the individual components needed to develop a customized device (*e.g.,* ear mold for an FM system or a light pointer for an augmentative and alternative communication device) would be considered an assistive technology device and, therefore, a covered early intervention service under part C of the Act. The commenter also recommended adding the phrase ''specially fit'' to the definition of *assistive technology device.*

Another commenter requested that low-tech assistive technology devices, for example, items that can be purchased at a department store, be expressly included in the definition.

Discussion: The definition of *assistive technology device* adequately addresses the commenters' concerns and is not amended. Section 303.13(b)(1)(i) provides that an assistive technology device includes equipment or product systems that may need to be modified or customized to meet the specific needs of a particular infant or toddler with a disability. A customized assistive technology device would include devices that are ''specially fit'' as well as all components needed to modify or customize that device for an infant or toddler with a disability.

The definition of *assistive technology device* in § 303.13(b)(1)(i) states that an assistive technology device means any ''item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized.'' The language ''acquired commercially off the shelf'' in the definition adequately addresses the commenter's request that low-tech assistive technology devices be included in the definition of *assistive technology device.*

Changes: None.

Comment: One commenter did not agree with the language in § 303.13(b)(1)(ii)(E), which provides that an assistive technology service includes training or technical assistance for an infant or toddler with a disability or, if appropriate, that child's family. The commenter specifically requested that the phrase ''if appropriate'' be removed because, according to the commenter, it is always appropriate to provide training and technical assistance to the family of an infant or toddler with a disability who receives assistive technology services.

Discussion: The language referenced by the commenter in § 303.13(b)(1)(ii)(E) is substantively unchanged from language in current § 303.12(d)(1)(v). We do not agree that providing training to a family of an infant or toddler with a disability who is receiving an assistive technology service will always be appropriate. For example, if training already has been provided to a family about an assistive technology device and the family is familiar with its use, the IFSP Team may determine that it is not necessary to train family members again. As part of the family-directed assessment under § 303.321, the IFSP Team (which includes the parent) determines whether training is necessary. The family assessment identifies the resources, priorities, and concerns and the supports and services necessary to enhance a family's capacity to meet the developmental needs of the infant or toddler with a disability, including whether training of family members regarding assistive technology services is appropriate or necessary.

Changes: None.

Types of Early Intervention Services—Family Training, Counseling, and Home Visits (§ 303.13(b)(3))

Comment: A few commenters requested that we clarify the definition of *family training, counseling, and home visits* in § 303.13(b)(3). One commenter recommended deleting the reference to ''home visits'' in the title of this paragraph because the commenter considered home visits to be a method of providing a service rather than a service in and of itself. The commenter acknowledged that the Department may not be able to make this change, however, because the term home visits is used in the Act. One commenter expressed concern that this definition could be misinterpreted to mean that family training must occur in the home and must include counseling.

Discussion: Section 632(4)(E)(i) of the Act expressly states that early intervention services include family training, counseling, and home visits. Thus, removing the reference to home visits from § 303.13(b)(3) would be inconsistent with the Act.

The language in § 303.13(b)(3) does not mean that family training must occur in the home or include counseling. Section 303.13(b)(3) merely defines three separate early intervention services —- family training, counseling, and home visits—that may be provided to assist the family of an infant or toddler with a disability in understanding the special needs of the child and enhancing the child's development.

Changes: None.

Comment: One commenter questioned how the family training services referenced in § 303.13(b)(3) differ from the parent training referenced in the definition of *psychological services* in § 303.13(b)(10)(iv).

Discussion: The term family training, as used in § 303.13(b)(3), is an example of an early intervention service identified in section 632(4)(E) of the Act and parent training is referenced in § 303.13(b)(10)(iv) as an example of one

component of a program of psychological services for an infant or toddler with a disability. While there may be some overlap in these services, the purposes and providers of the trainings may differ. ''Family training'' as used in § 303.13(b)(3) is broader than ''parent training'' in § 303.13(b)(10)(iv). For example, family training in § 303.13(b)(3) may include training in any area related to the special needs of the infant or toddler with a disability (such as the use of specialized equipment or feeding techniques); whereas, parent training as used in § 303.13(b)(10)(iv) only encompasses training with respect to the child's psychological condition and the psychological services the child is receiving.

Changes: None.

Comment: One commenter recommended adding ''support of the parent-child relationship'' as an area that would be covered by the definition of *family training, counseling, and home visits* in § 303.13(b)(3).

Discussion: Supporting the parent-child relationship may be one of any number of early intervention services provided to assist a family of an infant or toddler with a disability in understanding the special needs of the child and enhancing that child's development. Including specific types of services in § 303.13(b)(3) is not necessary because a wide range of services could fall under the definition of *family training, counseling, and home visits.* Indeed, including such a list could be interpreted to limit the types of services that would be considered family training, counseling, and home visits. We want to ensure that the regulations provide the flexibility for each IFSP Team to determine appropriate early intervention services based on the unique needs of an infant or toddler with a disability and his or her family. Leaving this definition more general will provide IFSP Teams with that flexibility.

Changes: None.

Comment: One commenter recommended adding references to ''family training and home visits'' in the definitions of all other services that are critical components of early intervention service delivery.

Discussion: Adding references to ''family training and home visits'' throughout the regulations is not necessary because § 303.13(b)(3) makes clear that family training, counseling, and home visits are an early intervention service that may be provided under part C of the Act. However, the determination of whether these particular services are provided to a family is made by the IFSP Team in accordance with the provisions in §§ 303.340 through 303.346. Accordingly, adding references to family training and home visits or other specific early intervention services in other sections of the regulations would not be appropriate.

Changes: None.

Comment: One commenter recommended adding language to § 303.13(b)(3) to provide that any training must be provided to all family members.

Discussion: The use of the word ''family'' in this definition is broad enough to encompass all family members if the IFSP Team determines that it is appropriate to provide training to all family members. Further, the decision about whether a family member receives training must be made by the IFSP Team in accordance with section 636(d)(4) of the Act and § 303.344(d)(1) of these regulations. We cannot mandate in these regulations that family training or any other specific early intervention service be provided to an infant or toddler with a disability or that child's family.

Changes: None.

Types of Early Intervention Services—Occupational Therapy (New § 303.13(b)(8)) (Proposed § 303.13(b)(6))

Comment: Several commenters supported our proposed definition of *occupational therapy* in new § 303.13(b)(8) (proposed § 303.13(b)(6)), but suggested that the Department modify the definition to require that such services be provided by qualified occupational therapists as required in 34 CFR 300.34(c)(6) of the part B regulations.

One commenter requested that we clarify the definition to state that an occupational therapy assistant working under the direct supervision of an occupational therapist could provide occupational therapy services.

A few commenters recommended that this definition identify the specific functional domains that occupational therapists facilitate and promote such as physical, cognitive, communication, social, emotional, and adaptive skills.

Discussion: Specifying that occupational therapy must be provided by a qualified occupational therapist, as required in the part B regulations, is not necessary because occupational therapists are identified in § 303.13(c)(4) as a type of qualified personnel who provide the early intervention services listed in § 303.13(b). Additionally, § 303.119(c) provides that paraprofessionals and assistants who are appropriately trained and supervised in accordance with State law, regulation, or written policy, may assist in the provision of early intervention services under part C of the Act. Repeating this language from §§ 303.13(c) and 303.119(c) in new § 303.13(b)(8) is not necessary.

The functional skill domains that the commenter requested be listed in new § 303.13(b)(8) are already listed in § 303.13(a)(4). Thus, under these regulations, occupational therapy services could focus on one or more of these functional skill domains, and the specific occupational therapy services provided to a child would be based on the occupational therapy outcomes in the child's IFSP.

Changes: None.

Types of Early Intervention Services—Special Instruction (New § 303.13(b)(14)) (Proposed § 303.13(b)(11))

Comment: One commenter recommended changing the title of the definition of *special instruction* in new § 303.13(b)(14) (proposed § 303.13(b)(11)) to ''developmental instruction'' because ''special instruction'' services may not be covered by public or private insurance.

Discussion: Section 632(4)(E)(ii) of the Act references ''special instruction'' as an example of an early intervention service. The definition of *special instruction* has not changed substantively from the definition of *special instruction* in current § 303.12(d)(13) and specifically includes developmental instruction. States may refer to this early intervention service as ''developmental instruction'' or use another term, provided that it meets the definition of *special instruction* in § 303.13(b). Moreover, many States currently use the term ''special instruction'' and, thus, revisions to the title of this definition are not necessary.

Changes: None.

Types of Early Intervention Services—Speech-Language Pathology Services (New § 303.13(b)(15)) (Proposed § 303.13(b)(12))

Comment: Some commenters recommended that sign language, cued language, auditory/oral language, and transliteration services be defined separately from, and not included in, the definition of speech-language pathology services because they are different types of services. One commenter supported their inclusion in the definition. A few commenters suggested that separate definitions would reflect that speech-language pathologists and interpreters receive different preparatory training, are

licensed by different boards, and are subject to different professional regulations.

Other commenters noted that sign language, cued language, auditory/oral language, and transliteration services are provided by qualified professionals, such as audiologists, teachers of children who are deaf and hard of hearing, and interpreters, and that speech-language pathologists may not necessarily be qualified to provide these services. Finally, one commenter recommended that, at a minimum, we change the title of this definition to reference sign language and cued language services to be consistent with the list of types of early intervention services specified in section 632(4)(E)(iii) of the Act.

Discussion: We agree that establishing a separate definition of *sign language and cued language services,* which includes auditory/oral language and transliteration services, is consistent with section 632(4)(E)(iii) of the Act. Therefore, we have included in new § 303.13(b)(12) a definition of the term that incorporates the language from proposed § 303.13(b)(12)(iv).

Changes: We have moved proposed § 303.13(b)(12)(iv) to new § 303.13(b)(12). Due to the addition of this separate definition of *sign language and cued language services* in § 303.13(b)(12), the definitions in § 303.13(b) (types of early intervention services), beginning with the definition of *social work services,* have been renumbered.

Comment: A significant number of commenters requested that the Department clarify that sign language and cued language services may be provided not only to children who are deaf or hard of hearing but also to an eligible child who is not deaf or hard of hearing whose IFSP Team has identified such services as appropriate to meet that child's developmental needs.

Discussion: We agree with the commenters and have not included the reference to infants and toddlers with a disability who are deaf or hard of hearing from proposed § 303.13(b)(12)(iv) in the new definition of *sign language and cued language services* in new § 303.13(b)(12).

Changes: The phrase ''as used with respect to infants and toddlers with disabilities who are hearing impaired'' has not been included in the definition of *sign language and cued language services* in new § 303.13(b)(12).

Comment: One commenter suggested that the description of sign language and cued language services, which is now in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)), was confusing because of the use of the word ''and'' between ''cued language'' and ''auditory/oral language services.'' The commenter recommended that this phrase be changed to ''cued language or auditory/oral language services'' because the word ''and'' implied that either all services in the list must be provided or none of the services can be provided.

Discussion: In reviewing new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)), we determined it was necessary to clarify and distinguish between services that focus on teaching and interpretation. Thus, we have clarified that sign language and cued language services include teaching sign language, cued language, and auditory/oral language, providing oral transliteration services (such as amplification), and providing sign and cued language interpretation.

Regarding the commenter's concern about the use of the term ''and'', this use does not mean that all of the services listed must be identified in the IFSP or provided. The definition of *sign language and cued language services* in new § 303.12(b)(12) provides that sign language and cued language services ''include'' certain services and § 303.18, in turn, defines the term *include* to mean ''that the items named are not all of the possible items that are covered, whether like or unlike the ones named.'' Accordingly, revising the reference to ''and'' in the definition of *sign language and cued language services* is not necessary.

Changes: We have revised new § 303.13(b)(12) to define *sign language and cued language services* to include ''teaching sign language, cued language, and auditory/oral language, providing oral transliteration services (such as amplification), and providing sign and cued language interpretation.''

Comment: One commenter requested that the Department add a parenthetical ''such as amplification'' to the phrase ''oral transliteration'' in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)) and distinguish between ''translation'' and ''transliteration.'' Another commenter recommended moving the reference to cued language interpreting and transliteration services from the definition of *early intervention services* in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)) to the definition of *native language* in § 303.25(b) because, for children who are deaf, native language is defined as the mode of communication normally used by the individual (including sign language).

Discussion: Transliteration, in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)), refers to the rendering of one language or mode of communication into another by sound such as voicing over difficult-to-understand speech in order to clarify the sounds, not the meaning. We agree that including amplification as an example of transliteration is appropriate and have added amplification as an example in the definition. However, because the regulations do not use the term ''translation'' (*i.e.,* rendering one language into another by its meaning), there is no need to define that term. Additionally, we decline to adopt the commenter's suggestion that we move the reference to cued language interpreting and transliteration services to the definition of *native language* in § 303.25(b). These services are types of early intervention services that the IFSP Team may identify as needed by the eligible child and family and therefore including them under the definition of *early intervention services* in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)) is appropriate. Further, including the reference recommended by the commenter in § 303.25(b) is not necessary because we believe the examples in paragraph (b) of that definition, regarding mode of communication that is normally used by an individual who is deaf or hard of hearing, blind or visually impaired, or for an individual with no written language, are appropriate and further examples are not needed to understand the meaning of the term *native language.*

Changes: We have added the parenthetical ''(such as amplification)'' as an example of transliteration services in new § 303.13(b)(12).

Comment: Several commenters recommended adding such services as auditory habilitation and rehabilitation, dysphagia, auditory-verbal therapy, oropharyngeal, or feeding and swallowing services to the definition of *speech-language pathology services* in new § 303.13(b)(15) (proposed § 303.13(b)(12)).

Discussion: The services identified in the definition of *speech-language pathology services* in new § 303.13(b)(15) (proposed § 303.13(b)(12)) are not intended to be exhaustive. Section 303.13(b)(15) (proposed § 303.13(b)(12)) does not preclude an IFSP Team from determining that an infant or toddler with a disability is in need of any of the services suggested by the commenters if the services are necessary to meet the outcomes identified for that child in the child's IFSP.

Changes: None.

Types of Early Intervention Services—Transportation and Related Costs (New § 303.13(b)(16)) (Proposed § 303.13(b)(13))

Comment: Many commenters opposed the proposal to remove expenses for travel by taxi from the costs included in the definition of *transportation and related costs.* The commenters stated that omitting this type of transportation cost could be problematic for families who do not have access to private transportation or reliable public transportation or who live in large urban areas and rely on taxis to transport their child to an EIS provider.

Discussion: We did not include expenses for travel by taxi in the examples of transportation costs included in the definition of *transportation and related costs* because our understanding is that transportation via taxi for the purpose of traveling to an EIS provider is less common than the other examples we included in the proposed regulations such as transportation via common carriers. We did not intend to exclude such expenses specifically from the definition. Indeed, section 632(4)(E)(xiv) of the Act does not list any specific types of transportation and related costs. Accordingly, we have revised new § 303.13(b)(16) (proposed § 303.13(b)(13)) to remove the references to specific types of transportation costs.

Changes: We have revised new § 303.13(b)(16) (proposed § 303.13(b)(13)) to align more closely with the language in section 632(4)(E)(xiv) of the Act. Specifically, we have removed the parenthetical examples of travel and other costs that were in the proposed regulation.

Types of Early Intervention Services—Vision Services (New § 303.13(b)(17)) (Proposed § 303.13(b)(14))

Comment: Some commenters requested that the Department clarify the definition of *vision services* in new § 303.13(b)(17)(iii) (proposed § 303.13(b)(14)(iii)). A few commenters noted that the definition focused on older children and did not include the full scope of instruction available to young children and their families. One commenter expressed concern that the definition of *vision services* in new § 303.13(b)(17) (proposed § 303.13(b)(14)) described an outdated medical model that promotes skills training, rather than developmental adjustments that accommodate vision loss. A few commenters recommended that we add to this definition training and services in the following areas: tactile awareness, sensory utilization and preferences, emergent literacy, precane skills, environmental orientation, environmental adaptations, and modifications and conceptual understanding where visual impairment (including blindness) precludes typical access to early intervention.

One commenter suggested that the services listed could be included instead in the definition of *special instruction* in new § 303.13(b)(14) (proposed § 303.13(b)(11)) and requested guidance about who is qualified to provide these services.

Discussion: We have clarified in the definition of *vision services* in new § 303.13(b)(17) that evaluations and assessments of visual functioning include the diagnosis and appraisal of specific visual disorders, delays, and abilities that affect early childhood development. We also agree that reference to independent living applies to older children and have deleted the reference, which was in proposed § 303.13(b)(14)(iii), to ''independent living skills training.''

Regarding commenters' concerns that vision services are limited to ''training'' services and not skills, we note that the purpose of providing training to a child in specific vision areas is to improve the child's skills in those areas. The definition of *vision services* provides discretion and flexibility for each IFSP Team to identify those vision services necessary to meet the unique needs of an infant or toddler with a disability and the child's family. Therefore, we have not made the changes recommended by the commenter.

Maintaining separate definitions for *special instruction* and *vision services* aligns with sections 632(4)(E)(ii) and (4)(E)(xii) of the Act, regarding the types of services that are included as early intervention services. Vision services should not be included in the definition of *special instruction* because some of the examples of vision services would not be appropriate as examples of special instruction. For example, referral for medical or other professional services necessary for the habilitation or rehabilitation of visual functioning disorders, or both, would not fall under the definition of *special instruction.* The types of qualified personnel who may provide vision services are listed in § 303.13(c). This list includes optometrists and ophthalmologists and is not exhaustive. Thus, providing additional guidance about who is qualified to provide vision services is not necessary.

Changes: We have added the words ''that affect early childhood development'' after the words ''specific visual disorders, delays, and abilities.'' We also have removed the phrase ''independent living skills'' from proposed § 303.13(b)(14)(iii).

Qualified Personnel (§ 303.13(c))

Comment: Several commenters supported our proposal to include in the definition of *qualified personnel* in § 303.13(c) types of personnel that are not included in the current part C regulations. Commenters specifically supported the inclusion of ''registered dieticians,'' ''optometrists,'' ''teachers of children with hearing impairments,'' and ''teachers of children with visual impairments'' in the list of qualified personnel.

A few commenters objected to the inclusion of ''registered dieticians'' and ''vision specialists, including ophthalmologists and optometrists.'' The commenters suggested that the inclusion of medical professionals, *i.e.,* ophthalmologists, might cause confusion about whether diagnostic services provided by ophthalmologists would qualify as early intervention services. Other commenters requested that the Department provide separate guidance about the use of and distinction between ''ophthalmologists and optometrists.'' One commenter requested clarification about whether a lead agency was responsible only for referring families to these specialists or if they also would be responsible for paying for diagnostic services.

One commenter requested that nutritionists be added to the list of qualified personnel because a nutritionist might be available when a registered dietician is not.

Discussion: We appreciate the commenters' support for the proposed definition of qualified personnel in § 303.13(c). We included registered dieticians and vision specialists, including ophthalmologists and optometrists, in the proposed regulations to conform with the language in section 632(4)(F)(viii) and (4)(F)(x) of the Act, which lists these specialists as qualified personnel who provide early intervention services. Any of the personnel listed under this section could perform diagnostic services as part of the ongoing assessment of an infant or toddler or provide direct services to an infant or toddler with a disability and these services would qualify as early intervention services.

Concerning the comment about a lead agency's payment and referral responsibility, the lead agency would be responsible for referring families to ophthalmologists or optometrists and also would be responsible for paying for

diagnostic services, as required under § 303.13(b)(5).

We did not include the term nutritionist in the examples of qualified personnel in § 303.13(c) because this term was not included in section 632(4)(F)(viii) and (4)(F)(x) of the Act. However, nothing precludes lead agencies from utilizing services from a nutritionist if a nutritionist, instead of a registered dietician, can provide the nutrition or other services identified in the child's IFSP.

Changes: None.

Comment: A few commenters recommended listing ''teachers of children with hearing impairments'' and ''teachers of children with visual impairments'' in separate paragraphs in the definition of *qualified personnel* because these teachers are from two distinct disciplines. Another commenter stated that classifying teachers of the visually impaired as special educators is not necessary and suggested that doing so would have no impact on the availability of qualified personnel.

Discussion: We agree with the commenter that teachers of children with hearing impairments and teachers of children with visual impairments are two distinct professions. The list of qualified personnel in § 303.13(c) who provide early intervention services under this part includes special educators. The term ''special educators'' consists of many distinct professions including teachers of children with hearing impairments and teachers of children with visual impairments. Therefore, including teachers of children with hearing impairments and teachers of children with visual impairments as examples of special educators in § 303.13(c)(11) is appropriate and listing these terms separately is not necessary.

Concerning the comment that classifying teachers of the visually impaired as special educators is not necessary, the Department recognizes that there are some special educators that receive their training and certification in visual impairments and hearing impairments. Therefore, teachers of children with hearing impairments and teachers of children with visual impairments remain as examples of special educators in the list of qualified personnel who provide early intervention services under this part to ensure that these teachers are considered qualified personnel to provide early intervention services.

Changes: None.

Comment: A few commenters requested that, in identifying the types of qualified personnel who provide early intervention services, the reference to ''teachers of children with hearing impairments'' be revised to refer to ''teachers of deaf and hard of hearing children.'' Another commenter stated that the appropriate reference to teachers who instruct children who are deaf or hard of hearing is ''teachers of the hearing impaired.'' Commenters who recommended using ''teachers of deaf and hard of hearing children'' opposed the word ''impairment'' as outdated, value-laden, and inconsistent with the language in the part B regulations.

Discussion: The types of qualified personnel listed in § 303.13(c)(11) include ''teachers of children with hearing impairments (including deafness).'' This language is consistent with the part B regulations in 34 CFR 300.8(a)(1), which defines a child with a disability to mean a child as having a ''hearing impairment (including deafness).'' The terms hearing impairment, deafness, hearing impaired, and hard of hearing are all used in the field. For purposes of consistency among the regulations under the Act, we have continued to refer to these teachers as teachers of children with hearing impairments (including deafness).

Changes: None.

Comment: One commenter recommended adding ''low vision specialist'' to the list of qualified personnel because this addition would clarify that not all vision specialists are qualified to work with pediatric populations and that low vision is a subspecialty of optometry and ophthalmology.

Discussion: Section 632(4)(F)(x) of the Act identifies vision specialists, including ophthalmologists and optometrists, as qualified personnel who provide early intervention services. Usually an optometrist or ophthalmologist would make the referral to a low vision specialist if such a referral is warranted. The list of qualified personnel identified in the Act and § 303.13(c) is not exhaustive; accordingly, nothing precludes the lead agency's use of a low vision specialist, if such a referral is made, to provide appropriate early intervention services to an infant or toddler with a disability.

Changes: None.

Other Services (§ 303.13(d))

Comment: One commenter supported proposed § 303.13(d), which provides that the services and personnel identified in § 303.13(b) and (c) do not comprise exhaustive lists of early intervention services and qualified personnel and that IFSP Teams and families also may consider other services that may be appropriate for infants and toddlers with disabilities.

Another commenter requested that the Department revise the language in this paragraph to indicate that any other services identified in the IFSP of an infant or toddler with a disability be based on proven methods or evidence-based practices.

Discussion: We do not agree that requiring services identified in an IFSP to be based on proven methods or evidence-based practices is appropriate. Section 636(d)(4) of the Act provides that the IFSP include a statement of the specific early intervention services, based on peer-reviewed research, to the extent practicable, that are necessary to meet the unique needs of the infant or toddler with a disability and the family. Mirroring this standard, § 303.344(d)(1) requires that each IFSP include a statement of the specific early intervention services based on peer-reviewed research (to the extent practicable) that are necessary to meet the unique needs for the child and the family to achieve the measurable results or outcomes identified in the IFSP. Using the standard recommended by the commenter could limit the breadth of early intervention service options in a manner inconsistent with these provisions. Thus, we have not revised the language in § 303.13(d) as requested by the commenter.

Changes: None.

Comment: One commenter requested that the Department add language to § 303.13(d) to provide that families have the option to identify in the IFSP medical and other services that the child or family needs or is receiving through other sources, but that are neither required nor funded under part C of the Act.

Discussion: Section 303.344(e) provides for the IFSP Team to identify in the IFSP medical and other services that the child or family needs or is receiving through other sources, but that are neither required nor funded under part C of the Act. Thus, making the change requested by the commenter is not necessary.

Changes: None.

Free Appropriate Public Education (§ 303.15)

Comment: One commenter recommended clarifying that the requirement to provide FAPE under part C of the Act only applies when a State chooses to make services under part C available to children ages three and older under the provisions in § 303.211 and is not applicable to the provision of part C services to children ages birth to three years of age.

Discussion: The term FAPE is used in §§ 303.211, 303.501, and 303.521 of these regulations. Section 303.211 provides that a State may elect to offer services under part C of the Act to a child age three or older; however, if a State elects to offer these services and a parent chooses part C services instead of part B services for a child, the State is not required under this part to provide FAPE for the child.

Section 303.501 provides that States may use part C funds to provide FAPE to a child from the child's third birthday until the beginning of the school year following that birthday. Section 303.521 addresses situations in which State law mandates the provision of FAPE for children under the age of three.

To clarify the applicability of the FAPE requirements to these regulations, we have revised § 303.15 to provide that the definition of FAPE is included for purposes of the use of this term in §§ 303.211, 303.501 and 303.521.

Changes: We have added references in § 303.15 to §§ 303.211, 303.501 and 303.521.

Health Services (§ 303.16)

Comment: The comments we received on the proposed definition of *health services* in § 303.16 indicated there was some confusion concerning the conditions under which a child may receive health services under part C of the Act. Some commenters stated that the definition of *health services* was vague and could be read to mean that: (1) Infants and toddlers with disabilities are eligible to receive health services under part C of the Act even when those infants and toddlers are otherwise not eligible to receive early intervention services under part C of the Act and (2) funding of these health services under part C of the Act was required when no other payor was available.

Discussion: The Department's position is that § 303.16 clearly states that a lead agency is only required to fund health services that meet the definition of *health services* in § 303.16 during the time that the child is eligible to receive early intervention services under part C of the Act and regardless of the availability of other payors. However, to avoid confusion, we have added language in § 303.16 clarifying that requirement.

Changes: We have modified the definition of *health services* in § 303.16(a) to add the words ''otherwise eligible'' before the word ''child'' in order to clarify that a child must be eligible to receive early intervention services under this part in order to also receive *health services* as defined in § 303.16.

Comment: A few commenters expressed concern that the definition of *health services* in § 303.16 would broaden the responsibilities of part C lead agencies and result in an increased fiscal burden on States. Another commenter suggested that the definition of *health services* in § 303.16 would make it difficult to differentiate between developmental services and medical services.

Discussion: The only substantive difference between the definition of *health services* in current § 303.13 and the proposed definition of *health services* in § 303.16 is the addition of § 303.16(c)(1)(iii), which states that the definition of *health services* does not include services that are related to the implementation, optimization (*e.g.,* mapping), maintenance, or replacement of a medical device that is surgically implanted, including cochlear implants. This one substantive change limits, rather than expands, the responsibilities of part C lead agencies.

Therefore, the Secretary believes that the definition of health services does not broaden the responsibilities of lead agencies and thus, we do not anticipate that this definition will lead to an increased fiscal burden on States.

We do not agree with the commenter that the definition of *health services* in § 303.16 makes differentiating between developmental services and medical services difficult. Section 303.16(c) provides specific examples of services that are purely medical in nature and, therefore, not included in the definition of *health services.* These examples are sufficient to distinguish medical services from developmental services.

Changes: None.

Comment: Commenters had differing views concerning the Department's proposal to exclude from the definition of *health services* those services related to the implementation, optimization (*e.g.,* mapping), maintenance, or replacement of a medical device that is surgically implanted, including cochlear implants. One commenter supported excluding services related to the optimization (*e.g.,* mapping) of surgically implanted devices. A few commenters opposed the exclusion of services related to the optimization (*e.g.,* mapping) of surgically implanted medical devices, including cochlear implants. One commenter suggested that excluding this service from the definition of *health services* is not consistent with the intent of Congress and would effectively deny eligible infants and toddlers a service necessary for the child to benefit from other part C services.

Discussion: Excluding services related to the optimization (*e.g.,* mapping) of a medical device that is surgically implanted, including cochlear implants, from the definition of *health services* in § 303.16, is consistent with section 602(1)(B) of the Act, which provides that the term *assistive technology device* does not include a medical device that is surgically implanted, or the replacement of such device. Further, this exclusion is consistent with the definition of *related services* in 34 CFR 300.34(b) of the part B regulations, which provides that related services do not include a surgically implanted device, including a cochlear implant or a medical device that is surgically implanted, the optimization of that device's functioning (*e.g.,* mapping of a cochlear implant), maintenance of that device, or the replacement of that device.

The term ''mapping'' refers to the optimization of a cochlear implant and is not included in the definition of *health services* in § 303.16. Specifically, ''mapping'' and ''optimization'' refer to adjusting the electrical stimulation levels provided by the cochlear implant that is necessary for long-term post-surgical follow-up of a cochlear implant. The maintenance and monitoring of surgically implanted devices such as cochlear implants require the expertise of a licensed physician or an individual with specialized expertise beyond that typically available from early intervention service providers. While the cochlear implant must be mapped properly in order for an infant or toddler with a disability to hear well while receiving early intervention services, the mapping does not have to be done as a part of early intervention service delivery in order for it to be effective.

Particularly with young children, EIS providers are frequently the first to notice changes in an infant's or toddler's ability to perceive sounds. A decrease in an infant's or toddler's ability to perceive sounds may manifest itself as decreased attention or understanding on the part of the infant or toddler or increased frustration in communicating. Such changes may indicate a need for remapping, and we would expect that EIS providers would communicate with the child's parents about their observations. To the extent that adjustments to the devices are required, a specially trained professional would provide the remapping, but this is not the responsibility of the lead agency or EIS provider.

While providing mapping as an early intervention service is neither required nor permitted by part C of the Act, § 303.16(c)(1)(iii)(B) makes clear that

nothing in part C of the Act or these regulations prevents an early intervention service provider from routinely checking that the external components of a cochlear implant of an infant or toddler with a disability are functioning properly. Trained lay individuals can routinely check an externally worn processor connected to the cochlear implant to determine if the batteries are charged and the external processor is operating. For example, EIS providers can be trained to check the externally worn speech processor to ensure that it is turned on, the volume and sensitivity settings are correct, and the cable is connected.

The exclusion of mapping as a health service is not intended to deny an infant or toddler with a disability access to any early intervention service. Each infant's or toddler's IFSP Team, which includes the child's parent, determines the early intervention services, and the level of those services, required by an eligible infant or toddler.

Finally, as discussed in our response to comments received on § 303.13(b)(1), it is the Department's position that the exclusion of services related to the optimization (*e.g.,* mapping) of surgically implanted medical devices, such as cochlear implants, from the definition of health services is consistent with the Act.

Changes: None.

Comment: One commenter requested that the Department clarify the difference between medical devices referenced in the definition of *health services* in § 303.16(c)(2) and the medical devices referenced in the definition of *assistive technology device* in § 303.13(b)(1)(i).

Discussion: Both §§ 303.16(c)(2) and 303.13(b)(1)(i) provide examples of devices that are medical in nature and, therefore, not included under this part. Section 303.16(c)(2) states that devices necessary to control or treat a medical condition are not included under the definition of *health services* and provides examples of these devices. Section 303.13(b)(1) states that medical devices that are surgically implanted are not included in the definition of *assistive technology devices and services* or the umbrella term *types of early intervention services* and provides cochlear implants as an example of these medical devices.

Changes: None.

Homeless Children (§ 303.17)

Comment: Commenters generally were supportive of the proposed definition of *homeless children* in § 303.17. One commenter supported including the definition of *homeless children* in the regulations and another appreciated the focus on a traditionally underserved population.

One commenter expressed concern that the definition of *homeless children* may be broader than a State's definition. The commenter requested that we clarify in the regulations that a State is not required to serve children, even if they are homeless, who do not meet the State's eligibility definition.

One commenter recommended that we clarify the definition to provide that *homeless children* also include children over the age of three if a State chooses to implement the provisions of § 303.211, under which a State has the option to make services under part C of the Act available to children ages three and older.

Discussion: We do not agree that the definition of *homeless children* in § 303.17 is broader than any valid State definition of children served. The definition of *homeless children* in § 303.17 is consistent with the definition in section 602(11) of the Act and section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act (McKinney-Vento Act), as amended, 42 U.S.C. 11431 *et seq.* A State may choose to promulgate a definition of homeless children that is broader than the definition in the McKinney-Vento Act, as amended, but a State may not promulgate a definition that is narrower in scope than the Federal definition.

We agree with the commenter and have clarified the definition to include children over the age of three, specifically in cases where States choose to implement § 303.211 and make services under part C of the Act available to children ages three and older.

Changes: We have removed the phrase ''under the age of three'' from the definition of *homeless children* to make the definition consistent with section 635(c) of the Act, which provides States with the flexibility to serve children three years of age and older until entrance into elementary school, and § 303.211, under which a State may make services under part C of the Act available to children ages three and older.

Individualized Family Service Plan (§ 303.20)

Comment: One commenter supported the provision in the definition of *individualized family service plan* that provides that the plan must be implemented as soon as possible after obtaining parental consent for early intervention services.

One commenter recommended adding a requirement that services begin as soon as possible, but no later than 10 days after receiving parental consent for early intervention services.

Discussion: We address these comments in our discussion of the comments on § 303.342.

Changes: None.

Infant or Toddler With a Disability (§ 303.21)

Comment: Several commenters supported our proposed definition of *infant or toddler with a disability.*

Commenters specifically supported the definition in § 303.21(a)(2) regarding eligibility for children with conditions that have a high probability of resulting in a child's developmental delay. One commenter supported the inclusion of ''chromosomal abnormalities'' in the examples of conditions in § 303.21(a)(2)(ii) that have a high probability of resulting in a child's developmental delay.

A few commenters requested clarification of the list of examples of these conditions in § 303.21(a)(2)(ii). One commenter requested that ''severe attachment disorders'' be added as an example in § 303.21(a)(2)(ii). Another commenter requested that the qualifier ''severe'' be deleted from the reference to ''sensory impairments'' in § 303.21(a)(2)(ii) because mild hearing losses can result in developmental delays. One commenter suggested that we clarify that the definition of *infant or toddler with a disability* in § 303.21(a)(2) does not require that the infant or toddler with a disability have a severe or chronic condition and that the definition includes at-risk infants and toddlers.

Another commenter requested that we revise § 303.21 to provide that a State's definition of *infant or toddler with a disability* can include, at the State's discretion, children with disabilities who are eligible for services under section 619 of the Act and previously were served under part C of the Act until such children enter, or are eligible to enter, kindergarten. Another commenter was concerned that services will be denied to children transitioning between part C of the Act and part B of the Act during the summer months despite the requirements in § 303.21(c) and the definition of *child* in § 303.6.

Discussion: The examples of diagnosed conditions that have a high probability of resulting in developmental delay listed in § 303.21(a)(2)(ii) were taken from Note 1 following current § 303.16, which states:

The phrase 'a diagnosed physical or mental condition that has a high probability of

resulting in developmental delay,' * * * applies to a condition if it typically results in developmental delay. Examples of these conditions include chromosomal abnormalities; genetic or congenital disorders; severe sensory impairments, including hearing and vision; inborn errors of metabolism; disorders reflecting disturbance of the development of the nervous system; congenital infections; disorders secondary to exposure to toxic substances, including fetal alcohol syndrome; and severe attachment disorders.

The reference to ''severe attachment disorders,'' which was included in Note 1, was inadvertently omitted from proposed § 303.21(a)(2)(ii) and we have added it to § 303.21(a)(2)(ii) as an example of a diagnosed condition that has a high probability of resulting in developmental delay.

Concerning the commenter's request that the qualifier ''severe'' be deleted from the phrase ''sensory impairments,'' in § 303.21(a)(2)(ii), we agree with the commenter that even a mild sensory impairment may result in developmental delay and have revised the definition accordingly.

Concerning the commenter's request that we clarify that the definition of *infant or toddler with a disability* does not require that the infant or toddler with a disability have a severe or chronic condition, § 303.21 includes various groups of children such as an infant or toddler who is experiencing a developmental delay, or who has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay and in no way limits eligibility to infants or toddlers with severe or chronic conditions. Thus, the clarification recommended by the commenter is not necessary.

With respect to the commenter's request that the definition of *infant or toddler with a disability* in § 303.21 include at-risk infants and toddlers, § 303.21(b) provides that the definition of *infant or toddler with a disability* may include, at a State's discretion, an at-risk infant or toddler, as defined in § 303.5. It is the Department's position that each State must be provided discretion to develop a definition of infant or toddler with a disability that meets the unique needs of its population. The definition of *infant or toddler with a disability* addresses sufficiently and appropriately the issue of at-risk infants and toddlers and, therefore, we have not revised the definition as requested.

Concerning the request to revise the definition of *infant or toddler with a disability* to include children who are eligible for services under section 619 of the Act and were previously served under part 303, § 303.21(c) already makes clear that the definition of *infant or toddler with a disability* may include, at a State's discretion, a child with a disability who is eligible for services under section 619 of the Act and who previously received services under part 303 until the child enters, or is eligible under State law to enter, kindergarten or elementary school.

Summer services should not be denied to a child transitioning from early intervention services under part C of the Act to programs under part B of the Act simply because that child transitions during the summer months. Once a child is determined eligible for part B services, an IEP, or if consistent with 34 CFR 300.323(b) of the part B regulations, an IFSP, must be developed. If a child's IEP Team determines that extended school year services are necessary for the child to receive FAPE, the child must receive those services in accordance with the IEP (or IFSP under 34 CFR 300.323(b) of the part B regulations). Issues relating to transition of infants and toddlers from part C to part B services are discussed in more detail in the *Analysis of Comments and Changes* for subpart C in response to comments received on § 303.209.

Changes: We have revised § 303.21(a)(2)(ii) to add ''severe attachment disorders'' to the list of diagnosed conditions that have a high probability of resulting in developmental delay. Additionally, we have removed the word ''severe'' as a qualifier to the term ''sensory impairments'' in § 303.21(a)(2)(ii).

Lead Agency (§ 303.22)

Comment: One commenter requested that the Department provide its opinion on whether a State statute that designates the State agency that will serve as the lead agency in that State is consistent with the Act and these regulations.

Discussion: Section 303.22, regarding the designation of the lead agency by the State's Governor, incorporates the requirement in section 635(a)(10) of the Act that the Governor designate the lead agency that is responsible for administering part C of the Act in the State. If a State statute signed into law by the Governor designates the lead agency, such designation would be consistent with this requirement.

Changes: None.

Local Educational Agency (§ 303.23(c))

Comment: None.

Discussion: The proposed definition of local educational agency included a definition for BIA-funded schools, which referred to an elementary or secondary school funded by the Bureau of Indian Affairs (BIA). The Bureau of Indian Affairs is now called the Bureau of Indian Education or BIE and we have updated our references in § 303.23(c) accordingly.

Changes: We have replaced, in § 303.23(c), references to the Bureau of Indian Affairs with the Bureau of Indian Education.

Multidisciplinary (§ 303.24)

Comment: We received a significant number of comments concerning the definition of *multidisciplinary.* Multidisciplinary was defined in proposed § 303.24, with respect to evaluation and assessment of a child, an IFSP Team, and IFSP development under subpart D of this part, as the involvement of two or more individuals from separate disciplines or professions or one individual who is qualified in more than one discipline or profession. Some commenters supported this definition because it would help States allocate personnel and resources and may be less overwhelming for some families.

However, the vast majority of commenters opposed this proposed definition with respect to its reference to the IFSP Team. Specifically, these commenters stated that permitting one individual, even if that individual is qualified in more than one discipline or profession, to serve as the sole member of the IFSP Team (other than the parent), does not reflect best practice. One commenter suggested that the definition of *multidisciplinary* reflect the language in the definition of IEP Team in 34 CFR 300.23 of the part B regulations, which defines the IEP Team as a ''group'' of individuals. Additional commenters interpreted the definition of *multidisciplinary* to mean that one person could represent the entire IFSP Team and expressed concern that the definition, as written, would remove necessary checks and balances and may lead to potential conflicts of interest or decisions based on biased opinions. Additionally, commenters noted that changing this long-standing definition might create confusion for both families and service providers. Commenters requested that the definition be modified to ensure that multiple perspectives are included on each IFSP Team and adequate representation is not hampered or constrained on any given IFSP Team by an individual who is qualified in more than one discipline or profession. A few other commenters requested that the definition of *multidisciplinary* in current § 303.17 be retained.

Some commenters were concerned that multidisciplinary teams are the

only types of teams referenced in the regulations and that the regulations do not acknowledge that other types of teams, including but not limited to transdisciplinary and interdisciplinary teams, are routinely used in determining services under part C of the Act. The commenters suggested that all of these models should be included in the final regulatory definition to give teams the flexibility to choose the type of team model that best meets the needs of the individual situation.

Discussion: We agree with commenters' concerns about the definition of *multidisciplinary* in relation to the IFSP Team as it is important to ensure the involvement of the parent and two or more individuals, one of whom must be the service coordinator (consistent with § 303.343(a)(1)(iv)), from separate disciplines or professions on the IFSP Team and have made this change. With respect to IFSP Team meetings, we believe it is important for the parent to be able to meet not only with the service coordinator (who may have conducted the evaluation and assessments), but also with another individual (whether that person is the service provider or another evaluator) to obtain input from two or more individuals representing at least two disciplines and have revised § 303.24 accordingly. We also have added a reference to multidisciplinary in § 303.340, regarding the general provisions that apply to IFSP development, review, and implementation. Thus, with these changes in §§ 303.24 and 303.340, the term multidisciplinary IFSP Team requires the involvement of two or more individuals from separate disciplines or professions, one of whom must be the service coordinator (consistent with § 303.343(a)(1)(iv)).

With respect to evaluation of the child and assessments of the child and family, § 303.321(a) requires that all evaluations and assessments be conducted by qualified personnel. Qualified personnel, as defined in § 303.31, means personnel who have met State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the areas in which the individuals are conducting evaluations or assessments or providing early intervention services. Therefore, if one individual completes an evaluation while representing two or more separate disciplines or professions, that individual would have to meet the definition of qualified personnel in each area in which the individual is conducting the evaluation or assessment. Given these standards and requirements, we have retained the proposed definition to indicate that *multidisciplinary* means the involvement of two or more separate disciplines or professions and may include one individual who is qualified in more than one discipline or profession.

Finally, for clarity, we have added cross-references to the use of the term multidisciplinary, where appropriate, in §§ 303.113, 303.321, and 303.340 regarding multidisciplinary evaluations, assessments, and IFSP Teams.

Concerning adding a reference to transdisciplinary or interdisciplinary, the term multidisciplinary is consistent with section 635(a)(3) of the Act, regarding the requirement that the part C statewide system must include a timely, comprehensive, multidisciplinary evaluation of the functioning of each infant or toddler with a disability in the State. Transdisciplinary and interdisciplinary are specific team models. Multidisciplinary teams could be based on these models as long as the team meets the State's definition of *multidisciplinary* and the State's definition meets both statutory and regulatory requirements in this part. Thus, referencing specific team models in the regulatory definition of *multidisciplinary* is not necessary.

Changes: We have revised the definition of *multidisciplinary* in § 303.24 to add paragraphs (a) and (b) and clarified in paragraph (b) that the IFSP Team in § 303.340, must include the involvement of the parent and two or more individuals from separate disciplines or professions and one of these individuals must be the service coordinator (consistent with § 303.343(a)(1)(iv)). We also have added cross-references in § 303.24(a) and (b) to §§ 303.113, 303.321, and 303.340 regarding multidisciplinary evaluations, assessments, and the IFSP Team.

Native Language (§ 303.25)

Comment: We received a number of comments on proposed § 303.25(a)(2). Most commenters opposed the proposed requirement that the native language be used in all direct contact with the child. The commenters stated that such a requirement would be nearly impossible to implement in States where many different languages are spoken and would impose undue fiscal and personnel burdens on States where implementation is feasible.

Additionally, these commenters indicated that the proposed requirement would be inconsistent with section 602(20) of the Act, regarding the definition of *native language,* and section 607 of the Act, regarding requirements for prescribing regulations. One commenter expressed concern that proposed § 303.25(a)(2) would prohibit the delivery of services in English in situations where the child is in either a multilingual living or learning environment, even if the parent wanted the services delivered in English, or would prohibit the parent from serving as a translator for the EIS provider.

Several other commenters requested clarification regarding the applicability of proposed § 303.25(a)(2) in rural areas or areas that suffer from shortages of EIS providers. Other commenters asked what language should be used when conducting evaluations of newborns or young infants. Commenters also requested clarification as to whether and in what manner interpreters could be used when providing services.

A number of commenters supported proposed § 303.25(a)(2) stating that the provision would allow EIS providers to better communicate with families and infants and toddlers with disabilities, and would be consistent with 34 CFR 300.29 of the part B regulations, regarding the definition of *native language,* and section 607(a) of the Act.

Discussion: We agree with commenters that requiring the native language to be used in all direct contact with a child, especially in providing early intervention services to an infant or toddler with a disability, may not be necessary or feasible in all circumstances. For example, a child may not require the use of native language when part C services are directly provided to the child when the child's receptive or expressive language has not yet developed to indicate a clear spoken language preference. Thus, we have not included in these final regulations the requirement in proposed § 303.25(a)(2) that native language be used in all direct contact with the child. However, as recipients of Federal financial assistance, part C lead agencies must comply with the requirements in Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in programs or activities receiving Federal financial assistance.

Changes: We have removed proposed § 303.25(a)(2).

Comment: None.

Discussion: To better align the definition of *native language* in these part C regulations with the definition of this term in section 602(2) of the Act and in 34 CFR 300.29 of the part B regulations and to ensure internal consistency between the *native language* definition in § 303.25(b) and the requirement in § 303.321 to use

native language when conducting evaluations and assessments, we have made the following changes.

First, we added to § 303.25(a) the definition of *native language* for individuals with limited English proficiency (LEP) that is in 34 CFR 300.29(a) of the part B regulations and we cross-referenced the statutory definition of LEP that is in section 602(18) of the Act. With this revision, § 303.25(a)(1) provides that the native language of an individual with limited English proficiency is the language normally used by that individual, or in the case of a child, the language normally used by the parents of the child, except as provided in § 303.25(a)(2). We added new § 303.25(a)(2) to provide that, for evaluations and assessments of a child, the native language of a child with limited English proficiency is the language normally used by the child if qualified personnel conducting the evaluation or assessment determine that this language is developmentally appropriate for the child given the child's age and communication skills.

These changes do not change the long-standing native language requirements in § 303.342, concerning IFSP meetings, § 303.420, concerning obtaining parental consent, and § 303.421, concerning prior written notice and procedural safeguards. As discussed in the *Analysis of Comments and Changes* for subpart E of this part, we have added a native language requirement in § 303.404, concerning the general notice of confidentiality procedures provided to parents.

Changes: We have revised § 303.25(a)(1) to state that, when used with respect to an individual who is limited English proficient (LEP) as that term is defined in section 602(18) of IDEA, the term *native language* means—(1) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in § 303.25(a)(2). We also added a new paragraph (a)(2) to this section to provide that the native language for an individual who is limited English proficient means, for evaluations and assessments conducted pursuant to § 303.321(a)(5) and (a)(6), the language normally used by the child if determined developmentally appropriate for the child by qualified personnel conducting the evaluation or assessment.

Natural Environments (§ 303.26)

Comment: Many commenters suggested changes to the proposed definition of *natural environments* in § 303.26. A few commenters recommended adding the phrase ''community settings where children without disabilities participate'' to make the definition consistent with section 632(4)(G) of the Act. Other commenters recommended retaining the reference to the ''child's age peers'' in current § 303.18. Some commenters recommended replacing the word ''normal'' with ''typical'' because the term ''normal'' is value-laden, vague, and open to interpretation.

One commenter recommended providing a list of natural environments in which an infant or toddler with a disability may receive services. Several commenters, some in response to § 303.26 and others in response to § 303.126, recommended adding specific examples of settings to § 303.26, including Early Head Start or child care programs, day care, play groups, churches, grocery stores, parks, public libraries, community settings, and settings where parents with infants and toddlers with similar disabilities gather.

Two other commenters recommended the definition indicate that a clinical setting could be the natural environment, particularly when the service requires the use of specialized equipment that cannot be transported to the child's home. One commenter expressed concern that mandating services to be provided in settings where non-disabled children are present may suggest that the alternative is less than acceptable. Another commenter recommended that the definition of *natural environments* require that services be provided within family routines and activities and opposed identifying specific settings. *Discussion:* Three sections of these regulations describe natural environments requirements that apply to States receiving funds under part C of the Act: §§ 303.26, 303.126, and 303.344(d)(1). We address comments that relate to § 303.26, regarding the definition of *natural environments,* in this discussion section. We address comments that relate to § 303.126, regarding the requirements related to natural environments in State applications, in the *Analysis of Comments and Changes* for subpart B. Finally, we address comments that relate to § 303.344(d)(1), regarding the requirements related to natural environments for IFSPs and IFSP Team decision-making processes concerning appropriate service settings, in the *Analysis of Comments and Changes* for subpart D.

The definition of *natural environments* in § 303.26 remains substantively unchanged from current § 303.18 and is consistent with the language in section 632(4)(G) of the Act, as well as the following statutory sections:

Section 635(a)(16) of the Act, which is reflected in § 303.126 and requires that the part C statewide system include policies and procedures to ensure that, consistent with section 636(d)(5) of the Act, to the maximum extent appropriate, early intervention services are provided in natural environments and the provision of early intervention services for any infant or toddler with a disability occurs in a setting other than the natural environment that is most appropriate, as determined by the parent and IFSP Team, only when early intervention cannot be achieved satisfactorily for the infant or toddler in the natural environment.

Section 636(d)(5) of the Act, which is reflected in § 303.344(d)(1)(ii) and which requires that an IFSP contain a statement of the natural environments in which early intervention services will be provided appropriately, including a justification of the extent, if any, to which the services will not be provided in the natural environment. Section 632(4)(G) of the Act provides that natural environments may include home and community settings. However, the reference to community settings was not included in the proposed regulations. We have added a reference to ''community settings'' in § 303.26 to ensure greater conformity with the statutory language, to address commenters' concerns, and to clarify that the term natural environments includes not only the home but community settings in which one finds same-aged children who do not have disabilities (diagnosed conditions, developmental delays, or, at the State's option, at-risk children).

The term ''normal'' was introduced into the regulations implementing the Individuals with Disabilities Education Act Amendments of 1991 and at that time, ''normal'' was commonly used and accepted. However, we agree with commenters that ''normal'' is less commonly used today and have replaced the word ''normal'' with the word ''typical'' in the definition of *natural environments* in § 303.26.

Concerning commenters' requests to add a list of settings or examples of community settings, it would not be appropriate or practicable to include a list of every setting that may be the natural environment for a particular child or those settings that may not be natural environments in these

regulations.[1] In some circumstances, a setting that is natural for one eligible child based on that child's outcomes, family routines, or the nature of the service may not be natural for another child. As further discussed in § 303.344(d)(1) of the *Analysis of Comments and Changes* for subpart D, the decision about whether an environment is the natural environment is an individualized decision made by an infant's or toddler's IFSP Team, which includes the parent. Additionally, a variety of community settings exist that may be natural environments, and we do not wish to limit the types of service settings that the IFSP Team may consider appropriate. Thus, we have not added a list of settings or specific community-based settings as requested by commenters.

We appreciate the commenters' requests for clarification as to whether clinics, hospitals, or a service provider's office may be considered the natural environment in cases when specialized instrumentation or equipment that cannot be transported to the home is needed. Natural environments mean settings that are natural or typical for an infant or toddler without a disability. Section 635(a)(16) of the Act and § 303.126 require services be provided, to the maximum extent appropriate, to infants and toddlers with disabilities in natural environments (including the home and community settings). We do not believe that a clinic, hospital or service provider's office is a natural environment for an infant or toddler without a disability; therefore, such a setting would not be natural for an infant or toddler with a disability.

However, § 303.344(d)(1) requires that the identification of the early intervention service needed, as well as the appropriate setting for providing each service to an infant or toddler with a disability, be individualized decisions made by the IFSP Team based on that child's unique needs, family routines, and developmental outcomes. If a determination is made by the IFSP Team that, based on a review of all relevant information regarding the unique needs of the child, the child cannot satisfactorily achieve the identified early intervention outcomes in natural environments, then services could be provided in another environment (*e.g.* clinic, hospital, service provider's office). In such cases, a justification must be included in the IFSP, pursuant to § 303.344(d)(1)(ii)(A).

Concerning the comment to add a reference to family routines and activities to the definition of *natural environments,* § 303.26 allows for and supports providing services within family routines and activities.

Changes: We have added in the definition of *natural environments* in § 303.26 the phrase ''or community settings'' after ''home'' and the phrase ''same-aged'' before the phrase ''infant or toddler without a disability.'' We also have replaced the reference to ''normal'' with ''typical.''

Parent (§ 303.27)

Comment: While a few commenters supported the changes to the definition of *parent,* a majority of commenters did not support the proposed changes and recommended that the definition of *parent* in § 303.27 be amended. One commenter requested that ''non-relative caregivers'' be included in the definition of parent.

Discussion: The definition of *parent* in § 303.27 reflects section 602(23) of the Act and is consistent with the definition of *parent* in 34 CFR 300.30 of the part B regulations. Adding ''non-relative caregivers'' to these regulations is not necessary because when the child lives with a non-relative caregiver, that individual is considered a parent under the provisions in § 303.27(a)(4). Further, including non-relative caregivers with whom the child does not reside in the definition of *parent* would not be consistent with section 602(23)(c) of the Act.

Changes: None.

Comment: A few commenters suggested that the definition of *parent* include a specific reference to foster child, in addition to the current reference to ward of the State.

Discussion: The definition of *ward of the State* in § 303.37 includes foster children. Therefore, adding ''foster child'' to ''ward of the State'' in the definition of *parent* would be redundant.

Changes: None.

Comment: One commenter recommended that the Department clarify the definition of *parent* to provide that foster parents, absent custody or other legal right, do not have the right to consent to or deny early intervention services. Another commenter requested clarification concerning the role of the foster parent when the biological parent is available, as well as when the whereabouts of the biological parent are unknown or when the biological parent is incarcerated. The commenter also requested guidance on how assertively the State should seek out the biological parent to obtain consent.

Discussion: Section 602(23) of the Act provides that a foster parent may act as the parent for the purposes of part C of the Act, unless the foster parent is prohibited from acting as the parent by State law. Thus, it would be inconsistent with the Act to require that a foster parent have custody of the child, or other legal right, to act on the child's behalf in matters of early intervention services if, under State law, the foster parent is not precluded from serving as the parent for that child.

When more than one individual seeks to act as the parent, § 303.27 provides that the biological parent attempting to act as the parent is presumed to be the parent unless that person does not have legal authority to make decisions for the infant or toddler concerning early intervention service matters, or there is a judicial order or decree specifying another individual to act as the parent under part C of the Act. Thus, when the whereabouts of the biological parent are unknown (*e.g.,* cases in which the parent is concerned about revealing his or her location due to safety concerns) or the biological parent is incarcerated, but the parent is attempting to act as the parent, the biological parent would be presumed to be the parent. However, when the whereabouts of the biological parent are unknown or the parent is incarcerated, and the biological parent is not attempting to act as the parent, an individual identified in § 303.27, including the foster parent would be presumed to be the parent unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent.

The Act and the regulations are silent on how assertively a State, for purposes of obtaining consent, should seek out the biological parent of an infant or toddler who is undergoing an eligibility determination or who has been determined eligible to receive early intervention services under part C of the Act. It is the Department's position that these regulations should not prescribe the efforts, including specific procedures or timelines, that a State must make in its attempts to contact the biological parent(s). The procedures and timelines will vary depending on numerous factors, including how judicial orders or decrees are routinely handled in a State or locality, and are best left to the State and local officials

[1] Lead agencies currently provide data on service settings under Information Collection 1820–0578. Examples of community settings identified in response to this information collection include: child care centers (including family day care), preschools, regular nursery schools, early childhood centers, libraries, grocery stores, parks, restaurants, and community centers (*e.g.,* YMCA, Boys and Girls Clubs).

to determine in light of State law and policy.

Changes: None.

Comment: Some commenters asked that we clarify the phrase ''when attempting to act as the parent'' as used in § 303.27(b)(1) to describe the situation when a biological or adoptive parent attempts to act as the parent and more than one party is qualified under the regulations to act as a parent. One commenter noted that keeping the biological parent involved in decisions concerning the child is always important because the child may return to the care of the biological parent.

A few commenters suggested that the determination of whether a parent is ''attempting to act'' as the parent must be based on a comprehensive assessment of whether the parent is attempting to perform her or his role as a participant and decision-maker in the early intervention process and not on whether a parent misses a meeting. One commenter requested that the phrase ''attempting to act as a parent'' be deleted if specific clarification is not offered. Another commenter raised concerns that lead agencies will misinterpret this paragraph to mean that biological or adoptive parents must affirmatively assert their rights or take action in order to be presumed to be the parent for the purposes of this section. Another commenter requested that the regulations reinforce the affirmative obligation under these regulations to provide notice to, and accommodate the schedules of, biological and adoptive parents when scheduling IFSP meetings.

Discussion: Section 303.27(b) was added to assist lead agencies and EIS providers in determining the appropriate individuals who may act as a ''parent'' under part C of the Act in those difficult situations when more than one individual is attempting to act as a parent under these regulations. This definition recognizes that the biological or adoptive parent is presumed to be the parent for purposes of making decisions for a child unless those rights have been legally terminated or modified.

The phrase ''attempting to act as a parent'' refers to situations when an individual attempts to assume the rights and responsibilities of a parent under the Act and these regulations. An individual may ''attempt to act as a parent'' under the Act in many situations, such as providing consent for an evaluation and assessment, attending an IFSP Team meeting, and filing a complaint. Identifying all of the circumstances under which an individual may ''attempt to act as a parent'' would be difficult and is unnecessary.

The biological or adoptive parent would be presumed to be the parent under these regulations, unless a question is raised about their legal authority. There is nothing in the Act that requires the biological or adoptive parent to affirmatively assert their rights to be presumed to be the parent.

Pursuant to § 303.27(b), unless a judicial order or decree identifies a specific person or persons to act as the parent of an infant or toddler, the biological or adoptive parent, when attempting to act as a parent, must be determined to be the ''parent'' for purposes of part C of the Act and thus retains all the rights and responsibilities of a parent under the Act, including the right to receive written notice and attend meetings.

Changes: None.

Comment: One commenter requested that the Department remove the reference to ''health'' decisions in proposed § 303.27(b)(1) and (b)(2), regarding individuals that may act as the parent of an infant or toddler with a disability for purposes of making health, educational, or early intervention services decisions for the child. The commenter stated that decisions concerning a child's health could cover a broad range of issues and a judicial decision to appoint a decision-maker to make health decisions for an eligible infant or toddler in place of the child's biological or adoptive parent should not necessarily have an impact on a biological or adoptive parent's authority to make early intervention and educational decisions.

Discussion: We agree with the commenter that a judge may appoint a person to make health-related decisions for an eligible infant or toddler without intending to limit the biological parent's or adoptive parent's role in early intervention decision-making. Therefore, we have revised paragraphs (b)(1) and (b)(2) to remove the reference to ''health'' decisions.

Changes: We have removed the word ''health'' from § 303.27(b)(1) and (b)(2).

Comment: One commenter recommended that the Department clarify that a judicial appointment of a parent for the purposes of part C of the Act may be a temporary or permanent appointment.

Discussion: The length of a judicial appointment of a parent for the purposes of part C of the Act is at the discretion of the judge issuing the appointment, is subject to State law, and is often decided on a case-by-case basis. State law or the judge issuing the appointment would determine whether an appointment is temporary or permanent and the length of any appointment. Therefore, we have not revised the definition as requested.

Changes: None.

Comment: None.

Discussion: For clarity and to eliminate redundancy, we have revised the definition of *parent* in § 303.27(b)(2) to state that if an EIS provider or a public agency provides any services to a child or any family member of that child, that EIS provider or public agency may not act as the parent for that child. We have replaced ''early intervention services or other services'' in proposed § 303.27(b)(2) with ''any services'' in new § 303.27(b)(2). This change is necessary to make clear that if a public agency provides services other than early intervention services to a family member of the child, that public agency may not serve as the parent for that child.

This change strengthens protections against potential conflicts of interest by providing that a public agency that provides services to a child or any family member of that child cannot act as the parent under these regulations.

Changes: We have replaced in § 303.27(b)(2) the phrase ''an EIS provider or public agency that provides early intervention or other services to a child or any family member of that child may not act as the parent'' with ''if an EIS provider or a public agency provides any services to a child or any family member of that child, that EIS provider or public agency may not act as the parent for that child.''

Comment: Some commenters requested that the phrase ''other services'' as used in proposed § 303.27(b)(2) be replaced with ''child welfare services.'' Another commenter asked if law guardians and child welfare case managers appointed by a judge would meet the definition of *parent* because neither ''law guardian'' nor ''child welfare case manager'' meets the definition of *public agency* in § 303.30. One commenter requested that private agencies be added to the list of entities that are excluded from acting as a parent in § 303.27(b)(2) because private agencies should not have the option to serve in the place of a parent.

Discussion: As discussed previously, we have revised the definition of *parent* to state that if an EIS provider or a public agency provides any services to a child or any family member of that child, that EIS provider or public agency may not act as the parent for that child, which would preclude a public agency that provides child welfare services (including a child welfare case manager) to the child or any family member of the

child from acting as the parent for that child.

The meaning of the term ''law guardians'' referred to in the comments is unclear. However, a guardian with a limited appointment that does not authorize the guardian to act as a parent of the child generally, or does not authorize the guardian to make early intervention services decisions for the child, is not a *parent* within the meaning of these regulations. The legal authority that the judicial order grants to the individual is the controlling factor, not the term used to identify that individual. Whether a person appointed as a financial guardian, guardian *ad litem,* or other guardian (*e.g.,* a law guardian) has the requisite authority to be considered a *parent* under this section depends on State law and the nature of the person's appointment.

Adding a reference to private agencies in § 303.27(b)(2), regarding entities that are prohibited from acting as a parent, is unnecessary because the language in § 303.27(b)(2) expressly references an EIS provider and the definition of *EIS provider* in § 303.12 includes any entity, whether public, private, or non-profit, or an individual that provides early intervention services under part C of the Act, whether or not that entity receives Federal funds under part C of the Act. Therefore, a private agency that provides early intervention services to a child cannot serve as the parent for that child.

Changes: None.

Parent Training and Information Center (§ 303.28)

Comment: One commenter recommended adding language to this definition to require that the parent training and information centers provide training that is targeted to all family members.

Discussion: Making the change suggested by the commenter is not appropriate because § 303.28 defines *parent training and information centers* solely by reference to sections 671 and 672 of the Act, which provide the substantive definitions of *parent training and information centers* and *community parent resource centers* and identify the responsibilities and activities of these centers. We cannot include in these regulations changes that would alter the statutory requirements for these centers under the Act.

Changes: None.

Personally Identifiable Information (§ 303.29)

Comment: Some commenters requested clarification of the confidentiality provisions. One commenter requested that the information protected under the part C confidentiality provisions align with the information that is protected under FERPA.

Discussion: We agree it is important to align the definition of personally identifiable information in these regulations with the definition of that same term in 34 CFR 99.3 under the Family Educational Rights and Privacy Act (FERPA) (in section 444 of the General Education Provisions Act). Examples of data that would be considered personally identifiable information under both the FERPA regulations in 34 CFR 99.3, as well as under part C of the Act, include the child's or parent's name and social security number, date and place of birth, race, ethnicity, gender, physical description, and disability or level of developmental delay, because some of this information can also indirectly identify an individual depending on the combination of factors and level of detail released.

The definition of personally identifiable information in 34 CFR 99.3 was the subject of the Department's December 9, 2008 Final Regulations under FERPA in the **Federal Register** (73 FR 74805). Given that the confidentiality provisions in §§ 303.401 through 303.417 reference other specific FERPA provisions, we believe it is appropriate to add in § 303.29 a cross-reference to the FERPA definition, as amended, rather than separately revising the definition in these regulations. Thus, we adopt by reference in § 303.29, with appropriate modifications, the FERPA definition in § 99.3, as amended.

Changes: We have revised the definition of personally identifiable information in § 303.29 to cross-reference the definition in 34 CFR 99.3, as amended, except that the terms ''student'' and ''school'' mean ''child'' and ''EIS providers'' respectively as used in this part.

Public Agency (§ 303.30)

Comment: None.

Discussion: We use the term public agency in this part to refer to public agencies that provide early intervention services as well as public agencies that provide other services or are sources of funding for early intervention services. Therefore, we have revised the definition of *public agency* in § 303.30 to make clear that the term includes the lead agency and any other agency or political subdivision of the State. We also have clarified, in § 303.12, that a public agency that is responsible for providing early intervention services to infants and toddlers with disabilities under this part and their families is an *EIS provider* under § 303.12.

Changes: We have removed the phrase ''that is responsible for providing early intervention services to infants and toddlers with disabilities under this part and their families'' from § 303.30.

Qualified Personnel (§ 303.31)

Comment: One commenter requested that the word ''area'' in the definition of *qualified personnel* in § 303.31 be changed to ''type of early intervention services.'' The commenter expressed concern that an individual could provide services in the ''area'' of occupational therapy, but not be a licensed or qualified occupational therapist. Another commenter requested clarification of the role of qualified personnel in conducting evaluations.

Discussion: States have the authority to establish standards for licensure or certification and to determine on a case-by-case basis personnel who meet those standards. Therefore, an individual could only provide services in the area of occupational therapy if that individual meets State approved or recognized certification, licensing, registration or other comparable requirements that apply to the area in which the individual is providing early intervention services. Paraprofessionals or assistants could assist in the provision of occupational therapy if they are appropriately trained and supervised in accordance with State law, regulation, or written policy to assist in the provision of early intervention services under part C of the Act to infants and toddlers with disabilities pursuant to § 303.119(c).

The term ''area'' as used in § 303.31 refers to the specific domain in which the individual has qualified through State certification, licensing, registration, or other comparable requirements to provide early intervention services. Thus, revising § 303.31 as suggested by this commenter is not necessary.

We agree with the commenter's request to clarify the role of qualified personnel in conducting evaluations. Thus, we have added in § 303.31 a reference to conducting evaluations or assessments to reflect the long-standing requirement in current § 303.322 and new § 303.321 (proposed § 303.320) that evaluations and assessments must be conducted by qualified personnel.

Changes: We have added ''conducting evaluations or assessments or'' before ''providing early intervention services.''

Scientifically Based Research (§ 303.32)

Comment: None.

Discussion: We determined that adding a definition for *scientifically based research* to subpart A would be helpful because the definition will provide clarity and understanding when the term scientifically based research is used in this part. Thus, we have added the defined term *scientifically based research* and provided that the term has the same meaning as in section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). When applying this definition to the regulations under part C of the Act, any reference to ''education activities and programs'' refers to ''early intervention services.''

Change: A cross-reference to the definition of *scientifically based research* in section 9101(37) of the ESEA has been added as new § 303.32. Subsequent definitions have been renumbered accordingly.

Service Coordination Services (Case Management) (Proposed § 303.33) (New § 303.34)

Comment: Numerous commenters expressed a need for clarification of this section. A substantial number of commenters stated that the regulations should have included the language from the definition of *service coordination (case management)* in current § 303.23(a)(2)(ii), which provides that the service coordinator is responsible for ''serving as the single point of contact in helping parents to obtain the services and assistance they need.'' The commenters suggested that only requiring the service coordinator to assist parents in ''gaining access to * * * services,'' in proposed § 303.33(a)(2), would decrease the level of assistance and limit the types of services that families will receive.

Discussion: We agree that the proposed language and structure of this section may cause confusion and, therefore, we have made several structural and organizational revisions to improve clarity and readability. Additionally, while the proposed language in this section was not meant to limit or decrease the level of assistance that a service coordinator would provide to an infant or toddler with a disability and his or her family, we recognize that removing the phrase ''serving as the single point of contact in helping parents to obtain the services and assistance they need'' from the regulations has caused concern and confusion. Therefore, we have clarified in these final regulations that the service coordinator is responsible for assisting parents of infants and toddlers with disabilities in obtaining access to needed early intervention services and other services identified in the IFSP. Additionally, for clarity, we have provided examples of activities that the service coordinator may engage in when assisting parents in obtaining access to needed early intervention services and other services identified in the IFSP.

We have further clarified that service coordination services assist and enable an infant or toddler with a disability and the child's family to receive the services and rights, including procedural safeguards, required under part C of the Act. Such activities include: (1) The coordination of early intervention services and other services that the child needs or is being provided; (2) conducting referral and other activities; (3) ensuring the timely provision of services; and (4) conducting follow-up activities to determine that appropriate part C services are being provided.

Changes: We have reorganized paragraph (a) of new § 303.34 (proposed § 303.33(a)) as follows: Paragraph (a)(1) defines *service coordination services;* paragraph (a)(2) provides that each infant or toddler with a disability and the child's family must be provided a service coordinator and describes the responsibilities of the service coordinator; and paragraph (a)(3) describes the activities involved in service coordination. Section 303.34(b) (proposed § 303.33(b)) has been revised to indicate in § 303.34(b)(1) that service coordination services include assisting parents of infants and toddlers with disabilities in obtaining access to needed early intervention services and other services identified in the IFSP. Section 303.34(b)(2) has been added to indicate that service coordination services include coordinating the provision of early intervention services and other services (such as educational, social, and medical services that are not provided for diagnostic or evaluative purposes) that the child needs or is being provided. We have modified § 303.34(b)(5) (proposed § 303.33(b)(3)) to add the phrase ''conducting referral and other activities'' as an example of activities that may assist families in identifying available EIS providers. We also have revised § 303.34(b)(6) (proposed § 303.33(b)(4)) to add the phrase ''to ensure that the services are provided in a timely manner.'' Finally, we have added § 303.34(b)(7) to clarify that service coordination services also include conducting follow-up activities to determine that appropriate part C services are being provided.

Comment: Several commenters expressed concern that the proposed regulation was unclear about who could serve in the capacity of a service coordinator, and some commenters requested that the regulations specify exactly who may serve as a service coordinator. Other commenters expressed concern that the qualifications for service coordinators may have been eliminated. One commenter recommended modifying the definition to require that a service coordinator be selected from the profession most immediately relevant to the needs of the child or family.

Discussion: Section 303.13(a)(7) requires that service coordination services must be provided by *qualified personnel* as defined in § 303.31. The definition of *qualified personnel* in § 303.31 states that personnel are qualified if they meet State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing early intervention services. Additionally, § 303.344(g), which provides that an IFSP contain information about the service coordinator, requires that the service coordinator be selected from the profession most immediately relevant to the child's or family's needs or be a person who is otherwise qualified to carry out all applicable responsibilities under part C of the Act. Thus, repeating these criteria in new § 303.34 (proposed § 303.33) is not necessary.

Changes: None.

Comment: Some commenters suggested that the regulations could be read to require parents to coordinate early intervention services. Two commenters expressed concern that, as proposed, the regulation could be read to mean that more than one person may fill the role of a service coordinator for a particular infant or toddler and, thereby compromise consistency and quality of services.

Discussion: Nothing in these regulations requires a parent to coordinate early intervention services. Section 303.34(a)(2)(i) (proposed § 303.33(a)(3)) specifies that the service coordinator, or case manager, is responsible for coordinating all services required under part 303 across agency lines. Section 303.34(a)(2)(ii) (proposed § 303.33(a)(3)) stipulates that a service coordinator, or case manager, serves as the single point of contact for the family. This provision means that only one person may serve as the service coordinator or case manager for a particular family at a given time. However, the regulations do not

prohibit more than one person from serving as the service coordinator or case manager over the entire period that the eligible infant or toddler is receiving early intervention services under part C of the Act, provided that only one service coordinator or case manager is assigned to an infant or toddler at a given time to ensure that parents and EIS providers for a particular child have a single point of contact.

Changes: None.

Comment: One commenter requested that the Department clarify the statement in proposed § 303.33(c) that the lead agency's or an EIS provider's use of the term service coordination or service coordination services does not preclude characterization of the services as case management or any other service that is covered by another payor of last resort.

Discussion: The legislative history of the 1991 amendments to the Act indicates that use of the term ''service coordination'' is not intended to affect authority to seek reimbursement for services provided under Medicaid or any other legislation that makes reference to ''case management'' services. See H.R. Rep. No. 198, 102d Cong., 1st Sess. 12 (1991); S. Rep. No. 84, 102d Cong., 1st Sess. 20 (1991). Accordingly, this paragraph is intended to reflect the intent of Congress. For the same reason, we added the parenthetical reference to case management in the title of this section.

Changes: None.

Comment: One commenter requested that the definition of *service coordination services (case management)* be amended to include those services that are not directly early intervention services, but that are essential to the well-being of the child and the family, in accordance with § 303.344(e). Section 303.344(e) provides that a child's IFSP must identify medical and other services that the child or family member needs or is receiving through other sources, but that are neither required nor funded under part C of the Act.

Discussion: The commenters' concern is addressed sufficiently by the requirements in new § 303.34(a)(3)(ii) (proposed § 303.33(a)(2)), which provides that service coordination involves coordinating the other services identified in the IFSP under § 303.344(e) that are needed or are being provided to the infant or toddler with a disability and that child's family.

Changes: None.

Comment: One commenter recommended that proposed § 303.33(a)(2), which provides that a service coordinator or case manager must assist parents of infants and toddlers with disabilities to coordinate early intervention services and other services identified in the IFSP that are needed or are being provided to the infant or toddler with a disability, be revised to state that a service coordinator or case manager must coordinate early intervention and other services identified in the IFSP for ''other family members'' in addition to ''parents.''

Discussion: Including a reference to ''other family members'' in this section would be inconsistent with sections 636(e) and 639(a)(3) of the Act, which provide that a parent, and not ''other family members,'' has the authority to consent to the eligible child and family member's receipt of any early intervention services identified in the IFSP by the IFSP Team.

Changes: None.

Subpart B—State Eligibility for a Grant and Requirements for a Statewide System

State Eligibility—Requirements for a Grant Under This Part (§ 303.101)

Comment: A few commenters recommended adding the phrase ''Native American'' before the words ''Indian infants and toddler'' in § 303.101(a)(1)(i). A few commenters suggested that in addition to referencing ''wards of the State,'' the regulations, including § 303.101(a)(1)(iii), should also refer to ''children in foster care.''

Discussion: Section 303.101(a)(1)(i) provides that, as a grant condition, a State must assure that it has adopted a policy that appropriate early intervention services are available to all infants and toddlers with disabilities in the State and their families, including Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State. Adding the phrase ''Native American'' before the words ''Indian infants and toddlers'' in § 303.101(a)(1)(i) is not appropriate because the language in § 303.101(a)(1)(i) reflects the language in section 634(1) of the Act, which does not use the term ''Native American'' in referring to Indian infants and toddlers. Additionally, it is not appropriate to add the phrase ''Native American'' before the words ''Indian infants and toddlers'' in § 303.101(a)(1)(i) because the term *Indian* is specifically defined in section 602(12) of the Act and § 303.19(a) of these regulations. Given that *Indian* is a defined term in these regulations, it could cause confusion to refer to ''Native American'' Indian infants and toddlers in this section.

Similarly, adding the phrase ''children in foster care'' each time the regulations refer to ''wards of the State'' is unnecessary because the definition of *wards of the State* in § 303.37 makes clear that a foster child is a ward of the State unless that child has a foster parent who meets the definition of *parent* in § 303.27. Therefore, adding the phrase ''children in foster care'' to § 303.101(a)(1)(iii) would be redundant.

Changes: None.

Comment: None.

Discussion: To incorporate the long-standing requirement that States have in place policies and procedures that address each of the components of the part C statewide system, we have clarified in § 303.101(a)(2) that the State's application must include an assurance that the State has in effect policies and procedures that address each of the components required in §§ 303.111 through 303.126.

Changes: We have added to § 303.101(a)(2) the words ''policies and procedures that address'' after the word ''including'' and before the words ''at a minimum.''

Comment: None.

Discussion: Based on further review, we have determined that it is more appropriate to describe in subpart B—rather than subpart C—of these regulations the State's obligation to obtain prior Secretarial approval of those policies and procedures that are required to be submitted with the State's application. For this reason, we have moved proposed § 303.208(b) to new § 303.101(c), and further specified in § 303.101(c), those policies and procedures that are required to be submitted as part of the State's application.

Changes: We have added a new § 303.101(c), based on proposed § 303.208(b), to describe the State's obligation to obtain approval by the Secretary before implementing any policy or procedure that is required to be submitted as part of its application under §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211.

Acquisition of Equipment and Construction or Alteration of Facilities (§ 303.104)

Comment: None.

Discussion: The word ''Act'' was inadvertently omitted from the title ''Americans with Disabilities Accessibility Guidelines for Buildings and Facilities'' in § 303.104(b)(1). We have revised this section to reflect the correct title of the guidelines.

Changes: We have added the word ''Act'' following the words ''Americans with Disabilities.''

Positive Efforts To Employ and Advance Qualified Individuals With Disabilities (§ 303.105)

Comment: Some commenters requested that this section be amended to include positive efforts to employ and advance parents of individuals with disabilities because such efforts would benefit the part C system by encouraging parent leadership at all levels. A few commenters indicated general support for the language in this section, but requested that the regulations require States to report to the Office of Special Education Programs (OSEP) on their plan and efforts to employ qualified individuals with disabilities.

Discussion: We agree with the commenter that positive efforts to employ and advance parents of individuals with disabilities would encourage parent participation in State part C programs. However, the language in § 303.105 reflects the requirement in section 606 of the Act, concerning the employment and advancement of qualified individuals with disabilities themselves, and, therefore, we do not believe that it is appropriate to expand this requirement to include the parents of individuals with disabilities, as suggested by the commenters. Nothing in the Act precludes a State from making positive efforts to employ and advance in employment parents of individuals with disabilities if such a policy is consistent with State statute, regulation, and policy. Additionally, section 606 of the Act does not require that States report to OSEP on their efforts to employ and advance qualified individuals with disabilities. In carrying out its monitoring function, OSEP may review, as appropriate, State plans and efforts to employ and advance qualified individuals with disabilities, but the Department's position is that it would not be useful to require States to report this information to OSEP because State hiring and retention plans and efforts vary based on the individual employment needs of each State as do the State laws, regulations, or written policies that govern the certification, licensing, and registration of qualified personnel providing early intervention services in each State part C program.

Changes: None.

State Definition of Developmental Delay (§ 303.111)

Comment: Some commenters strongly supported the flexibility afforded States through the regulatory language in § 303.111, regarding a State's definition of *developmental delay*. Other commenters requested that the Department define the term ''rigorous'' in § 303.111. One commenter requested that the regulations clarify that a ''rigorous'' definition of *developmental delay* does not necessarily mean that States must change their definitions to make them more rigorous than they were before the enactment of the 2004 amendments to the Act. The same commenter expressed concern that any definition of *developmental delay* under § 303.111 would exclude certain children who are eligible under the State's existing definition of developmental delay.

Another commenter suggested that § 303.111 be amended to include ''children'' with delays, and not only ''infants and toddlers,'' because of a State's option to make part C services available to children ages three and older pursuant to § 303.211.

Discussion: The definition of *developmental delay* in § 303.111, which is aligned with section 635(a)(1) of the Act, replaces the definition of developmental delay in current §§ 303.161 and 303.300. Consistent with § 303.203(c), a State's definition of *developmental delay* is considered to be rigorous under part C of the Act if the definition meets the requirements in § 303.111(a) and (b), and, was established in accordance with the public participation requirements in new § 303.208(b).

As required in § 303.111, a State's definition of *developmental delay* must include: (1) Consistent with § 303.321, a description of the evaluation and assessment procedures that will be used to measure a child's development; and (2) a description of the specific level of developmental delay in functioning or other comparable criteria that constitute a developmental delay in one or more of the developmental areas identified in § 303.21(a)(1). Additionally, in order to be ''rigorous'', each State's definition of developmental delay must be established in accordance with the public participation requirements in new § 303.208(b) to enable parents, EIS providers, Council members and other stakeholders and members of the public to comment on the State's definition. Section 303.111 does not require a State to revise, or preclude a State from using, its existing definition of developmental delay as long as the definition meets the requirements in § 303.111 and was established in accordance with the public participation requirements that are set forth in new § 303.208(b) after December 2004.

We decline to replace the phrase ''infants and toddlers,'' as used in § 303.111, with the term ''child,'' as one commenter requested, because this change is unnecessary. The definition of ''infant or toddler with a disability'' in § 303.21(c) includes any child to whom the State elects to offer part C services under section 635(c) of the Act and § 303.211.

Changes: None.

Availability of Early Intervention Services (§ 303.112)

Comment: Several commenters requested that specific terms in this section be defined or clarified. Many commenters requested that these regulations define the term ''scientifically based'' and that the definition of the term be aligned, similar to part B of the Act, with the definition in Title I of ESEA. A few commenters recommended replacing the phrase ''scientifically based'' with ''peer-reviewed'' (or vice versa) to provide for consistency throughout the regulations. One commenter requested that the Department clarify that ''scientifically based research'' and ''peer-reviewed research'' are two distinct terms, that they cannot be used interchangeably, and that the terms apply to both lead agencies and IFSP Teams. Finally, one commenter requested that the regulations define the term ''practicable.''

Discussion: We agree with the commenters that the definitions of ''scientifically based research'' under parts B and C of the Act should be aligned with and explicitly cross-reference the definition of ''scientifically based research'' from section 9101(37) of the ESEA. We have added a cross-reference to this definition in new § 303.32.

We also agree that the term ''scientifically based research'' is not interchangeable with ''peer-reviewed research.'' The definition of *scientifically based research* is broader and includes the concept of peer-reviewed research. Peer-reviewed research generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. However, there is no single definition of ''peer-reviewed research'' because the review process varies depending on the type of information being reviewed.

We do not agree with the commenter, however, that the terms ''scientifically based research'' and ''peer-reviewed research'' apply to both lead agencies and IFSP Teams because these terms are used in different sections of the regulations for different purposes.

Use of the term ''scientifically based research'' in § 303.112 reflects the requirement in section 635(a)(2) of the

Act that a lead agency must include as a part of its part C statewide system a policy that ensures that appropriate early intervention services based on scientifically based research, to the extent practicable, are available to all infants and toddlers with disabilities and their families. The use of the term peer-reviewed research, on the other hand, reflects the requirement in section 636(d)(4) of the Act, which provides that an IFSP must include a statement of the specific early intervention services, based on peer-reviewed research (to the extent practicable), that are necessary to meet the unique needs of the child and the family to achieve the results or outcomes as required by these regulations. Finally, with regard to the comment requesting that the Department define the term ''practicable'' in both §§ 303.112 and 303.344(d)(1), it is the Department's position that this change is not necessary. In the context of these regulations, the term has its plain meaning (*i.e.,* feasible and possible). As used in § 303.112, ensuring that ''appropriate early intervention services are based on scientifically based research, to the extent practicable'' means that services and supports should be based on scientifically based research to the extent that it is feasible or possible, given the availability of scientifically based research concerning a particular early intervention service.

Changes: None.

Comment: Some commenters suggested revising § 303.112 to require States to ensure that early intervention services are not only available, but also accessible, to all infants and toddlers with disabilities and their families, including families in rural areas.

Discussion: Section 303.112 reflects the language of, and requirements in, section 635(a)(2) of the Act that each part C statewide system must have in effect a State policy that ensures that appropriate early intervention services, based on scientifically based research, to the extent practicable, are available to all infants and toddlers with disabilities and their families, including Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State, and infants and toddlers with disabilities who are homeless children and their families. Children living in rural areas are a historically underrepresented population and as stated in § 303.1(d), one of the purposes of this program is to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of rural children. Additionally, under § 303.227(a), States must ensure that policies and practices have been adopted to ensure that traditionally underserved groups, including minority, low-income, homeless, and rural families and children with disabilities who are wards of the State, are meaningfully involved in the planning and implementation of all the requirements of this part. Given these requirements, we expect that accessibility issues, such as transportation, that may be specific to these groups will be addressed by the lead agency.

Lead agencies must comply with the requirements in Title II of the Americans with Disabilities Act of 1990 (ADA), which apply to public entities (*i.e.,* State and local governments), and the requirements in section 504 of the Rehabilitation Act of 1973 (Section 504), which apply to recipients of Federal financial assistance. Both Title II of the ADA and Section 504 prohibit discrimination on the basis of disability, including exclusion from participation in, and the denial of the benefits of, any program or activity of a lead agency. Both of these laws and their implementing regulations generally require appropriate auxiliary aids and services be made available where necessary to afford a qualified individual with a disability an equal opportunity to participate in, and enjoy the benefits of, any program or activity conducted by a lead agency that receives a grant under part C of the Act. Thus, lead agencies are required to ensure that early intervention services are accessible under Title II of the ADA and Section 504, as appropriate. It would be redundant for the part C regulations to include these accessibility requirements.

Changes: None.

Comment: Two commenters recommended that we specifically reference, in § 303.112, children who have experienced or have been exposed to abuse, neglect, or family violence.

Discussion: Section 303.112 of these regulations reflects the requirement in section 635(a)(2) of the Act that a State's system include a policy that ensures that early intervention services are available to all infants and toddlers with disabilities and their families, including Indian children with disabilities and their families residing on a reservation geographically located in the State and homeless children with disabilities and their families. We define the word *including* in § 303.18 of subpart A of these regulations to mean that the items named are not all the possible items that are covered, whether like or unlike the ones named. The use of the term ''including'' in § 303.112 is meant to make clear that the list of groups (*i.e.,* Indian children and homeless children) is not exhaustive. We also note that provisions regarding the identification of infants and toddlers with disabilities who have experienced or have been exposed to abuse, neglect, or family violence (and other subpopulations that were specifically added in the 2004 Amendments to the Act) are reflected in § 303.302(c) of these regulations, which address the scope and coordination of the State's child find system. Thus, revising § 303.112 to specifically identify additional subgroups of infants and toddlers with disabilities and their families is not necessary.

Changes: None.

Evaluation, Assessment, and Nondiscriminatory Procedures (§ 303.113)

Comment: Two commenters recommended adding the word ''voluntary'' before ''family-directed identification of the needs of the family'' in paragraph (a)(2) of this section to clarify that the part C program is voluntary and that the assessment cannot take place unless and until parents agree to the assessment.

Discussion: We agree that the family-directed identification of the needs of the family referenced in § 303.113(a)(2) is voluntary on the part of the family. However, it is not necessary to revise § 303.113 because, in § 303.113(b), we make clear that the family assessment must meet the requirements in § 303.321. Section 303.321(c)(2), in turn, provides that the family assessment must be voluntary on the part of the family. We decline to make the requested change because it would be redundant to repeat the family assessment requirements in § 303.113.

Changes: None.

Individualized Family Service Plans (IFSPs) (§ 303.114)

Comment: One commenter recommended adding the words ''and his/her family'' after the term ''disability'' in this section.

Discussion: We agree that the IFSP is designed to address the needs of both the infant and toddler with a disability and the child's family. Accordingly, we have revised § 303.114 to make clear that the State's system must provide an IFSP for each infant or toddler with a disability and the child's family in the State. Additionally, we have reworded § 303.114, without changing the substantive meaning.

Changes: We have (a) added the words ''and his or her family'' following the phrase ''each infant or toddler with a disability'' in § 303.114, (b) replaced

the word ''include'' with the word ''ensure,'' and (c) clarified that the IFSP developed and implemented for a child must meet the requirements in §§ 303.340 through 303.346 and include service coordination services.

Comprehensive Child Find System (§ 303.115)

Comment: One commenter recommended that language be included in this section to explicitly require States to seek out and serve all infants and toddlers under the age of three, regardless of when they were referred to the lead agency for early intervention services. The commenter expressed the belief that many children referred to the part C program after age two are not served.

Discussion: We do not believe that the requested change is appropriate or necessary because § 303.115 provides that the State's comprehensive child find system must meet the requirements in §§ 303.301 through 303.303. Section 303.302(b)(1) expressly requires a lead agency to ensure that all infants and toddlers with disabilities in the State who are eligible for services under part C of the Act are identified, located, and evaluated. Additionally, the definition of an *infant or toddler with a disability* in § 303.21 expressly includes any eligible child until that child reaches the age of three.

Thus, even if a child is referred to the part C program after the age of two, the lead agency, with parental consent, must conduct an evaluation under § 303.321 or provide the parent with notice (under § 303.421(b)) explaining why an evaluation is not being conducted (*i.e.,* the child is not suspected of having a disability). Additionally, if the parent consents to an evaluation, new § 303.310(b) requires that the initial evaluation and the initial assessment of the child and the initial IFSP meeting must be conducted within 45 days of the child's referral to the part C program. (However, as provided under § 303.209(b)(1)(iii), if a child is referred less than 45 days prior to his or her third birthday, the lead agency is not required to evaluate the child; instead, if the child may be eligible for services under part B of the Act, the lead agency, with parental consent, is required to refer the child to the part B program.)

Section 303.342(e) requires that when a child is determined eligible for part C services and the parent consents to the provision of part C services identified on the child's IFSP, the lead agency must ensure that those early intervention services are available and provided to the child.

Changes: None.

Central Directory (§ 303.117)

Comment: Some commenters objected to proposed § 303.117, regarding the central directory being published on the lead agency's Web site because many families may not have access to a computer. The commenters recommended that we require lead agencies to disseminate printed central directories. Two of these commenters requested that we specify the means, other than through a Web site, by which lead agencies may disseminate the central directory. Another commenter stated that a Web-only directory could be easily updated and could provide greater access to all parents.

A few commenters requested that the regulations require that material placed on the Web site be accessible to and usable by individuals with disabilities and for non-English speaking families. One commenter requested that the Department require that the central directory be made available in the main languages spoken in the State.

Discussion: Section 303.117 specifies that each system's central directory must be accessible to the general public through publication on the lead agency's Web site and ''other appropriate means.'' This section does not permit the lead agency to make the central directory accessible and available only through its Web site. The lead agency must make the central directory available through other appropriate means.

''Other appropriate means'' may include providing printed copies of the central directory at locations, such as libraries, and offices of key primary referral sources. Given that needs vary from State to State, each State is in the best position to determine the additional, appropriate means that the lead agency will use to make its central directory accessible. Thus, it would not be constructive to include in § 303.117 an exhaustive list of the methods a lead agency could use to make its central directory accessible to the general public.

In response to commenters' concerns about the ability of individuals with disabilities to access the central directory, accessibility to the central directory requires not only the ability of the general public to obtain a copy of the directory, but also the ability to access the contents in the directory. Lead agencies must comply with the requirements in the ADA, which apply to public entities (*i.e.,* State and local governments), and the requirements in Section 504, which apply to recipients of Federal financial assistance. Both of these statutes and their implementing regulations generally require that communications with individuals with disabilities be as effective as communications with individuals without disabilities, and that appropriate auxiliary aids and services be made available where necessary to afford a qualified individual with a disability an equal opportunity to participate in, and enjoy the benefits of, any program or activity conducted by a lead agency that receives a grant under part C of the Act. Further clarification in § 303.117 is not necessary because the lead agency is already responsible in § 303.117 for ensuring that the central directory is accessible and is also subject to the requirements of these other Federal laws.

Regarding access to the central directory by non-English speaking families, recipients of Federal funds, including lead agencies, must take reasonable steps to ensure that persons of limited English proficiency (LEP) have meaningful access to programs and activities funded by the Federal government under Title VI of the Civil Rights Act of 1964 and implementing regulations (42 U.S.C. 2000d *et seq.* and 34 CFR 100.1 *et seq.*). Because the lead agency is responsible for ensuring that the central directory is accessible in § 303.117 and such accessibility includes providing LEP persons with meaningful access under Title VI of the Civil Rights Act of 1964, we decline to make the changes requested by the commenters.

Changes: None.

Comment: One commenter requested that the Department revise § 303.117 to include more guidance on the actual contents of the central directory. A few commenters recommended that lead agencies be required to update the central directory at least annually.

Discussion: Section 635(a)(7) of the Act requires that the central directory include information on early intervention services, resources, and experts available in the State and research and demonstration projects being conducted in the State. To the extent consistent with this statutory requirement, § 303.117 provides more detail on the information that must be included in the directory. Section 303.117 requires the central directory to include information about: public and private early intervention services, resources, and experts available in the State; professional and other groups that provide assistance to infants and toddlers with disabilities eligible under part C of the Act and their families; and research and demonstration projects being conducted in the State relating to

infants and toddlers with disabilities. Section 303.117 identifies the minimal information that the directory must include for the directory to be useful to the general public. Nothing in the Act or these regulations prohibits a State from including other relevant information that it deems appropriate.

Section 303.117 requires that the central directory contain accurate and up-to-date information. To comply with the requirement that the information be accurate and up-to-date, States likely may update their central directories more often than annually. Thus, including a requirement that the directory be updated at least annually might be interpreted as setting a lower standard than the requirement in § 303.117 that States maintain an accurate and up-to-date directory.

Changes: None.

Comprehensive System of Personnel Development (CSPD) (§ 303.118)

Comment: Some commenters requested that this section require a State's CSPD to include training that is targeted to particular groups of service providers or training on techniques and services that address the specific needs of particular groups of infants and toddlers. For example, one commenter requested that the CSPD provide training specific to serving children who are homeless and children who have been exposed to, or have experienced, violence or trauma. Another commenter requested that training for occupational therapists be explicitly included. Other commenters requested that the regulations require that all training available under the CSPD be mandatory.

Discussion: The requirements for a CSPD in § 303.118 incorporate the requirements in section 635(a)(8) of the Act. With respect to the request that a State's CSPD specifically require training that is targeted to address the early intervention service needs of infants and toddlers with disabilities who are homeless or who have been exposed to or experienced violence or trauma, we do not believe that it is appropriate for the Department to require that a State's CSPD mandate particular types of training or training targeted to specific populations. Each State is in the best position to evaluate the training needs of personnel providing early intervention services in that State and to design the CSPD to meet those needs. Similarly, it is the Department's position that it is not necessary to list in the regulations occupational therapy or other specific fields in which training must be provided, particularly given that § 303.13(a)(7) requires that qualified personnel provide all early intervention services, including occupational therapy. Moreover, § 303.119(a), which requires that a State's system include policies and procedures relating to the establishment and maintenance of qualification standards to ensure that personnel are appropriately and adequately prepared and trained, is sufficiently broad to ensure that each State will address, as appropriate, the needs of its specific subpopulations and identify any providers or personnel that may need more specific training.

We disagree that the regulations should require a State's CSPD to mandate all training, including the training described in § 303.118(b). As noted in the preceding paragraph, we want to provide each State with flexibility to create a CSPD with the appropriate components to meet that State's unique training and personnel development needs.

Changes: None.

Comment: One commenter stated that lead agencies do not have authority over higher education systems and curriculum and recommended that § 303.118 be revised to only require that the lead agency make efforts to work with higher education systems and other training providers, including national associations, to ensure that training programs have adequate space and an updated curriculum to train the necessary early intervention services personnel.

Discussion: Section 303.118 does not imply that lead agencies have authority over institutions of higher education (IHEs) and IHE curricula. Nothing in § 303.118 prescribes IHE curricula; rather, § 303.118(a)(2) requires only that a CSPD promote the preparation of EIS providers who are fully and appropriately qualified to provide early intervention services under part C of the Act. For this reason, we do not believe that the requested change is necessary.

Changes: None.

Comment: Some commenters suggested that the Department retain the language from current § 303.360(b)(4)(iii), which requires the CSPD to include training related to assisting families in enhancing the development of their children, and in participating fully in the development and implementation of IFSPs. The commenters stated that, if such training is included in the regulations, it should be required and not optional. One commenter recommended that this section include training for parents concerning their rights, identifying functional outcomes, and IFSP processes.

Discussion: The 2004 amendments of the Act revised section 635(a)(8) of the Act to mandate that each State's CSPD include three specific personnel training components. In the NPRM, we added as an optional training component in § 303.118(b)(3) the training of personnel to support families in participating fully in the development and implementation of the child's IFSP because it was important to retain this component from current § 303.360(b)(4)(iii). However, we recognize that the Act identifies only three mandatory components and believe that States should have the flexibility to identify appropriate personnel training components of their CSPD. In reviewing the introduction and paragraph (a) of this section, we have made additional edits for clarification that are not substantive.

Changes: We have made technical edits to the introductory paragraph and paragraph (a)(1) of this section to clarify the subject of the training in the CSPD and to clarify that the items listed in this paragraph are training requirements.

Comment: None.

Discussion: In the Improving Head Start for School Readiness Act of 2007 (Head Start Act, 42 U.S.C. 9801 *et seq.*), Congress authorized the Governor of each State to designate or establish a State Advisory Council on Early Childhood Education and Care for children from birth to school entry (referred to as the State Advisory Council). The overall responsibility of each State Advisory Council on Early Childhood Education and Care is to lead the development or enhancement of a high-quality, comprehensive system of early childhood development and care that ensures statewide coordination and collaboration among the wide range of early childhood programs and services in the State, including child care, Head Start, the IDEA programs (including the IDEA program under part C of the Act, and the preschool program under section 619 of part B of the Act), and pre-kindergarten programs and services. Under the Head Start Act, the State Advisory Council is required to conduct periodic statewide needs assessments on the quality and availability of programs and services for children from birth to school entry, identify opportunities for and barriers to coordination and collaboration among existing Federal and State-funded early childhood programs, and develop recommendations for a statewide professional development system and career ladder for early childhood educators and high-quality State early learning standards.

Another activity of the State Advisory Council under the Head Start Act is to assess the capacity and effectiveness of institutions of higher education in the State to support the development of early childhood educators. The Department strongly encourages lead agencies to assist the State Advisory Council in strengthening State-level coordination and collaboration among the various sectors and settings of early childhood programs in the State to support professional development, recruitment, and retention initiatives for early childhood educators. Regarding personnel standards, nothing would prevent a State from adopting or recommending more rigorous personnel standards under part C than those developed or recommended by the State Advisory Council.

Because this requirement regarding State Advisory Councils on Early Childhood Education and Care was established after the proposed part C regulations were published, in final § 303.118 we have added coordination with these State Advisory Councils as an authorized activity of the CSPD. This change will not impose an additional burden on the CSPD because it is an optional duty under § 303.118(b) and not a required duty under § 303.118(a).

Changes: New § 303.118(b)(4) has been added to allow the CSPD to include training personnel who provide services under this part, using standards that are consistent with early learning personnel development standards funded under the State Advisory Council on Early Childhood Education and Care established under the Head Start Act, if applicable.

Personnel Standards (§ 303.119)

Comment: Some commenters disagreed with our proposal to remove the provision in current § 303.361(a)(2), which requires State education personnel standards to meet the highest requirement for a profession or discipline. The commenters asserted that the removal of this provision, while perhaps deemed necessary to alleviate an immediate personnel shortage crisis and serve children who are currently eligible, could undermine the quality of early intervention programs. The commenters expressed concern that not requiring State education personnel standards to meet the highest requirement for a profession or discipline will promote a two-tiered system in which infants and toddlers with disabilities served in natural settings receive services provided by personnel who are less qualified than personnel providing services in other settings, such as hospitals and private clinics. One commenter recommended that the Department revise this section to require lead agencies to ensure that early intervention services providers who deliver services in their discipline or profession have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.

Discussion: Section 303.119, which is consistent with section 635(a)(9) of the Act, does not contain the provision in current § 303.361(a)(2), requiring State EIS personnel standards to be based on the highest State requirement for a profession or discipline, because this requirement was removed from section 635(a)(9) in the 2004 amendments to the Act.

Section 303.119(b) requires that all qualification standards for EIS providers under part C of the Act must meet State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the profession, discipline, or area those personnel are providing early intervention services. This requirement applies equally to EIS providers regardless of the setting in which they provide part C services.

Concerning the comment requesting that the Department prohibit EIS providers from providing services if their certification or licensure requirements are waived on an emergency, temporary, or provisional basis, nothing in the Act prohibits early intervention service providers from receiving a waiver or other type of emergency credential to provide early intervention services so long as the provision of early intervention services by such providers is consistent with State law, regulation, or other policy governing certification and licensure. Under section 635(b) of the Act, a State may adopt a policy that includes making ongoing good-faith efforts to recruit and hire appropriately and adequately trained personnel to provide early intervention services to infants and toddlers, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards previously described.

Changes: None.

Qualification Standards (§ 303.119(b))

Comment: One commenter recommended that the Department revise this section to require that qualification standards be consistent with professional scope of practice provisions in State practice laws (*i.e.,* State statutes that govern the practices of specific professions).

Discussion: Section 303.119 requires the State to establish and maintain qualification standards that are consistent with State-approved professional standards. To maintain State flexibility in updating State qualification standards for part C personnel, we will continue to require that these standards be consistent with the requirements of any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the profession, discipline, or area that personnel are providing early intervention services.

Changes: None.

Use of Paraprofessionals and Assistants (§ 303.119(c))

Comment: Two commenters requested that paraprofessionals and assistants be required to meet the same State licensure requirements as early intervention service providers and that, in the absence of such a policy, States not be allowed to create ''State-certified paraprofessionals'' or ''State-certified'' assistants who might encroach upon the practice of certified early intervention service providers. Two other commenters requested that this section clarify that States must comply with State laws governing the practices of specific professions and the appropriate supervision of assistants as well as the professional codes of ethics for the different disciplines. One commenter requested that this section be revised to require the supervision of paraprofessionals and assistants. A few commenters recommended that additional guidance be provided on the definitions of the terms ''paraprofessional,'' ''assistant,'' and ''supervision,'' and that the regulations require States to file with the Department their regulations regarding the scope of work performed by paraprofessionals and assistants and the supervision provided them.

Discussion: Nothing in the Act requires paraprofessionals and assistants who assist in the provision of early intervention services under part C of the Act to meet State licensure requirements for early intervention service providers. However, consistent with section 635(a)(9) of the Act, § 303.119(c) requires that paraprofessionals and assistants who assist in the provision of early intervention services be appropriately trained and supervised in accordance with State law, regulation, or written policy. We decline to require, in these regulations, that paraprofessionals and

assistants providing early intervention services meet State licensure requirements for EIS providers. We believe that section 635(a)(9) of the Act and § 303.119(c) are, in conjunction with State law or policy, sufficiently adequate to ensure that paraprofessionals and assistants are appropriately trained to assist in the provision of early intervention services made available under part C of the Act.

Neither the Act nor the regulations prohibit a State from establishing a State certification for paraprofessionals or assistants who assist in the provision of early intervention services, so long as the requirements in § 303.119(c) are met. The Department's position is that it would not be appropriate to preclude a State from establishing a State certification for paraprofessionals or assistants who assist in the provision of early intervention services because specific certification and licensure requirements are best left to a State to determine.

For the purposes of part C of the Act, paraprofessionals and assistants are individuals who assist in the provision of early intervention services to infants and toddlers with disabilities. We do not believe it is necessary to define these terms with greater specificity because defining these terms is best left to individual States based on their laws, regulations, and written policies. Further, it is most appropriate for States to develop, if needed, a definition of supervision. Concerning commenters' requests that States file with the Department their regulations on paraprofessionals and assistants, section 634 of the Act requires States to assure but not necessarily demonstrate their compliance with the requirements in section 635 of the Act, including section 635(a)(9). Therefore, we decline to include definitions of these terms or a filing requirement in these regulations.

Changes: None.

Policy To Address Shortage of Personnel (§ 303.119(d))

Comment: One commenter requested that we include definitions of the terms ''geographic area of the State,'' ''geographic area where there is a shortage,'' ''good-faith effort,'' and ''most qualified individuals available'' in this section of the regulations.

Discussion: Section 303.119(d) provides that a State may adopt a policy to address a shortage of personnel, including efforts to recruit and hire appropriately and adequately trained personnel in a geographic area of the State where there is a shortage of personnel. The Department's position is that the phrases ''geographic area of the State'' and ''geographic area where there is a shortage,'' as used, in this section are best left to the State to define.

The Department's position is that the term ''good faith effort'' reflects the common understanding of the term and that States will make the reasonable efforts necessary to enable the State to recruit, hire, and retain appropriately and adequately prepared and trained personnel to provide early intervention services to infants and toddlers with disabilities. Thus, defining the term in these regulations is not necessary.

Finally, States can best determine how to define the term ''most qualified individual available,'' provided that the State's definition is consistent with the provisions in § 303.119(a) and (b). This approach gives States the flexibility they need to determine which individuals would be considered the ''most qualified individual available'' in light of unique State personnel needs.

Changes: None.

Lead Agency Role in Supervision, Monitoring, Funding, Interagency Coordination, and Other Responsibilities (§ 303.120)

Comment: None.

Discussion: Based on further review of § 303.120, we have determined it is appropriate to add references to EIS providers in paragraphs (a)(2)(i) and (d) of this section to clarify that a lead agency's responsibilities include monitoring EIS providers as well as agencies, institutions, and organizations used by the State to carry out part C of the Act and to ensure the timely provision of early intervention services to infants and toddlers with disabilities and their families under part C of the Act, pending reimbursement disputes between public agencies and EIS providers. We also have made § 303.120(a) internally consistent by adding references where needed in paragraphs (a)(1), (a)(2), and (a)(2)(i) to make clear that the lead agency's monitoring responsibility extends to ''agencies, institutions, organizations, and EIS providers'' that are receiving financial assistance under part C of the Act.

Changes: We have added references to EIS providers in § 303.120(a)(2)(i) and (d) and appropriate references to ''agencies, institutions, organizations, and EIS providers'' in paragraphs (a)(1), (a)(2), and (a)(2)(i) of this section.

Comment: One commenter recommended that § 303.120(a)(2)(iv), regarding the lead agency's monitoring of part C programs, include an additional provision requiring States to demonstrate ''improvements that will result in the delivery of quality services to reach compliance within one year of identification.''

Discussion: To ensure compliance with the requirements in § 303.120(a)(2)(iv), States must demonstrate improvement in the implementation of their part C programs; under §§ 303.700 through 303.702, each lead agency reports in its APR on its improvement efforts under the SPP. For example, by correcting noncompliance in accordance with § 303.120(a)(2)(iv) a State might require an EIS program or EIS provider to revise any noncompliant policies, procedures, and practices to be consistent with the requirements of part C of the Act. Additionally, in order to comply with § 303.120(a)(2)(iv), a State might demonstrate improvement through, for example, follow-up review of data, other appropriate documentation, or through interviews showing that the noncompliant policies, procedures, and practices were corrected and are consistent with part C requirements. Demonstration of improvement is an integral part of § 303.120(a)(2)(iv) and the State's SPP/APR reporting; for this reason, we decline to make the requested change to § 303.120(a)(2)(iv).

Changes: None.

Comment: One commenter recommended that the regulations expressly require all EIS providers, including those who do not receive Federal part C funds from the lead agency, to comply with the requirements of the Act and these regulations.

Discussion: The changes recommended by the commenter are not necessary because the Act and the regulations already require, under section 635(a)(10)(A) of the Act and § 303.120(a)(2), that the lead agency monitor EIS providers as defined in § 303.12(a), regardless of whether such EIS providers receive Federal part C funds. Under the definition of *EIS provider* in § 303.12(a), the EIS provider must provide services in compliance with part C of the Act, even if the EIS provider does not receive Federal part C funds. Therefore, no further changes are required.

Changes: None.

Comment: A few commenters disagreed with the one-year timeline to correct noncompliance in § 303.120(a)(2)(iv) because, according to these commenters, one year is too long and not in the best interests of children and families. Another commenter recommended, instead, that we revise § 303.120(a)(2)(iv) to provide that a lead agency have three years to demonstrate correction of noncompliance.

One commenter recommended that the Department require in § 303.120(a)(2)(iv) that lead agencies report to the public the correction of noncompliance in order to ensure that parents and others are informed of the correction of the noncompliance.

Discussion: Correcting noncompliance as soon as possible but not later than one year from identification is a critical responsibility of lead agencies and it is the Department's position that one year, and not three years—as one commenter suggested—is a reasonable timeframe for an EIS provider to correct noncompliance identified by the lead agency and for the lead agency to verify that the EIS provider is complying with part C of the Act and its implementing regulations.

The Department's position is that a shorter timeframe (*e.g.,* 90 days from identification) is not appropriate because, in many cases, it would not provide sufficient time to correct noncompliance. For example, a lead agency may determine that an EIS provider is not in compliance with requirements relating to making decisions about the settings where infants or toddlers with disabilities receive early intervention services. To take corrective action and verify the correction in a case such as this would likely take more than 90 days. Therefore, we continue to believe that an outside timeframe of one year will provide lead agencies adequate time to correct noncompliance identified through monitoring while at the same time ensuring that lead agencies timely correct noncompliance.

Concerning commenters' requests to have lead agencies publicly report on timely correction, subpart H of these regulations identifies the specific reporting requirements, including timelines for reporting the correction of noncompliance. Pursuant to § 303.702(b)(1)(i)(A), a lead agency is required to report annually to the public on the performance of each EIS program on the targets in the SPP. Additionally, every State is required to report on the timely correction of noncompliance in its APR. We decline to add a reporting requirement to § 303.120(a)(2)(iv) because the SPP/APR reporting requirements regarding timely correction of noncompliance are adequate to ensure that the public and the Department are informed about a lead agency's performance in correcting noncompliance under § 303.120(a)(2).

Changes: None.

Data Collection (§ 303.124)

Comment: One commenter opposed the requirement in § 303.124(b) that statewide data systems include a description of the State's sampling methods, if sampling is used, for reporting certain data required by the Secretary. The commenter opposed this requirement stating that sampling is not supported by the Act.

Discussion: We disagree with the commenter that sampling is not supported by the Act. Section 635(a)(14) of the Act provides that the part C statewide system include a system for compiling data requested by the Secretary under section 618 of the Act that relates to part C of the Act, and section 618(b)(2) of the Act specifically states that the Secretary may permit States and the Secretary of the Interior to obtain data through sampling.

Changes: None.

State Interagency Coordinating Council (§ 303.125)

Comment: One commenter recommended that this section require the establishment and maintenance of a Federal interagency coordinating council that also meets the requirements of subpart G of these regulations.

Discussion: The 2004 amendments to the Act eliminated the authority for a Federal interagency coordinating council. Therefore, it would be inconsistent with the Act and the intent of Congress to require the establishment and maintenance of a Federal interagency coordinating council.

Changes: None.

Early Intervention Services in Natural Environments (§ 303.126)

Comment: A few commenters requested that § 303.126, regarding the provision of early intervention services in the natural environment, include the phrase ''necessary to meet the unique needs of the infant or toddler with a disability and the family'' when referring to early intervention services.

Discussion: Section 303.126 cross-references § 303.344(d)(1), which requires the child's IFSP to include a statement of the specific early intervention services that are necessary to meet the unique needs of the child and the family to achieve the measurable results or outcomes identified in the IFSP. Section 303.344(d)(1) requires that early intervention services be individualized according to the child's needs. Therefore, it is not necessary to repeat this requirement in § 303.126 in connection with a statewide system that includes policies and procedures to ensure that early intervention service settings, to the maximum extent appropriate, are provided in natural environments.

Changes: None.

Comment: Many commenters stated that the language in § 303.126(b) should incorporate the language in section 635(a)(16) of the Act and requested that the phrase ''provided satisfactorily'' be replaced with the statutory phrase ''achieved satisfactorily.''

Discussion: Our use of the phrase ''provided satisfactorily'' in proposed § 303.126(b) was not intended to be a substantive change from section 635(a)(16) of the Act or current practice. We agree that the language in this section should incorporate the language in section 635(a)(16) of the Act.

Changes: We have replaced the word ''provided'' in § 303.126(b) with the word ''achieved.''

Comment: Several commenters requested that § 303.126(b) be reworded to clarify that parents are members of the IFSP Team.

Discussion: It is certainly true that, under section 636(a)(3) of the Act and § 303.343(a)(1)(i) of these regulations, parents are required members of a child's IFSP Team. However, we decline to make the requested change because § 303.126(b), which is taken directly from section 635(a)(16)(b) of the Act, underscores the important role parents have in deciding, together with the rest of the members of the IFSP Team, whether early intervention services will be provided in settings other than the child's natural environment. Given that other provisions in the regulations and the Act make clear that the child's parents are required members of a child's IFSP Team, we do not believe it is necessary to revise § 303.126(b) as requested by the commenters.

Changes: None.

Subpart C—State Application and Assurances

General

Comment: A few commenters requested clarification about State application requirements regarding how States ensure the coordination of all available resources and whether interagency agreements, State laws or regulations, or other methods were required.

Discussion: Each State must have policies and procedures to ensure the coordination of all available resources in the State and to implement the payor of last resort requirements in § 303.511. Section 303.511(b) requires the State to use one or more of the following methods to implement part C's payor of

last resort requirements: State law or regulation, interagency agreements, or other appropriate written methods that are approved by the Secretary.

We have added a new § 303.203(b)(2) to clarify that the State must include in its application, those methods used by the State to implement the payor of last resort requirements in § 303.511(b)(2) and (b)(3), such as interagency agreements and other appropriate written methods. We require submission of the methods referenced in § 303.511(b)(2) and (b)(3) in the State's application because these methods must be approved by the Secretary before implementation.

Changes: We added in new § 303.203(b)(2), regarding State application requirements, that States must submit ''methods used by the State to implement the requirements in § 303.511(b)(2) and (b)(3).''

Comment: Some commenters requested that the Department define ''rigorous'' as that term is used in the phrase ''rigorous definition of developmental delay'' in § 303.203(c). One commenter expressed concern that some State definitions of developmental delay exclude infants and toddlers with mild developmental delays from part C eligibility. The commenter requested that the Department clarify that a State's definition of developmental delay should include mild developmental delays.

Discussion: Within each State, eligibility for part C services turns, in part, on how the State defines developmental delay. We interpret the term ''rigorous'' in the phrase ''rigorous definition of developmental delay'' in § 303.203(c) to mean that the State has obtained public input on its definition pursuant to § 303.208 (because the definition constitutes a State policy), and that its definition meets the requirements in § 303.111(a) and (b).

Under § 303.111(a) and (b), the State's definition of developmental delay must include: (1) A description of the evaluation and assessment procedures that will be used, consistent with § 303.321, to measure a child's development; and (2) a description of the specific level of developmental functioning or other comparable criteria that constitute a developmental delay in one or more of the developmental areas identified in § 303.21(a)(1). Under § 303.208, the State must receive, and respond to, public comments (including comments from parents, EIS providers, members of the Council and other stakeholders) and conduct public hearings on its definition of developmental delay.

Requiring public scrutiny of the definition of developmental delay in each State before the State adopts it helps ensure that the definition ultimately adopted by the State is appropriate for that State. As noted in the preamble discussion for § 303.111 of subpart B of these regulations, a State is not required to change its definition of *developmental delay* in order for it to be ''rigorous'' provided that the definition (regardless of the level of developmental delay it covers) meets the requirements in § 303.111(a) and (b) and met the public participation requirements in § 303.208(b) since the Act was amended in December 2004.

Given that section 635(a)(1) of the Act provides each State with the flexibility to define the term developmental delay, as it is used in the State's part C program, the requirements in §§ 303.111 and 303.208 address the public's desire to ensure appropriate identification of all infants and toddlers with disabilities while providing each State the continued flexibility to develop its definition.

Changes: None.

Application's Definition of At-Risk Infants and Toddlers and Description of Services (§ 303.204)

Comment: One commenter supported the requirements of this section and the definition of the term *at-risk infant or toddler* in § 303.5, but expressed concern that serving at-risk infants and toddlers would be an additional fiscal burden on States.

Discussion: Serving at-risk infants or toddlers is a State option under section 632(5)(B)(i) of the Act. Section 303.204 incorporates the requirement from section 637(a)(4) of the Act that the State describe the services to be provided to at-risk infants and toddlers through the part C statewide system only if the State chooses to make ''at-risk infants and toddlers'' eligible for part C services in the State.

If a State elects to provide services to at-risk infants and toddlers with disabilities, the State must include the definition of at-risk infants and toddlers with disabilities in its application. A State also must include in its application a description of the early intervention services to be provided to at-risk infants and toddlers with disabilities. Section 303.204 does not require a State to provide services to at-risk infants and toddlers; therefore, these requirements and the financial responsibilities associated with their implementation are applicable only to those States that choose to include ''at-risk infants and toddlers'' in their definition of infant or toddler with a disability under § 303.21(b).

Changes: None.

Comment: One commenter recommended adding language in § 303.204(a) to encourage States to examine closely the percentage of premature infants who eventually receive part C services and to use this information to develop presumptive eligibility criteria for at-risk infants and toddlers to receive part C services.

Discussion: The Act does not require States to develop presumptive eligibility criteria for at-risk infants and toddlers. Sections 632(1), 632(5)(B)(i), and 637(a)(4) of the Act provide States with the option to make at-risk infants and toddlers eligible under part C of the Act, and further to determine the part C services that will be made available to these children. This flexibility enables each State to determine the eligibility criteria for at-risk infants and toddlers that are most appropriate in the State. Examining data on premature infants who eventually receive part C services is one method a State could use to help determine its eligibility criteria for at-risk infants or toddlers, but there are other methods that might be more appropriate for other States. For example, a State with a large number of homeless infants and toddlers who have high rates of developmental delay could determine that such children should be presumptively included in its definition of at-risk infants and toddlers.

Therefore, while a State could certainly use data on premature infants who eventually receive part C services to inform its decision on the eligibility criteria the State will use for at-risk infants or toddlers, it is not appropriate to require all States to do so.

Changes: None.

Availability of Resources (§ 303.207)

Comment: A few commenters recommended replacing the word ''resources'' in § 303.207 with the term ''services'' because the term ''resources'' is not defined in the regulations or the Act.

Discussion: Section 303.207 incorporates the language (including the term ''resources'') from section 637(a)(7) of the Act. We decline to make the requested change because we interpret the term ''resources,'' as used in section 637(a)(7) of the Act and § 303.207, to be broader than the term ''services.'' We interpret ''resources'' to include not only services but also funding, personnel, and other materials. This regulatory provision ensures that resources—not just services—are available in all geographic areas within a State.

Changes: None.

Public Participation Policies and Procedures (§ 303.208)

Comment: Commenters requested that the Department clarify when the public participation requirements in § 303.208 apply. Some commenters requested that the public participation requirements in current § 303.110(a)(1), including a 30-day comment period, be retained. A number of commenters, including parents of infants and toddlers with disabilities, service providers, and national disability rights organizations, requested that the 30-day timeline for notice of public hearings from current § 303.110(a)(3) be retained in § 303.208 to ensure meaningful public participation at public hearings. These commenters stated that the phrase ''adequate notice'' as used in proposed § 303.208(a)(1) is too vague.

A few commenters opposed the public participation requirements in proposed § 303.208. One commenter suggested that States use their State Administrative Procedure Act (APA) procedures instead of the procedures in § 303.208. Another commenter stated that the State's part C application should not be subject to any public participation requirements if the application does not include policies or procedures that affect direct services to eligible infants and toddlers and their families. Another commenter stated that it would be too burdensome to require public hearings when States amend their policies and procedures.

Finally, a few other commenters recommended that the public participation requirements expressly identify foster parents and other caregivers of infants and toddlers with disabilities as stakeholders in the public participation process.

Discussion: The purpose of § 303.208 is to require each State to engage the public in the development of its part C application and to include, in its application, information on its public participation policies and procedures. Section 303.208 is based, in part, on section 637(a)(8) of the Act, which requires each State's application to include a description of State policies and procedures that ensure that, prior to the adoption by the State of any other policy or procedure necessary to meet the requirements of part C of the Act, there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of infants and toddlers with disabilities.

We have restructured this section in response to comments requesting clarification on the applicability of the public participation requirements. As restructured, paragraph (a) of this section describes the applicability of the public participation requirements to the part C application itself. Section 303.208(b) describes the applicability of the public participation requirements to any new policy or procedure (including any revision to an existing policy or procedure) needed to comply with part C of the Act and these regulations.

The requirements in § 303.208(a) that States publish their part C applications for 60 days and obtain public comments during a 30-day period within that 60-day period are consistent with the requirements in current § 303.110(a)(1) and section 441 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232d(b)(7)(B)). Under § 303.208(b), a State is required to conduct public hearings when the State is adopting or revising a policy or procedure that is necessary to meet the requirements of part C of the Act and these regulations. This public hearing requirement is intended to ensure that States obtain, consistent with section 637(a)(8) and (b)(7) of the Act, meaningful involvement from the public (including underrepresented populations) on the State's policies and procedures necessary to carry out the requirements of part C of the Act prior to implementing those policies and procedures.

Restructuring § 303.208 in this manner addresses requests by commenters to retain language from current §§ 303.110(a)(1) and (a)(3). Specifically, § 303.208(a) ensures that the public has at least 30 days to comment on a State's part C application before the State submits the application to the Department. Additionally, we agree with commenters that specifying a minimum timeline for notice of public hearings is preferable to simply requiring that States provide ''adequate notice'' of the hearings. It is the Department's position that 30 days prior notice is the minimum notice needed to ensure meaningful public participation at public hearings. For this reason, in § 303.208(b)(2), we have added the requirement from current § 303.110(a) that States must provide notice of public hearings at least 30 days prior to the hearing. Regarding the comments opposing the public participation requirements in § 303.208, we appreciate the concern about the potential burden these requirements place on States and lead agencies; however, we strongly believe that the benefits of public input outweigh any potential burden because States have flexibility under part C of the Act in many areas (*e.g.,* developing their definition of developmental delay, serving at-risk infants and toddlers, serving children beyond age three, using part B or C due process procedures, and system of payments), and the part C policies and procedures in these and other areas affect the fundamental rights of infants and toddlers with disabilities and their families. For this reason, it is critical that the public have an opportunity to weigh in on a State's policies and procedures, regardless of whether they are new or revised or if they involve direct part C services.

In response to the comment recommending that States be permitted to use their State APA procedures to ensure public participation in connection with part C policies and procedures, we decline to make any changes to § 303.208. State APA procedures vary from State to State, and because the Department views meaningful public participation as critical for the part C program, it is appropriate to establish in § 303.208 the minimum steps States must take to ensure meaningful public participation. This will ensure that all States participating in the part C program have procedures that are consistent at least with the requirements in § 303.208.

Finally, when referring to the ''general public,'' § 303.208 specifically lists ''parents of infants and toddlers with disabilities.'' The definition of the term *parent,* as used in these regulations, includes foster parents, guardians authorized to act as a child's parent, caregivers who are individuals acting in the place of a biological parent with whom the child is living, or surrogate parents who have been appointed in accordance with § 303.422. Therefore, adding a reference to foster parents and caregivers in this section is not necessary.

Changes: We have restructured § 303.208 to clarify the applicability of the public participation requirements to (a) the State's part C application, and (b) the State's policies and procedures (including any revision to an existing policy or procedure) that are necessary to comply with part C of the Act.

Finally, as described in the discussion of new § 303.101(c) earlier in this preamble, we have moved the requirement that States obtain approval by the Secretary before implementing any policy, procedure, method, or budget information that is required in §§ 303.200 through 303.212 to be submitted as part of the States' application. This requirement was reflected in proposed § 303.208(b). We did deviate from the language in proposed § 303.208(b) by referring to

policies, procedures, methods and budget information required in §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211—rather than those required in §§ 303.200 through 303.212, more generally.

Comment: A few commenters recommended that the Department add the word ''shall'' to the end of § 303.208(a)(2).

Discussion: As noted elsewhere in this discussion, we have restructured § 303.208 to clarify the entire section. Given the revisions made to this section, the commenters' requested change is no longer applicable.

Changes: None.

Comment: One commenter expressed concern that requiring States to seek approval of the Secretary before implementing policies, procedures, and methods that are subject to the public participation requirements in proposed § 303.208(b) (new § 303.101(c)) will impede a State's ability to respond in a timely way to the local needs of eligible children, families, and early intervention programs.

Discussion: Section 637(a) of the Act requires each State that seeks part C funding to submit an application to the Secretary for approval. This section of the Act also describes the information that must be included in the State application. Pursuant to section 637(a)(3)(A) of the Act, each State must submit as part of its application ''information demonstrating to the Secretary's satisfaction that the State has in effect the statewide system required by section 633'' of the Act.

Pursuant to section 637(a)(3)(A) of the Act, we continue to require each State to submit in its application the policies, procedures, methods and budgetary and other information required in §§ 303.201 through 303.212, though, for the sake of clarity, we list the specific regulatory sections (*i.e.,* §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211). This requirement ensures that a State's application includes, for example, its policies regarding its system of payments (*i.e.,* financial sources such as insurance or family fees to pay for part C services) and its definition of developmental delay. These policies and procedures, among others required in §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211, are critical to understanding a State's implementation of part C of the Act, such as the individuals whom the State is serving and the funding sources used to pay for the provision of early intervention services.

We have retained in § 303.101(c) the long-standing Departmental policy of requiring a State to obtain approval of policies and procedures that must be submitted to the Secretary prior to implementation. The purpose of the Secretary's review is to ensure that State policies and procedures are consistent with the Act, thereby ensuring that the rights of infants and toddlers with disabilities and their families are protected and the responsibilities of lead agencies, EIS providers, and parents are explicitly defined.

Changes: None.

Transition to Preschool and Other Programs (§ 303.209)

Application Requirements (§ 303.209(a))

Comment: None.

Discussion: Upon further review of § 303.209, we determined that it would be helpful to clarify that the transition requirements in § 303.209 apply to all toddlers with disabilities before those toddlers turn three years old, including those toddlers with disabilities served by States that elect to provide services pursuant to § 303.211.

To distinguish the transition requirements in § 303.211(b)(6), which apply to toddlers receiving services under the part C extension option in § 303.211, who by definition are age three or older, we have revised § 303.209(a) to state that the transition policies and procedures it must describe relate to the transition of infants and toddlers with disabilities under the age of three and their families. As further discussed elsewhere in this *Analysis of Comments and Changes* section, we have made corresponding changes to § 303.211 to clarify that the transition requirements in § 303.209 apply to all infants and toddlers under the age of three who are transitioning from the part C program (as described in § 303.211(b)(6)(i)) and that the transition requirements described in § 303.211(b)(6)(ii) apply to children age three and older who are transitioning from services provided pursuant to § 303.211.

Changes: We have deleted in new § 303.209(a)(1) (proposed § 303.209(a)(1)(i)) the parenthetical ''(including toddlers receiving services under § 303.211).'' We also have revised § 303.209(a)(1) to clarify that each State must describe in its application, the policies and procedures it will use to ensure a smooth transition for infants and toddlers with disabilities under the age of three and their families from receiving early intervention services to (i) preschool or other appropriate services (for toddlers with disabilities) or (ii) exiting the program (for infants and toddlers with disabilities). We have addressed separately in new § 303.211(b)(6)(ii) the substance of proposed § 303.209(b)(2)(i) and (b)(2)(ii) regarding transition from services under § 303.211.

Comment: Some commenters opposed § 303.209(a)(3)(i)(B), which requires a State whose lead agency is the SEA to include in its application an intra-agency agreement between the program within the SEA that administers part C of the Act and the program within the SEA that administers section 619 of the Act. These commenters stated that requiring two programs within one SEA to have an agreement with each other is unnecessary and would create an undue paperwork burden. A few other commenters expressed concern that the requirement would be particularly burdensome for States with seamless ''Birth to Five'' programs.

Discussion: Section 303.209(a)(3)(i) requires all States, including those in which the SEA is the lead agency, to establish an interagency or an intra-agency agreement between the early intervention program under part C of the Act and the preschool program under section 619 of part B of the Act. We included the requirement for intra-agency agreements because, through the Continuous Improvement Focused Monitoring System (CIFMS) process and State reporting under the SPP/APRs, the Department has identified noncompliance with transition requirements under both part C of the Act (*e.g.,* noncompliance with section 637(a)(9) of the Act, regarding notification of the LEA and conducting transition conferences, and, with sections 636(a)(3) and (d)(8) and 637(a)(9) of the Act, regarding the transition steps and services in the IFSP) and part B of the Act (*e.g.,* noncompliance with section 612(a)(9) of the Act, regarding development and implementation of an IEP by a child's third birthday). Given this noncompliance and the need for States to have clearly defined transition coordination policies and procedures between the early intervention program under part C of the Act and the preschool program under part B of the Act, requiring an intra-agency agreement will be a useful tool to enhance coordination and communication between the part C and part B preschool programs.

Developing interagency or intra-agency agreements should not be a significant burden for States because approximately two-thirds of lead agencies already have interagency agreements and the remaining third, where the lead agency is also the SEA, currently are required to have transition policies and procedures that address the

transition of toddlers from early intervention to preschool services under parts B and C of the Act. For lead agencies that are also SEAs, the Department's position is that the benefits associated with requiring intra-agency agreements pursuant to § 303.209(a)(3)(i)(B) outweigh the minimal burden associated with this requirement. An intra-agency agreement serves the useful purpose of ensuring that there is an appropriate level of coordination and communication across the early intervention and preschool programs in a lead agency that is also an SEA. The burden of developing this agreement is minimal because the requirement does not involve the development of new transition policies and procedures—these policies and procedures are already required pursuant to § 303.209(a). Moreover, the Council often serves to advise the lead agency when it develops these agreements; in fact, the Council is specifically required under section 641(e)(1)(C) of the Act to advise and assist the SEA (which in this case would be the lead agency) regarding the transition of toddlers with disabilities to preschool and other appropriate services.

There are only a few States that have adopted ''Birth to Five'' programs (*i.e.,* programs in which the SEA and LEA provide both preschool services under part B of the Act and early intervention services under part C of the Act to children from ages birth to five). In these States, the same State and local agencies administer part C of the Act and section 619 of the Act. Therefore, States with these programs must include one or more intra-agency agreements to satisfy the requirement in § 303.209(a)(3)(i)(B). As stated in the preceding two paragraphs, the benefits associated with intra-agency agreements pursuant to § 303.209(a)(3)(i)(B) outweigh the minimal burden associated with the requirement.

Changes: None.

Comment: None.

Discussion: Based on further review of § 303.209(a)(3)(ii), we have determined that additional clarification is needed with regard to the required transition-related content of the interagency and intra-agency agreements under § 303.209(a)(3)(i). To clarify that these agreements must address how the lead agency and the SEA will meet the confidentiality requirements in § 303.401(d) and (e), we have added specific references to those provisions in § 303.209(a)(3)(ii). Additionally, we have specified that the agreements required pursuant to § 303.209(a)(3)(i) must address how the agency and the SEA will meet, for all children transitioning from part C services to part B services, the requirements in 34 CFR 300.101(b)—that is, how the lead agency and the SEA will ensure that FAPE is made available to each eligible child residing in the State no later than the child's third birthday.

Changes: We have added the words ''including any policies adopted by the lead agency under § 303.401(d) and (e)'' as well as a reference to 34 CFR 300.101(b) to § 303.209(a)(3)(ii).

Notification to the SEA and Appropriate LEA (§ 303.209(b))

Comment: None.

Discussion: Upon further consideration of this section of the regulations, we have determined that the requirement in proposed § 303.209(b)(1) that each family member of a toddler with a disability receiving part C services be included in the development of the transition plan is better addressed under the transition plan requirements in § 303.209(d) and not with the SEA and LEA notification requirements in § 303.209(b). This change does not reflect a substantive change to the regulations.

Changes: We moved the text from proposed § 303.209(b)(1) to new § 303.209(d)(1)(ii).

Comment: Some commenters supported the requirement, reflected in new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)), that the lead agency notify the LEA, at least nine months before the third birthday of a toddler who resides in the area served by the LEA, that the toddler will reach the age of eligibility for preschool services under part B of the Act. Other commenters opposed this nine-month timeline stating that it would be an undue burden and inconsistent with the Act. Several of these commenters recommended alternative timelines (*i.e.,* timelines ranging from 10 days to 3 or 6 months before a child's third birthday). One commenter recommended aligning the timeline requirement for LEA notification in new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)(i)) with the 90-day timeline for transition plans in § 303.209(d)(2).

Discussion: Establishing a timeline within which a lead agency must notify the appropriate LEA that a child is about to transition from part C services and may be eligible for services under part B of the Act is challenging. The timeline must allow sufficient time for both the lead agency to fulfill its transition responsibilities under sections 636(a)(3) and (d)(8) and 637(a)(9) of the Act and the SEA and LEA to meet their respective child find and early childhood transition responsibilities under sections 612(a)(3), 612(a)(9), 612(a)(10)(A)(ii), and 614(d)(2)(B) of the Act and 34 CFR 300.124.

For the reasons outlined in the following paragraphs, we agree with the commenter who recommended aligning the LEA notification requirement with the 90-day timeline for transition plans in § 303.209(d)(2).

We have revised new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)(i)) to require that LEA notification occur no fewer than 90 days prior to the toddler with a disability's third birthday. This ''not fewer than 90 days'' timeline for LEA notification aligns with the date by which: (1) A transition conference must be conducted for a toddler with a disability who may be eligible for services under part B of the Act (as required in section 637(a)(9)(A)(ii)(II) of the Act and § 303.209(c)(1)); and (2) a transition plan must be in place for all toddlers with disabilities (as required in § 303.209(d)(2)).

We also are making this change in order to provide SEAs and LEAs with enough time to carry out their responsibilities in implementing part B of the Act. These responsibilities include, under section 612(a)(9) of the Act and 34 CFR 300.124(c) of the part B regulations, participation by a representative from the LEA where the toddler with a disability resides in the transition conference that the lead agency is required to conduct under section 637(a)(9)(A)(ii)(II) of the Act and § 303.209(c)(1). In addition, when the LEA receives notice from the lead agency or an EIS provider that a specific toddler with a disability who has been receiving services under part C of the Act is potentially eligible for services under part B of the Act, the LEA must treat this as a referral and provide parents with the procedural safeguards notice under 34 CFR 300.504(a)(1) and determine if an evaluation for eligibility must be conducted under part B of the Act.

Further, if the parent consents to the initial evaluation under part B of the Act, the LEA must conduct the evaluation within 60 days of receiving parental consent or pursuant to a State-established timeline as required in section 614(a)(1)(C) of the Act and 34 CFR 300.301(c)(1) of the part B regulations. If the child is determined eligible under part B of the Act, the LEA must conduct, pursuant to 34 CFR 300.323(c)(1) of the part B regulations, a meeting to develop an IEP for the child with a disability within 30 days of

the eligibility determination. For toddlers with disabilities who are referred from the part C program to the part B program, this 60-day evaluation timeline (reflected in 34 CFR 300.301(c)(1) of the part B regulations) and the 30-day IEP meeting timeline (reflected in 34 CFR 300.323(c)(1) of the part B regulations) are subject to the requirement in section 612(a)(9) and 34 CFR 300.101(b) and 300.124(b) of the part B regulations that the SEA and LEA ensure that, for a child who transitions from services under part C of the Act to part B of the Act, an IEP is developed and implemented for the child by the time the child reaches age three. Thus, the 90-day period prior to the toddler's third birthday is the minimal time period necessary for an LEA to meet its responsibilities to ensure that an IEP is developed and implemented by the child's third birthday.

We recognize that some States may have a State-established timeline for conducting an evaluation under part B of the Act that is different than the 60-day timeline in 34 CFR 300.301(c)(1). Even if a State adopts a longer part B evaluation timeline under 34 CFR 300.301(c)(1) of the part B regulations, each SEA and LEA must ensure that an IEP is developed and implemented for a toddler with a disability transitioning from part C to part B of the Act by the time the toddler reaches age three. This requirement is reflected in section 612(a)(9) of the Act and 34 CFR 300.101(b) and 300.124(b) of the part B regulations. Thus, it is the Department's position that the 90-day notification timeline provides the minimum amount of time necessary for an SEA and LEA to meet their respective early childhood transition responsibilities under part B of the Act.

Finally, in reviewing § 303.209, we have determined that it is not appropriate to refer to ''other services'' under part B of the Act because this section addresses only the transition that must occur before an infant or toddler with a disability turns three years old. References to other services, such as elementary school, are now more appropriately addressed in § 303.211(b)(6) regarding the transition requirements of children who are three and older and receiving services under § 303.211.

Changes: We have revised new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)(i)) to require the lead agency to notify the SEA and the LEA for the area in which the toddler resides ''not fewer than 90 days'' before the third birthday of the toddler with a disability if that toddler may be eligible for preschool services under part B of the Act.

Comment: A few commenters recommended that we clarify that the lead agency must notify the LEA under § 303.209(b) only for those children who are potentially eligible for services under part B of the Act.

Discussion: We agree and have revised § 303.209(b) to clarify that the LEA notification requirement applies only to toddlers with disabilities who may be eligible for preschool services under part B of the Act and not to all toddlers with disabilities.

The part C lead agency establishes the State's policy regarding which children may be eligible for preschool services under part B of the Act. In establishing this policy, the lead agency should review carefully, ideally in collaboration with the SEA, the eligibility definitions under parts B and C of the Act, including the State's definitions of developmental delay under both parts B and C of the Act.

The determination of whether a toddler with a disability is ''potentially eligible'' for services under part B of the Act is critical under both parts C and B of the Act. It is the first step in ensuring a smooth transition for that toddler and family to services under part B of the Act. When the LEA receives notice from the lead agency or an EIS provider that a specific toddler with a disability who has been receiving services under part C of the Act may be eligible for services under part B of the Act, the LEA must treat this as a referral and provide parents with the procedural safeguards notice under 34 CFR 300.504(a)(1) and determine if an evaluation for eligibility must be conducted under part B of the Act.

There are several reasons for limiting LEA notification to children who may be eligible for preschool services under part B of the Act. First, the limitation is consistent with section 637(a)(9)(A)(ii)(II) of the Act, which requires that, with the approval of the family of the child, the lead agency convene a transition conference among the lead agency, the family, and the LEA representative only for those children potentially eligible for preschool services under part B of the Act.

Second, limiting LEA notification to cover only toddlers potentially eligible for preschool services under part B of the Act is critical to ensuring that the SEA and LEA where the toddler resides have adequate time to meet their respective child find and early childhood transition responsibilities under sections 612(a)(3), 612(a)(9), 612(a)(10)(A)(ii), and 614(d)(2)(B) of part B of the Act, and in particular to develop and implement an IEP by the child's third birthday as required by section 612(a)(9) of the Act and 34 CFR 300.124(b). These provisions require that children who participate in the early intervention programs under part C of the Act and children who will participate in the preschool services under part B of the Act experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(9) of the Act.

Third, LEA notification should not be required for toddlers with disabilities who are not potentially eligible for part B services under the Act given that the lead agency has other responsibilities for these children, which we believe are sufficient to meet their transition needs. For these children, the lead agency must: (1) Ensure that a transition plan is developed pursuant to section 637(a)(9)(C) of the Act and § 303.209(d); and (2) make reasonable efforts, pursuant to section 637(a)(9)(A)(ii)(III) of the Act and § 303.209(c)(2), to convene a transition conference with the family of the toddler and providers of other appropriate services. The transition plan for toddlers with disabilities who are not potentially eligible for part B services under the Act must identify the appropriate steps for the toddler with disabilities and his or her family to exit from the part C program, include services, such as Head Start, that the IFSP team identifies as needed by that toddler and his or her family.

Finally, we are clarifying that the LEA notification requirement in § 303.209(b)(1)(i) only applies to toddlers who may be eligible for part B services because, if the requirement applied to all toddlers who are nearing age three, it would result in the unnecessary disclosure of personally identifiable information and place an undue burden on lead agencies, without any significant benefit. Ordinarily, to meet the LEA notification requirement, the lead agency must inform the LEA where the child resides and provide the LEA with the information referenced in § 303.401(d)(1) (*i.e.,* the child's name, date of birth, and parent contact information, including the parents' names, addresses, and telephone numbers), unless the State has adopted an opt-out policy under § 303.401(e). Requiring the lead agency to disclose this personally identifiable information for limited child find purposes to the LEA or even the SEA for children who are not potentially eligible for part B would be unnecessary and burdensome.

Changes: We have revised new § 303.209(b) (proposed § 303.209(b)(2)(i)

and (b)(2)(ii)) to clarify that a lead agency must notify the LEA under § 303.209(b) only for those children who may be eligible for services under part B of the Act.

Comment: Some commenters recommended that the LEA notification requirement in new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)) apply to both the SEA and the LEA where the child resides.

Discussion: We have revised the LEA notification requirement in § 303.209(b)(1)(i) to require that the lead agency notify the SEA in addition to the LEA where the child resides. This change is intended to help lead agencies and SEAs coordinate to ensure a smooth and effective early childhood transition pursuant to sections 612(a)(9) and 637(a)(9)(A) of the Act. Moreover, this change will assist SEAs in carrying out their responsibilities under part B of the Act. For example, under section 612(a)(9) of the Act and 34 CFR 300.101(b) and 300.124(b) of the part B regulations, an SEA must ensure that FAPE is made available to an eligible child with a disability no later than that child's third birthday for all toddlers with disabilities who were referred for part B services by the lead agency and are eligible for services under part B of the Act. Also, an SEA must report annually in its SPP/APR on the percent of children referred by the part C program prior to the age of three who are found eligible for part B services and have an IEP developed and implemented by the third birthday. Requiring lead agencies to notify SEAs when a child may be eligible for part C services will help SEAs fulfill this obligation. Providing this information to SEAs will add very little burden to lead agencies because they are already required to provide the information to LEAs.

Changes: We have revised new § 303.209(b)(1)(i) through (b)(1)(iii) (proposed § 303.209(b)(1) and (b)(2)) to specify that the lead agency must notify the SEA and the LEA where the child resides in the case of a toddler who may be eligible for preschool services under part B of the Act.

Comment: A few commenters requested clarification in § 303.209 of the lead agency's transition responsibilities when a child is referred ''late'' to the part C program (*i.e.,* less than 45 or 90 days prior to the child's third birthday). A few commenters expressed concern that the reference to a child's ''third birthday'' in the LEA notification provision in proposed § 303.209(b)(2)(i) may interfere with State-established transition policies and may disrupt many existing options that have been carefully crafted by States and local communities to ensure seamless transitions from the part C program to the part B program.

Discussion: We agree that it is important to clarify the transition requirements that apply when a child is referred to or determined eligible for the part C program fewer than 90 days before the child's third birthday. Given the 45-day timeline requirement in new § 303.310, we have added paragraphs (b)(1)(i) and (b)(1)(ii) to new § 303.209 to address the commenters' concerns.

Specifically, new § 303.209(b)(1)(ii) clarifies that if a child is referred and determined eligible for services under part C of the Act between 90 and 45 days before the child's third birthday, LEA notification must occur as soon as possible after the child is determined eligible for early intervention services under part C of the Act. For these children, although the lead agency is not able to conduct a transition conference and develop a transition plan within the timelines in § 303.209(b)(1)(i) and (d)(2), we encourage States to discuss transition at the child's initial IFSP meeting.

New § 303.209(b)(1)(iii) clarifies that if a child is referred to the lead agency fewer than 45 days before that child's third birthday, the lead agency is not required to conduct an evaluation, assessment or an initial IFSP meeting. We believe that the referral of a child fewer than 45 days before a child's third birthday would not allow a lead agency sufficient time to conduct the evaluation, assessment and initial IFSP meeting. Additionally, a lead agency would not have sufficient time to conduct a transition conference to discuss steps and services. Thus, we have clarified in new § 303.209(b)(1)(iii) that, for a child who is referred to the lead agency fewer than 45 days before the child's third birthday, if the lead agency has received information in its referral that the child may be eligible for preschool services or other services under part B of the Act, the lead agency, with the parental consent required under § 303.414, must refer the toddler to the SEA and the LEA for the area in which the toddler resides.

Concerning commenters' requests not to use the child's ''third birthday'' in calculating timelines for LEA notification, the third birthday is significant under part C of the Act because eligibility for services for the toddler with a disability ends once that toddler turns three, with two exceptions. A lead agency may provide services to a child who has turned three years old if a State elects either to (a) offer services under the option to make part C services available beyond age three pursuant to § 303.211 and the parent consents to services under that section, or (b) provide services to a child who is eligible under part B of the Act from that child's third birthday to the beginning of the following school year under section 638(3) of the Act and § 303.501(c)(1), provided that those services constitute FAPE for that child. In both circumstances, the child, upon turning age three, must be eligible as a child with a disability under section 619 of the Act. With the exception of these two circumstances, part C services end at the child's third birthday; therefore, the Department's position is that the use of the phrase ''third birthday'' with regard to the LEA notification provision is appropriate.

Changes: We have added new § 303.209(b)(1)(ii) to clarify that if the lead agency determines, between 90 and 45 days prior to a child's third birthday that the child is eligible for early intervention services under part C of the Act, the lead agency must notify the SEA and the LEA for the area in which the toddler resides as soon as possible after the eligibility determination, that the toddler on his or her third birthday will reach the age of eligibility for services under part B of the Act, as determined in accordance with State law. Additionally, we have added paragraph (b)(3) to § 303.209 to provide that if a toddler is referred to the lead agency fewer than 45 days before that toddler's third birthday, the lead agency is not required to conduct an evaluation, assessment or an initial IFSP meeting, and if that toddler may be eligible for preschool services or other services under part B of the Act, the lead agency, with parental consent required under § 303.414, must refer the toddler to the SEA and the LEA for the area in which the toddler resides.

Conference To Discuss Services (§ 303.209(c))

Comment: A few commenters recommended clarifying the required attendees, timelines, and procedures for the transition conference required in § 303.209(c). One commenter asked why a child's service coordinator is not included in the list of required attendees for the transition conference. Other commenters requested that the regulations specifically require an LEA or SEA representative to participate in the transition conference; these commenters argued that this requirement would make the part C regulations consistent with 34 CFR 300.124(c) of the part B regulations.

Discussion: We agree that it would be helpful to clarify the required attendees

for a transition conference. For this reason, we have added a new paragraph (e) to § 303.209, which references § 303.343(a) and the required members of the IFSP Team, to ensure that the attendees required for periodic IFSP review meetings under § 303.343(b), including the service coordinator, also are required to attend the transition conference required under § 303.209(c) and the meeting to develop the transition plan pursuant to § 303.209(d).

It is the Department's position that requiring participation by an LEA representative under this part is not appropriate but we note that, as part of its responsibilities under section 637(a)(9)(A)(ii)(II) of the Act and § 303.209(c)(1) of these regulations, the lead agency must invite the LEA representative to the transition conference. Under 34 CFR 300.124(c) of the part B regulations, each LEA must participate in the transition conference arranged by the lead agency under section 637(a)(9)(A)(ii)(II) of the Act and § 303.209(c). Thus, the requirements under parts B and C of the Act provide adequately for the participation of the LEA in the transition conference.

Changes: We have added a new § 303.209(e) to require that the transition conference conducted under paragraph (c) of this section or the meeting to develop the transition plan under paragraph (d) of this section (which conference and meeting may be combined into one meeting) must meet the IFSP meeting and participant requirements in §§ 303.342(d) and (e) and 303.343(a).

Program Options and Transition Plan (§ 303.209(d))

Comment: One commenter recommended that the regulations clarify that a child transitioning from part C services to part B services must not have a gap in services during the summer months.

Discussion: Once a toddler with a disability who received services under part C of the Act turns three and is eligible for part B preschool services under section 619 of the Act, that toddler may receive services that are provided as either: (1) Part C services by the lead agency under § 303.211 (if the State has elected to offer early intervention services to children after age three, and the toddler's parent consents to receipt of services under this option), or (2) services that constitute FAPE either under section 619 of the Act (if the IEP Team determines such services are needed) or under section 638(3) of the Act (if the lead agency elects to offer such services). A State may provide services under sections 619, 635(c) or 638(3) of the Act regardless of whether the child turns age three during the summer months. However, if the child with a disability receives services under section 619 of the Act, any summer services (*i.e.,* extended school year (ESY) services pursuant to 34 CFR 300.106 of the part B regulations) must be provided, through an appropriate IEP, if the child's IEP Team determines that those ESY services are necessary for FAPE to be provided to that child.

Changes: None.

Comment: One commenter expressed concern that limiting transition planning to no more than nine months prior to the child's third birthday does not offer enough time to ensure a seamless transition for all children. The commenter recommended that the standard ''not fewer than 90 days'' be adopted if a timeline must be established at all.

Discussion: Section 303.209(d) requires that a transition plan be established in a child's IFSP not fewer than 90 days (and at the discretion of all parties, not more than 9 months) before a toddler's third birthday. The ''not fewer than 90 days'' component of this requirement aligns the timeline for transition planning with the timeline for the SEA and LEA notification requirements in § 303.209(b) and with the timeline for the transition conference for toddlers with disabilities potentially eligible for part B services in § 303.209(c), pursuant to section 637(a)(9)(A)(ii)(II) of the Act.

The outer limit of this timeline (*i.e.,* ''not more than 9 months'' before the toddler's third birthday) is intended to protect toddlers, whose needs change frequently at this age. The Department's position is that if transition planning occurs more than nine months prior to a toddler's third birthday, this planning may not accurately reflect the needs of the child at the time of transition. For this reason, the regulations only allow the parties to establish a transition plan for a child not earlier than nine months prior to the child's third birthday.

Changes: None.

Comment: One commenter recommended deleting ''as appropriate'' from § 303.209(d)(3), which requires, consistent with § 303.344(h), that the transition plan in the IFSP include, as appropriate, steps for the toddler with a disability and his or her family to exit from the program. The commenter stated that IFSP Teams should not have the discretion to determine which elements of a transition plan are appropriate.

Discussion: The phrase ''as appropriate'' is included in section 637(a)(9)(C) of the Act, the statutory authority for § 303.209(d)(3). Section 303.209(d)(3)(i) requires the transition plan to include certain steps for the toddler with a disability and his or her family to exit from the part C program. Section 636(a)(3) of the Act, regarding IFSP content requirements, was modified in 2004 to require that the IFSP identify the appropriate transition services for an infant or toddler. Section 303.209(d)(3) clarifies that the requirements in that section must be read in conjunction with § 303.344(h), which requires the IFSP to include steps to support the transition to one of the following: Preschool services under part B of the Act; elementary school or preschool services for children participating under a State's option in § 303.211 to provide early intervention services to children ages three and older; early education, Head Start, and Early Head Start or child care programs; or other appropriate services. The transition steps appropriate for a toddler with a disability will differ depending upon which program listed in § 303.344(h) the IFSP Team selects. The transition plan is part of the IFSP and must meet the content requirements in § 303.344. The IFSP Team must identify in the IFSP appropriate steps for the toddler and his or her family to exit the program and any transition services. Therefore, the phrase ''as appropriate'' gives the IFSP Team the flexibility to make an individualized determination as to what (not whether) transition steps and services are appropriate for each toddler with a disability.

Changes: None.

Comment: None.

Discussion: Based on further review of § 303.209(d)(2), we have determined that it is appropriate to clarify that a transition plan referred to in this section is actually a part of an IFSP and not a separate document. Consistent with section 636(a) of the Act, the IFSP must include a description of the appropriate transition services for the infant or toddler.

Changes: We have added the phrase ''in the IFSP'' following the words ''transition plan'' in § 303.209(d)(2). We also have added section 636(a)(3) of the Act (20 U.S.C. 1436(a)(3)) to the authority citation for this section.

Comment: A few commenters requested that the term ''transition services,'' as used in § 303.209(d)(3)(ii), be defined in the regulations.

Discussion: Transition services are those services that assist a toddler with a disability and his or her family to experience a smooth and effective transition from an early intervention program under part C of the Act to the

child's next program or other appropriate services, including services that may be identified for a child who is no longer eligible to receive part C or part B services. The IFSP Team, which includes the parent, determines the appropriate transition services for each toddler exiting the part C program. Given that transition services are based on the unique needs of the child and the family, States require flexibility to provide appropriate and individualized transition services for each child. Therefore, it is the Department's position that to further define the term transition services is not appropriate.

Changes: None.

Comment: Some commenters requested that a rule of construction be added to § 303.209 to indicate that part C programs would not be held responsible for ensuring that required transition timelines are met if referral for part C services occurs less than 45 days prior to the date that the transition conference must occur.

Discussion: It is the Department's position that adding a rule of construction to the regulations is not necessary because a State can use its inter or intra-agency agreements, or other methods, to clarify transition procedures and develop a process for unique circumstances, such as the referral of a child less than 45 days prior to the date that the transition conference must occur. The lead agency may not be able to meet the transition conference and transition plan timelines in § 303.209(c)(1) and (d) if the lead agency receives a referral for that child less than 45 days prior to the date that the transition conference must occur (*i.e.,* more than 90 days but less than 135 days (that is, 45 days plus 90 days) prior to the child's third birthday). However, we encourage States in these instances to discuss transition at the initial IFSP meeting for a toddler with a disability who is referred within 135 days of that toddler's third birthday.

Additionally, the lead agency remains responsible under § 303.310 for meeting the 45-day timeline for conducting the initial evaluation, assessments and IFSP meeting and, under §§ 303.342(e) and 303.344(f)(1), for implementing the IFSP services that are consented to by the parent as soon as possible. While we recognize that the lead agency may not be able to meet the transition conference and transition plan timelines in § 303.209(c) and (d) for children referred 135 days prior to their third birthday, pursuant to § 303.209(b)(1)(ii), the lead agency must still refer the toddler with a disability, as soon as possible, to the SEA and the LEA where the toddler resides if that toddler is potentially eligible for preschool services under part B of the Act.

Changes: None.

Comment: One commenter requested clarification as to whether the IFSP meeting requirements, including accessibility of meetings, apply to transition conferences in § 303.209.

Discussion: In response to this comment, we have added new § 303.209(e) to clarify that transition conferences conducted under § 303.209(c) must meet the accessibility and parental consent requirements in § 303.342(d) and (e) and the meeting participant requirements in § 303.343(a). Additionally, because the meeting to develop the transition plan under § 303.209(d) can, but may not, occur at the time of the annual or periodic IFSP review, we also have clarified that the meeting to develop the transition plan under § 303.209(d) must meet the accessibility and parental consent requirements in § 303.342(d) and (e) and the meeting participant requirements in § 303.343(a).

States may choose, but are not required, to combine the transition conference with the meeting to develop the transition plan. It may make sense in many States to combine the transition conference and IFSP transition plan meeting, particularly for children potentially eligible for services under part B of the Act, given that: (1) The LEA representative must attend the transition conference (under section 612(a)(9) of the Act and 34 CFR 300.124(c) of the part B regulations); and (2) the SEA and LEA must ensure that an IEP is developed and implemented by age three for children with disabilities transitioning from part C to part B of the Act (under section 612(a)(9) of the Act and 34 CFR 300.101(b) and 300.124(b) of the part B regulations). We do not require that the transition conference and meeting to develop the transition plan be combined because transition practices vary both between States and within States and it may not be appropriate for children not potentially eligible for services under part B of the Act.

Changes: We have added new § 303.209(e) to clarify that any conference conducted under paragraph (c) of this section or the meeting to develop the transition plan under paragraph (d) of this section must meet the requirements in §§ 303.342(d) and (e) and 303.343(a). We also have included a parenthetical in this new section confirming that this conference and meeting may be combined into one meeting.

Comment: A few commenters sought guidance on how the transition requirements in § 303.209 apply, including how to implement the transition timeline requirements in §§ 303.209(c)(1) and 303.209(d)(2) for children served under § 303.211.

Discussion: We have added new § 303.209(f) to clarify that the transition requirements under § 303.209 apply to all toddlers with disabilities before they turn three years old and to identify the separate, additional transition requirements that apply to toddlers with disabilities in a State that offers services under § 303.211. Thus, new § 303.209(f)(1) sets forth the requirement that the lead agency must ensure the transition requirements in § 303.209 apply to all toddlers with disabilities (including toddlers with disabilities in a State that offers services under § 303.211) before they turn three years old.

For toddlers with disabilities in a State that offers services under § 303.211, we also have clarified in new § 303.209(f)(2) the additional requirements that apply at the transition conference. Under new § 303.209(f)(2), at the transition conference, the parents of a toddler with a disability must receive: (1) An explanation, consistent with § 303.211(b)(1)(ii), of the toddler's options to continue to receive early intervention services under this part or preschool services under section 619 of the Act; and (2) the initial annual notice referenced in § 303.211(b)(1). We have added these requirements in § 303.209(f)(2) to ensure that the initial annual notice required in § 303.211(b)(1) is provided at the transition conference when the IFSP Team, which includes the parent of a toddler with a disability, is required to consider transition options, steps and services. The annual notice requirement in § 303.209(f)(2) is not new as it is required under § 303.211(b)(1). Requiring the initial annual notice to be provided at the transition conference is critical because the annual notice must contain an explanation of the differences between services provided under § 303.211 and preschool services under section 619 of the Act.

In new § 303.209(f)(3), we clarify that the transition requirements in new § 303.211(b)(6)(ii), which relate to transition from services under § 303.211 to preschool, kindergarten or elementary school, apply to children age three and older when those children are receiving services under § 303.211. We also discuss these transition requirements further in the discussion relating to new § 303.211(b)(6) later in this *Analysis of Comments and Changes* section of the preamble.

Changes: We removed from new § 303.209(a)(1) (proposed § 303.209(a)(1)(i)) references to children receiving services under § 303.211. We have added new paragraphs (f)(1), (f)(2), and (f)(3) to § 303.209 to clarify the applicability of transition requirements under § 303.209. New § 303.209(f)(1) provides that the transition requirements in paragraphs (b)(1) and (b)(2), (c)(1), and (d) of this section apply to all toddlers with disabilities receiving services under this part before those toddlers turn age three. New § 303.209(f)(2) states that ''In a State that offers services under § 303.211, for toddlers with disabilities identified in paragraph (b)(1) of this section, the parent must be provided at the transition conference conducted under paragraph (c)(1) of this section: (i) An explanation, consistent with § 303.211(b)(1)(ii), of the toddler's options to continue to receive early intervention services under this part or preschool services under section 619 of the Act and (ii) The initial annual notice referenced in § 303.211(b)(1).'' Finally, in new § 303.209(f)(3), we clarify that the transition requirements for children with disabilities age three and older receiving services under § 303.211 are set forth in § 303.211(b)(6)(ii).

Coordination With Head Start and Early Head Start, Early Education, and Child Care Programs (§ 303.210)

Comment: One commenter stated that § 303.210 is redundant because Head Start and Early Head Start are required members of the State Interagency Coordinating Council (Council) under § 303.601(a)(8).

Discussion: We do not agree that the inclusion of Head Start and Early Head Start in § 303.210 repeats the requirement in § 303.601(a)(8), which requires at least one member of the Council to be from a Head Start or Early Head Start agency or program in the State. Section 303.210 implements section 637(a)(10) of the Act, which requires each State application to contain a description of State efforts to promote collaboration among Early Head Start programs under section 645A of the Head Start Act, early education and child care programs, and services under part C of the Act. This is different from the requirement in section 641(b)(1)(H) of the Act, and implemented through § 303.601(a)(8), which specifies that at least one member of the Council must be from a Head Start or Early Head Start agency or program in the State.

Changes: None.

Comment: None.

Discussion: As discussed under § 303.118, section 642B of the Head Start Act of 2007 now requires the Governor of each State to designate or establish a council to serve as the State Advisory Council on Early Childhood Education and Care (referred to as State Advisory Councils). 42 U.S.C. 9837b(b)(1)(A)(i). Section 642B(b)(1)(C)(viii) of the Head Start Act states that the members of the State Advisory Council shall include, to the maximum extent possible a representative of the State agency responsible for programs under section 619 or part C of the IDEA. Because this requirement regarding State Advisory Councils was established after the proposed part C regulations were published, in final § 303.210 we have added that the State lead agency must participate as a representative on the State Advisory Council, if applicable. This provision mirrors the provision in the Head Start Act and will increase coordination among early childhood programs in the State.

Changes: Proposed § 303.210 has been redesignated as § 303.210(a) and we have added new § 303.210(b) to require that the State lead agency participate as a representative, under section 642B(b)(1)(C)(viii) of the Head Start Act, on the State Advisory Council on Early Childhood Education and Care established under the Head Start Act, if applicable.

State Option To Make Services Under This Part Available to Children Ages Three and Older (§ 303.211)

Comment: A significant number of commenters opposed including a State option to make services under this part available to children ages three and older. Several commenters reported that States will not make part C services available to children ages three and older pursuant to this section. Most commenters stated that States do not have adequate funding to implement this option. Another commenter expressed concern that this option creates an additional program with its own regulations, but no additional funding.

Discussion: Section 303.211 reflects the language from section 635(c) of the Act, which provides States with the option to make early intervention services available to children beginning at three years of age until the children enter, or are eligible under State law to enter, kindergarten or elementary school. If a State elects to offer this option, children who are eligible for services under part B of the Act and who previously received early intervention services under part C of the Act would continue to receive early intervention services if their parents choose to continue the services under this option. The Department has no authority to eliminate this provision because it is statutory.

Providing part C services to children who (a) are three years of age and older, (b) are eligible for services under section 619 of the Act, and (c) previously received early intervention services is an option each State can consider. If a State chooses to offer part C services to this group of children, it is ultimately the parent's decision as to whether his or her eligible child, upon turning three years of age, will continue to receive early intervention services rather than part B services. Nothing in § 303.211 or in section 635(c) of the Act requires a State to provide this option or parents to elect to receive part C services for their child if their State makes this option available.

Concerning the comments about funding for this option, it is the Congress that decides whether to appropriate funds for this program.

Changes: None.

Comment: A few commenters stated that implementing the provisions in § 303.211 would be confusing for parents and LEAs given that early intervention services are an entitlement while services under part B of the Act are a mandate. These same commenters stated that simply extending an entitlement via flexibility provisions could jeopardize services to children with disabilities at a critical time in their development.

Discussion: The Department recognizes the difference between parts B and C of the Act; part B of the Act authorizes a program that requires States to provide FAPE, defined as special education and related services designed to meet the unique needs of a child with a disability, and part C of the Act authorizes States to offer early intervention services that are designed to meet the developmental needs of infants and toddlers with disabilities at no cost to parents, except where Federal or State law provides for a system of payments, including a schedule of sliding fees. We do not agree with the commenters that the implementation of the provisions in § 303.211 would jeopardize services to children with disabilities. Section 303.211 incorporates the language from section 635(c) of the Act, regarding the flexibility to serve children three years of age until entrance, or eligibility for entrance, into kindergarten or elementary school. States that choose to implement the option in § 303.211 to provide part C services to children three

years of age and older must provide, pursuant to § 303.211(b)(2), the parents of children with disabilities who are eligible for services under section 619 of the Act and previously received early intervention services with an annual notice that includes the following: a description of the rights of the parents to elect to receive early intervention services under part C of the Act or preschool services under part B of the Act; an explanation of the differences between early intervention services provided under part C of the Act and preschool services provided under part B of the Act, including the types of services and the locations that the services are provided; the procedural safeguards that apply; and possible costs, if any, to parents of infants or toddlers with disabilities receiving early intervention services. This 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.

Moreover, with regard to the commenter's concern that the provisions in § 303.211 could jeopardize services to children with disabilities at a critical time in their development, § 303.211(b)(3) requires that States offering this option have a policy in place that ensures that any child served pursuant to § 303.211 has the right to receive, at any time, FAPE under part B of the Act instead of early intervention services under part C of the Act.

Changes: None.

Comment: One commenter recommended that each State have the flexibility to provide the § 303.211 option to a subset of eligible children based on age range and consistent with State-established policies and procedures.

Discussion: Section 303.211, consistent with section 635(c) of the Act, 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 the Act can choose for these children to continue receiving early intervention services under part C of the Act. Section 635(c) of the Act expressly identifies (and limits) the age range through which these services may be provided; that is, early intervention services could be available to these children until they enter, or are eligible under State law to enter, kindergarten. Section 303.211(a)(2) is specifically intended to provide flexibility to a State that chooses to allow for the continuation of early intervention services pursuant to § 303.211 to provide services under the option to one of three subsets of eligible children within this age range (*i.e.,* eligible children from age three until the beginning of the school year following the child's third birthday, eligible children from age three until the beginning of the school year following the child's fourth birthday and eligible children from age three until the beginning of the school year following the child's fifth birthday).

Changes: We have revised paragraph (a)(2) of § 303.211 to clarify the subsets of age ranges States can select to provide services under the option in § 303.211. We also have added new (a)(3) to highlight the statutory requirement from section 635(c)(1) of the Act that a State may provide services under § 303.211 only until the child enters, or is eligible under State law to enter, kindergarten or elementary school in the State.

Requirements (§ 303.211(b))

Annual Notice Requirements (§ 303.211(b)(1))

Comment: A few commenters recommended that the Department clarify what it means to give parents adequate information concerning the differences between the part C and part B procedural safeguards as required in § 303.211(b)(1)(ii)(B).

Discussion: We agree clarification is needed regarding when, under § 303.211(b)(1), parents whose children are receiving services under § 303.211 must be provided an annual notice of procedural safeguards. As discussed in the *Analysis of Comments and Changes* section for new § 303.209(f)(2), we have clarified that the first annual notice must be provided at the transition conference when the parent is presented the initial option for the child to receive services under § 303.211 or under section 619 of the Act.

Additionally, for consistency, we have revised reference to children being served under § 303.211 to children who are eligible for services under section 619 of the Act and who previously received early intervention services because when the first annual notice is provided, children generally would not yet be served under § 303.211.

Regarding what information must be included in the annual notice, States choosing to offer early intervention services under § 303.211 must provide parents of these children with disabilities with an annual notice that includes, among other things, an explanation of the differences between early intervention services provided under part C of the Act and preschool services provided under part B of the Act. Section 303.211(b)(1)(ii)(B) requires the explanation to include a description of the differences in procedural safeguards that apply to parents who decide to continue receiving early intervention services under part C of the Act compared with the procedural safeguards that apply to parents who decide their child should receive preschool services under part B of the Act. The notice required under § 303.211(b)(1) must identify procedural safeguards that apply, which identification requirement can be met by including the content requirements from § 303.421(b)(3) and 34 CFR 300.504(c) and an explanation of the major differences between the procedural safeguards available under the separate programs.

Changes: We have deleted in § 303.211(b)(1) ''served pursuant to this section'' and added the phrase ''eligible for services under section 619 of the Act and who previously received early intervention services under this part will be'' before ''provided annual notice.''

Educational Component (§ 303.211(b)(2))

Comment: One commenter recommended including the words ''social and health'' in § 303.211(b)(2) to reinforce that the part C program promotes education, social, and health therapies.

Discussion: It is not necessary to include the words ''social and health'' in § 303.211(b)(2) because the part C requirements apply to children receiving services under § 303.211 in the same manner as they do to all other children receiving services under part C of the Act, which may require, depending on an individual child's needs, providing health services and social or emotional services under § 303.13.

Changes: None.

FAPE (§ 303.211(b)(3))

Comment: One commenter expressed concern regarding the potential loss of FAPE for children age three and older who continue to receive early intervention services pursuant to § 303.211. One commenter recommended amending § 303.211(b)(3) to clarify that parents whose child is receiving services under part C of the Act past the age of three pursuant to § 303.211 have the right, at any time, to opt out of these early intervention services and, instead, to obtain FAPE,

which includes preschool services, under part B of the Act.

Discussion: We agree with the commenter that parents must retain the right to opt out at any time after choosing part C services past the age of three. Therefore, we have added the phrase ''at any time'' to § 303.211(b)(3) to clarify that parents whose child is receiving services under part C of the Act past the age of three pursuant to § 303.211 retain the right, at any time, to opt out of these early intervention services pursuant to § 303.211 and, instead, to obtain FAPE under part B of the Act for their child.

Changes: We have revised § 303.211(b)(3) to require that the part C statewide system ensures that any child served under § 303.211 has the right, at any time, to receive FAPE under part B of the Act instead of early intervention services under part C of the Act.

Services During Eligibility Determination (§ 303.211(b)(4))

Comment: Some commenters stated that the language in proposed § 303.430(e)(3) relates not to pendency, but to the requirement in section 635(c)(2)(D) of the Act and § 303.211(b)(4), that IFSP services continue to be provided to a toddler with a disability until a part B eligibility determination is made for that child in a State that elects to make part C services available beyond age three under § 303.211. A few commenters suggested clarifying that this requirement only applies in a State that has opted to make early intervention services available to children ages three and older.

Another commenter opposed the requirement in § 303.211(b)(4) and proposed § 303.430(e)(3) stating that it could create disincentives for LEAs to make timely part B eligibility determinations, impede a child's timely access to FAPE, and require a lead agency to provide part C services to a child who is not eligible under part B of the Act for a significant period beyond the child's third birthday.

A few commenters indicated that proposed § 303.430(e)(3) conflicts with sections 607(a) and (b) and 615(j) of the Act and the Third Circuit decision in *Pardini* v. *Allegheny Intermediate Unit,* 420 F.3d 181 (3d Cir. 2005), *cert. denied,* 126 S.Ct. 1646 (2006). One commenter recommended referencing part B eligibility as well as ineligibility in proposed § 303.430(e)(3)(ii).

Discussion: We agree with commenters who noted that the requirement in proposed § 303.430(e)(3) applies only to States that elect to offer services under § 303.211 and is not a pendency provision and, thus, we have moved the substance of proposed § 303.430(e)(3) to § 303.211(b)(4). For clarification, we have added that it is the lead agency that must continue to provide all early intervention services identified in the toddler with a disability's IFSP under § 303.344 (and consented to by the parent under § 303.342(e)) beyond age three until that toddler's initial eligibility under part B of the Act is determined under 34 CFR 300.306.

Regarding commenters' concerns about delaying part B eligibility determinations and potentially requiring a lead agency to provide services for an unlimited time period, we have clarified that this provision does not apply if the LEA has requested parental consent for the initial evaluation under 34 CFR 300.300(a) and the parent has not provided that consent.

We disagree with commenters' suggestion that this requirement in § 303.211(b)(4) creates disincentives for LEAs to make a timely part B eligibility determination for a toddler with a disability who is not yet age three and is transitioning from the part C program at age three to either the part B preschool program under section 619 of the Act or to the part C extension option under section 635(c) of the Act and § 303.211. In order for the toddler with a disability to be eligible either for part B preschool services or for services under § 303.211, the child must be determined to be eligible under section 619 of the Act and the LEA is required to make this eligibility determination.

Under § 303.209(c) and 34 CFR 300.124(c), a lead agency representative and an LEA representative must attend the transition conference under part C of the Act for a child potentially eligible for part B services (with approval of the family) and this conference must occur at least 90 days (and at the discretion of all parties not more than 9 months) prior to the child's third birthday. It is at this conference that the LEA and lead agency must coordinate the determination of eligibility of a child for services under section 619 of the Act and offering the parent any services under the part C extension option under § 303.211.

The parent must consent to an evaluation to determine eligibility under section 619 of the Act. Once a parent consents to the initial evaluation under part B of the Act, the LEA must conduct the evaluation under 34 CFR 300.301(b) of the part B regulations within 60 days or a State-determined timeline. Additionally, under section 612(a)(9) of the Act and 34 CFR 300.124(b) of the part B regulations, the SEA and LEA must ensure that an IEP has been developed and is being implemented by age three for a toddler with a disability who transitions from part C of the Act to part B of the Act regardless of whether the State has established a timeline different from the 60-day evaluation timeline in 34 CFR 300.301(c)(1) of the part B regulations.

Thus, the eligibility determination must be made by the LEA in sufficient time to enable the LEA to offer FAPE to that child who is transitioning from the part C program by age three (if that child is eligible as a child with a disability under part B of the Act), as required by section 612(a)(9) of the Act and 34 CFR 300.124(b) of the part B regulations.

In response to commenters' reference to section 615(j) of the Act and the Third Circuit decision in *Pardini,* the part B pendency provisions in section 615 of the Act and 34 CFR 300.518(c) do not otherwise require public agencies under part B of the Act to provide part B services when a child transitions from part C to part B of the Act. Additionally, unless the State elects to offer services under § 303.211, the lead agency or EIS provider under part C of the Act is not required to provide part C services once the child turns three.

Changes: We have revised § 303.211(b)(4) to clarify that the lead agency must continue to provide all early intervention services identified in the toddler with a disability's IFSP under § 303.344 (and consented to by the parent under § 303.342(e)) beyond age three until that toddler's initial eligibility determination under part B of the Act is made under 34 CFR § 300.306. This requirement does not apply if the LEA has requested parental consent for the initial evaluation under § 300.300(a) and the parent has not provided that consent.

Informed Consent (§ 303.211(b)(5))

Comment: One commenter recommended deleting the words ''where practicable'' in § 303.211(b)(5), which relates to the requirement that the lead agency obtain informed consent from parents before the child reaches three years of age. The commenter also recommended adding language to § 303.211(b)(5) to require lead agencies to obtain verification from parents that they fully understand the benefits of both the program implemented under part B of the Act and the program implemented under part C of the Act before allowing the parents to decide whether to place their child in a part B or part C program at age three pursuant to § 303.211.

Discussion: Section 303.211(b)(5) requires States to ensure that informed consent is obtained from the parent of any child to be served under § 303.211. The phrase ''where practicable'' was not intended to mean that parental consent was optional. To be clear, the lead agency must obtain informed consent for all children served under § 303.211. The ''where practicable'' language was intended to modify the requirement that lead agencies obtain consent before—rather than after—the child turns three years of age. We included the ''where practicable'' language because we recognize that it may not always be possible or practicable for lead agencies to obtain consent before the child's third birthday, for example, when a child is ill or there is a family emergency. We have revised § 303.211(b)(5) to clarify our intended meaning for this provision.

Requiring in § 303.211(b)(5) that lead agencies verify that parents fully understand the benefits of both the part B and part C programs is not necessary for two reasons. First, § 303.211(b)(1) requires that States provide an annual notice that includes an explanation of the differences between early intervention services provided under part C of the Act and preschool services provided under part B of the Act to parents of children with disabilities who are eligible under section 619 of the Act and who previously received early intervention services. Second, § 303.211(b)(5) further provides that informed consent must be obtained from parents for the continuation of early intervention services pursuant to § 303.211 for their child.

Consent, as defined in § 303.7, means the parent has been fully informed of all information relevant to the activity for which consent is sought in the parent's native language or other mode of communication. This definition of *consent* in § 303.7 also requires that the parent understand and agree in writing to the activity for which the parent's consent is sought.

Thus, §§ 303.211(b)(1) and 303.211(b)(5), when read together, make clear that States are required to obtain written consent from parents of children with disabilities eligible under section 619 of the Act who previously received early intervention services and that this written consent must state that the parents fully understand the differences between early intervention services provided under part C of the Act and preschool services provided under part B of the Act. Repeating this requirement, as recommended by the commenter, is not necessary.

Changes: We have modified § 303.211(b)(5) by separating the language into two sentences. The first sentence clarifies that a statewide system of a State offering the option under § 303.211 must ensure that the lead agency obtain informed consent from the parents of any child to be served under this section for the continuation of early intervention services pursuant to § 303.211. We have moved the phrase ''where practicable'' to the end of a new second sentence to clarify that it modifies the requirement that consent be obtained before the child reaches three years of age.

Applicability of Transition Timelines (§ 303.211(b)(6))

Comment: One commenter recommended revising § 303.211(b)(6) to provide States with explicit guidance on how to implement the transition timeline requirements in §§ 303.209(c)(1) and 303.209(d)(2).

Discussion: We agree that the transition timelines for children served under § 303.211 were not clear in proposed §§ 303.209 and 303.211. Thus, we have revised § 303.211(b)(6) to identify the transition requirements (*i.e.,* requirements relating to the transition from receiving services under § 303.211 to preschool, kindergarten or elementary school) that apply to children age three and older who are receiving services under § 303.211. Specifically, we have added new § 303.211(b)(6)(i), (b)(6)(ii), and (b)(6)(iii) to clarify that the lead agency must notify the SEA and appropriate LEA, conduct a transition conference, and develop a transition plan in the IFSP not fewer than 90 days before the child will no longer be eligible under § 303.211(a)(2) to receive or will no longer receive early intervention services under § 303.211. These transition requirements, which parallel the requirements in § 303.209(b)(1)(i), (c)(1), and (d), are intended to occur after the child is receiving, but soon to exit from, services under § 303.211. These transition requirements do not affect the transition requirements under § 303.209, which apply to all infants and toddlers under the age of three, including those in a State that elects to provide services under § 303.211.

As noted earlier under new § 303.209(f) of this *Analysis of Comments and Changes* section of the preamble, we have clarified in new § 303.211(b)(6) that the transition requirements concerning SEA and LEA notification, transition conference, and transition plan in §§ 303.209(b)(1)(i) and (b)(1)(ii), (c)(1), and (d), respectively, apply to toddlers with disabilities under the age of three in a State that elects to offer services under § 303.211. We have clarified these requirements because ensuring a seamless transition for children receiving services under § 303.211 is important and the lead agency and LEA must coordinate transition planning (including part B eligibility determination and timely IEP development) for toddlers who may continue to receive part C services under § 303.211.

Finally, we have identified the appropriate timeline as ''not fewer than 90 days before the child will no longer be eligible to receive, or will no longer receive, early intervention services under § 303.211.'' We recognize that, in limited instances, parents may not notify the lead agency more than 90 days prior to requesting that their child no longer receive services under § 303.211 and, in those instances, it would not be possible for the lead agency to meet the requirements in § 303.211(b)(6). In these instances, we encourage lead agencies and SEAs and LEAs to coordinate, to the extent feasible, the transition of these children from early intervention services under § 303.211.

Changes: We have revised new § 303.211(b)(6) to clarify that toddlers with disabilities in a State that offers services under this section are subject to the transition requirements in § 303.209(b)(1)(i) and (b)(1)(ii), (c)(1), and (d). We also have revised § 303.211(b)(6) to describe the lead agency's obligations to ensure a smooth transition for children age three and older who are receiving services under § 303.211 (*i.e.,* transition from § 303.211 services to preschool, kindergarten, or elementary school). Under new § 303.211(b)(6)(ii)(A), the lead agency must notify the SEA and the LEA where the child resides not fewer than 90 days before the child will no longer be eligible to receive, or will no longer receive, early intervention services under § 303.211. In new § 303.211(b)(6)(ii)(B), the lead agency must, with the approval of the parents of the child, convene a transition conference, among the lead agency, the parents, and the LEA, not fewer than 90 days—and, at the discretion of all of the parties, not more than 9 months—before the child will no longer be eligible to receive, or will no longer receive, § 303.211 services, to discuss any services that child may receive under part B of the Act. Finally, we have added § 303.211(b)(6)(i)(C) to require lead agencies to establish a transition plan in the IFSP not fewer than 90 days—and, at the discretion of all of the parties, not more than 9 months—before the child will no longer be eligible to

receive, or no longer will receive, § 303.211 services.

Referral Based on Trauma Due to Exposure to Family Violence (§ 303.211(b)(7))

Comment: Some commenters recommended amending § 303.211(b)(7) to specifically reference infants and toddlers, not just children over the age of three, who experience trauma because the regulatory language in this section is not consistent with the explanation for the regulation provided by the Department in the preamble of the NPRM. Another commenter stated that there is no principled reason for restricting the required referral under this section to children over the age of three in States where these children remain eligible for early intervention services, while another commenter questioned whether the requirement to refer children under the age of three based on trauma due to exposure to family violence only applies to children in States implementing the birth to kindergarten option.

Discussion: It appears that the commenters may have misunderstood § 303.211(b)(7). Section 303.211(b)(7), consistent with section 635(c)(2)(G) of the Act, requires, for States that adopt policies under § 303.211, a referral for evaluation for early intervention services of a child under the age of three who experiences a substantiated case of trauma due to exposure to family violence, as defined in section 320 of the Family Violence Prevention and Services Act. This requirement only applies to children under the age of three because children age three and older are not eligible to be referred for early intervention services under any provision in part C of the Act. Children age three and older will either continue to receive early intervention services for which they were already referred or would be referred to the part B system. Referrals to the part B system are addressed under part B of the Act; it would not be appropriate to address them under this part.

Section 303.211(b)(7) clarifies that a referral for evaluation for early intervention services applies only to children under the age of three who experience a substantiated case of trauma due to exposure to family violence, and only in States implementing the State option in § 303.211 to make part C services available to children ages three and older. An example of a child who may be referred under § 303.211(b)(7) would be a child under the age of three who has experienced a substantiated case of trauma due to exposure to family violence and who is a sibling of a child already receiving early intervention services under the option described in § 303.211.

We have not amended § 303.211(b)(7) as requested by the commenters; however, we have removed the parenthetical in new § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(A)) and new § 303.303(c)(11) (proposed § 303.302(c)(11)). The parenthetical in § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(A)) limits coordination of the child find system with programs that provide services under the Family Violence and Prevention Act to States that elect to make services available under this part to children after the age of three. The parenthetical in new § 303.303(c)(11) (proposed § 303.302(c)(11)) limits the scope of domestic violence shelters and agencies as primary referral sources to ''domestic violence shelters and agencies in States that elect to make services available under this part to children after the age of three.''

The Department's position is that domestic violence shelters and agencies should be considered primary referral sources regardless of whether the State that they are located in elects to make services available under this part to children after the age of three. It is the Department's position that it is not appropriate to limit either coordination or referrals in this manner and, thus, we have removed each parenthetical in new § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(A)) and new § 303.303(c)(11) (proposed § 303.302(c)(11)).

Changes: We have removed the parenthetical ''(for States electing to make available services under this part to children with disabilities after the age of three in accordance with section 635(c)(2)(G) of the Act and § 303.211)'' from § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(A)) and new § 303.303(c)(11) (proposed § 303.302(c)(11)).

Comment: One commenter requested that the Department clarify in § 303.211(b)(7), or elsewhere in § 303.211, the parental consent requirements for children receiving services under § 303.211. Specifically, the commenter questioned whether the definition of *parent* in § 303.27 and general consent for evaluation requirements in § 303.420(a)(2) apply to this section. The commenter also expressed concern that parental consent may be difficult to obtain for the children referenced in § 303.211(b)(7), especially for children who are under the jurisdiction of a child protective services agency.

Discussion: If a State elects to offer services under § 303.211, the lead agency must obtain parental consent as required under § 303.211(b)(5) before making those services available. The Department's position is that § 303.211(b)(5) is sufficiently clear with regard to parental consent and, thus, we have not revised § 303.211(b)(5) as requested by the commenter. The definition of *parent* under part C of the Act in § 303.27 applies to the parental consent requirement in § 303.211(b)(7). A parent, as defined in § 303.27, can be a biological or adoptive parent, foster parent (unless State law, regulation, or contractual obligation prohibits the foster parent from acting as a parent), a guardian generally authorized to act as the child's parent (or authorized to make early intervention, educational, health, or developmental decisions for the child, but not the State if the child is a ward of the State), an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent or other relative with whom the child lives), an individual legally responsible for the child's welfare, or a surrogate parent appointed in accordance with § 303.422 or section 639(a)(5) of the Act.

The lead agency's process for obtaining parental consent under § 303.211 is the same as its process for obtaining parental consent under § 303.420(a), whether parental consent is needed to conduct an evaluation under part C of the Act or to provide part C services.

While we appreciate the commenter's concern about obtaining parental consent when a child is placed with a child protective services agency, the Department's position is that the regulations in this part provide sufficient clarity and information about how to proceed in this situation. First, § 303.27 identifies who can serve as the parent under part C of the Act and whether a surrogate parent needs to be appointed. Further, § 303.27(b)(1) explains that if more than one individual meets the definition of a *parent,* the biological or adoptive parent must be presumed to be the parent unless that parent's authority is circumscribed as set forth in that section. Second, § 303.420 specifies when the lead agency must obtain consent from a parent. Parental consent must be obtained before early intervention services are provided to the child. Third, § 303.421 provides information about important aspects of the consent process, prior written notice, and procedural safeguards.

Fourth, § 303.420 sets forth the requirements and options if parental consent is not obtained. Given these other regulatory requirements, the Department's position is that the issue of obtaining parental consent for the children referenced in § 303.211(b)(7) is addressed appropriately and sufficiently.

Changes: None.

Rules of Construction (§ 303.211(e))

Comment: A few commenters expressed concern about the rules of construction provision in § 303.211(e). One commenter stated that these provisions may contradict a parent's option to select part B services if a State offers a ''Birth to Five'' program. Another commenter requested that the Department expand the rules of construction to include a provision that a lead agency will not be held responsible for meeting transition timelines when a child is referred for part C services less than 45 days prior to the time that the transition conference is due to be held.

Discussion: States are not required to implement the provisions in § 303.211. This section simply provides States with an option to make services under part C of the Act available to children ages three and older. If a State decides to offer this option, parents may choose for their children to receive early intervention services, rather than part B services, beyond the age of three. Nothing in § 303.211 or section 635(c) of the Act affects a parent's right to choose services under part B of the Act at any time once the child is eligible to receive part B services. Additionally, nothing in § 303.211 or section 635(c) of the Act requires a State to use the option described in § 303.211 in order to implement policies and procedures for transition to preschool and other programs included in § 303.209.

Finally, the commenter requested that we amend the rules of construction to state that a lead agency will not be held responsible for meeting transition timelines when a child is referred for part C services less than 45 days prior to the time that the transition conference is required to be held under § 303.209. The rules of construction in § 303.211(e) only apply to § 303.211 and thus only apply to children over the age of three who were previously eligible for and received early intervention services under part C of the Act. A child over the age of three who was previously eligible for and already received early intervention services under part C of the Act would never need to be referred for part C services and, therefore, the transition timeline requirements in § 303.209 do not apply to these children. For this reason, we decline to make the change requested by the commenter.

Changes: None.

Additional Information and Assurances (§ 303.212)

Comment: None.

Discussion: To create a freestanding document in these regulations, we have added as new § 303.212(a), regarding additional information and assurances that must be included in each State's part C application, a provision that incorporates the application content requirements under section 427(b) of GEPA. This provision of GEPA requires a State application to include a description of the steps that the State is taking to ensure equitable access to, and equitable participation in, the programs that will be conducted by the State using Federal funds (in this case, Federal funds for the part C program). This provision also requires the State to develop and describe in its application the steps the State is taking to address the special needs of program beneficiaries (in this case, infants and toddlers with disabilities and their families) in order to overcome barriers to equitable participation, including barriers based on gender, race, color, national origin, disability, and age.

Changes: We have added a new paragraph (a) to § 303.212 to clarify that a State's part C application must include: ''A description of the steps the State is taking to ensure equitable access to, and equitable participation in, the part C statewide system as required by section 427(b) of GEPA.''

Reports and Records (§ 303.224)

Comment: A few commenters expressed concern with the requirements in § 303.224. One commenter stated that this section grants the Secretary broad authority over State recordkeeping without providing appropriate notice to States about the content they are required to maintain in the records. Another commenter expressed concern that States may not have the data to respond to requests from the Secretary and recommended that, if adopted, the requirement should be modified to indicate that data requests from the Secretary cannot be unreasonable or place an undue burden on States. One commenter requested that the Department include in § 303.224 a reference to the Single Audit Act.

Discussion: This section tracks the language from section 637(b)(4) of the Act, which requires States both to ensure that reports are in the form and contain the information that the Secretary may require to carry out the functions under part C of the Act and to keep such reports and afford such access to the reports as the Secretary may find necessary to ensure the correctness and verification of those reports and proper disbursement of Federal funds under part C of the Act. The purpose of this section is for the Secretary to have access to the proper records to ensure compliance with the part C requirements. The requirements in this section do not reflect any new requirements or an additional burden on States.

Regarding the request to add a reference to the Single Audit Act in this section, it would be redundant to identify all of the provisions in other authorities such as GEPA, Education Department General Administrative Regulations (EDGAR), and the Single Audit Act that require the lead agency to maintain fiscal accounting records. Thus, we decline to add this reference as requested by the commenter.

Changes: None.

Prohibition Against Supplanting; Indirect Costs (§ 303.225)

Comment: The Department received several comments on proposed § 303.225 in the following areas: the Single Audit Act, the phrase ''and increase'' in proposed § 303.225(b)(1)(i), and whether States must certify and verify that they have maintained fiscal effort from year to year.

Discussion: Since the publication of the NPRM in May 2007, the Department has received many informal inquiries requesting guidance on MOE requirements (which implement the supplement not supplant requirements under part C of the Act). States also have expressed concern about their ability to meet the MOE requirements and their continued participation in the part C program. So that we can seek further input on the MOE requirements, the Department intends to issue an NPRM on the MOE requirements. Therefore, we are not finalizing proposed § 303.225 and instead are incorporating into § 303.225(a) the provisions in section 637(b)(5) of the Act, which prohibit the commingling of Federal funds with State funds and supplanting State and local funds with Federal funds. We also are incorporating into § 303.225(b) the MOE requirements in current § 303.124 and are retaining the indirect cost provisions in proposed § 303.225(c).

Changes: We have revised proposed § 303.225(a) to include language from section 637(b)(5) of the Act and replaced

proposed § 303.225(b) with current § 303.124.

Traditionally Underserved Groups (§ 303.227)

Comment: A few commenters supported the requirement in § 303.227 that ensures policies and practices be adopted so that traditionally underserved groups, including minority low-income, homeless, rural families, and children with disabilities who are wards of the State are meaningfully involved in the planning and implementation of services. However, the commenters suggested that all families, not just those identified in this section, should have access to culturally competent services. Another commenter recommended including explicit language requiring a State to ensure that its service providers have an understanding of the communication norms and family customs of traditionally underserved groups as a part of the cultural competence mentioned in § 303.227(b).

Discussion: Early intervention services, as defined in § 303.13, must be designed to meet the needs of an infant or toddler with a disability, and as requested by the family, the needs of the family to assist appropriately in the infant's or toddler's development. Thus, all families of an infant or toddler with a disability must be provided with access to culturally competent services when those services are necessary to meet the needs of their child. Section 303.227(b) does not limit this requirement in any way; it simply focuses on the access of traditionally underserved groups to culturally competent services, consistent with the provisions in current § 303.128 and section 637(b)(7) of the Act, which require a State to provide, in its application, policies and procedures that ensure meaningful involvement of underserved groups in the planning and implementation of all the requirements of this part. Thus, the Department's position is that the regulations in this part adequately address the commenter's concern about families' access to culturally competent services.

We do not define the term cultural competence in these regulations because it is the Department's position that States are in the best position to determine the parameters of ''culturally competent services'' to meet the unique needs of their populations.

Changes: None.

Comment: A few commenters requested that § 303.227 require States to identify and address barriers faced by homeless children and other traditionally underserved populations when attempting to participate in part C programs.

Discussion: We appreciate the commenter's concerns regarding barriers faced by homeless children and other traditionally underserved populations when attempting to participate in part C programs, but it is the Department's position that it is unnecessary and inappropriate to add language to these regulations to require States to identify and address those barriers. This subject is more appropriately addressed through technical assistance and guidance so that the Department can work collaboratively with States to assist each State to identify the traditionally underserved populations that are specific to the State, meet the needs of homeless children and the infants and toddlers with disabilities in the identified populations, and address the barriers to service for homeless children and infants and toddlers with disabilities in the identified populations. Additionally, the McKinney-Vento Act offers a number of protections to homeless children, including homeless infants and toddlers with disabilities, and it is the Department's position that it is not necessary to duplicate the requirements of the McKinney-Vento Act in these regulations. The Department is committed to providing technical assistance to States in order to assist States in their ability to ensure access to early intervention services by homeless children and other traditionally underserved populations.

Changes: None.

Notice and hearing before determining that a State is not eligible (§ 303.231(a)(1)(i)).

Comment: One commenter recommended that § 303.231(a)(1)(i) be amended to ensure that a State receive at least 90 days notice—not just ''reasonable notice''—prior to the Secretary making a final determination that the State is ineligible to receive its part C grant award.

Discussion: Section 637(c) of the Act provides that the Secretary may not disapprove an application for a part C grant award unless the Secretary determines, after notice and opportunity for a hearing, that the application fails to comply with the requirements under part C of the Act. Both parts B and C of the Act in current § 303.101 (which references 34 CFR 300.581 through 300.586 of the part B regulations in effect prior to October 13, 2006) and 34 CFR 300.179 of the current part B regulations require the Secretary to provide a State with reasonable notice before making a final determination that the State is ineligible to receive a grant award. Section 303.231(a)(1)(i) incorporates this long-standing reasonable notice requirement and thus provides both the Department and States with the flexibility to address circumstances on a case-by-case basis. Therefore, it is the Department's position that it is not necessary to add a 90-day timeline as requested by the commenter.

Changes: None.

Subpart D—Child Find, Evaluations and Assessments, and Individualized Family Service Plans

General (New § 303.300)

Comment: We received a number of comments concerning subpart D of these regulations; many of these comments suggested that there is some confusion in the field about the implementation of the child find, screening, evaluation, assessment, and IFSP provisions in the proposed regulations.

Discussion: Given the number of comments we received on this subpart, we have provided an overview of how subpart D is organized and how the components described in this subpart relate to one another. We have added a new § 303.300 to identify and distinguish the following required components of the part C statewide early intervention system: (a) Pre-referral (public awareness and child find) policies and procedures, (b) referral policies and procedures, and (c) post-referral policies and procedures. Accordingly, we have renumbered the public awareness program provisions as new § 303.301 and the child find provisions as new § 303.302.

In order for the part C statewide system to identify, locate, evaluate, and serve all infants and toddlers with disabilities effectively, the system must be both comprehensive and coordinated. As clarified in this subpart, this means establishing policies and procedures for (a) pre-referral activities (*i.e.,* to make the public aware of the availability of early intervention services and to coordinate with other programs to identify and locate infants and toddlers with disabilities), (b) the referral of children under the age of three to the part C program, and (c) post-referral activities (*i.e.,* the screening, if applicable, of children under the age of three who have been referred to the part C program under new § 303.320 (proposed § 303.303); the evaluation and assessment of the child and the child's family under new § 303.321 (proposed § 303.320); and the development, review, and implementation of the IFSP, under §§ 303.342 through 303.346).

Subpart D follows the general chronological order of the pre-referral, referral, and post-referral components of the part C statewide system. Specifically, this subpart begins by describing the required public awareness program (part of the pre-referral process) and ends with a requirement that public agencies and EIS providers that are directly responsible for providing early intervention services to a child make good faith efforts to assist that child in achieving the outcomes in the child's IFSP (part of the post-referral process). In this way, we intend subpart D of these regulations to provide the framework for effectively identifying, locating, and providing early intervention services to all eligible infants and toddlers with disabilities.

Changes: We have added new § 303.300 to identify and distinguish between the pre-referral, referral, and post-referral components of a statewide early intervention system. Section 303.300 states that the statewide comprehensive, coordinated, multidisciplinary interagency system to provide early intervention services for infants and toddlers with disabilities and their families required in § 303.1 must include the following components: (a) Pre-referral policies and procedures that include a public awareness program as described in new § 303.301 (proposed § 303.300) and a comprehensive child find system as described in new § 303.302 (proposed § 303.301); (b) Referral policies and procedures as described in new § 303.303 (proposed § 303.302); and (c) Post-referral policies and procedures to ensure compliance with the timeline requirements in new § 303.310 and that include screening, if applicable, as described in new § 303.320 (proposed § 303.303); evaluations and assessments as described in new § 303.321 (proposed § 303.320); and development, review, and implementation of IFSPs as described in §§ 303.342 through 303.346.

Public Awareness Program—Information for Parents (New § 303.301) (Proposed § 303.300)

Comment: A few commenters supported proposed § 303.300(a)(1)(ii), which specifically included parents with premature infants or infants with other physical risk factors associated with learning or developmental complications among those parents to whom information about early intervention services must be disseminated. These commenters requested that we add a requirement that child find activities be conducted in collaboration with parent advocacy groups or other community agencies that are available to answer questions and provide support to these families as they access services.

Discussion: The regulations track the language in section 635(a)(6) of the Act, which describes the required public awareness program. Although collaboration with parent advocacy groups or other community agencies regarding public awareness is not specifically mentioned in the Act or these regulations, there is nothing in the Act or these regulations that prevents a State from collaborating with other community resources to disseminate public awareness materials beyond primary referral sources. We do not mandate that public awareness materials be distributed to all parent advocacy groups or community agencies in these regulations because each State needs the flexibility to tailor its public awareness programs to the population of infants and toddlers with disabilities who may be eligible in that State (*e.g.,* a State that serves at-risk infants and toddlers may target specific agencies). This approach will allow States to create and implement a public awareness program that includes the appropriate and necessary components to effectively meet State-specific needs.

Changes: None.

Comment: Some commenters recommended including the notes from current § 303.320, regarding a system's public awareness program, in new § 303.301 (proposed § 303.300) because these notes provided clarity to lead agencies.

Discussion: New § 303.301 (proposed § 303.300) is consistent with section 635(a)(6) of the Act, which describes the requirements of a public awareness program. Notes 1 and 2 following current § 303.320 describe the components of an effective public awareness program and provide examples of methods for informing the general public about the provisions of this part. We do not wish to make the substance of these notes regulatory requirements because we do not want to limit State flexibility to create a public awareness program that meets State-specific needs.

While we have not incorporated the notes as requirements in the regulations, we continue to believe that an effective public awareness system is one that involves an ongoing effort that is in effect throughout a State, including rural areas; provides for the involvement of, and communication with, major organizations throughout a State that have a direct interest in this part, including public agencies at the State and local level, private providers, professional associations, parent groups, advocate associations, and other organizations; has coverage broad enough to reach the general public, including those who have disabilities; and includes a variety of methods for informing the public about the provisions of this part. Methods for informing the public continue to include the use of printed materials, television, radio, and the Internet, but may also include other appropriate methods in a particular State. For these reasons, we decline to revise new § 303.301 (proposed § 303.300) as requested by the commenter.

Changes: None.

Comment: One commenter recommended adding a reference to other family members after each mention of parents in this section.

Discussion: New § 303.301 (proposed § 303.300) tracks the language in section 635(a)(6) of the Act, regarding disseminating information about available early intervention services to parents of infants and toddlers with disabilities. While family members—other than parents—may voluntarily participate in a family assessment, may be invited by a parent to participate in IFSP meetings, and may be included when early intervention services are provided, the parent of an infant or toddler is ultimately responsible for making decisions under these regulations. The term *parent* is broad enough to encompass not just the biological or adoptive parent but other individuals who meet the definition in § 303.27. Additionally, nothing in these regulations prevents the lead agency from disseminating its public awareness materials through primary referral sources to other family members. Therefore, it is the Department's position that not extending this requirement to other family members of infants and toddlers with disabilities is appropriate.

Changes: None.

Comment: Two commenters requested clarification of new § 303.301(c) (proposed § 303.300(b)(4)), which required the lead agency to provide parents of toddlers who are nearing transition age with a description of the availability of services under section 619 of the Act. These commenters questioned when this description must be provided and whether providing it when a toddler is two years and four months of age would meet the requirement to provide information at least nine months prior to a child's third birthday in new § 303.301(c) (proposed § 303.300(b)(4)).

One commenter stated that the public awareness requirement in new § 303.301(c) (proposed § 303.300(b)(4)) should be the responsibility of public agencies responsible for implementing part B of the Act and should be a collaborative effort between the State part B and C agencies and local part B programs to ensure that all parents and families are fully informed of the availability of services under section 619 of the Act.

Discussion: We agree that, as written, proposed § 303.300(b)(4) did not provide sufficient clarification regarding when, and to whom, a description of the availability of services under section 619 of the Act must be provided. Accordingly, we have revised new § 303.301(c) (proposed § 303.300(b)(4)) to specify that each public awareness program must include a requirement that the lead agency provide for informing parents of toddlers with disabilities of the availability of preschool services under section 619 of the Act not fewer than 90 days prior to the child's third birthday. We have removed the reference to ''toddlers with disabilities nearing transition age'' and instead clarified the timeline by which the information must be provided. We have revised this timeline so that it is consistent with the timelines for LEA notification and other transition requirements in § 303.209.

In response to the specific comment asking whether providing public awareness under new § 303.301(c) (proposed § 303.300(b)(4)) to parents when their toddler reaches two years and four months of age would be in compliance with this requirement, it would be in compliance under the revised requirement because each lead agency must ensure that information about preschool services under section 619 of the Act is provided to parents of toddlers with disabilities not fewer than 90 days prior to the toddler's third birthday.

Concerning the comment that the public awareness requirement should be the responsibility of the part B State or local public agencies, section 635(a)(6) of the Act was revised in 2004 to require that the lead agency prepare and disseminate information about preschool services under section 619 of the Act. SEAs and LEAs have child find responsibilities as defined in sections 612 and 619 under part B of the Act. The requirement in new § 303.301(c) (proposed § 303.300(b)(4)) reflects the lead agency's responsibilities under sections 635(a)(6) and 637(a)(9) of the Act to ensure that information about part B preschool services is available to parents of all toddlers with disabilities exiting the part C program, not just those toddlers who have been determined by the lead agency to be potentially eligible under part B of the Act.

Concerning the commenter's request to require collaboration between the State and local part B and part C agencies, adding this requirement is unnecessary because, under new § 303.302(c) (proposed § 303.301(c)), the lead agency, with the assistance of the Council, must ensure that its child find system under part C of the Act is coordinated with the State's child find efforts under part B of the Act.

Changes: We have revised new § 303.301(c) (proposed § 303.300(b)(4)) to specify that each public awareness program must include a requirement that the lead agency provide for informing parents of toddlers with disabilities of the availability of preschool services under section 619 of the Act not fewer than 90 days prior to the child's third birthday. Additionally, because we have clarified that parents must be provided with this information not fewer than 90 days prior to their toddler's third birthday, we have deleted the parenthetical ''starting at least nine months prior to the child's third birthday.''

Comprehensive Child Find System (New § 303.302) (Proposed § 303.301)

Comment: None.

Discussion: To reflect the varied administrative structures of different part C child find systems and the revised definitions of *public agency* and *EIS provider* in §§ 303.30 and 303.12, respectively, we have replaced the reference to ''public agencies'' with ''lead agencies or EIS providers'' in new § 303.302(a)(2) (proposed § 303.301(a)(2)), regarding the child find system including a system for making referrals to lead agencies and EIS providers.

Changes: We have replaced the reference to ''public agencies,'' in new § 303.302(a)(2) (proposed § 303.301(a)(2)), with a reference to ''lead agencies or EIS providers''.

Comment: A few commenters requested that the Department define the term ''rigorous,'' as that term is used to modify ''standards for appropriately identifying infants and toddlers with disabilities under this part that will reduce the need for future services'' in new § 303.302(a)(3) (proposed § 303.301(a)(3)). These commenters asked the Department to provide specific guidance on how to define this term to avoid arbitrary and conflicting applications of the standards.

Discussion: New § 303.302(a)(3) (proposed § 303.301(a)(3)), consistent with section 635(a)(5) of the Act, requires that each State's part C child find system include rigorous standards for appropriately identifying infants and toddlers with disabilities for early intervention services that reduce the need for future services. We interpret the term ''rigorous'' in this section to mean that the State has obtained public (including stakeholder) input on its child find system policies and procedures that are required in §§ 303.101(a)(2), 303.115, and 303.116. Requiring public input ensures that stakeholders who have an interest in the development of a State's child find system, including parents of infants and toddlers with disabilities, EIS providers, Council members, and other stakeholders, have adequate opportunity to comment on, and inform, the decision-making process regarding a State's child find policies and procedures.

Changes: None.

Comment: A few commenters recommended removing the phrase ''that will reduce the need for future services'' from new § 303.302(a)(3) (proposed § 303.301(a)(3)), which requires each State's child find system to include rigorous standards for appropriately identifying infants and toddlers with disabilities for early intervention services that will reduce the need for future services. These commenters stated that eligible infants and toddlers should have access to necessary early intervention services regardless of whether the lead agency or EIS provider expects the early intervention services to reduce a child's need for future services.

Discussion: New § 303.302(a)(3) (proposed § 303.301(a)(3)) incorporates statutory language from section 635(a)(5) of the Act and reflects the finding in section 631(a)(2) that there is an urgent and substantial need to reduce the educational costs to our society, including our nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age. Thus, new § 303.302(a)(3) (proposed § 303.301(a)(3)) does not require a determination as to whether a specific infant or toddler with a disability will or will not require future services, but rather reflects one of the critical findings underlying part C of the Act.

Changes: None.

Comment: None.

Discussion: We have made a minor change to new § 303.302(b)(1)(i) (proposed § 303.301(b)(1)(i)) to clarify

that the coordination with tribes, tribal organizations, and consortia is for the purpose of identifying infants and toddlers with disabilities in the State based, in part, on the information provided by these entities to the lead agency under § 303.731(e)(1).

Changes: We have revised the parenthetical in new § 303.302(b)(1)(i) (proposed § 303.301(b)(1)(i)) by adding the words ''to identify infants and toddlers with disabilities in the State based, in part, on'' before the words ''the information provided.''

Comment: Many commenters supported retaining the requirement from current § 303.321(b)(2), which requires that an effective method be developed and implemented to determine which children are receiving needed early intervention services. However, these commenters strongly opposed the requirement in proposed § 303.301(b)(2) to have an effective method to determine which children are not in need of early intervention services. The commenters argued that this is not a statutory requirement and would add significant burden to lead agencies.

Discussion: We agree with the commenters that child find efforts under part C of the Act should focus on identifying infants and toddlers with disabilities who are potentially eligible for, or in need of, early intervention services and not those who are not potentially eligible for such services. Therefore, we have removed the requirement that lead agencies must determine which children are not in need of services in new § 303.302(b)(2) (proposed § 303.301(b)(2)).

Changes: We removed the phrase ''and which children are not in need of those services'' in new § 303.302(b)(2) (proposed § 303.301(b)(2)).

Comment: None.

Discussion: Proposed § 303.301(c)(1)(ii)(G) identified ''child protection programs, including programs administered by, and services provided through, the foster care agency * * *'' as one of the programs that the lead agency must ensure that it coordinates with when implementing its child find responsibilities. However, child welfare programs, such as the foster care system, and child protection programs are two different programs and in some States are not in the same system. Therefore, we have clarified in new § 303.302(c)(1)(ii)(G) (proposed § 303.301(c)(1)(ii)(G)) that lead agencies must coordinate child find activities with both child protection and child welfare programs.

Changes: We have added the words ''and child welfare'' after the words ''child protection'' in new § 303.302(c)(1)(ii)(G) (proposed § 303.301(c)(1)(ii)(G)).

Comment: None.

Discussion: As previously stated in the *Analysis of Comments and Changes* section for subpart C of these regulations, upon further review, the Department has determined that it is not appropriate to limit either coordination with, or referrals from, the programs that provide services under the Family Violence Prevention and Services Act in new § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(I)) and § 303.303(c)(11) (proposed § 303.302(c)(11)). Therefore, we have removed the following language ''(for States electing to make available services under this part to children with disabilities after the age of three in accordance with section 635(c)(2)(G) of the Act and § 303.211.)'' from new § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(I)) and § 303.303(c)(11) (proposed § 303.302(c)(11)).

Changes: We have removed the parenthetical referencing section 635(c)(2)(G) of the Act and § 303.211 from new § 303.302(c)(1)(ii)(A) and § 303.303(c)(11).

Comment: Several commenters recommended adding the Children's Health Insurance Program (CHIP) to the list of programs with which the lead agency must coordinate its child find activities in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)) because many children with disabilities participate in CHIP. A few commenters requested adding State Early Hearing Detection and Intervention (EHDI) systems to this list as well.

Discussion: We agree with commenters that coordinating with the CHIP programs and State Early Hearing Detection Intervention (EHDI) systems can assist the lead agency in its child find responsibilities to identify infants and toddlers with disabilities. The addition of these two programs in the child find coordination provision in new § 303.302(c)(1)(ii) does not mean that these entities are ''participating agencies'' under § 303.403 if they function as primary referral sources or funding sources, but do not otherwise meet the definition of participating agency in § 303.403.

CHIP is authorized under Title XXI of the Social Security Act and each State determines the level of income eligibility and available health benefits for children. In many States, CHIP benefits are combined with benefits under Medicaid (Title XIX of the Social Security Act). Requiring the lead agency to coordinate its child find efforts with the CHIP program ensures nonduplication of Federal and State funds and efforts to provide needed health services to eligible children.

Each State has a State EHDI program, which is responsible for creating a system of newborn hearing screening, follow-up, audiological diagnosis (for those who do not pass screening), and intervention (for those who are identified with hearing loss). Recent data indicate that 55 percent of State EHDI programs never or rarely notify the part C statewide system about infants who have failed their final hearing screening. (National Center for Hearing Assessment and Management, *The Impact of Privacy Regulations,* May 2008, available at *http://www.infanthearing.org*) By adding the State EHDI program in § 303.302(c)(1)(ii), we acknowledge that coordination between the State EHDI program and the statewide child find system can play a critical role in the referral of children from the EHDI program to the part C program to identify children potentially eligible for part C early intervention services, including infants and toddlers who are deaf or hard of hearing. Therefore, we have added CHIP and EHDI to the programs listed in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)).

Nothing precludes the State lead agency from coordinating with additional appropriate entities in the State, such as Grant-Supported Federally Qualified Health Centers (''FQHCs''), which include Community Health Centers and Healthcare for the Homeless Programs, *see* 42 U.S.C. §§ 254b(a), 1396a(a)(10)(A), 1396d(a)(2)(C); the Temporary Assistance for Needy Families (TANF) Program, *see* 42 U.S.C. §§ 601 *et seq.;* the supplemental nutrition program for Women, Infants and Children (WIC), *see* 42 U.S.C. §§ 1786 *et seq.;* and the Supplemental Nutrition Assistance Program (''SNAP'') (formerly the Federal Food Stamp program), *see* 7 U.S.C. 2011 *et seq.* Some of these programs may serve as primary referral sources. We note that some States have adopted a centralized intake center for families for many State health, social welfare, public assistance, and other programs that target the health and welfare of children and families and that the part C early intervention program may be included in such an intake center.

Changes: We have added new paragraphs (J) and (K) to new § 303.302(c)(1)(ii) to include EHDI and CHIP among the programs with which the lead agency must coordinate its child find activities.

Comment: None.

Discussion: To provide consistency between the lead agency's responsibilities to ensure non-duplication of child find efforts in new § 303.302(c)(2)(i) (proposed § 303.301(c)(2)(i)) and child find coordination in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)), we have replaced, in new § 303.302(c)(2)(i) (proposed § 303.301(c)(2)(i)), the broad reference to various agencies with a reference to the specific programs identified in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)), with which the lead agency must coordinate its child find efforts.

Changes: We have replaced in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(2)(i)) the phrase ''various agencies involved in the State's child find system under this part'' with ''programs identified in paragraph (c)(1)(ii) of this section.''

Comment: One commenter requested clarification on why the reference to public agency was deleted from new § 303.302(c)(1)(ii) (proposed § 303.301(c)(2)(ii)), concerning the requirement that the State make use of each EIS provider in implementing child find in an effective manner. Another commenter disagreed with the language in proposed § 303.301(c)(2)(ii) because public agencies that provide services to young children are critical to the child find system and these public agencies should be expressly referenced and continue to be an active part of the child find system. Both commenters recommended that current § 303.321(c)(2)(ii) be retained.

Discussion: Current § 303.321(c)(2)(ii), regarding coordination efforts, provides that the lead agency make use of the resources available through each public agency in the State to implement child find in an effective manner. We added in new § 303.302(c)(2)(ii) (proposed § 303.301(c)(2)(ii)) a reference to EIS providers because of the revised definitions of *EIS providers* and *public agencies.* We agree with the commenters that the reference to public agencies should be reinstated and also have added that reference.

Changes: We have added the words ''each public agency'' to the reference to ''EIS provider in the State'' to new § 303.302(c)(2)(ii) (proposed § 303.301(c)(2)(ii)).

Referral Procedures (New § 303.303) (Proposed § 303.302)

Comment: None.

Discussion: We have made a technical edit to new § 303.303(a)(1) (proposed § 303.302(a)(1)) to clarify that the referral procedures that lead agencies must provide to primary referral sources are the State's procedures for referring a child under the age of three to the part C program.

Changes: We have added the word ''State's'' before the word ''procedures'' in § 303.303(a)(1) (proposed § 303.302(a)(1)).

Comment: Many commenters supported removing current § 303.321(d)(2)(ii), which required primary referral sources to refer a child to the part C program within two working days of the child's identification. The commenters stated that because the two-day timeline was not enforceable by lead agencies, they supported the language in proposed § 303.302(a)(2)(i) that requires referrals be made as soon as possible. These commenters stated that requiring primary referral sources to refer identified children as soon as possible would provide States with the flexibility to establish or maintain more stringent reporting requirements on primary referral sources, while acknowledging the difficulties associated with monitoring the adherence of thousands of primary referral sources to a Federal standard.

A significant number of commenters, however, opposed the language in proposed § 303.302(a)(2)(i) and recommended retaining the two-day timeline for referrals in current § 303.321(d)(2)(ii). These commenters expressed concern that the proposed timeline, *i.e.,* as soon as possible, threatens to introduce long delays into part C referral, evaluation, and program implementation processes. Other commenters proposed that the regulations retain the phrase ''as soon as possible,'' but qualify it with a maximum timeline. Commenters proposed a variety of maximum timelines, ranging from three business days to ten business days.

Discussion: We agree with the commenters who expressed concern that requiring primary referral sources to refer an identified child to the part C program ''as soon as possible'' could introduce undue delays into the part C referral process. Although enforcement of the timeline in current § 303.321(d)(2)(ii), which requires primary referral sources to refer a child to the part C system within two working days of the child's identification, has been a challenge for lead agencies, requiring referrals to be made ''as soon as possible'' may be more difficult to enforce than the two-day timeline. We believe it is appropriate to retain the phrase ''as soon as possible'' because it conveys a sense of urgency that referrals be made to the part C program in a timely manner. Therefore, we have retained the ''as soon as possible'' language and added a maximum timeline to new § 303.303(a)(2)(i) (proposed § 303.302(a)(2)(i)) to require that a child be referred as soon as possible, but in no case more than seven days, after the child has been identified. We realize that in some cases an earlier referral may be reasonable, but establishing a maximum timeline of seven days provides more flexibility to primary referral sources for making referrals than the timeline under current § 303.321(d)(2)(ii). Moreover, the new timeline requires primary referral sources to refer children as soon as possible.

Changes: We have revised new § 303.303(a)(2)(i) (proposed § 303.302(a)(2)(i)) to require primary referral sources to refer a child to the part C program as soon as possible, but in no case more than seven calendar days after the child has been identified.

Comment: One commenter opposed the requirement in proposed § 303.302(b) that the lead agency adopt procedures requiring the referral of specific at-risk children. The commenter stated that this provision does not reflect congressional intent to ensure that these children are screened, either by a designated primary referral source or EIS provider, to determine whether a referral for an evaluation for early intervention services under part C of the Act is warranted.

Discussion: The language in new § 303.303(b) (proposed § 303.302(b)) is based on the statutory language in section 637(a)(6) of the Act, regarding the referral of a child under the age of 3 who is involved in a substantiated case of child abuse or neglect; or is identified as affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure.

As noted by the commenter, lead agencies may use a variety of methods to ensure the identification of specific at-risk infants and toddlers who may be infants and toddlers with disabilities eligible for services under part C of the Act. Under new § 303.320 (proposed § 303.303), the lead agency may establish screening procedures for children under the age of three, including at-risk infants and toddlers, who have been referred to the part C program. Primary referral sources also may choose to conduct screenings of at-risk infants and toddlers prior to referring a child to the part C program under new § 303.303 (proposed § 303.302). If a primary referral source conducts a screening under the supervision of the lead agency in order

to determine if a child is suspected of having a disability, such screening procedures must meet the requirements in new § 303.320 (proposed § 303.303).

The lead agency may use interagency agreements or other methods to coordinate with primary referral sources, such as the State agency that administers the Child Abuse Prevention and Treatment Act (CAPTA), to conduct child find and ensure identification of at-risk infants and toddlers who may be eligible for services under part C of the Act. The screening procedures in new § 303.320 (proposed § 303.303) are consistent with section 637(a)(6) of the Act and the policy, reflected in the legislative history cited by the commenter, that not every child referred to the part C program must be evaluated. Therefore, we decline to revise the regulations as requested by the commenter.

Changes: None.

Comment: One commenter requested clarification of the scope of the phrase ''affected by illegal substance abuse'' in new § 303.303(b) (proposed § 303.302(b)). Specifically, the commenter asked who must be referred for early intervention services under this provision.

Discussion: The language ''affected by illegal substance abuse'' in new § 303.303(b) (proposed § 303.302(b)) is from section 637(a)(6)(B) of the Act, which requires children who are ''affected by illegal substance abuse'' to be referred to the part C program. The policy for requiring the referral of children under the age of three who have been directly affected by illegal substance abuse is that there is a likelihood that these children may experience developmental delays and thus be eligible for early intervention services under part C of the Act. We have clarified the phrase ''affected by illegal substance abuse'' by adding the term ''directly'' because we agree that the statutory language is vague. This change is consistent with our addition of the term ''directly'' in § 303.211(b)(7) regarding referral of a child under the age of three who directly experiences a substantiated case of trauma due to exposure to family violence.

Changes: We have added the term ''directly'' before the words ''affected by illegal substance abuse'' in new § 303.303(b)(2) (proposed § 303.302(b)(2)).

Comment: Some commenters requested that the Department mandate that child find systems provide for the referrals of children under the age of three who have been abandoned; affected by alcohol abuse, including prenatal alcohol exposure; or exposed to family violence or dangerous levels of lead paint. At a minimum, these commenters recommended that these regulations include these children as examples of children who should be referred to the part C program.

Discussion: Section 637(a) of the Act only requires the referral for early intervention services of a child under the age of three who is involved in a substantiated case of child abuse or neglect or is identified as affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure. While not required under the Act, a State may choose to require the referral for evaluation of the children identified by the commenter (*i.e.,* those who have been abandoned, affected by alcohol abuse, including prenatal alcohol exposure; or exposed to family violence or dangerous levels of lead paint). However, we do not wish to limit a State's flexibility to assess the unique needs in the State, and identify accordingly, other subgroups that may be determined to be at-risk and require a referral for evaluation. Thus, we decline to revise the regulations as requested by the commenter.

Changes: None.

Comment: A few commenters opposed new § 303.303(b)(1) (proposed § 303.302(b)(1)), which requires the referral of a child under the age of three who is involved in a substantiated case of child abuse or neglect. One commenter stated that this requirement is vague and inconsistent with the explanation provided in the preamble to the NPRM that, under this section and consistent with CAPTA requirements, a referral to the part C program would only be for the child who is the subject of the substantiated proceeding. The commenters requested that new § 303.303(b)(1) (proposed § 303.302(b)(1)) clarify that the referral requirements in that section would not apply, for example, to a sibling (under the age of three) of a child who had been the subject of a substantiated case of child abuse or neglect unless that sibling also had been the subject of a substantiated case of child abuse or neglect. Another commenter expressed concern that Federal funding is insufficient to address the potential increase in referrals of children under CAPTA.

Discussion: We agree with the commenters that the language ''involved in a substantiated case of child abuse or neglect'' in section 637(a)(6)(A) and new § 303.303(b) (proposed § 303.302(b)(1)) is vague. This provision is consistent with 42 U.S.C. 5106a of CAPTA, which was amended in June 2003 to require States receiving CAPTA funds to have policies regarding the referral to the part C program of children under the age of three who were the subject of a substantiated case of child abuse or neglect. The Department consulted with the U.S. Department of Health and Human Services (HHS), which administers CAPTA, and determined that our interpretation of this provision in section 637(a)(6)(A) of the Act is consistent with HHS's view that neither part C of the Act nor CAPTA requires the referral of a child other than a child who is the subject of a proceeding resulting in a substantiated case of child abuse or neglect. For this reason, we have revised the regulatory language in new § 303.303(b)(1) (proposed § 303.302(b)(1)) to refer to a child under the age of three who ''is the subject'' of a substantiated case of child abuse or neglect. Additionally, we do not interpret the statutory language or new § 303.303(b)(1) (proposed § 303.302(b)(1)) to require a sibling (under the age of three) to be referred or screened unless that sibling is a child under the age of three who also has been the subject of a substantiated case of child abuse or neglect. Given that we have narrowed the scope of children to be referred to the part C program under new § 303.303(b)(1) (proposed § 303.302(b)), the potential burden is decreased to States, which may currently receive referrals of all children (such as a sibling or step-sibling) who are involved in a substantiated case of child abuse or neglect.

Changes: The phrase ''involved in'' in new § 303.303(b)(1) (proposed § 303.302(b)(1)) has been changed to ''the subject of.''

Comment: One commenter noted, with respect to new § 303.303(b)(2) (proposed § 303.302(b)(2)), that section 106(b)(2)(A)(xxii) of CAPTA does not require referral to part C services of children under the age of three who are affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. This commenter requested that the Department clarify this fact in the preamble to these regulations.

Discussion: Section 303.303(b)(2) reflects the requirement in section 637(a)(6)(B) of the Act that each State's part C application include policies and procedures requiring the referral for early intervention services of a child under the age of three who is identified as affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. Section 106(b)(2)(A)(xxii) of CAPTA, however, requires that each State that receives CAPTA funds assure that it has policies and procedures (including appropriate

referrals to child protection service systems and for other appropriate services) to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. Thus, while the language of CAPTA differs from the language of section 637(a)(6)(B) of the Act, § 303.303(b)(2) reflects the appropriate requirement under the Act.

Changes: None.

Comment: One commenter recommended clarifying that the list of primary referral sources in new § 303.303(c) (proposed § 303.302(c)) is not an inclusive list and that a lead agency may include other primary referral sources in its child find system. Additionally, two commenters recommended adding McKinney-Vento ''local educational agency liaisons,'' as defined in 42 U.S.C. 11432(g)(6), as primary referral sources along with LEAs and schools in new § 303.303(c)(5) (proposed § 303.302(c)(5)).

Discussion: We agree with the commenter that new § 303.303(c) (proposed § 303.302(c)) is intended to be a non-exhaustive list of primary referral sources and that a lead agency may include other primary referral sources in its child find system. The term *include,* as defined in § 303.18 and used in the introductory text in new § 303.303(c) (proposed § 303.302(c)), means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

We decline to add McKinney-Vento local educational agency liaisons, as defined in 42 U.S.C. 11432(g)(6), to new § 303.303(c)(5) (proposed § 303.302(c)(5)), as requested, because these liaisons work with LEAs and school-age children—not children under the age of three—and, therefore, coordination with these liaisons is not required for programs under part C of the Act. Nothing in the Act or these regulations would preclude a lead agency from coordinating with the McKinney-Vento local educational agency liaisons, as defined in 42 U.S.C. 11432(g)(6), if it determines such coordination is appropriate.

Changes: None.

Comment: One commenter recommended changing the reference to day care programs in new § 303.303(c)(4) (proposed § 303.302(c)(4)) to child care and early learning programs.

Discussion: We agree that day care should be changed to child care because this term reflects the current terminology of the field. We also agree that early learning programs should be included in the list of primary referral sources. While the list in new § 303.303(c) (proposed § 303.302(c)) includes schools, some early learning programs, such as Early Head Start, may not always be included in this category. To ensure all early learning programs are included as referral sources we have added early learning programs to new § 303.303(c) (proposed § 303.302(c)).

Changes: We have changed the term ''day care programs'' to ''child care programs'' and added ''early learning programs'' in new § 303.303(c)(4) (proposed § 303.302(c)(4)).

Comment: None.

Discussion: To clarify that primary referral sources may include not only public health facilities and other social service agencies, but also public health agencies that are neither public health facilities nor social service agencies, we have added a reference to public health agencies in new § 303.303(c)(7) (proposed § 303.302(c)(7)). For example, other public health or social service agencies may include the Maternal, Infant, and Early Childhood Home Visiting Program, under Title V of the Social Security Act, as amended, or the Early Hearing Detection and Intervention (EHDI) systems administered by the Centers for Disease Control.

Changes: We have added the phrase ''public health or'' before the words ''social service agencies'' in new § 303.303(c)(7) (proposed § 303.302(c)(7)).

Forty-Five Day Timelines (New § 303.310) (Proposed § 303.320(e))

Comment: We received a large number of comments, questions, and recommendations regarding the 45-day timeline requirement in proposed § 303.320(e) that lead agencies complete the initial evaluation, the initial assessments, and the initial IFSP meeting within 45 days from parental consent for the initial evaluation.

Many commenters supported proposed § 303.320(e), which stated that the evaluation, assessment, and initial IFSP meeting must be completed within 45 days from the date the lead agency obtains parental consent for the child's evaluation. These commenters preferred this timeline to the 45-day timeline in current § 303.322(e), which commences not on the date the lead agency obtains parental consent, but rather on the date it receives the referral of the child. These commenters argued that, given the complexity of the post-referral process, adding more time to the period between referral and the initial IFSP meeting was appropriate.

A few commenters recommended that, if the Department adopted proposed § 303.320(e), the Department should add a separate timeline for the time period between referral and when the lead agency must obtain parental consent and suggested timelines for this period ranging from 2 to 30 days or ''as soon as possible.''

Many other commenters opposed the 45-day timeline in proposed § 303.320(e). These commenters expressed concern that having the 45-day timeline triggered by the date the lead agency obtains parental consent, rather than the date the lead agency receives the child's referral, could result in significant delays in getting infants and toddlers with disabilities the early intervention services they need. These commenters argued that proposed § 303.320(e)(ii), which stated that lead agencies must obtain parental consent as soon as possible once a child is referred to a lead agency, would be an inadequate protection if adopted because it would allow an undetermined and unregulated period of time between the child's referral and parental consent, and could delay the completion of initial evaluations, initial assessments, and initial IFSP meetings. These commenters expressed concern that proposed § 303.320(e) would result in less accountability for lead agencies because, under that provision, the lead agencies could control—to a large extent—when they obtained parental consent for evaluation and thus when the 45-day timeline would commence.

These commenters further argued that the Department should not adopt the timeline in proposed § 303.320(e) and that it should instead retain the timeline reflected in current § 303.322(e), which requires the public agency to complete the evaluation and assessment activities and hold an IFSP meeting within 45 days from the date the public agency receives the child's referral. For these commenters, beginning the 45-day timeline from the date the public agency receives the child's referral is preferable because it promotes accountability for lead agencies; the triggering event for the timeline is something outside of a lead agency's control. Moreover, commenters argued that beginning the 45-day timeline from the date of referral will help ensure that children receive services within a shorter timeframe. Some of the commenters that supported triggering the required timeline from the date of referral recommended that the length of the timeline be changed; they suggested alternative timelines, ranging from 30 days from referral to 75 days from referral.

Finally, a few commenters recommended that these regulations not include any timeline. These

commenters argued that each State should have the flexibility to establish its own timeline to complete the post-referral activities through the initial IFSP meeting; they argued that this flexibility would be similar to the flexibility offered in the evaluation timeline under 34 CFR 300.301(c)(1)(ii) to conduct an evaluation to determine eligibility for the part B program.

Discussion: After much review and careful consideration of the many and divergent opinions on the 45-day timeline, we have determined that it is appropriate to retain in new § 303.310(a) the 45-day timeline from the date of the child's referral as reflected in current § 303.321(e), but to provide for limited exceptions when the 45-day timeline will not apply. Data from Federal fiscal year (FFY) 2006 State part C SPP/APRs indicate that many States have made significant progress toward meeting the current 45-day timeline requirement. The Department's position is that maintaining this standard in new § 303.310(a)—combined with the flexibility offered by the two exceptions incorporated in new § 303.310(b)—will help States continue to ensure timely initial evaluations, initial assessments, and initial IFSP meetings when children are referred to the part C program without unduly burdening lead agencies and EIS providers.

We believe that having the 45-day timeline in new § 303.310(a) commence on the date of referral, rather than on the date the lead agency or EIS provider obtains parental consent for the initial evaluation, ensures accountability, consistency, and predictability, and it is easier for States and parents to implement and track. More importantly, we are persuaded that this timeline will result in fewer delays in infants and toddlers with disabilities receiving early intervention services as quickly as possible after being referred. For these reasons, we have incorporated the 45-day timeline, commencing from referral, in new § 303.310. For clarity, we have revised the language in this section to ensure that the timeline applies to both lead agencies and EIS providers because EIS providers as well as lead agencies implement these requirements and conduct initial evaluations, initial assessments, and initial IFSP meetings.

As we noted in the NPRM, however, we fully appreciate that a lead agency or EIS provider may not be able to comply with the 45-day timeline because of exceptional family circumstances that are beyond its control. For example, as we noted in the NPRM, a lead agency or EIS provider cannot meet the 45-day timeline from the date of referral without parental consent for initial evaluations and initial assessments. Moreover, delays in obtaining parental consent may drastically reduce the time available for the lead agency or EIS provider to perform the initial evaluation and initial assessments and prepare for the initial IFSP meeting. Rather than attempting to address these concerns by commencing the 45-day timeline from the date the lead agency or EIS provider obtains parental consent, it is more appropriate to address these concerns by providing for limited exceptions in new § 303.310(b) to clarify when the 45-day timeline in new § 303.310(a) would not apply.

We have described in new § 303.310(b) two specific circumstances when the 45-day timeline would not apply. First, as noted in new § 303.310(b)(1), there may be periods of time when the child or parent is unavailable to complete the screening, if applicable; the initial evaluation; the initial assessment of the child; the initial assessment of the family; or the initial IFSP meeting due to exceptional family circumstances that are documented in the child's early intervention records. To clarify that it is only the unavailability of the child or parent (and not other family members) that determines the availability of this exception, we have added new § 303.310(d) to ensure that the family assessment is completed within the 45-day timeline, if the parent concurs, as long as the parent is available.

The second exception to the 45-day timeline is set forth in new § 303.310(b)(2), which provides that if the parent has not provided consent for the screening (if the State has adopted a policy to conduct screenings and elects to conduct a screening of that child), initial evaluation, or initial assessment of the child despite documented, repeated attempts by the lead agency or EIS provider to obtain parental consent, then the 45-day timeline would not apply. We have not included the family assessment or the initial IFSP meeting in this second exception because, while the family assessment is voluntary on the part of any family member who participates in it and the initial IFSP meeting must be scheduled at a time convenient to the family, there are no express written consent requirements for conducting the family assessment and initial IFSP meeting.

To ensure that these exceptions are not absolute, we have added a new requirement in § 303.310(c) to clarify that the lead agency or EIS provider must complete the screening, if applicable; initial evaluation; initial assessments; and initial IFSP meeting as soon as possible after the circumstances described in new § 303.310(b) no longer exist or parental consent is obtained. We believe that the availability of the two limited exceptions to the 45-day timeline in new § 303.310(b) creates flexibility and reduces burdens for lead agencies and EIS providers. Coupling these exceptions with a 45-day timeline commencing on the date of the child's referral to the part C program in new § 303.310(a) creates a clear and enforceable timeline that ensures accountability for timely identification, evaluations, assessments, and IFSP meetings for infants and toddlers with disabilities.

Additionally, to further protect children affected by circumstances described in new § 303.310(b)(1) and (b)(2), we have added new § 303.310(c)(3) to clarify that the lead agency must have procedures to ensure that the lead agency or EIS provider develop and implement an interim IFSP to the extent appropriate and consistent with § 303.345 in the event of the circumstances described in § 303.310(b).

With regard to the comments recommending that we lengthen or remove the 45-day timeline in new § 303.310(a) (proposed § 303.320(e)), we decline to do so because lengthening or removing the timeline would not create the same level of accountability for ensuring timely evaluations and assessments and IFSP development for infants and toddlers with disabilities. Given the rapid developmental changes in this age group of children, it is essential that lead agencies and EIS providers evaluate, assess, and provide early intervention services to those in need as soon as possible. We also decline to shorten the 45-day timeline, as requested by some commenters, because we are not convinced that a shortened timeline would be feasible for lead agencies and EIS providers to carry out their obligations under subpart D of these regulations.

Finally, regarding the request to incorporate in these regulations a timeline within which a lead agency or EIS provider must obtain parental consent following a child's referral to the part C program, establishing this separate timeline is unnecessary because the Department has adopted a 45-day timeline that runs from the date of referral, not the date parental consent is obtained.

Changes: We have redesignated proposed § 303.320(e) as new § 303.310(a) and revised it to require that, within 45 days after the lead agency or EIS provider receives a referral, the screening (if the State has adopted a policy and elects, and the

parent consents, to conduct a screening of a child), initial evaluation, initial assessments, and initial IFSP meeting must be conducted. We have deleted the language from proposed § 303.320(e)(1)(ii) regarding the lead agency obtaining parental consent as soon as possible after receiving the child's referral.

We have clarified in § 303.310(a) that the 45-day timeline applies to the screening conducted under new § 303.320, if applicable; initial evaluation (described in new § 303.321(a)(2)(i) as the child's evaluation to determine his or her initial eligibility under this part), initial assessments of the child and family under § 303.321(a)(2)(ii); and initial IFSP meeting under § 303.342.

We also have added new § 303.310(b) to identify two limited exceptions to the 45-day timeline. These exceptions cover periods of time when (i) the child or parent is unavailable to complete the screening, if applicable; the initial evaluation; the initial assessments of the child and family; or the initial IFSP meeting due to exceptional family circumstances that are documented in the child's early intervention records; or (ii) the parent has not provided consent for the screening, if applicable, the initial evaluation, or the initial assessment of the child, despite documented, repeated attempts by the lead agency or EIS provider to obtain parental consent.

We have added new § 303.310(c) to clarify that the lead agency must have procedures to ensure that the lead agency or EIS provider: (1) Documents the exceptional circumstances or repeated attempts by the lead agency or EIS provider to obtain parental consent, (2) completes the screening, if applicable, the initial evaluation, the initial assessments of the child and family, and the initial IFSP meeting as soon as possible after the documented exceptional family circumstances no longer exist or parental consent is obtained for the screening, if applicable, initial evaluation, and initial assessment of the child, and (3) develop and implement an interim IFSP to the extent appropriate and consistent with § 303.345.

Finally, we have added new § 303.310(d) to ensure that the family assessment is completed within the 45-day timeline, if the parent concurs, as long as the parent is available.

Comment: Two commenters recommended that, rather than changing the triggering event for the 45-day timeline from referral to parental consent, the Department should use its authority under section 618 of the Act to collect information related to the reasons for, and the scope of problems related to, a lead agency's failure to meet the 45-day timeline requirement. A few commenters recommended that new § 303.310 (proposed § 303.320(e)) require States to report on the timelines in new § 303.310 (proposed § 303.320(e)) as part of the State's application.

Discussion: As previously discussed, we have retained the current 45-day timeline from the date of a child's referral to the part C program for lead agencies and EIS providers to complete the child's initial evaluation, initial assessment, and initial IFSP meeting. Concerning commenters' requests that this timeline be reported in each State's application, States already report to the Department data on implementing the 45-day timeline and reasons for any delay in meeting this timeline. One of the indicators that each State is required to report on in its SPP/APR is compliance with this 45-day timeline. Each State reports these data annually to the Department. Pursuant to sections 616(d) and 642 of the Act, the Department uses these and other data to determine whether the State is meeting the requirements of part C of the Act and these regulations. Given that the Department already collects these data, it is not necessary to incorporate an additional data collection requirement in the application or elsewhere in these regulations.

Changes: None.

Comment: Some commenters recommended that a specific provision be added to new § 303.310(b) (proposed § 303.320(e)) to permit a lead agency to waive the 45-day timeline requirement if the lead agency or EIS provider made good faith efforts to conduct the initial evaluation, initial assessments, and initial IFSP meeting but the child or family member was unavailable (*e.g.,* due to child or parent illness, work or family vacation scheduling conflicts, or other parent-requested considerations) or the lead agency or EIS provider made good faith efforts to obtain parental consent for the initial evaluation and initial assessment but was unable to do so within the 45-day timeline.

Discussion: As discussed earlier in this preamble, we agree that exceptional family circumstances may make it difficult or impossible for the lead agency or EIS provider to meet the 45-day timeline in new § 303.310 (proposed § 303.320(e)). However, we do not believe an absolute waiver of the timeline is appropriate. Instead, to provide flexibility and ensure accountability, we have adopted, in new § 303.310(b), two limited exceptions to the 45-day timeline, one of which directly addresses the commenters' concern about exceptional family circumstances.

Specifically, new § 303.310(b) states that the 45-day timeline does not apply when: (1) The child or parent is unavailable to complete the screening, if applicable; the initial evaluation; the initial assessments of the child and family; or the initial IFSP meeting due to exceptional family circumstances that are documented in the child's early intervention records; or (2) the parent has not provided consent for the screening, if the State has adopted a policy to conduct screenings and elects to conduct a screening of that child; initial evaluation; or initial assessment of the child despite documented, repeated attempts by the lead agency or EIS provider to obtain parental consent.

To ensure that these exceptions are used appropriately, new § 303.310(c) requires the lead agency to develop procedures to ensure that exceptional family circumstances or repeated attempts by the lead agency or EIS provider to obtain parental consent are documented in the child's early intervention records.

Moreover, to ensure that these exceptions do not result in absolute waivers of the 45-day timeline, new § 303.310(c)(2) and (c)(3) require that the lead agency or EIS provider complete the activities as soon as possible after the basis for the exceptions cease to exist, and develop and implement an interim IFSP to the extent appropriate and consistent with § 303.345.

These two limited exceptions provide States needed flexibility while ensuring that, once parental consent is provided for the screening, if applicable; initial evaluation; and initial assessment of the child; or the exceptional family circumstances no longer exist, the lead agency or EIS provider conduct the screening, if applicable; initial evaluation; initial assessments; and initial IFSP meeting as soon as possible to ensure the timely identification and evaluation of infants and toddlers with disabilities.

Changes: As noted earlier in this preamble, we have added new § 303.310(b) to identify two exceptions to the 45-day timeline and added § 303.310(c) to clarify that the lead agency must have procedures to ensure that the lead agency or EIS provider: (i) Documents exceptional circumstances or repeated attempts by the lead agency or EIS provider to obtain parental consent, (ii) completes the screening, if applicable; the initial evaluation; initial assessments; and the initial IFSP

meeting as soon as possible after the documented exceptional family circumstances no longer exist or parental consent is obtained, and (iii) develop and implement an interim IFSP if appropriate, consistent with § 303.345.

Screening Procedures (Optional) New § 303.320 (Proposed § 303.303)

Comment: None.

Discussion: Based on further review of § 303.320(a)(1) (proposed § 303.303(a)(1)), regarding screening procedures, we have determined that the words ''when appropriate'' are unnecessary and potentially confusing. Lead agencies always can adopt policies for screening. If a State elects to adopt screening policies and procedures, those policies and procedures must specify when screening of a particular child is appropriate.

Changes: We have removed the words ''when appropriate'' from § 303.320(a)(1) (proposed § 303.303(a)(1)).

Comment: A significant number of commenters requested additional clarification regarding the screening procedures in proposed § 303.303. Some commenters opposed including screening in these regulations stating that they were concerned that children for whom part C eligibility is not readily or easily apparent may be denied an evaluation and services if screening is conducted.

Other commenters recommended that proposed § 303.303(a)(3) be amended to require that if the lead agency determines, based on screening and other available information, that the child is not suspected of having a disability, the lead agency must ensure that notice is provided to the parent under § 303.421, including notice of the right to request and receive an evaluation at any time. Additionally, the commenters requested that this notice include a description of the difference between a ''screening,'' conducted pursuant to proposed § 303.303, and an ''evaluation,'' as required in proposed § 303.320.

Other commenters suggested that if the lead agency decides the child is not suspected of having a disability, the lead agency should be required to present this decision and the reasons for the decision to a parent in writing, but should not be required to provide this information through prior written notice under § 303.421. These commenters further recommended that the lead agency be required to offer an evaluation only after that decision is conveyed to the parent, and the parent disagrees with that determination and requests an evaluation.

One commenter stated that if a parent disagrees with a decision regarding a referral for evaluation, the parent should be entitled to appeal that decision using the due process procedures in subpart E of these regulations, but the lead agency should not be required to evaluate the child.

A few commenters requested that parents be informed verbally and in writing, in their native language or preferred method of communication, of their right to request a full evaluation of their child, including their right to bypass screening and go straight to an evaluation.

Discussion: New § 303.320 (proposed § 303.303) has been restructured, and a few provisions have been added, to address the commenters' concerns regarding screenings and a parent's right to request an evaluation. We have added new § 303.320(a)(1)(i) and (a)(1)(ii), stating that if the lead agency or EIS provider proposes to screen a child, it must provide the parent notice under § 303.421 of its intent to screen the child to determine whether the child is suspected of having a disability and obtain parental consent as required in § 303.420(a)(1) before administering the screening. That notice must explain the parent's right to request an evaluation under new § 303.321 (proposed § 303.320) at any time during the screening process.

We also have revised new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) to specify that when the lead agency provides notice to a parent under § 303.421 that, based on the screening or other available information, a child is not suspected of having a disability, the notice must describe the parent's right to request an evaluation.

Additionally, in new § 303.320(a)(3), we have retained the provision in proposed § 303.303(a)(4) to allow parents to request and consent to an evaluation when the lead agency or EIS provider determines that the child is not suspected of having a disability. We have revised this section to specify that parents may request, and consent to, an evaluation at any time during the screening process. This ensures that an evaluation may still be requested by the parent of a child for whom part C eligibility is not readily or easily apparent.

With regard to the comment that the notice provided to parents when the child is not suspected of having a disability should include an explanation of the differences between screening and evaluation, it is not necessary to add that language to new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) because this section requires that prior written notice pursuant to § 303.421 be provided to a parent when a child is not suspected of having a disability, and § 303.421(b) mandates that prior written notice be in sufficient detail to inform the parents about the action that is being proposed or refused. Therefore, we expect that the procedures involved in screening and evaluation will be explained to the parents through the prior written notice.

It is the Department's position that presenting a parent with a written decision that the child is not suspected of having a disability and the reasons for the decision in a manner that meets the prior written notice requirements in § 303.421(b) would ensure that parents are fully informed of their rights. We believe fully informing parents of their rights is a critical aspect of enhancing the capacity of families to meet the special needs of their infants and toddlers with disabilities, pursuant to section 631 of the Act and, thus, we have required lead agencies to ensure that parents are provided with prior written notice of any determination that their child is not suspected of having a disability.

A parent has the right to request an evaluation if the screening or other available information indicates that the child is not suspected of having a disability, instead of having to utilize the due process procedures in subpart E of these regulations to appeal that decision. The Department's experience indicates that parents often can identify or suspect developmental delays in their children that may not be identified through a screening. For this reason, parents should be able to request and receive an evaluation without the potential delay and expense of a due process hearing. We believe this approach facilitates a comprehensive child find system tasked with identifying all infants and toddlers with disabilities. Additionally, because a child is only eligible for part C services for a short period of time and providing services earlier rather than later can enhance the development of infants and toddlers with disabilities, time is of the essence with regard to identifying a child as an infant or toddler with a disability. Thus, it is important that parents retain the right to request an evaluation at any time during the screening process.

With regard to the comment that notice of the right to request an evaluation should be provided to the parent verbally and in writing, in the parent's native language or preferred method of communication, parental

notice of the right to request an evaluation must meet all of the requirements in § 303.421, including the native language requirement. The requirements in § 303.421 are discussed further in the *Analysis of Comments and Changes* section for subpart E of these regulations. We believe that the requirements in § 303.421 are comprehensive and sufficient to provide parents with an understanding of their rights, specifically with regard to their right to request an evaluation.

Changes: We have restructured this section and added language to new § 303.320(a) (proposed § 303.303(a)) to clarify that parents have an ongoing right to request an evaluation before, during, or after their child is screened. Specifically, we have added a new § 303.320(a)(1)(i) and (a)(1)(ii), stating that if the lead agency or EIS provider proposes to screen a child, it must (i) provide the parent notice under § 303.421 of its intent to screen the child to identify whether the child is suspected of having a disability (and include in the notice a description of the parent's right to request an evaluation under § 303.321 at any time during the screening process) and (ii) obtain parental consent as required in § 303.420(a)(1) before administering the screening. We also have revised new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) to specify that when the lead agency provides notice to a parent under § 303.421 that, based on the screening or other available information, a child is not suspected of having a disability, the notice must describe the parent's right to request an evaluation.

We have added to new § 303.320(a)(3) (proposed § 303.303(a)(4)) a provision clarifying that parents may request an evaluation at any time during the screening process.

Comment: A few commenters expressed concern that the amount of time used for screening could increase the time between referral and the initiation of services. The commenters requested that a timeline be imposed so that eligibility determinations would not be delayed. Some commenters requested clarifying that the 45-day timeline in new § 303.310 (proposed § 303.320(e)) starts prior to the screening, not after. Additional commenters expressed concern that while comprehensive statewide screening efforts could enhance the early identification of eligible children, the regulations do not adequately emphasize that screening efforts should not be used to deny or delay an eligibility determination from the lead agency.

Discussion: The timeline outlined in new § 303.310(a) (proposed § 303.320(e)) requires that any screening under § 303.320, if applicable, be completed within 45 days from the date the lead agency or EIS provider receives the referral of the child. Because screening by the lead agency is optional and is included in the 45-day timeline, the use of screening is not expected to cause a delay in determining a child's eligibility for services under part C of the Act, but rather to assist the lead agency and parent in determining whether a child is suspected of having a disability. With regard to the commenters' concern that the regulations in this part do not adequately emphasize that screening efforts should not be used to deny an eligibility determination, a parent has the right, under new § 303.320(a)(3) (proposed § 303.303), to request and receive an evaluation at any time during the screening process and must be notified of this right, under new § 303.320(a)(1)(i), at the beginning of the screening process. Therefore, the regulations protect parents with regard to eligibility determinations and sufficiently address the commenters' concern.

Changes: As previously discussed in response to comments on new § 303.310 (proposed § 303.320(e)), we have added a reference to screening as an activity that is subject to the 45-day timeline in § 303.310 (proposed § 303.320(e)).

Comment: A few commenters expressed concern that, under new § 303.320 (proposed § 303.303), lead agencies may use the results of screening procedures to determine eligibility for early intervention services and requested that these regulations explicitly require a full evaluation be conducted in order to determine eligibility for services under part C of the Act.

Discussion: New § 303.320 makes clear that the purpose of screening is to determine if a child is suspected of having a disability. If eligibility is to be determined, new § 303.321 requires that an evaluation (not screening) be used to determine eligibility. We believe these regulations are clear in their scope and purpose and decline to make the change requested by the commenters.

Changes: None.

Comment: A significant number of commenters requested additional clarification regarding the procedures that should be used to screen infants and toddlers. These commenters recommended that States should be required to ensure that professionals conducting the screening meet the requirements that apply to EIS providers. Some commenters requested that the regulations set a standard for personnel conducting the screening. Other commenters requested that States be required to use one standardized screening tool across the State in order to eliminate differences in screening procedures across jurisdictions.

Discussion: Proposed § 303.303(b)(2) provided that screening procedures include the administration of appropriate instruments by qualified personnel, who can assist in making the identification outlined in new § 303.320(a). We have revised that language, in new § 303.320(b)(2), to indicate that personnel who conduct screening of a child must be trained to administer appropriate screening instruments. We made this revision to ensure that personnel, such as paraprofessionals or other individuals who are trained to administer a specific screening instrument, may conduct screenings.

Concerning the request that we require a State to use one standardized screening tool across the State, it is the Department's position that requiring or recommending the use of specific measurement tools, including requiring that a State use only one measurement tool throughout the State, is not appropriate because individual child differences should be taken into account when selecting appropriate instruments.

Changes: We have deleted the reference to ''qualified personnel'' in new § 303.320(b)(2) (proposed § 303.303(b)(2)), and added a reference to ''personnel trained to administer those instruments.''

Comment: A few commenters requested that language be included in proposed § 303.303 to stipulate that screening is not required for infants and toddlers with established physical or mental conditions.

Discussion: Screening is intended to be a tool to assist the lead agency and EIS providers determine whether an infant or toddler is suspected of having a disability and is in need of an evaluation. If a child has a diagnosed physical or mental condition, an evaluation or screening may not be needed to determine eligibility. We specifically provide in new § 303.321(a)(3)(i) that a child's medical and other records may be used to establish eligibility (without conducting an evaluation of the child) under this part if those records indicate that the child is an infant or toddler with a disability in § 303.21, which includes children with diagnosed conditions, developmental delays, and, at the State's option, at-risk children. For children with established diagnosed

conditions, screening is not needed because records establish that the child is not only suspected of having a disability, but in fact has a disability.

Changes: None.

Comment: A few commenters requested that proposed § 303.303(a)(2) be amended to provide that parents be offered the option of an evaluation in cases where the results of their child's screening indicate that the child is suspected of having a disability as opposed to requiring the lead agency to evaluate the child.

Discussion: We understand the commenters' concerns and did not intend this provision to require evaluations in all cases where the results of a screening indicate that a child may have a disability. To clarify our intent, we have added language to new § 303.320(a)(2) (proposed § 303.303(a)(2)) stating that if a parent consents to screening and the screening or other available information indicates that the child is suspected of having a disability, after notice is provided under § 303.421 and once parental consent is obtained as required in § 303.420, an evaluation and assessment of the child must be conducted under new § 303.321 (proposed § 303.320).

Changes: New § 303.320(a)(2) (proposed § 303.303(a)(2)) has been restructured to clarify that, after screening, notice under § 303.421 and parental consent are required before an infant or toddler can be evaluated.

Comment: A few commenters recommended adding language to new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) to require notification by the lead agency to the caregivers of infants and toddlers and the agencies assigned to care for them when the lead agency knows that the infant or toddler is in foster care or is a ward of the State. The commenters noted that, in these situations, it is to the child's advantage to have relevant information given to the caregiver and the agency responsible for the child.

Discussion: The definition of *parent* in § 303.27 includes a biological or adoptive parent of a child; a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; a guardian generally authorized to act as the child's parent, or authorized to make early intervention, educational, health, or developmental decisions for the child (but not the State if the child is a ward of the State); an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or a surrogate parent who has been appointed in accordance with § 303.422 or section 639(a)(5) of the Act.

For a child in foster care who has a foster parent that meets the definition of a *parent* in § 303.27, the child's foster parent must be notified, pursuant to § 303.421 and new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)), if the child is screened and not suspected of having a disability.

For a child who is a ward of the State (which includes a foster child who does not have a foster parent that meets the definition of a *parent* in § 303.27), protections under § 303.422, regarding surrogate parents, apply. Specifically, each lead agency must ensure that the rights of a child are protected when the child is a ward of the State. The lead agency must determine whether a child needs a surrogate parent and if so, assign a surrogate parent to the child. If a ward of the State has a surrogate parent, this parent must be notified, pursuant to § 303.421 and new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)), if the child is screened and not suspected of having a disability. Therefore, it is the Department's position that further clarification is unnecessary because the commenters' concerns about notification for infants and toddlers who are in foster care or wards of the State are adequately provided for under this part.

Changes: None.

Comment: A few commenters stated that the requirements in new § 303.320(a)(3) (proposed § 303.303(a)(4)), which allow a parent to request an evaluation even after the lead agency determines, using its screening procedures, that the child is not suspected of having a disability, would diminish the cost effectiveness of screening.

Discussion: Screening under new § 303.320 (proposed § 303.303) is not required under the Act; rather, it is an option that a State may choose to include as a part of its comprehensive child find system. An evaluation under new § 303.321 (proposed § 303.320) entails more extensive requirements than the screening under § 303.320 (proposed § 303.303) and, thus, could yield more information about whether a child is an infant or toddler with a disability than a screening may. In light of this and the fact that section 635(a)(5) of the Act requires that each State's child find system ensures rigorous standards for appropriately identifying infants and toddlers with disabilities, it is important that parents have the right to request an evaluation if screening does not result in their child being suspected of having a disability.

Changes: None.

Comment: Several commenters recommended that the regulations require re-screening every six months until the age of three if, through the screening process under new § 303.320 (proposed § 303.303), a child is not suspected of having a disability. The commenters noted that children grow and change dramatically in their first three years of life and that developmental delays are often difficult to recognize at a specific point in time.

Discussion: New § 303.302 (proposed § 303.301) provides that each State must have a comprehensive child find system that ensures that all infants and toddlers with disabilities in the State who are eligible for early intervention services under this part (including children who have been screened in the past and those who have never been screened) are identified, located, and evaluated. This section includes specific requirements to facilitate identification, location, and evaluation of all of these children.

For children who are screened and not suspected of having a disability, all of the general child find requirements in new § 303.302 (proposed § 303.301) apply and, in addition, the lead agency or EIS provider must ensure that the parent is provided notice under § 303.421, and that, pursuant to new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)), the notice describes the parent's right to request an evaluation. These provisions provide sufficient protection for children who are screened and not suspected of having a disability.

Further, a lead agency may adopt specific screening procedures, consistent with the requirements in new § 303.320 (proposed § 303.303). As part of these procedures, a State could mandate re-screening or other protections for children who have been screened but are not suspected of having a disability. It is important for a lead agency to have some flexibility in determining how best to implement screening in its State and, therefore, it is the Department's position that mandating re-screening is not appropriate.

Changes: None.

Comment: Two commenters requested clarification as to why the phrase ''except for parents'' was included in new § 303.320(b)(1) (proposed § 303.303(b)(1)), given that parents are a vital source of information in identifying whether a child is suspected of having a disability.

Discussion: We agree that parents are a valuable source of information in determining whether a child is suspected of having a disability. Therefore, we have removed the parenthetical in new § 303.320(b)(1) (proposed § 303.303(b)(1)).

Changes: The phrase ''except for parents'' has been removed from new § 303.320(b)(1) (proposed § 303.303(b)(1)).

Comment: None.

Discussion: To clarify that screening may be conducted by the lead agency or EIS provider, we have decided to use the terms ''lead agency'' or ''EIS provider'' in lieu of the reference to ''public agency, early intervention service provider, and designated primary source'' in new § 303.320(b)(1) (proposed § 303.303(b)(1)).

Changes: We have removed the words ''public agency, early intervention service provider, or designated primary source'' from new § 303.320(b)(1) (proposed § 303.303(b)(1)) and replaced them with the words ''lead agency or EIS provider.''

Comment: A commenter recommended strengthening the language under new § 303.320(b)(2) (proposed § 303.303(b)(2)) to clarify the meaning of ''appropriate instruments.'' The commenter recommended that the screening instruments administered must have established validity and reliability to use with children under the age of three. A few commenters requested that new § 303.320(b) (proposed § 303.303(b)) require screening instruments to be peer-reviewed and research-based. One commenter recommended including reliable and valid parent-report instruments as examples of screening instruments in new § 303.320(b)(2) (proposed § 303.303(b)(2)).

Discussion: New § 303.320(b)(2) (proposed § 303.303(b)(2)) requires the administration of appropriate instruments by personnel trained to administer those instruments. Given that screening instruments vary by State—and often even within a State—and the selection of screening instruments is based on a variety of factors, it is the Department's position that it is inappropriate for these regulations to further specify the screening instruments to be used. States need the flexibility to identify which screening instruments are used. Screening instruments for children under the age of three rely heavily on parent reports. Thus, we do not believe that it is necessary to clarify, or appropriate to limit, the types of screening instruments a lead agency may use.

Changes: None.

Evaluation of the Child and Assessment of the Child and Family (New § 303.321) (Proposed § 303.320)

Comment: Several commenters noted that there were significant changes in proposed § 303.320 that did not appear to have a basis in the Act. Commenters stated that changing the definitions of evaluation and assessment procedures at this point would have major implications for State rules, policies, procedures, professional development, parent training, data systems, and State monitoring systems.

Discussion: The definitions of *evaluation* and *assessment* in proposed § 303.320(a), (b), and (c) were not substantively different from current § 303.322(b)(1) through (b)(2); instead, the changes made in proposed § 303.320 were intended to clarify the current requirements. However, because of the concerns raised by some of the commenters, we have revised the definitions in new § 303.321(a)(2) (proposed § 303.320(a), (b), and (c)) to provide further clarification. Specifically, we have clarified that evaluation means the procedures used by qualified personnel to determine a child's initial and continuing eligibility under this part, consistent with the definition of *infant or toddler with a disability* in § 303.21. Also, we have clarified that assessment means the ongoing procedures used by qualified personnel to identify a child's unique strengths and needs and the early intervention services appropriate to meet those needs throughout the period of a child's eligibility under this part and includes the assessment of the child, consistent with new § 303.321(c)(1) (proposed § 303.320(b)) and the assessment of the child's family, consistent with new § 303.321(c)(2) (proposed § 303.320(c)).

We have further clarified the definition of assessments in new § 303.321(a)(1)(ii) to incorporate the language from section 636(a)(1) and (a)(2) of the Act, which requires each statewide system to provide for each eligible child: (1) A multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet those needs; and (2) A family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the infant or toddler.

In making these revisions to the definitions of *evaluation* and *assessment,* we determined it was also appropriate to clarify what is meant by the terms ''initial evaluation'' and ''initial assessment.'' Other sections of these regulations, particularly in the context of the 45-day timeline reflected in new § 303.310 (proposed § 303.320(e)), often refer to the initial evaluation and the initial assessment. For this reason, we have clarified in new § 303.321(a)(2)(i) that the term ''initial evaluation'' refers to the child's evaluation to determine his or her initial eligibility under this part. We have clarified in new § 303.321(a)(2)(ii) that the term ''initial assessment'' refers to assessments of the child and the family conducted prior to the child's initial IFSP meeting, both of which must be conducted within the 45-day timeline described in new § 303.310 (proposed § 303.320(e)), even if family members other than the parent agree to participate but are unavailable to complete the family assessment. We do not believe that these definitions are new concepts under the part C program; rather, we view them as clarifying the terminology used so that the field can more easily distinguish between evaluations and assessments that occur throughout a child's time in the part C program and the initial evaluation and initial assessment that must be completed, along with the initial IFSP meeting, within 45 days after the child is referred to the part C program.

Changes: The definitions of *evaluation* and *assessment* in new § 303.321(a)(2) (proposed § 303.320(a), (b), and (c)) have been clarified to reflect the language in section 636(a)(1) and (a)(2) of the Act. We also have added definitions of the terms *initial evaluation* and *initial assessment* to this section.

Comment: A few commenters requested clarification on the distinction between an assessment and an evaluation, as used in new § 303.321(a) (proposed § 303.320(a), (b), and (c)).

Discussion: We agree with the commenters regarding the need for clarification and, therefore, have revised new § 303.321 (proposed § 303.320). An *evaluation,* as defined in new § 303.321(a)(2)(i) (proposed § 303.320(a)(2)(i)), means the procedures used by qualified personnel to determine a child's initial and continuing eligibility under this part, and can include, pursuant to new § 303.321(b) (proposed § 303.320(a)(2)), activities such as administering an evaluation instrument; taking the child's history (including interviewing the parent); identifying the child's level of functioning in each of the

developmental areas in § 303.21(a)(1); gathering information from other sources such as family members, other care-givers, medical providers, social workers, and educators, if necessary, to understand the full scope of the child's unique strengths and needs; and reviewing medical, educational, or other records.

We recognize that the three separate references to assessments in proposed § 303.320(a) (assessment of the child, assessment of the family, and assessment of service needs) may have caused confusion. To facilitate understanding, we have defined the term *assessment,* in new § 303.321(a)(2)(ii), to mean the ongoing procedures used by qualified personnel to identify the child's unique strengths and needs and the early intervention services appropriate to meet those needs throughout the period of a child's eligibility under this part and to include the assessment of the child and the assessment of the child's family.

We also have removed all general references to assessment of service needs as used in the proposed regulations. These changes are further discussed in the *Analysis of Comments and Changes* section addressing comments received on proposed § 303.320(d).

Changes: We have reorganized and revised new § 303.321(a) (proposed § 303.320(a), (b), and (c)) to set out clear definitions of the terms *evaluation* and *assessment.*

Comment: One commenter requested that the final regulations clarify that the assessment in new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii)) is a ''developmental'' assessment of the child.

Discussion: The assessment of the child includes the identification of the child's needs in each of the developmental areas in § 303.21(a)(1), the definition of an *infant or toddler with a disability;* however, the assessment also includes identifying the unique strengths and needs of the child and the early intervention services appropriate to meet those needs; reviewing the results of an evaluation; and conducting personal observations of the child. Therefore, it is the Department's position that limiting the assessment of the child to a developmental assessment is not appropriate.

Changes: None.

Comment: Some commenters expressed concern about the language in new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(iii)), regarding the assessment of the family. One commenter stated that the requirement to conduct a family assessment before determining an infant or toddler's eligibility presents an undue and unnecessary burden on State part C programs. The commenter recommended that language be added to the regulations to ensure that family assessments do not have to be conducted unless an infant or toddler is determined to be eligible for early intervention services. Two commenters requested that we revise this section to clarify the assessments that must be conducted as part of an initial evaluation of a child referred under this part.

Discussion: An assessment of a child and family as defined in new § 303.321(a)(1), (a)(2)(ii), (a)(3), (a)(4), and (c) (proposed § 303.320(a)(1), (a)(2)(iii), (a)(3)(b), and (c)) is only required if the child is determined to be eligible to receive services under this part. We have added language to new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii) and (a)(1)(iii)) to make this clear.

Changes: We have revised the introduction to new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii) and (a)(1)(iii)) to read ''If the child is determined eligible as an infant or toddler with a disability as defined in § 303.21.''

Comment: Several commenters expressed concern that proposed § 303.320(a)(1)(iv) may be inconsistent with section 636(a) and (d)(4) of the Act with regard to when service needs are identified. These commenters were concerned that determining service needs prior to the IFSP meeting could preempt important decisions that need to be made as part of the IFSP process. One commenter recommended that the language in current § 303.322(c)(3)(iii), which requires the ''assessment of the unique needs of the child * * * including the identification of services appropriate to meet those needs'' be retained instead. Several commenters recommended that we replace the term ''service needs'' in proposed § 303.320(a)(1)(iv) with the phrase ''unique needs in each of the developmental areas,'' which is used in current § 303.322(c)(3)(iii). Other commenters did not support the assessment of service needs as part of the evaluation process, because this assessment typically is part of the IFSP process, completed after the IFSP Team has determined child and family outcomes.

Discussion: Based on commenters' requests for clarification regarding what must be included in an assessment, we have revised new § 303.321(a)(2)(ii) and (c)(1) (proposed § 303.320(b), (c), and (d)) to provide that an assessment means the ongoing procedures used by qualified personnel to identify the child's unique strengths and needs and the early intervention services appropriate to meet those needs. We also have clarified that an assessment of the child must include a review of the results of the evaluation conducted under new § 303.321(b) (proposed § 303.320(a)(2)), personal observations of the child, and the identification of the child's needs in each of the developmental areas in § 303.21(a)(1). Because we have revised new § 303.321(a)(2)(ii) and (c)(1) (proposed § 303.320(b), (c), and (d)) to state that the assessment of the child must include identification of the child's unique strengths and needs and the early intervention services appropriate to meet those needs, we have removed the language requiring an assessment of service needs from new § 303.321(a)(1) (proposed § 303.320(a)(iv)) and have removed proposed § 303.320(d) from the final regulations. The results of the assessment of the child, together with the results of the assessment of the family, are the basis for the IFSP Team's determination of which early intervention services would be appropriate to meet the needs of the infant or toddler with a disability and his or her family.

Regarding commenters' concern that using assessments to identify the early intervention services appropriate for a child prior to an IFSP meeting is inconsistent with the Act, section 636(a) of the Act, provides that a statewide system must include a multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs. Section 636 of the Act states that the IFSP shall contain a statement of specific early intervention services and §§ 303.343 and 303.344 require the IFSP Team (which includes the parent) to identify the early intervention services appropriate to meet the child's needs at the IFSP Team meeting. This requirement is not replaced by the assessment; rather, the assessment serves to inform the IFSP Team process by identifying the developmental strengths and needs of the child. We believe that this facilitates rather than preempts important decisions that need to be made through the IFSP process.

Changes: The procedures for assessment of the child have been changed in new § 303.321(a)(1)(ii) and (c)(1) (proposed § 303.320(b), (c), and (d)) to include the identification of the child's unique strengths and needs and the early intervention services

appropriate to meet those needs. Further, new § 303.321(c)(1) (proposed § 303.320(b), (c), and (d)) has been revised to clarify that an assessment of the child must include a review of the results of the evaluation conducted under new § 303.321(b) (proposed § 303.320(a)(2)), personal observations of the child, and the identification of the child's needs in each of the developmental areas in § 303.21(a)(1).

Comment: A few commenters requested that new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)) be clarified to require that a child, prior to the IFSP meeting, receive an assessment in accordance with new § 303.321(c) (proposed § 303.320(b) and (c)) even when medical records and other information are adequate to determine eligibility without an evaluation in order to inform IFSP members of the child's unique strengths and needs.

Discussion: We agree that clarification is needed because we inadvertently referred in the proposed section to ''assessment'' instead of ''evaluation'' in the parenthetical ''(without conducting an assessment of the child and the family).'' Additionally, regardless of whether a child's eligibility is determined through medical records or an evaluation, once a child is determined to be eligible to receive services under part C of the Act, initial assessments of the child and family must be completed.

Activities that are the basis of the initial assessment of the child may occur with the initial evaluation of the child. We have added the phrase ''if the child is determined eligible as an infant or toddler with a disability as defined in § 303.21'' to new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii) and (a)(1)(iii)) to clarify that an assessment is required once a child is determined eligible, regardless of how eligibility is determined. We also have added a sentence to new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)) to further explain that, if a child's part C eligibility is established through a review of his or her medical or other records, the lead agency or EIS provider must conduct assessments, including the family assessment, pursuant to new § 303.321(c) (proposed § 303.320).

Changes: As noted elsewhere, we have added the phrase ''if the child is determined eligible as an infant or toddler with a disability as defined in § 303.21'' to new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii) and (a)(1)(iii)). We also have added a sentence to new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)) to further explain that, if a child's part C eligibility is established under that paragraph, the lead agency or EIS provider must conduct assessments, including the family assessment, pursuant to new § 303.321(c) (proposed § 303.320).

Comment: One commenter expressed concern about proposed § 303.320(a)(3), which required that evaluations and assessments of the child and family be conducted in the child's or family's native language, as appropriate. The commenter stated that the phrase ''as appropriate'' weakens the requirement. Another commenter requested that the regulations restore the phrase ''unless it is clearly not feasible to do so'' from current § 303.323(a) and, further, that these regulations use the phrase consistently when referencing native language. Two commenters requested that we add ''or other mode of communication'' after ''native language'' in proposed § 303.320(a)(3) to ensure that the native language requirement is not narrowly interpreted to exclude sign language.

One commenter requested that, because of the family-centered nature of the part C program, the assessment should be conducted in the family's native language, regardless of whether the child has or uses a different native language.

Discussion: For clarity and in response to the comments about removing the phrase ''as appropriate'' and adding the phrases ''unless clearly not feasible to do so'' and ''other mode of communication'' to proposed § 303.320(a)(3), regarding conducting evaluations and assessments of the child, we have deleted the phrase ''in the child's or family's native language (as appropriate)'' from new § 303.321(a)(4) (proposed § 303.320(a)(3)), and added new provisions in §§ 303.321(a)(5) and (a)(6).

We specify in new § 303.321(a)(5) that, unless clearly not feasible to do so, all evaluations and assessments of a child must be conducted in the native language of the child, in accordance with the definition of *native language* in § 303.25. We also specify in new § 303.321(a)(6) that, unless clearly not feasible to do so, family assessments must be conducted in the native language of the family members being assessed, in accordance with the definition of *native language* in § 303.25. The ''unless clearly not feasible to do so'' standard acknowledges that there may be instances when conducting evaluations or assessments in the native language of the child, parent, or family member is not possible because, for example, interpreters for a particular language cannot be located, despite best efforts. If on-site interpreters cannot be located for a particular language despite best efforts, other methods of communication in the native language, such as using telephonic interpreters, should also be explored when an interpreter is needed and appropriate, for the evaluation and assessment.

We do not agree with the commenter that evaluations and assessments of the child should only be conducted in the parent's or family's native language, regardless of whether the child has or uses a different language. Section 303.321(a)(5), together with § 303.25(a)(2), recognize that while it sometimes may be appropriate to conduct an evaluation or assessment of an infant or toddler in the language normally used by the child's parents, in other cases it may be determined to be developmentally appropriate to evaluate or assess the child in the language normally used by the child if that language differs from his or her parents. For example, evaluations or assessments of infants are often conducted in the native language of the parent because the parents are present and infants are pre-verbal both in their expressive and receptive language abilities. In contrast, many evaluations and assessments of toddlers (*i.e.,* children who are between the ages of one and three) are conducted in the toddler's native language, rather than the native language of the parent. We believe that ultimately the qualified personnel conducting the evaluation or assessment is in the best position to determine which language is developmentally appropriate—-that of the child or the parent.

Changes: We have removed the phrase ''in the child's or family's native language (as appropriate)'' from new § 303.321(a)(4) (proposed § 303.320(a)(3)), and added new provisions in §§ 303.321(a)(5) and (a)(6). We specify in new § 303.321(a)(5) that, unless clearly not feasible to do so, all evaluations and assessments of a child must be conducted in the native language of the child, in accordance with the definition of *native language* in § 303.25.

We also specify in new § 303.321(a)(6) that, unless clearly not feasible to do so, family assessments must be conducted in the native language of the family members being assessed, in accordance with the definition of *native language* in § 303.25.

Comment: A few commenters recommended that subpart D include provisions that clearly specify that multidisciplinary evaluations include the participation of qualified personnel with knowledge of the disability that may be indicated, particularly given the inclusion of informed clinical opinion

in new § 303.321(a)(3)(ii) (proposed § 303.320(b)(1) and (b)(2)). The commenters stated that for clinical opinion to be valid, personnel must have knowledge and experience in the disability presented by the child. For infants and toddlers with a known disability (*e.g.,* visual impairment), the inclusion of personnel with knowledge and training in that area of disability increases the accurate interpretation of results and is consistent both with the Act and the part B regulations.

Discussion: The term *evaluation* is defined in new § 303.321(a)(2)(i) as procedures used by qualified personnel to determine a child's initial and continuing eligibility under part C of the Act, consistent with the definition of infant or toddler with a disability in § 303.21. The definition of *qualified personnel* in § 303.31 requires that personnel meet State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are conducting evaluations or assessments or providing early intervention services. We believe that new § 303.321(a)(2)(i), in conjunction with the definition of *qualified personnel* in subpart A of these regulations, adequately address the commenters' concerns and, therefore, repeating the definition in this section is not necessary.

Please note, regarding the commenters' concern about clinical opinion, for an infant or toddler with a diagnosed physical or mental condition that has a high probability of resulting in a developmental delay (*i.e.,* known disability), clinical opinion may not be necessary to determine eligibility because, under new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)), the child's medical or other records may be sufficient to establish eligibility. For a child without a diagnosed physical or mental condition that has a high probability of resulting in a developmental delay, clinical opinion may be used in evaluating a child to establish eligibility but it may not be used to negate eligibility established through the use of other appropriate evaluation instruments.

Changes: None.

Procedures for Assessment of the Child and Family (New § 303.321(c)) (Proposed § 303.320(b) and (c))

Comment: Two commenters recommended adding language to new § 303.321(c) (proposed § 303.320(b) and (c)) to require the qualified personnel who perform the assessment of a child to be from disciplines that relate to the concerns and needs for which the child was referred for part C services.

Discussion: As defined in § 303.321(a)(2)(ii), the term *assessment* means the ongoing procedures used by qualified personnel to identify the child's unique strengths and needs and the early intervention services appropriate to meet these needs throughout the period of the child's eligibility under this part. These qualified personnel must review the results of the evaluation conducted under new § 303.321(b) (proposed § 303.320(a)(2)); observe the child; and identify the child's needs in each of the developmental areas in § 303.21(a)(1). *Qualified personnel,* as defined in § 303.31, means personnel who have met State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are conducting evaluations or assessments, or providing early intervention services. Given that the term assessment encompasses the assessment of the areas of concern and need for which a child was referred to part C services, and that personnel must be qualified, under § 303.31, in the areas in which they are providing an assessment, the regulations sufficiently address the commenters' concern. For this reason, we have not made the requested change.

Changes: None.

Comment: One commenter requested clarification as to whether informed clinical opinion in new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)) was an objective criterion or an assessment strategy separate from other objective criteria. Some commenters suggested that a more detailed description of informed clinical opinion than the one used in new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)) is needed. These commenters recommended that the Department adopt the definition of informed clinical opinion used by the National Early Childhood Technical Assistance Center (NECTAC). NECTAC describes informed clinical opinion as the fusion of the assessment team's knowledge and experience with all the information collected during an assessment, including informal measures, such as interviews with parents or observation of the child, and standardized measures such as test scores. Another commenter recommended that States be allowed to define informed clinical opinion based on the definition of developmental delay for the State.

Lastly, a few commenters requested clarification of the last phrase of new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)), which states that informed clinical opinion may not negate the results of assessment instruments used to establish eligibility.

Discussion: As set forth in new § 303.321(a)(3)(ii), qualified personnel must use their informed clinical opinion when conducting an evaluation or an assessment of a child. The use of informed clinical opinion by qualified personnel is neither an objective criterion nor a separate assessment strategy. Rather, informed clinical opinion is the way in which qualified personnel utilize their cumulative knowledge and experience in evaluating and assessing a child and in interpreting the results of evaluation and assessment instruments.

With regard to allowing States to define informed clinical opinion based on that State's definition of developmental delay, we note that all States must allow qualified personnel, when conducting evaluations, to use their informed clinical opinion to determine whether the child meets the State's definition of developmental delay. Given the Department's monitoring experience in States where qualified personnel are not permitted to use their informed clinical opinion as a separate basis to establish eligibility, we have set forth in new § 303.321(a)(3)(ii) that such personnel must be able to use informed clinical opinion as an alternate basis for establishing eligibility. Permitting informed clinical opinion to serve as a separate basis to establish a child's eligibility under part C of the Act is important given that standardized instruments may not capture the extent of a child's delay. The purpose of new § 303.321(a)(3)(ii) is to alleviate the confusion and to expressly permit qualified personnel to use their informed clinical opinion to establish a child's eligibility for early intervention services under part C of the Act, even when other instruments fail to identify or confirm the level of developmental delay to establish part C eligibility.

Finally, we agree with the commenter that clarification is needed regarding the last phrase of new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)), which states that informed clinical opinion may not negate the results of assessment instruments used to establish eligibility. We inadvertently referred to ''assessment'' instruments instead of ''evaluation'' instruments in proposed § 303.320(b)(2)). We have corrected this in new § 303.321(a)(3)(ii) to state that in no case may informed clinical opinion be used to negate the results of

evaluation instruments used to establish eligibility.

Changes: We have clarified in new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)) that qualified personnel must use their informed clinical opinion when conducting an evaluation or assessment of the child and replaced the phrase ''assessment instruments'' with the phrase ''evaluation instruments.''

Comment: One commenter recommended that it should remain a State option to determine when a low test score for a child, in a domain such as adaptive behavior, is due to cultural preferences rather than a true delay.

Discussion: All evaluations and assessments of a child and family under new § 303.321(a)(4) must be selected and administered so as not to be racially or culturally discriminatory. In conducting an evaluation and assessment, the lead agency must ensure that they are not culturally discriminatory and must permit qualified personnel to use informed clinical opinion in interpreting the results of evaluation and assessment instruments.

Changes: None.

Procedures for Assessment of the Family (New § 303.321(c)) (Proposed § 303.320(c))

Comment: A number of commenters stated that the language in proposed § 303.320(c) regarding voluntary family assessments appeared to be something that is done ''to'' families and not ''with'' families. The commenters encouraged the Department to consider the term ''family-directed assessment'' in the regulations when referring to a family assessment in order to make it clear that the family is a primary partner in the process.

One commenter suggested that the family assessment in new § 303.321(c)(2) (proposed § 303.320(c)) be based on information obtained through the use of assessment tools, voluntary personal interviews, or other appropriate methods. Another commenter recommended that language be added to new § 303.321(c)(2)) (proposed § 303.320(c)) to ensure culturally competent services, including an awareness and respect of cultural differences in family values and child rearing practices.

Discussion: We have restructured new § 303.321(c)(2) (proposed § 303.320(c)) to identify both the purpose and the requirements of the family assessment, which requirements are set forth in new § 303.321(c)(2)(i) through (c)(2)(iii). We agree with commenters and have added the term ''family-directed assessment'' from section 636(a)(2) of the Act to new § 303.321(c)(2) to ensure that the identification of a family's resources, priorities, and concerns are family-directed.

Concerning the commenter's request to add ''other appropriate methods,'' new § 303.321(c)(2)(ii) (proposed § 303.320(c)) requires family assessments to be based on information obtained through an assessment tool and also on information provided by the family through a personal interview. Nothing in this provision would preclude the use of additional appropriate methods provided that the family assessment includes the use of an assessment tool and personal interview pursuant to new § 303.321(c)(2)(ii) (proposed § 303.320(c)). We do not believe it is appropriate to require all family assessments to use ''other appropriate methods.''

Concerning the comment on culturally competent services, the requirements in § 303.321(c)(2)(i) through (c)(2)(iii) ensure that each family is involved and has the opportunity to meet with a lead agency or EIS provider to identify their priorities and concerns regarding the development of the child (*i.e.,* by participating in the assessment, by providing information in response to the assessment tool and personal interview, and by providing a description of its resources, priorities, and concerns related to enhancing the child's development). We believe family involvement can help ensure that services that are identified in the IFSP are relevant and culturally competent.

Changes: We have restructured new § 303.321(c)(2)(i) through (c)(2)(iii) (proposed § 303.320(c)) to list the requirements of a family assessment as follows: (1) Be voluntary on the part of each family member participating in the assessment; (2) Be based on information obtained through an assessment tool and also through an interview with those family members who elect to participate in the assessment; and (3) Include the family's description of its resources, priorities, and concerns related to enhancing the child's development.

Comment: Two commenters requested that we emphasize the important role of siblings by including them in new § 303.321(c)(2) (proposed § 303.320(c)). Other commenters agreed and, in addition to siblings, requested that new § 303.321(c)(2) (proposed § 303.320(c)) include a reference to grandparents, other family members, and others who take on roles, responsibilities, or functions traditionally taken on by family members.

Discussion: New § 303.321(c)(2) (proposed § 303.320(c)) is based on section 636(a)(2) of the Act, which requires a family-directed assessment of the resources, priorities, and concerns of the family. Including a reference to siblings or other individuals who take on the roles, responsibilities, or functions traditionally performed by family members is not necessary. The term ''family'' is not exclusive and, therefore, this term, as it is used in new § 303.321(c)(2) (proposed § 303.320(c)), would cover any of the individuals mentioned by the commenters, such as siblings. Not defining this term will allow individual families to define the term in a manner that best meets the unique needs of the child involved.

Changes: None.

Determination That a Child Is Not Eligible (New § 303.322)

Comment: None.

Discussion: New § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) outlines the process a lead agency must follow if, through screening, the lead agency determines that a child is not suspected of having a disability under this part. The proposed regulations did not specify the procedures a lead agency must follow if it determines, through an evaluation, that a child is *not* a child with a disability. We have added a new § 303.322 to clarify the procedures a lead agency must follow if, after an evaluation is conducted under new § 303.321 (proposed § 303.320), it determines that a child is not eligible for services under this part. Specifically, a lead agency must provide the parent with prior written notice required by § 303.421, and include in the notice information about the parent's right to dispute the eligibility determination through dispute resolution mechanisms, such as requesting a due process hearing or mediation or filing a State complaint.

Changes: New § 303.322 has been added to identify the procedures the lead agency must follow if, after conducting an evaluation, it determines that a child is not eligible for services under this part.

Individualized Family Service Plans—General (§ 303.340)

Comment: Many commenters expressed concern about the definition of *multidisciplinary* in proposed § 303.24 because they believed this definition, used in the context of multidisciplinary IFSP Teams, could result in an IFSP Team being comprised of only one member other than the parent. These commenters argued that such a result is neither consistent with best practices nor the requirements in

section 636(a)(3) of the Act regarding a multidisciplinary team developing the IFSP.

Discussion: As noted in the *Analysis of Comments and Changes* section for § 303.24, we agree with commenters regarding the definition of multidisciplinary as it applies to IFSP Teams and have added in § 303.340, concerning the development, review, and implementation of an IFSP, a reference to the ''multidisciplinary team, which includes the parents'' to reflect the requirements in section 636(a)(3) of the Act. The IFSP participant requirements in § 303.343, together with §§ 303.24(b) and 303.340, clarify that the multidisciplinary IFSP Team requires the involvement of the parent and two or more individuals from separate disciplines or professions, one of whom must be the service coordinator.

Changes: We have added after the reference to ''IFSP'' in § 303.340 the following phrase ''developed by a multidisciplinary team, which includes the parents'' from section 636(a)(3) of the Act.

Procedures for IFSP Development, Review, and Evaluation (§ 303.342)

Comment: None.

Discussion: Based upon further review of § 303.342(a), we have determined that it is not entirely accurate to refer to children who have ''been evaluated for the first time and determined to be eligible under this part'' in the lead-in to this section because, as stated in new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)), a child's part C eligibility can be established through a review of his or her medical or other records, without the child being evaluated.

Changes: We have deleted the phrase ''for a child who has been evaluated for the first time and determined to be eligible under this part'' from § 303.342(a) and have inserted, in its place, ''for a child referred to the part C program and determined to be eligible under this part as an infant or toddler with a disability.''

Comment: Some commenters recommended that § 303.342 be revised to require IFSP Teams, in developing the IFSP of an infant or toddler with a disability, to consider the same special factors that IEP Teams must consider under 34 CFR 300.324(a)(2) of the part B regulations. These commenters suggested requiring every IFSP Team to consider strategies to address the following: (1) Specific behaviors of an infant or toddler with a disability whose behavior impedes his or her development or the development of other infants or toddlers with disabilities; (2) the language needs of an infant or toddler with a disability who has limited English proficiency; (3) the need for instruction in braille for an infant or toddler who is blind or visually impaired; (4) the communication needs of an infant or toddler who is deaf or hard of hearing, including instruction in his or her language and communication mode; and (5) whether the infant or toddler with a disability needs assistive technology devices and services to ensure that infants and toddlers with disabilities in these groups receive appropriate services to meet their language, literacy, and other needs.

Discussion: The commenters referenced the special factors in 34 CFR 300.324(a)(2) of the part B regulations, which are from 614(d)(3)(B) of the Act. Part C of the Act does not contain similar specific language regarding special factors that must be considered by the IFSP Team. However, it is the Department's position that the regulations, as written, adequately address the commenters' concerns. Section 303.344(d)(1) requires that each IFSP include a statement of the specific early intervention services that are necessary to meet the unique needs of the child and the family to achieve the results or outcomes identified in the IFSP. Therefore, each IFSP Team must explore any factor (including, as applicable and appropriate, the factors included in 34 CFR 300.342(a)(2)) that are relevant to an infant or toddler with a disability achieving the results or outcomes identified in his or her IFSP.

Changes: None.

Comment: None.

Discussion: For clarification, we have added the words ''results or'' before ''outcomes'' and added ''identified in the IFSP'' after the reference to ''outcomes'' and ''services'' in § 303.342(b)(1)(i) and (b)(1)(ii).

Changes: We have added the words ''identified in the IFSP'' after the word ''outcomes'' and the word ''services,'' in § 303.342(b)(1)(i) and (b)(1)(ii), respectively.

Comment: One commenter recommended that the regulations retain Note 2 following current § 303.344. This note recognizes the importance of the variety of roles that family members play in enhancing a child's development throughout the IFSP process, the importance of addressing the needs of the family in the IFSP process in a collaborative manner, and the parents' retention of the ultimate decision in determining whether they, their child, or other family members will accept or decline services under this part.

Discussion: Including Note 2 from current § 303.344 is not necessary because part of the note (regarding a parent's right to accept or decline services) is reflected in § 303.342(e) and the remainder of the note does not reflect regulatory requirements but, instead, is explanatory. As reflected in § 303.342(e), parents make the ultimate decision as to whether they, their child, or other family members will accept or decline services under this part.

Removal of the note does not in any way change the policy of the Department. We continue to believe that best practice dictates that throughout the process of developing and implementing IFSPs for an infant or toddler with a disability, the lead agency, service coordinators, and EIS providers need to recognize the variety of roles that family members play in enhancing a child's development. Additionally, addressing the needs of the family in the IFSP process is crucial and should be determined in a collaborative manner with the full agreement and participation of the parent of the infant or toddler.

Changes: None.

Comment: Several commenters expressed opposition to replacing the term ''ongoing assessment of child and family'' in current § 303.342(c) with the term ''assessment of service needs'' in proposed § 303.342(c) and requested clarification of the meaning of the term ''service needs'' in this section.

Discussion: The term ''service needs'' was included in the proposed regulations to be consistent with the use of that term in new § 303.321 (proposed § 303.320). However, as discussed earlier in this preamble in the *Analysis of Comments and Changes* section in response to comments on the use of the term ''service needs'' in proposed § 303.320, we no longer use the term in new § 303.321 (proposed § 303.320) or any other section of these regulations. We, therefore, have removed the phrase from § 303.342(c) and replaced it with the phrase ''the child and family'' to be consistent with new § 303.321 (proposed § 303.320).

Changes: The phrase ''service needs'' has been removed from § 303.342(c) and replaced with the words ''the child and family.''

Comment: One commenter recommended amending § 303.342(d)(1)(ii) to require a lead agency to exhaust all possible options for conducting IFSP meetings in the native language of the family because part C of the Act makes clear that involvement of the family in the IFSP

process is critical. The commenter was concerned that the current regulatory language allows too much room for a lead agency to claim that it is ''not feasible'' to conduct the IFSP meeting in a family's native language. The commenter stated that, given the availability of resources such as bilingual staff, interpreters, and telephonic interpreter service, it should be feasible to ensure that IFSP meetings are conducted in the family's native language.

Discussion: Section 303.342(d)(1)(ii) requires that IFSP meetings be conducted in the native language of the family or other mode of communication used by the family unless it is clearly not feasible to do so. Thus, lead agencies should consider the availability of native language resources, such as those listed by the commenter, when determining whether it is feasible to conduct the IFSP meeting in the native language of the family. However, given that the U.S. Census Bureau recognizes over 300 languages used in the United States (not including dialects), it may not be feasible, in every instance, to provide interpreter services with respect to a particular native language because an interpreter of that language may not be available.

Changes: None.

Comment: One commenter suggested that the lead agency should be allowed to provide notice to the child's family and other participants of the IFSP Team meeting under § 303.342(d)(2) by electronic mail (e-mail) or documentation of a phone call arranging the meeting, and not only by providing written notice. The commenter further stated that parents should be given the option to waive receiving written notification of the meeting in favor of another method of notification.

Discussion: The IFSP written notice requirement in § 303.342(d)(2) is substantively unchanged from current § 303.342(d)(2). Nothing in the regulations prohibits States from providing additional notice of the IFSP meeting by, for example, electronic mail or phone call, but, at a minimum, it must provide written notice to the family and other participants to ensure that they can attend the IFSP meetings.

Changes: None.

Comment: Two commenters suggested that the requirements in § 303.342(e), regarding informed parental consent for services, are similar to those in § 303.420(d), regarding parental consent and the ability to decline services, and stated that the two sections should be merged or cross-referenced. Another commenter requested that the term ''parental consent'' as used in § 303.342(e) should be further defined. Specifically, the commenter expressed concern that § 303.342(e) requires the lead agency only to obtain informed consent prior to the provision of early intervention services, and not informed written consent as required by the Act.

Discussion: Section 303.342(e) is consistent with § 303.420(a)(3) and (d) regarding parental consent. The term ''parental consent'' in § 303.342(e) is consistent with the statutory language in section 636(e) of the Act (which refers both to ''parental consent'' and ''informed written consent from the parents'') and the definition of *consent* in § 303.7. The term parental consent, as used in § 303.342(e), must meet the definition of *consent* in § 303.7. (In this case, the word ''parental'' modifies the term ''consent,'' which has a specific definition in these regulations under § 303.7.) To further clarify, we have added cross-references to § 303.7, which requires that the parent understand and agree in writing when giving consent, and § 303.420(a)(3), which requires the lead agency to ensure that parental consent is obtained prior to providing early intervention services to a child. Also, in the interest of clarity and tracking statutory language, we have added the word ''written'' to the phrase ''informed consent.''

Changes: We have added in § 303.342(e) cross-references to §§ 303.7 and 303.420(a)(3) and revised the phrase ''informed consent'' to include the word ''written.''

Comment: In response to the 45-day timeline in new § 303.310 (proposed § 303.320(e)) and the language in § 303.344(f)(1), regarding the timeline by which services identified in a child's IFSP must be initiated, a few commenters requested that the regulations identify a timeline for the provision of services.

Discussion: We have clarified in §§ 303.342(e) and 303.344(f)(1) that early intervention services must be provided as soon as possible after obtaining parental consent. We believe that it is important for the timeline to run from the date of parental consent and not from the initiation date identified at the IFSP meeting, as is provided for in current § 303.344(f)(1). A State may only provide a service identified in the IFSP if a parent provides consent under § 303.420. In some instances, even if the IFSP is developed with a service initiation date, a parent may not have provided consent to the service and, therefore, the service may not be provided. Thus, we have revised the time period to commence from the date of parental consent.

Currently, most States have adopted a 30-day timeline that commences from the date of parental consent to the date the services in the IFSP are provided with some States adopting a shorter timeline and only a few States adopting a slightly longer timeline (*e.g.,* 45 days), which timeline also commences from the date of parental consent to the date the services in the IFSP are provided. We do not believe it is appropriate to adopt a time period more specific than ''as soon as possible'' for the provision of *all* early intervention services identified in an IFSP. While each State must ensure that services in an IFSP are provided as soon as possible after receiving parental consent, we believe that ''as soon as possible'' may vary depending on a number of factors, such as the availability of qualified personnel in a State, the number of children to be served, and the location of those children. While we give States some flexibility in implementing this provision, we also monitor, through the SPP/APR, data on when each State initiates services for each child. Thus, we decline to adopt in §§ 303.342(e) and 303.344(f)(1) a timeline more specific than ''as soon as possible.''

Changes: We have clarified in §§ 303.342(e) and 303.344(f)(1) that early intervention services must be provided as soon as possible after parental consent is obtained.

IFSP Team Meetings and Periodic Reviews (§ 303.343)

Comment: A few commenters recommended amending § 303.343(a)(1)(v) to require that the individual or individuals directly involved in conducting the evaluations and assessments in new § 303.321 (proposed § 303.320) must have knowledge and training related to the infant's or toddler's disability.

Discussion: The requested change is not necessary because, as we explained in the *Analysis of Comments and Changes* in response to comments received on new § 303.321(a), the individuals responsible for conducting evaluations and assessments under new § 303.321(a)(2)(i) and (a)(2)(ii) (proposed § 303.320(a)(3)) must be qualified personnel.

Qualified personnel, under § 303.31, are individuals who meet State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the developmental area in which the individuals are conducting an evaluation or assessments or providing early intervention services. Given the definition of *qualified personnel* in § 303.31, it is unnecessary to amend

§ 303.343(a)(1)(v) as requested by the commenter.

Changes: None.

Comment: Some commenters expressed concern that the required participants for the periodic review of the IFSP in § 303.343(b) do not include the individuals (such as the individuals who conducted the evaluations and assessments, unless conditions warrant) who are required to participate in the initial and annual IFSP review under § 303.343(a). Specifically, the commenters stated that the regulations limit the ability of parents under § 303.343(a)(1)(i) and (ii) to include participants of their choosing in the periodic review of the IFSP.

Discussion: Section 303.343(b) makes clear that individuals: (1) Who are directly involved in conducting evaluations and assessments or (2) who provide early intervention services are not required to be invited or attend the IFSP periodic review meeting unless ''conditions warrant.'' An example of a condition under § 303.342(b) that may warrant the attendance of the qualified personnel who conducted an evaluation at the IFSP periodic review meeting is if that individual conducted a reevaluation of an infant or toddler with a disability and the results of that evaluation will be discussed at the periodic review. Additionally, reviewing the child's progress in a particular developmental area may require the participation of the EIS provider(s) in those areas. In such instances, the lead agency must ensure the participation of those individuals.

However, while the issues at an IFSP periodic review meeting vary, the periodic reviews are usually limited to reviewing the child's progress towards the measurable results or outcomes. The periodic review is less formal than the initial or annual IFSP meeting and may be done through a teleconference, a face-to-face meeting or other means acceptable to the parents and other participants. Requiring the attendance of individuals referenced in § 303.343(a)(1)(v) and (a)(1)(vi) at every IFSP periodic review meeting would be burdensome and unnecessary and thus we refrain from making the change requested by the commenter.

The commenter correctly notes that a parent may invite advocates or individuals outside of the family to periodic reviews under § 303.343(a)(1)(ii). However, that provision may not be used to override the lead agency's determination of when conditions warrant the attendance of individuals directly involved in conducting evaluations and assessments or who are EIS providers.

Changes: None.

Content of an IFSP (§ 303.344)

Results or Outcomes (§ 303.344(c))

Comment: A few commenters requested that the parenthetical phrase referencing the inclusion of pre-literacy and language skills as developmentally appropriate for the child be deleted from § 303.344(c). One commenter stated that adding this parenthetical phrase to this section, which requires that a child's IFSP include a statement of the measurable results or measurable outcomes expected to be achieved by the child, creates confusion between part C and part B responsibilities. The commenter recommended replacing the proposed language in the parenthetical with ''communication or social and emotional developmental goals.''

Discussion: Under § 303.344(c), the IFSP must include, among other things, a statement of the measurable results or measurable outcomes expected to be achieved for the child (including pre-literacy and language skills, as developmentally appropriate for the child) and family. The phrase ''including pre-literacy and language skills as developmentally appropriate for the child'' is from section 636(d)(3) of the Act. Thus, it would not be appropriate to delete this language and replace it with other language. Concerning the confusion between part C and part B responsibility, pre-literacy and language skills emerge during infancy and, therefore, should be a measurable result or measurable outcome that is developmentally appropriate for a child served under the part C program.

Changes: None.

Comment: A few commenters requested that we provide definitions for the terms ''measurable results'' and ''measurable outcomes,'' as those terms are used in § 303.344(c). These commenters also questioned whether it was necessary for this section to include both terms.

Discussion: Section 303.344(c) incorporates language from section 636(d)(3) of the Act, which requires that the IFSP contain a statement of the ''measurable results or outcomes expected to be achieved for the infant or toddler and the family.'' The Department interprets the word ''measurable'' in this section of the Act to modify both the words ''results'' and ''outcomes.'' For this reason, it is appropriate to clarify, in § 303.344(c), that the IFSP must contain measurable results or measurable outcomes. Further clarification is not necessary given that there is little material difference, for IFSP content purposes, between the meaning of the terms ''results'' and ''outcomes'' and we use these terms in the regulation because they are both referenced in the section 636 of the Act.

Changes: None.

Comment: Two commenters recommended that the word ''functional'' be inserted before every use of the word ''outcomes'' in these regulations. Two other commenters requested that, for clarity, the word ''expected'' be inserted before the words ''results, outcomes, or early intervention services'' in § 303.344(c)(2).

Discussion: We agree with the commenters who recommended we add the term ''expected'' before the words ''results, outcomes, or early intervention services are necessary'' in § 303.344(c)(2). Therefore, we have made the requested change.

We decline to add the adjective ''functional'' every time the word ''outcomes'' is used in these regulations because not all outcomes are functional; for example, for children receiving services under § 303.211, outcomes may be educational.

Changes: We have added the term ''expected'' before the words ''results, outcomes, or early intervention services are necessary'' in § 303.344(c)(2).

Early Intervention Services (§ 303.344(d))

Comment: Some commenters requested that the term ''peer-reviewed research'' in § 303.344(d)(1) be defined or removed. Most of the commenters recommended that we use a definition that is consistent with the National Research Council's use of the term. Two commenters were concerned about a potential conflict between the use of the term ''peer-reviewed research'' in this section and the use of ''scientifically based research'' in § 303.112, regarding the availability of early intervention services. Another commenter stated that the term ''peer-reviewed'' is not used in the Act, and argued that because the term ''scientifically based research'' is used in the Act it should be used in this section, rather than the term ''peer-reviewed.''

Discussion: In the *Analysis of Comments and Changes* section for § 303.112, we discuss the definition of the term ''peer-reviewed research.'' We also address in that section the differences in meaning between the term ''scientifically based research,'' as used in section 635(a)(2) of the Act and § 303.112 of these regulations, and ''peer reviewed research,'' as used in section 636(d)(4) of the Act and § 303.344(d) of these regulations. We disagree with the commenter who stated that the term

''peer-reviewed research'' is not used in the Act; as noted elsewhere in this discussion, section 636(d)(4) of the Act, which is the statutory basis for § 303.344(d), refers to peer-reviewed research, not scientifically based research.

Changes: None.

Comment: One commenter requested that the regulations define the phrase ''to the extent practicable'' as used in § 303.344(d)(1).

Discussion: As noted in § 303.112 of the *Analysis of Comments and Change,* defining the phrase ''to the extent practicable'' is not needed. In the context of these regulations, the term has its plain meaning (*i.e.,* feasible or possible). As it is used to modify the extent to which early intervention services in a child's IFSP are based on peer-reviewed research in § 303.344(d)(1), we note that this phrase is from section 636(d)(4) of the Act. As used in this context, the phrase generally means that specific early intervention services should be based on peer-reviewed research to the extent that it is feasible or possible, given the availability of peer-reviewed research on the early intervention services determined to be most appropriate to respond to the child's needs and strengths identified pursuant to information from the child's evaluations and assessments under § 303.321.

Changes: None.

Comment: A few commenters requested that § 303.344(d)(1) be amended to require IFSP Teams to consider the same special factors that IEP Teams must consider under 34 CFR 300.324(a)(2) of the part B regulations.

Discussion: These comments are addressed in the *Analysis of Comments and Changes* for subpart D in response to the comments on § 303.342.

Changes: None.

Comment: Some commenters expressed concern that the terms ''frequency,'' ''intensity,'' ''method,'' ''length,'' and ''duration'' in § 303.344(d)(1)(i) do not reflect the language in the Act and would require significant revisions to forms and training for staff. The commenters requested that the terms and their definitions be removed from the regulations.

Discussion: All of the terms mentioned by the commenters are taken directly from the Act. Section 636(d)(4) of the Act requires the IFSP to include a statement of the specific early intervention services based on peer-reviewed research, to the extent practicable, necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and method of delivering those services. Additionally, section 636(d)(6) of the Act requires the IFSP to include the anticipated length, duration, and frequency of the early intervention services identified in the IFSP.

Changes: None.

Comment: One commenter recommended expanding the requirements in § 303.344(d)(1)(ii)(B) to require that, in the case of an infant or toddler who is deaf or hard of hearing, the IFSP Team must: (a) Consider home, community, and program settings that provide full support for language and communication development for the child and family; (b) base recommendations for the appropriate setting for providing services on a comprehensive assessment of the child and the family's priorities, resources, and concerns; (c) provide families with comprehensive information about all programs and providers; (d) encourage families to visit all programs providing services to young children; (e) support families in selecting the programs, providers, settings, and services that best meet the needs of the child and family; and (f) recommend programs and services that employ qualified providers who are fluent users of the language(s) and modes of communication of the child.

Discussion: An IFSP Team may conclude that it is appropriate to address the factors presented by the commenter, as well as any other factors that the IFSP Team, which includes the child's parent, considers relevant to a determination concerning the appropriate setting for the provision of an early intervention service that meets the child's unique strengths and needs, including those of infants or toddlers who are deaf or hard of hearing. Thus, it would be impracticable to identify all potential factors concerning service settings because such factors are guided by the measurable outcomes or measurable results expected to be achieved for the infant or toddler with a disability.

Changes: None.

Comment: Some commenters requested clarification of the phrase ''if applicable'' in § 303.344(d)(1)(ii)(A) regarding the justification needed if a service is not provided in the natural environment. The commenters expressed concern that some individuals may interpret the language to mean that a justification is not always required for services that are not provided in the natural environment and may prompt lead agencies and EIS programs to provide services in settings other than the natural environment even though that setting may not necessarily be appropriate.

Discussion: Pursuant to section 636(d)(5) of the Act, justification is required when the IFSP Team (not the lead agency or EIS program) determines that early intervention services will be provided in a setting other than the natural environment. We did not intend for the phrase ''if applicable'' to modify this requirement. Thus, we have removed the phrase ''if applicable'' to alleviate potential confusion.

Additionally, we have revised § 303.344(d)(1)(ii)(A) to require that the IFSP include a statement that each early intervention service is provided in the natural environment to the maximum extent appropriate or, a justification as to why an early intervention service will not be provided in the natural environment. We believe that these changes make clear that a justification is always required when early intervention services are not provided in the natural environment for the child or service.

Changes: We have removed the phrase ''if applicable'' from § 303.344(d)(1)(ii)(A). Additionally, we have revised § 303.344(d)(1)(ii)(A) to require the IFSP to include (i) a statement that each early intervention service is provided in the natural environment for that child or service to the maximum extent appropriate, consistent with §§ 303.13(a)(8), 303.26 and 303.126, or, subject to § 303.344(d)(1)(ii)(B), and (ii) a justification as to why an early intervention service will not be provided in the natural environment.

Comment: Many commenters requested clarification on when early intervention services may be provided in the natural environment and when it is appropriate to provide a service in a setting that is not considered the natural environment. A few commenters recommended that § 303.126 be amended to allow parents to unilaterally decide where their infant or toddler with a disability will receive early intervention services. Another commenter recommended that § 303.126 allow other family members to be involved in determining the natural environments in which early intervention services will be provided. Two commenters recommended clarifying that an infant or toddler with a disability may receive services in a setting that is not the natural environment when the IFSP Team, which includes the parent, agrees that services should not be delivered in the natural environment. One commenter requested that the Department emphasize that selection of the natural environment for a particular infant or

toddler with a disability must be an individualized decision and that the State must monitor EIS providers to ensure that all natural environment decisions are individualized for each child by the child's IFSP Team.

Discussion: Section 303.344(d)(1)(ii), when read together with § 303.126, regarding early intervention services in natural environments, clarifies that the selection of the early intervention service setting for an infant or toddler with a disability is an individualized decision. Additionally, § 303.700(a)(1), regarding State monitoring and enforcement, clarifies that the lead agency must monitor the implementation of this part. Early intervention in the natural environment has been the subject of the Department's focused monitoring. We do not believe that any additional emphasis is necessary.

Nevertheless, we recognize that it may not always be practicable or appropriate for an infant or toddler with a disability to receive an early intervention service in the natural environment based either on the nature of the service or the child's specific outcomes. For example, the IFSP Team may determine that an eligible child needs to receive speech services in a clinical setting that serves only children with disabilities in order to meet a specific IFSP outcome. When the natural environment is not chosen with regard to an early intervention service, the IFSP Team must provide, in the IFSP, an appropriate justification for that decision.

Consistent with section 635(a)(16)(B) of the Act and under § 303.344(d)(ii)(B), the setting for the provision of early intervention services under part C of the Act is made by the IFSP Team. It is the responsibility of the IFSP Team (which includes the parent and may include other family members who are invited by the parent under § 303.343) to determine the most appropriate setting where each early intervention service will be provided for an infant or toddler with a disability based on the child's unique needs and outcomes.

Under § 303.343(a), family members may attend an IFSP meeting if requested by the parent, and if feasible to do so. Thus, we decline to revise § 303.126 to include family members, as suggested by one of the commenters, because a parent—not the lead agency—determines whether to invite additional family members to IFSP meetings.

Concerning the commenter who suggested that early intervention services could not be provided in a setting other than the natural environment and the commenters who conversely requested that the regulations clarify that early intervention services may be provided in a setting other than the natural environment, sections 635(a)(16)(B) and 636(d)(5) of the Act recognize that there may be situations in which an early intervention service cannot be provided in the natural environment. Section 303.344(d)(1)(ii), consistent with section 636(d)(5) of the Act, requires that the IFSP include a justification of the extent, if any, that an early intervention service will not be provided in the natural environment. In these instances, the IFSP Team (which includes the child's parents and other family members, at the parent's request) must identify whether the service can be provided in the natural environment and if it cannot, then the IFSP Team must document in the IFSP the justification for why that service is not provided in the natural environment (*i.e.,* why the alternative service setting is needed for the child to meet the developmental outcomes identified for the child in his or her IFSP).

Changes: None.

Comment: One commenter requested that the word ''functional'' be included to define outcomes as used in § 303.344(d)(1)(ii)(B)(3).

Discussion: We address this comment in the *Analysis of Comments and Changes* section on § 303.344(c).

Changes: None.

Comment: Some commenters recommended that natural environment settings be determined based on a child's needs rather than on outcomes, as required by § 303.344(d)(1)(ii)(B)(3).

Discussion: We believe that the commenters' concerns are addressed because when developing outcomes for the IFSP, the IFSP Team must consider the needs of the child based on the results of the evaluation and assessments of the child and the family pursuant to § 303.344(a) and (b). Once the outcomes are developed, the IFSP Team, including the parent, determines which early intervention services are necessary to achieve the expected outcomes and the setting(s) in which those services will be provided.

Changes: None.

Comment: Two commenters expressed concern that § 303.344(d)(2)(iv) would require an IFSP Team to project when a given service will no longer be provided. The commenters stated that some infants and toddlers with disabilities may require a particular early intervention service for the duration of their participation in the part C program and it would be inappropriate for an IFSP Team to project that far into the future.

Discussion: The purpose of the language in § 303.344(d)(2)(iv) is to help ensure accountability by requiring IFSP Teams to consider and periodically review the duration of a given service during the period in which a child is eligible to receive early intervention services and to anticipate when the child is expected to achieve certain results or outcomes associated with the receipt of the service. The duration of a service must be discussed and, if necessary, amended annually at the IFSP meeting.

We appreciate that the IFSP Team will not always know how long a particular service will be needed to achieve the measurable outcomes or results in the child's IFSP. What is critical is that the IFSP Team evaluates and re-evaluates whether the expected outcomes are being achieved at the appropriate pace. If the IFSP Team miscalculates how long a particular service will be provided, it can amend the IFSP during a periodic review. Due to the rapidly changing needs of infants and toddlers and the need for accountability in making sure the appropriate services are provided, it is important for families to participate in periodic and annual reviews in order to help make decisions about modifications to the IFSP based on the child's present level of development.

Changes: None.

Comment: A few commenters expressed concern about the requirement in § 303.344(d)(4) that the IFSP include an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children who are at least three years of age. The commenters stated that this requirement seemed to apply to any preschooler that has an IFSP and stated that the requirement was inconsistent with several provisions in the part B regulations in 34 CFR part 300. Specifically, the commenters stated that § 303.344(d)(4) was inconsistent with 34 CFR 300.323(b), regarding when an IFSP may serve as the IEP for children with disabilities aged three through five. Additionally, the commenters stated that § 300.320 does not explicitly require that the IEPs of children with disabilities in preschool include these IFSP content components. Another commenter stated that requiring an educational component in every IFSP of a child aged three through five is inappropriate because IFSP Teams must determine the individual needs of a child with a disability. One commenter requested that the Department clarify that the requirements in § 303.344(d)(4) only

apply to States that elect to serve children past age three.

Discussion: The requirement in § 303.344(d)(4) that IFSPs include, for children who are at least three years of age, an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills is directly from section 632(5)(B)(ii) of the Act. Section 303.344(d)(4) is consistent with 34 CFR 300.323(b) of the part B regulations. It is not necessary under part B of the Act to require an educational component for children with disabilities who receive preschool services under IEPs because the definition of an IEP in 34 CFR 300.112 of the part B regulations identifies by cross-reference the many educational components of the IEP.

Section 303.344(d)(4) and 34 CFR 300.323(b) of the part B regulations both require all IFSPs for children age three and older to include an educational component that promotes school readiness, and to incorporate pre-literacy, language, and numeracy skills. Children age three and older who have IFSPs under part C of the Act would be those children receiving services in States that have elected to serve children under the option in §§ 303.211 and 303.501(d) or under the option to provide services to children beyond age three until the beginning of the school year in § 303.501(c)(1). Both the Act and these regulations are clear and need no further clarification.

Changes: None.

Other Services (§ 303.344(e))

Comment: Some commenters requested that this paragraph be amended to explicitly include childcare as an ''other service.''

Discussion: Section 303.344(e) states that the IFSP must, to the extent appropriate, identify medical and other services that the child or family needs or is receiving through other sources, but that are neither required nor funded under this part. While childcare is not specifically included in paragraph (e) of this section, an IFSP Team may decide, when appropriate, to identify childcare as an ''other service'' that is not required under part C of the Act. We decline to revise the regulations as requested by the commenter because listing every service that may be considered as an ''other service'' would be impractical.

Changes: None.

Comment: Some commenters agreed with removing the requirement in current § 303.344(e)(1)(ii) that the IFSP identify funding sources for the medical and other services not required by part C of the Act, stating that the requirement was both beyond the scope of part C services and an additional burden on lead agencies. However, other commenters disagreed, arguing that, absent such information in the IFSP, children might not receive the additional services that they need, which would defeat the purposes of the Act to ensure that early intervention services are provided in order to reduce the need for services as the child matures.

Discussion: Section 303.344(e)(2) requires that, if a child or family needs medical and other services and these services are not currently being provided, the IFSP must include a description of the steps the service coordinator or family may take to assist the child and family in securing those services. The regulations no longer require the IFSP Team to identify, and service coordinators to coordinate, funding sources for these services (those not required under part C). We believe that § 303.344(e)(2), with this change, will help families receive additional services, without unduly burdening IFSP Teams and service coordinators who may have limited knowledge about funding for services provided by other programs.

Changes: None.

Dates and Duration of Service (§ 303.344(f))

Comment: None.

Discussion: We have made technical edits to § 303.344(f)(1) to cross-reference the consent provisions applicable to this section—that is, paragraph (e) of § 303.342 (parental consent) and § 303.420(a)(3) (consent for early intervention services). For clarity and consistency with these regulations, we also have inserted the words ''early intervention'' before the word ''service.'' As noted in the *Analysis of Comments and Changes* section discussing § 303.342(e), we have revised, in § 303.344(f)(1), the timeline that services begin ''as soon as possible'' after parental consent (instead of ''as soon as possible'' after the initiation date identified in the IFSP in current § 303.344(f)(1)).

Changes: We have replaced, in § 303.344(f)(1), after the words ''as soon as possible'' the phrase ''after the IFSP meetings described in § 303.342'' with the words ''after the parent consents to the service, as required.'' We also have added references to § 303.342(e) and § 303.420(a)(3). Additionally, we have inserted the words ''early intervention'' before the word ''service.''

Service Coordinator (§ 303.344(g))

Comment: One commenter requested that the regulations require service coordinators to be responsible for facilitating the full implementation of the IFSP. The commenter also requested that the regulations stipulate that the service coordinator for a particular infant or toddler with a disability may not be an EIS provider providing early intervention services to that particular infant or toddler with a disability.

Discussion: Section 303.344(g), when read together with § 303.33, the definition of *service coordination services* (case management), clarifies that the service coordinator is responsible for implementing the early intervention services identified in a child's IFSP. We do not agree with the commenter that the service coordinator for a particular infant or toddler with a disability cannot be an EIS provider for that particular infant or toddler with a disability, because the model of service coordination can vary from one State to another as well as among local communities because of such distinguishing factors as population size and economic, social, or cultural differences. Regardless of the model chosen by a State, we expect service coordination services to remain family centered.

Changes: None.

Transition From Part C Services (§ 303.344(h))

Comment: None.

Discussion: For consistency with section 636(a)(3) of the Act and § 303.344(h)(2)(iv), we have clarified that the IFSP must include not only transition steps but transition services needed to support the smooth transition of a child who is exiting the part C program.

Changes: We have added the phrase ''and services'' after the word ''steps'' to § 303.344(h)(1).

Comment: One commenter supported the requirement in § 303.344(h)(2)(iii) to obtain parental consent before transmitting additional information about a child to the LEA and requested clarification of the basic information that must be provided to the LEA representative at the transition conference or IFSP meeting to develop the transition plan. Another commenter noted that careful documentation will be needed to ensure that parental consent is obtained.

Discussion: To clarify the relationship between §§ 303.344(h) and 303.209 regarding transition, we have added the words ''smooth'' and ''from part C services'' in § 303.344(h)(1). We also have revised § 303.344(h)(2)(iii) to clarify that the transition steps and services in the IFSP must include confirmation that child find information

was transmitted to the LEA or other relevant agency.

With regard to the comments regarding parental consent in § 303.344(h)(2)(iii), we have clarified that parental consent must be obtained if personally identifiable information is disclosed as required under § 303.414. Given that personally identifiable information is discussed at the IFSP meeting to develop a transition plan, if the LEA representative is from an LEA that is not a participating agency under § 303.403(c) or if attendance is required of other individuals who are not employees or representatives of participating agencies, parental consent is required under § 303.414 for the lead agency to be able to disclose personally identifiable information to these individuals at the meeting.

We also have clarified that the additional information to be provided to the LEA to ensure continuity of services includes a copy of the most recent evaluation and assessments of the child and family and the most recent IFSP.

Changes: We have added the words ''smooth'' and ''from part C services'' in § 303.344(h)(1). We also have added the words ''confirmation that'' to precede the words ''child find information'' and ''if required under § 303.414'' to follow the phrase ''parental consent'' in § 303.344(h)(2)(iii). We also have clarified that the additional information in § 303.344(h)(2)(iii) includes a copy of the most recent evaluation and assessments of the child and family and the most recent IFSP.

Comment: One commenter stated that the requirement in proposed § 303.344(h)(1)(iii) that an IFSP include the steps that must be taken to support the transition of the child to early education, Head Start and Early Head Start, or child care programs is inappropriate because it is not required in the Act. This commenter requested that the requirement be removed from the regulations.

Discussion: We agree with the commenter that requiring transition to specific educational or child care programs may not be appropriate for every child and the phrase ''other appropriate services'' covers such programs. The programs identified in proposed § 303.344(h)(1)(iii) were intended to be examples of programs into which children may transition from part C services. However, early education, Head Start, Early Head Start, or child care programs are covered through the reference to other appropriate services in proposed § 303.344(h)(1)(iv), which stated that the IFSP must include the steps to be taken to support the transition of the child, in accordance with § 303.209, from part C services to other appropriate services. Therefore, to eliminate duplication, we have removed proposed § 303.344(h)(1)(iii). We also note that the reference in § 303.344(h)(1)(i) to elementary school or preschool was incorrect and are revising § 303.344(h)(1)(ii) to refer to ''part C services under § 303.211.''

Changes: We have removed proposed § 303.344(h)(1)(iii) and redesignated proposed § 303.344(h)(1)(iv) as § 303.344(h)(1)(iii). We have revised § 303.344(h)(1)(ii) to refer to ''part C services under § 303.211.''

Interim IFSPs—Provision of Services Before Evaluations and Assessments Are Completed (§ 303.345)

Comment: None.

Discussion: To improve clarity, we have added ''interim IFSPs'' to the title of this section.

Changes: We have added ''Interim IFSPs'' to the title of § 303.345.

Responsibility and Accountability (§ 303.346)

Comment: None.

Discussion: For consistency throughout the regulations, we have clarified that the agency referenced in § 303.346 is the public agency (defined in § 303.30) and the person referenced in this section is an EIS provider (defined in § 303.12).

Changes: We have revised § 303.346 so that it refers to a public agency and an EIS provider, rather than an agency and person.

Subpart E—Procedural Safeguards

General

Confidentiality and Opportunity To Examine Records (§ 303.401)

Comment: A few commenters recommended retaining as much of current § 303.402, concerning the opportunity to examine records, and § 303.460, concerning confidentiality of information, as is consistent with the Act.

Discussion: The confidentiality rights and protections contained in current §§ 303.402 and 303.460 have been retained in § 303.401(b) and have been explicitly referenced in both §§ 303.401(b) and 303.402 of these regulations, consistent with sections 617(c), 639(a)(2), and 642 of the Act. Provisions concerning parents' rights to inspect and review their children's records in current § 303.402 are incorporated in § 303.401(b)(2). The substance of the note following current § 303.460, which concerns the applicable confidentiality rights and protections afforded under sections 617(c) and 642 of the Act, is now in §§ 303.401(b) and 303.402.

We have added language in § 303.401(b) clarifying that, as required under sections 617(c) and 642 of the Act, 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 the Family Educational Rights and Privacy Act (FERPA) in 20 U.S.C. 1232g and 34 CFR part 99.

Changes: We have deleted in § 303.401(b) the parenthetical ''(which contain confidentiality provisions under FERPA in 20 U.S.C. 1232g and its regulations in 34 CFR part 99)'' and added in §§ 303.401(b) and 303.402 language regarding the implementation of the regulations in §§ 303.401 through 303.417 under sections 617(c) and 642 of the Act to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained pursuant to this part, in accordance with FERPA in 20 U.S.C. 1232g and 34 CFR part 99.

Comment: A few commenters recommended that the rights and protections afforded to parents concerning confidentiality and access to records be extended to foster families and agencies responsible for infants and toddlers who reside in out-of-home care.

Discussion: The confidentiality rights and protections in §§ 303.401 through 303.417 are available to an individual who meets the definition of a *parent* in § 303.27, which expressly includes foster parents, and any individual appointed as a surrogate parent under § 303.422. However, § 303.422(d)(2) excludes from serving as a surrogate parent for a child, an employee of the lead agency or any other public agency or EIS provider that provides any services to the child or a family member of that child. Thus, the confidentiality rights and protections available to parents under §§ 303.401 through 303.417 would not be available to agencies responsible for the care of infants and toddlers not residing at home or to the employees of such agencies.

Changes: None.

Comment: One commenter requested that we clarify the word ''broader'' as used in proposed § 303.401(b)(1), regarding confidentiality procedures.

Discussion: Proposed § 303.401(b)(1) stated that the part C confidentiality

procedures are consistent with, but broader than, those under FERPA. In some instances the part C confidentiality procedures differ from the requirements under FERPA (for example, part C uses the term ''participating agency'' and permits States to adopt an opt-out policy in § 303.401(e)). We agree that the phrase ''that are consistent with, but broader than those under'' is not clear; therefore, we have removed the phrase. Additionally, we have removed the last phrase of the parenthetical ''and include additional part C requirements'' because it is redundant.

Changes: The phrase ''that are consistent with, but broader than those under'' and the last phrase of the parenthetical ''and include additional part C requirements'' have been removed.

Comment: One commenter requested that the Department clarify whether it violates part C confidentiality regulations to accept a referral without parental consent.

Discussion: Section 303.401(c)(2) provides that the part C confidentiality procedures apply from the point in time when the child is referred for early intervention services, and thus, do not apply prior to a referral. Under § 303.401(c)(2), the confidentiality provisions under part C of the Act do not apply to primary referral sources. Thus, part C does not prohibit the lead agency or an EIS provider from accepting a referral of a child to the State part C system from a primary referral source. However, the primary referral source may be required to obtain parental consent prior to making a referral under other applicable laws (such as HIPAA, CAPTA, or State laws).

Changes: None.

Comment: None.

Discussion: Given that we reference ''participating agencies'' in §§ 303.405 through 303.417, we have changed the reference in § 303.401(c)(2) from ''lead agency and EIS provider'' to ''participating agency.'' We also have clarified that the confidentiality procedures apply until the later of when the participating agency is no longer required to maintain or no longer maintains, under applicable Federal and State laws, the personally identifiable information of a child and the child's family that is contained in early intervention records collected, used, or maintained under this part by the lead agency.

Changes: We have replaced the phrase ''lead agency or EIS provider'' with the phrase ''participating agency'' in § 303.401(c)(2). We also have replaced the phrase ''required to maintain or maintains'' with the phrase ''required to maintain or no longer maintains'' in § 303.401(c)(2).

Disclosure of Information (§ 303.401(d))

Comment: One commenter stated that it is unnecessary for the lead agency to disclose the information identified in § 303.401(d) to the LEA where the child resides or to the SEA and that such disclosure may potentially breach the right to confidentiality of personally identifiable information.

Discussion: Section 637(a)(9)(A)(ii)(I) of the Act, concerning preschool transition, requires the lead agency to notify the LEA where the toddler resides that the toddler will shortly reach the age of eligibility for preschool services under part B of the Act. We believe that notifying the LEA where the child resides and the SEA of the toddler's name, date of birth, and the parent contact information (including parents' names, addresses, and telephone numbers) is necessary to implement the requirements in section 637(a)(9)(A)(ii)(I) of the Act and to ensure that children exiting part C services experience a smooth and seamless transition to part B services.

Changes: None.

Comment: One commenter stated that the terms ''State Lead Agency (SLA)'' and ''Local Lead Agency (LLA)'' should be used in the regulations instead of the terms ''SEA'' and ''LEA'' because SEAs and LEAs are only two of the many types of lead agencies. The commenter also stated that using the terms ''SEA'' and ''LEA'' in the part C regulations is confusing.

Discussion: Part C of the Act uses the term ''lead agency'' to refer to the State agency designated by the State's Governor under section 635(a)(10) of the Act to administer the Federal part C funds the State receives under section 643 of the Act and to be responsible for implementing the statewide early intervention system. We recognize that while a few States have part C statewide systems that refer to EIS providers as ''local lead agencies'' this is not the general practice among most States. Additionally, many EIS providers are not public agencies and, therefore, we decline to revise these regulations to include that term and have continued to use the term ''EIS provider'' when referring to entities other than the lead agency who are responsible for assisting the State in implementing the part C statewide early intervention system.

Regarding use of the terms *participating agency, LEA,* and *SEA* in these regulations, these terms are defined in §§ 303.404(c), 303.23, and 303.36, respectively, and are terms used throughout these regulations and specifically in § 303.401(b) through (d)(1). Thus, we decline to make the change requested by the commenter.

Changes: None.

Comment: Several commenters supported § 303.401(e) while many other commenters opposed it stating that it diminishes a family's right to confidentiality and decision-making about their child. These commenters urged the Department to require a lead agency to obtain parental consent prior to disclosing to an LEA or SEA the information identified in § 303.401(d)(1) as it is personally identifiable information. Similarly, one commenter requested that the opt-out requirement in § 303.401(e) be changed to an ''opt-in'' policy.

Discussion: Section 303.401(e) permits a lead agency to adopt an opt-out policy under section 637(a)(9) of the Act and § 303.209(b)(1)(ii). An opt-out policy requires the lead agency and EIS providers, prior to disclosing the limited information identified in § 303.401(d)(1) to the LEA where the child resides or to the SEA, to inform the child's parent about the impending disclosure and provide the parent with a specific time period in which the parent may confirm his or her decision to decline, or opt-out of, the disclosure of such information about his or her child.

Permitting States to adopt an opt-out policy, rather than opt-in policy, which would require the lead agency to obtain affirmative parental consent before disclosure of the limited information identified in § 303.401(d)(1) to the LEA or SEA, allows States the flexibility to balance the privacy interests of parents of children receiving part C services and the lead agency's, SEA's, and LEA's respective responsibilities to identify children potentially eligible for services under part B of the Act, and to ensure a smooth transition from the State's part C program to its part B program. Parents, as well as other stakeholders and members of the public have an opportunity to provide input when the State circulates its LEA notification policies for public participation as required in § 303.208(b).

Changes: None.

Definitions (§ 303.403)

Comment: Two commenters requested that the term *education records* be changed to the term *early intervention records* because use of the term ''education'' is not consistent with part C of the Act and could be interpreted incorrectly by insurance companies and Medicaid concerning payment for services. One commenter also expressed concern that the term *education records*

is used inconsistently throughout the regulations (see §§ 303.405(a) and (b), 303.406, 303.407, 303.408, 303.410, and 303.411).

Discussion: We agree that the term *early intervention records* should replace the term *education records* in § 303.403 and have revised references to *education records* to read *early intervention records* in these regulations.

Changes: We have revised § 303.403(b) to define *early intervention records* instead of *education records* and clarified that the term includes all records regarding a child that are required to be collected, maintained, or used under part C of the Act and the regulations in this part.

Comment: One commenter expressed concerns that the definitions in § 303.403, while applicable to programs under part B of the Act, may not be appropriate for programs under part C of the Act.

Discussion: We agree that the definitions of *education records* and *participating agency* in § 303.403 could be amended to more appropriately apply to part C of the Act. As noted previously, we have removed the term *education records* in § 303.403(b) and replaced it with the term *early intervention records.*

Additionally, we have amended the definition of *participating agency* in § 303.403(c) to mean any individual, agency, entity, or institution that collects, maintains, or uses personally identifiable information to implement the requirements in part C of the Act and the regulations in this part with respect to a particular child.

Participating agency specifically includes the lead agency and EIS providers that provide any part C services, including service coordination, evaluations and assessments, and other part C services. We are adding this provision to distinguish between those primary referral sources that perform primarily a child find function and those entities that serve as funding sources only. We have clarified that this term does not include primary referral sources (unless they are also EIS providers), or public agencies (such as the State Medicaid or CHIP program), or private entities (such as private insurance companies) that act solely as funding sources for part C services.

Changes: We have revised the definition of *participating agency* in § 303.403(c) to provide that this term also includes an entity that collects, maintains, or uses personally identifiable information and that this information is collected, maintained, or used ''to implement the requirements in part C of the Act and the regulations in this part.'' We have added a provision that an EIS provider includes a provider of part C services, including service coordination, evaluations, and assessments, and other part C services. Additionally, we have added a provision specifically stating that primary referral sources, or public agencies (such as the State Medicaid or CHIP program) or private entities (such as private insurance companies) that act solely as funding sources for part C services are not considered a participating agency.

Notice to Parents (§ 303.404)

Comment: Some commenters requested that the confidentiality requirements in these regulations reflect the parallel requirements in the part B regulations, where appropriate. One commenter requested clarification as to when the general notice and confidentiality requirements under part C of the Act apply. One commenter recommended adding a requirement that the notice to parents in § 303.404 be provided in the native language of the parent.

Discussion: We agree that it would be helpful for lead agencies under part C of the Act to know when the general notice requirement applies. Requiring the lead agency to provide parents with notice of its general confidentiality policies and procedures, including document retention and destruction procedures, when a child is referred under part C of the Act ensures that parents are aware of the nature and scope of their rights under these policies and procedures. States may choose to provide this general notice at additional appropriate times, such as annual IFSP meetings, but we have not required that it be provided at each such meeting because of the burden this would place on the State and because the prior written notice requirements in § 303.421 already require a summary of each of the procedural safeguards.

Additionally, the content of the notice should include a description of the extent that the notice is available in the native languages of the various population groups in a State. We have added language to § 303.404 that reflects that requirement, which is also in 34 CFR 300.612 of the part B regulations. The prior written notice and procedural safeguards notice requirements in § 303.421(c)(1)(ii) require that the child-specific notice be in the parent's native language or other mode of communication used by the parent, unless it is clearly not feasible to do so, and that the notice include a description of the procedural safeguards, including confidentiality requirements under subpart C of this part.

Changes: We have added the phrase ''when a child is referred under part C of the Act'' in the introductory text in § 303.404. We also have added a new paragraph (d) to § 303.404 requiring that the notice to parents include a description of the extent that the notice is given in the native languages of the various population groups in the State.

Comment: A few commenters recommended revising § 303.404(a) to require the notice to parents, concerning the confidentiality provisions under the Act, to be more applicable to part C of the Act.

Discussion: Section 303.404(a) provides that the notice include a description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from which the information is gathered), and the uses to be made of the information. For example, children on whom personally identifiable information is maintained include children with developmental delays or diagnosed conditions, or, if applicable, children at risk for developmental delays. The types of information sought include developmental, medical, educational, and other information. The specific sources from which information is gathered would include primary referral sources in the State, and the uses to be made of the information would include the identification, evaluation, and provision of early intervention services to infants and toddlers with disabilities. Thus, § 303.404(a) sufficiently relates to the personally identifiable information maintained, collected, and used under part C of the Act.

Changes: None.

Access Rights (§ 303.405)

Comment: Commenters from several lead agencies recommended requiring lead agencies to respond to parents' requests to inspect and review their child's early intervention records within 10 calendar days of the request, instead of 20 days, because it is important for parents to have these records available in the event there is a pending due process hearing (that must be resolved within a 30-day timeline as required in § 303.430(d)(1)).

Discussion: We agree that a 10-day deadline would be more appropriate to ensure access to early intervention records when parents have filed a request for a due process hearing. We have changed the timeline for agency compliance with a parent's request to

inspect and review records to 10 calendar days after the parent makes the request. (The term *day* is defined as ''calendar day unless otherwise indicated'' in § 303.9.)

Changes: We have changed § 303.405(a) to reflect that an agency must comply with a parent's request to inspect and review records in no case more than 10 days after the request has been made.

Comment: One commenter recommended that the ''shall presume'' language in § 303.405(c) be revised to align with the analogous part B requirement in 34 CFR 300.613(c), which provides that an agency ''may presume'' that a parent has the authority to inspect and review his or her child's records.

Discussion: We agree with the commenter and have changed § 303.405(c) to be consistent with 34 CFR 300.613(c) in the part B regulations.

Changes: The word ''shall'' has been removed and replaced with the word ''may'' in § 303.405(c).

Fees for Records (§ 303.409)

Comment: One commenter recommended including in § 303.409 a provision to allow parents to receive a copy of their child's records upon request, thereby facilitating the role of parents as full and equal participants in the IFSP process. Another commenter expressed concern about the length of time that may lapse between a child's IFSP meeting and the time that the parent actually receives a copy of the child's IFSP. This commenter requested that the regulations require that the parent be given a copy of his or her child's IFSP at the conclusion of every IFSP meeting.

Discussion: We agree with commenters that in order to help parents to be full and equal participants in the IFSP process parents must receive a copy of their child's evaluation, assessments, and IFSP. Thus, we have added in new § 303.409(c) that each evaluation, assessment, and IFSP must be provided to the parent.

Additionally, under § 303.521(b), the lead agency must ensure that specific activities, including conducting evaluations and assessments, developing and reviewing IFSPs, and implementing procedural safeguards, are provided at no cost to parents. Thus, we have added in new § 303.409(c) the requirement that these records be provided to parents at no cost. Requiring States to provide a copy of evaluations, assessments, and IFSPs to parents, from the child's early intervention record, should not be a burden to States. As a standard practice, most States already provide these documents at no cost to parents. The requirement in new § 303.409(c) is comparable to the evaluation and IEP documents that must be provided to parents at no cost under the provisions in 34 CFR 300.306(a)(2) and 300.322(f) of the part B regulations.

Concerning the request that the IFSP be provided at the conclusion of the IFSP meeting, we decline to add this specific timeline but agree that it is important to specify when these documents must be provided. Thus, we also have added in new § 303.409(c) that a copy of each evaluation, assessment of the child, family assessment, and IFSP must be provided to the parent as soon as possible after each IFSP meeting.

Changes: We have added new § 303.409(c), which requires that a participating agency must provide at no cost to the parent, a copy of each evaluation and assessment of the child, family assessment, and IFSP as soon as possible after each IFSP meeting. We also have revised the heading of § 303.409 to add ''for records'' after ''Fees'', and added a clause to § 303.409(a) explaining that the right to charge fees does not apply to documents that must be provided and are mentioned in § 303.409(c).

Amendment of Early Intervention Records Under §§ 303.410, 303.411, and 303.412

Comment: One commenter recommended adding references to the family, in addition to the child, in §§ 303.410 and 303.412(a), regarding a parent's right to amend information in a child's early intervention record if it is inaccurate, misleading, or violates the privacy or other rights of the child.

Discussion: We agree that the protections in §§ 303.410(a) and 303.412(a) and (b) should apply to information about the parent as well as the child, but do not agree that the right to amend a record extends to information about other family members. This is because the definition of *personally identifiable information* in § 303.29(d) includes a list of personal characteristics or other information that would make the child's or parent's identity easily traceable. Therefore, we have added the reference to the parent, but not to the family. For the same reasons, we have added this reference to the parent in § 303.411.

Changes: We have added a reference to the parent in §§ 303.410(a), 303.411, and 303.412(a) and (b).

Opportunity for a Hearing (§ 303.411)

Comment: A few commenters stated that the requirements in § 303.411 are inconsistent with both the hearing procedures in § 303.413 and the relevant part B requirements in 34 CFR 300.619, which require a hearing to challenge information in a child's record to be conducted in accordance with the procedures under FERPA.

Discussion: We have clarified § 303.411 by providing that the parent may request a due process hearing if a State has adopted the part C due process hearing procedures that are referenced in § 303.430(d)(1), provided that such procedures meet the requirements of the hearing procedures in § 303.413 that comply with the FERPA regulations in 34 CFR 99.22. Thus, as suggested by the commenter, the procedural options available to parents would be consistent with 34 CFR 300.619 of the part B regulations. We believe permitting this option to parents provides parents with the benefits of the 30-day timeline if the State has adopted part C due process hearings under § 303.430(d) without imposing an additional burden on States that already have such procedures in place.

Changes: We have added to § 303.411 a reference to § 303.413 and a parenthetical regarding the hearing requirements under the FERPA regulations in 34 CFR 99.22.

Consent Prior to Disclosure or Use (§ 303.414)

Comment: A few commenters recommended retaining as much of current § 303.460, regarding confidentiality of information, as is consistent with the Act.

Discussion: Current § 303.460 references the confidentiality provisions in the part B regulations that were in effect prior to the publication of the amended part B regulations published in August 14, 2006; the Note following current § 303.460 indicates that because the part B regulations incorporate the FERPA regulations, FERPA also applies to the part C regulations. Consistent with the commenters' requests, we have removed the general citation to the part B regulations and FERPA and added in § 303.414(b)(2) the exceptions to the FERPA consent requirement in 34 CFR 99.31(a) as specific exceptions (where applicable to part C) to the parental consent requirement in these part C regulations. We have also added a provision requiring compliance with the additional pertinent conditions in 34 CFR 99.32 through 99.39.

Changes: We have incorporated as specific exceptions to the parental consent requirement in § 303.414(b)(2) of these part C regulations the specific exceptions to the written parental consent requirement in 34 CFR 99.31(a)

of the FERPA regulations (where applicable to part C), reference to the pertinent conditions in 34 CFR 99.32 through 99.39, and added appropriate modification provisions in § 303.414(b)(2)(i) through (b)(2)(vii).

Comment: One commenter expressed concern that sometimes service providers do not disclose information that parents have given consent to disclose, and suggested that service providers should be required to disclose documents or information when parents have consented to the disclosure.

Discussion: It is unclear what types of documents or information the commenter is referencing or the circumstances under which an EIS provider might not disclose the information for which a parent has given consent. However, there may be circumstances when the lead agency or an EIS provider may not have the authority to provide documents in the child's early intervention record to a third party, even after receiving parental consent for disclosure of personally identifiable information. For example, a lead agency or EIS provider may not have the authority to disclose third-party medical records. In these cases, the lead agency or EIS provider would instruct the parent to make such a request to the third party for the document or information.

Changes: None.

Comment: A few commenters recommended that the regulations clarify the exception that applies to Protection and Advocacy (P&A) agencies seeking access to information pursuant to their authority under the Protection and Advocacy for Individuals with Mental Illness Act (42 U.S.C. 10801, *et seq.*). Other commenters opposed disclosing information to P&A agencies and questioned why only this requirement is included in these regulations when other statutory authorities also may apply to part C records and why this provision is not in the part B regulations. One commenter stated that this requirement conflicts with the FERPA and HIPAA confidentiality provisions.

Discussion: We agree with the commenters that it would not be appropriate to include language in the part C regulations concerning the issue of limited disclosures of personally identifiable information in early intervention records that may be sought by P&A agencies and have removed § 303.414(d).

As the commenters stated, there are a number of statutory authorities that may apply to part C records. Given the variety of factual circumstances to be considered—including the uncertainty as to what personally identifiable information will be sought about infants and toddlers with disabilities and the varying context and purposes under which the information may be sought—regulating could not address the specific circumstances in each particular case.

Changes: We have removed § 303.414(d).

Comment: A commenter requested that the Department define in § 303.414 the term *participating agency*.

Discussion: The term *participating agency* as used in § 303.414 is defined in § 303.403(c).

Changes: None.

Safeguards (§ 303.415)

Comment: One commenter agreed with the provisions in § 303.415(a) (regarding the protection of personally identifiable information at the collection, maintenance, use, storage, disclosure, and destruction stages), (b) (requiring an official to be responsible for ensuring the confidentiality of personally identifiable information), and (c) (training for persons collecting and using personally identifiable information), but suggested that the requirements in these paragraphs may be inconsistent with § 303.415(d).

Discussion: Section 303.415(d) requires that each participating agency maintain a current listing of the names and positions of agency employees who may have access to personally identifiable information and reflects current, long-standing Department policy and regulations. Paragraphs (a) through (c) of this section are consistent with paragraph (d) because paragraph (d) applies to the individuals listed in paragraph (c) of this section. Paragraph (d) of this section further safeguards the confidentiality of these records by preventing access to the records by those individuals not listed.

Changes: None.

Comment: One commenter suggested that § 303.415(d) is unnecessary because records are generally maintained electronically in order to be consistent with the FERPA and HIPAA requirements.

Discussion: This requirement is necessary because the public has a right to know who may have access to personally identifiable information about their child and family. The method a participating agency uses to implement the provisions in § 303.415(d) is best left to the participating agency to determine. The agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information, regardless of whether such information is maintained electronically or as a written record.

Changes: None.

Destruction of Information (§ 303.416)

Comment: None.

Discussion: For consistency within the confidentiality regulations that apply to participating agencies in §§ 303.402 through 303.417, we have replaced the reference to ''public agency'' in § 303.416(a) with the term ''participating agency.''

Changes: We have replaced the reference to ''public agency'' with ''participating agency'' in § 303.416(a).

Comment: A few commenters expressed concern that we have included statutory references to GEPA in § 303.416(a), but these references are not included in the corresponding part B provisions in 34 CFR 300.624. The commenters requested that for consistency these citations be removed from § 303.416(a) or be added to the regulations under part B of the Act.

Discussion: SEAs are aware of the applicability of GEPA to the part B program. Therefore, it is not necessary to add these references to the part B regulations. However, there may be lead agencies that are unaware of the applicability of GEPA to the part C program; accordingly, it is important that § 303.416(a) identify the specific citations to those GEPA and EDGAR provisions concerning the maintenance, use, disclosure, and destruction of records. Thus, we have revised the citation to GEPA provisions to refer to 20 U.S.C. 1232f, which contains fiscal recordkeeping requirements. Lead agencies that are not SEAs may be similarly unfamiliar with the provisions in parts 76 and 80 of EDGAR that apply to the early intervention records, including, for example, the recordkeeping requirements in 34 CFR 80.42(b).

Changes: We have revised the citation to GEPA provisions in § 303.416 to refer to 20 U.S.C. 1232f.

Enforcement (§ 303.417)

Comment: One commenter recommended revising the language in § 303.417 because the proposed phrasing was awkward.

Discussion: We agree that § 303.417 should be clarified. We have amended § 303.417 to clarify that the enforcement policies and procedures that a State must have in effect are consistent with §§ 303.401 through 303.417, and include sanctions and the right to file a State complaint under §§ 303.432 through 303.434.

Changes: We have amended § 303.417 to indicate that the lead agency must have in effect the policies and procedures, including sanctions and the right to file a complaint under §§ 303.432 through 303.434, that a State uses to ensure that its policies and procedures, consistent with §§ 303.401 through 303.417, are followed and that the requirements of the Act and the regulations in this part are met.

Parental Consent and Ability To Decline Services (§ 303.420)

Comment: Some commenters requested that the Office of Special Education and Rehabilitative Services (OSERS) provide clarification regarding parental consent for the assessments used to report on child outcomes in the SPP/APR. One commenter requested that the OSERS September 2006 (revised October 2007) frequently asked questions (FAQ) document located at *http://www.rrfcnetwork.org/content/view/409/47/#cfiscal* be used as a reference point for clarification regarding parental consent for the assessments used to report child outcomes.

Discussion: If the lead agency collects, uses, or maintains information about an eligible child to meet the SPP/APR reporting requirements of the Department under part C of the Act, including the required reporting on child outcomes (which information is reported based on aggregate numbers of children, and not by individual child), generally, the information is not personally identifiable provided that the State has addressed any confidentiality constraints as a result of small data cells and, thus, prior written parental consent would not be required. However, as noted in the FAQ document referenced by the commenter, prior written parental consent is required under § 303.420 if the collection of outcome information is a part of the lead agency's evaluation to determine initial or continuing eligibility of a child in the part C program. In this circumstance, States must provide prior written notice to the parents under § 303.421 and, if applicable, obtain parental consent for evaluation as required in § 303.420.

Changes: None.

Comment: One commenter stated that requiring parental consent in § 303.420 to administer screening procedures in § 303.320 may dissuade some parents from allowing a developmental screening to be conducted.

Discussion: It is important for parents to be able to determine whether their child should receive a developmental screening. We have added in § 303.420(a)(1), regarding parental consent for screening, a reference to the screening provisions in § 303.320.

Changes: We added, in § 303.420(a)(1), a reference to § 303.320.

Comment: A few commenters requested that the word ''initial'' in current § 303.404 be reinserted into § 303.420(a)(2) before the words ''evaluation and assessment.''

Discussion: Consistent with section 639(a)(3) of the Act and the current policies and practice in the vast majority of States, the Department's position is that parental consent is required for all evaluations, including an initial evaluation and assessment of a child and all subsequent evaluations and assessments of a child. To clarify this point, we have amended the regulations to indicate that the consent provisions in § 303.420(a)(2) apply to all evaluations and assessments of a child.

Changes: We have added the word ''all'' to § 303.420(a)(2).

Comment: None.

Discussion: The Department received a large number of comments on proposed § 303.420(a)(4) as it relates to the lead agency obtaining parental consent prior to accessing public benefits or insurance. We have addressed those comments in the *Analysis of Comments and Changes* for subpart F of this part.

Changes: We have revised § 303.420(a)(4) to clarify that the lead agency must ensure that parental consent is obtained before public benefits or insurance or private insurance is used if such consent is required under § 303.520.

Comment: One commenter recommended that § 303.420, regarding parental consent and declining services, be amended to specifically reflect the language in part C of the Act. The commenter stated that there are inherent differences between part C and part B of the Act and that the part B requirements in 34 CFR 300.300(a)(3)(i) should not be adopted without revision. Specifically, the commenter pointed out that § 303.420(c)(1), which permits a lead agency to use the due process hearing procedures to challenge a parent's refusal to consent to an initial evaluation and assessments of a child for early intervention services, should not apply to part C because participation in early intervention services is voluntary. The commenter recommended removing this paragraph.

Discussion: We agree with the commenter that the participation of infants and toddlers with disabilities and their families in the part C program is voluntary and a parent may refuse an initial evaluation or assessment without the lead agency being able to use the due process hearing procedures under this part or under the regulations under part B of the Act to challenge the parent's refusal.

Additionally, because the lead agency may not use due process hearing procedures to challenge a parent's refusal to provide consent required under this part, we have added in new § 303.420(c) that such due process hearing procedures may not be used to challenge the parent's refusal to provide any consent that is required under paragraph (a) of this section. Therefore, we have amended § 303.420(c) accordingly.

Changes: We have amended § 303.420(c) to indicate that a lead agency may not use the due process hearing procedures under this part or part B of the Act to challenge a parent's refusal to provide any consent that is required under paragraph (a) of this section.

Comment: None.

Discussion: For consistency with § 303.414 and internal consistency within § 303.420, we refer to the confidentiality exceptions in § 303.414 instead of referring to the exchange of personally identifiable information in § 303.401.

Changes: We have revised § 303.420(a)(5) to read ''Disclosure of personally identifiable information consistent with § 303.414.''

Prior Written Notice and Procedural Safeguards Notice (§ 303.421)

Comment: A few commenters objected to the phrase ''reasonable time'' in § 303.421, which requires that prior written notice be given to parents a reasonable time before the lead agency under part C of the Act or an EIS provider proposes, or refuses, to take certain actions concerning their child. One commenter requested that ''reasonable time'' be replaced with a specific timeframe, for example, five days.

Discussion: Quantifying the phrase ''reasonable time'' in § 303.421(a) would be inappropriate because what constitutes a reasonable time may vary based on the individual circumstances of each case. However, we would expect a lead agency to provide notice under § 303.421 within a timeframe that allows the parent time to respond to the notice before the lead agency takes, or refuses to take, the actions listed in § 303.421(a).

Changes: None.

Comment: One commenter recommended adding language to § 303.421(c) to require that the prior written notice and procedural safeguards notice be provided in braille

to individuals who are blind or visually impaired.

Discussion: The commenter's concerns are addressed in § 303.421(c)(1)(ii), which requires that the notice be provided in the native language of the parent as the term *native language* is defined in § 303.25. Section 303.25(b) requires that for an individual who is blind or visually impaired the term *native language* means the mode of communication that is normally used by the individual (such as sign language, braille, or oral communication). Therefore, we decline to revise the regulation as requested by the commenter.

Changes: None.

Surrogate Parents (§ 303.422)

Comment: A few commenters recommended amending the language in § 303.422, concerning surrogate parents, to align the language with the parallel provisions in 34 CFR 300.519 of the part B regulations.

Discussion: Section 303.422, concerning surrogate parents, is primarily aligned with the requirements in sections 639(a)(5) of the Act and reflects many of the parallel provisions regarding surrogate parents in section 615(b)(2) of the Act and 34 CFR 300.519 of the part B regulations. Section 303.422 does not include the language from 34 CFR 300.519(a)(4) and (f) of the part B regulations because these provisions are not applicable to the part C program. Specifically, the language in the part B regulations references an unaccompanied homeless youth under the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)). The language from 34 CFR 300.519(c) of the part B regulations, although slightly modified for clarity, is applicable to the part C program. We have amended § 303.422 to add a new paragraph (c) to state that ''in the case of a child who is a ward of the State, the surrogate parent, instead of being appointed by the lead agency under paragraph (b)(1) of this section, may be appointed by the judge overseeing the infant or toddler's case provided that the surrogate parent meets the requirements in paragraphs (d)(2)(i) and (e) of this section.''

Changes: We have added new paragraph (c) and renumbered the subsequent paragraphs accordingly.

Comment: A few commenters requested that the Department clarify the phrase ''cannot locate a parent'' in § 303.422(a)(2), which requires each lead agency or other public agency to ensure that the rights of a child are protected when no parent can be located. One commenter pointed out that the language in § 303.422(a)(2) is different from the language in current § 303.406(a)(2), which states that each lead agency must ensure that the rights of a child are protected when the public agency cannot discover the whereabouts of a parent. The commenter asked whether there is a distinction between the current requirements and those in § 303.422(a)(2) and whether the Department is changing its position.

Discussion: Section 303.422(a)(2) is substantively unchanged from current § 303.406(a)(2). Although we used the simpler term ''locate a parent'' in place of the term ''discover the whereabouts of a parent,'' we have not changed the meaning of the regulations, and the regulations continue to require that the lead agency make reasonable efforts to discover the whereabouts of a parent before assigning a surrogate parent, consistent with sections 615(b)(2)(A) and 639(a)(5) of the Act.

Changes: None.

Comment: A few commenters recommended expanding the requirement in § 303.422(b)(2) to require that for children who are wards of the State or placed in foster care, a lead agency must consult with all individuals involved with the care of the child, including but not limited to, the child's care giver, appointed guardian, social worker, and attorney, when appointing a surrogate parent. The commenters stated this would ensure a fully informed decision when appointing a surrogate parent for children who are wards of the State or placed in foster care.

Discussion: Section 303.422(b)(2) requires the lead agency, when determining whether and who to appoint as a surrogate parent for children who are wards of the State or placed in foster care, to consult with the public agency with whom care of the child has been assigned. The individuals involved in implementing the provisions in § 303.422 for children who are wards of the State or placed in foster care will vary on a case-by-case basis. The regulations as written provide the flexibility necessary for a lead agency and the public agency, as part of the consultation process in § 303.422, to decide who should be involved in implementing the requirements of this section.

Changes: None.

Comment: One commenter stated that a lead agency should not consult with a child welfare agency with regard to assigning a surrogate parent, as required in § 303.422(b)(2), because the foster parent is the parent and can make decisions.

Discussion: The surrogate parent provisions in § 303.422 are only relevant if a parent is unavailable. If a foster parent meets the definition of *parent* in § 303.27 there would be no need for a surrogate parent to be assigned and the consultation provision in § 303.422(b)(2) would not apply.

Changes: None.

Comment: A few commenters recommended adding language specifying that a surrogate parent cannot be a person involved in the education or care of the child.

Discussion: We agree that this additional language would provide useful clarification and have amended the regulations to add language to § 303.422(d)(2)(i) clarifying that an employee of a public agency that provides education or care to a child or any family member of the child cannot be a surrogate parent.

Changes: We have amended § 303.422(d)(2)(i) to expressly prohibit any employee of the lead agency or any other public agency or EIS provider that provides early intervention services, education, care, or other services to a child or any family member of the child from serving as a surrogate parent for that child.

Comment: One commenter recommended adding language to § 303.422 to indicate that a lead agency may not remove a surrogate parent based upon a disagreement with a surrogate parent or because a surrogate parent refuses to consent to the provision of early intervention services.

Discussion: The Act is silent on when or how a surrogate parent can be removed. However, a lead agency has a responsibility to ensure that a surrogate parent is carrying out his or her responsibilities; therefore, there are some circumstances when removal may be appropriate. A mere disagreement with the decisions of a surrogate parent about appropriate services or placements for a child, however, generally would not be sufficient to give rise to a removal, as the role of a surrogate parent is to represent the interests of the child, which may not be the same as the interests of the public agency. We do not think a regulation is necessary because these circumstances may be resolved under State law. Additionally, the rights of an infant or toddler with a disability are adequately protected by Titles II and VI of the ADA, which prohibit retaliation or coercion against any individual who exercises their rights under Federal law for the purpose of assisting children with disabilities, to protect the child's rights under this statute.

Changes: None.

Comment: A few commenters recommended that we establish a

timeline, such as 30 days, for the lead agency or other public agency to identify and assign a surrogate parent. Other commenters expressed concern that significant delays will result in cases where a surrogate parent must be appointed in order to provide consent.

Discussion: We agree that a timeline to assign a surrogate parent should be included in these regulations and have changed § 303.422 to require a lead agency to make reasonable efforts to ensure that a surrogate parent is assigned not more than 30 days after the public agency determines that a child needs a surrogate parent. Given that the development of infants and toddlers quickly changes, identifying a surrogate parent in a timely manner is important to a child, prevents undue delays, and aids the effective implementation of the requirements of this part. Additionally, a 30-day time frame to identify a surrogate parent is consistent with 34 CFR 300.519(h) of the part B regulations and establishes a timeframe in which a surrogate parent must be appointed, thus preventing undue delays. We have revised § 303.422 accordingly.

Changes: We have added paragraph § 303.422(g) to require that the lead agency make reasonable efforts to ensure that a surrogate parent is assigned not more than 30 days after a public agency determines that the child needs a surrogate parent.

State Dispute Resolution Options (§ 303.430)

Comment: One commenter requested that we retain Note 2 from current § 303.420, concerning the importance of establishing State administrative procedures that result in speedy resolution of complaints because an infant's or toddler's development is so rapid that undue delay could be potentially harmful.

Discussion: We agree with the commenter that Note 2, following current § 303.420, is important and have included the substance of that note in the timelines in these regulations. For States that choose to adopt part C due process procedures, § 303.437(b) requires each lead agency to ensure that, not later than 30 days after the receipt of a parent's due process complaint, the due process hearing is completed and a written decision is mailed to each of the parties. For States that choose to adopt part B due process procedures, § 303.440(c) requires the lead agency to adopt either a 30- or 45-day timeline, subject to § 303.447(a), for the resolution of due process complaints. Additionally, the requirements for State complaint procedures in § 303.433(a), provide that, within 60 days after a complaint is filed, the lead agency must resolve the complaint. Therefore, it is not necessary to retain in § 303.430 verbatim the language of note 2 in current § 303.420.

Changes: None.

Comment: Several commenters expressed concerns with the dispute resolution options in § 303.430. A few commenters stated that the options do not fit into the part C program because the child's time in the program is limited. The commenters stated that the 30-day timeline for the resolution period and the 45-day timeline for the due process hearing in States that choose to adopt part B due process procedures under section 615 of the Act are too long.

Discussion: Section 303.430 requires each statewide system to include procedures to resolve complaints through mediation, State complaint procedures, and due process procedures. The concerns about the timelines for the resolution period and the due process hearing in States that choose to adopt part B due process procedures under section 615 of the Act, are more fully addressed in the *Analysis of Comments and Changes* in response to the comments received on § 303.440.

Changes: None.

Comment: None.

Discussion: We have revised the introductory text of § 303.430(d) to remove the phrase ''in addition to adopting the procedures in paragraphs (b) and (c) of this section'' because these requirements do not need to be referenced in paragraph (d) and to do so would be redundant with the requirements already cited in paragraphs (b) and (c) of § 303.430.

Changes: We have removed from § 303.430(d) the phrase ''in addition to adopting the procedures in paragraphs (b) and (c) of this section.''

Comment: Many commenters expressed concern that the language in proposed § 303.430(e)(3) relates not to pendency, but to the requirement in section 635(c)(2)(D) of the Act and § 303.211(b)(4) that IFSP services continue to be provided to a toddler with a disability until a part B eligibility determination is made for that child in a State that elects to make part C services available beyond age three under § 303.211. A few other commenters indicated that proposed § 303.430(e)(3) conflicts with sections 607(a) and (b) and 615(j) of the Act and the Third Circuit decision in *Pardini* v. *Allegheny Intermediate Unit,* 420 F.3d 181 (3d Cir. 2005), *cert. denied,* 126 S.Ct. 1646 (2006). One commenter, recommended referencing part B eligibility as well as ineligibility in proposed § 303.430(e)(1).

Discussion: We agree with commenters who noted that the requirement in proposed § 303.430(e)(3) applies only to those States that elect to offer services under § 303.211 and is not a pendency provision and, thus, we have moved the substance of proposed § 303.430(e)(3) to § 303.211(b)(4). These comments and the resulting changes are fully addressed in the *Analysis of Comments and Changes* for § 303.211(b)(4) in subpart C of this part.

Changes: We have moved the substance in § 303.430(e)(3) to § 303.211(b)(4).

Mediation (§ 303.431)

Comment: One commenter requested that the Department clarify the phrase ''including matters arising prior to the filing of a due process complaint'' as used in § 303.431(a) to make clear when mediation may be used by parties.

Discussion: We agree that § 303.431(a) needs clarification regarding when mediation is available. Section 303.431 incorporates sections 639(a)(8) and 615(e)(1) of the Act, and requires lead agencies to ensure that procedures are established and implemented to allow parties to resolve disputes involving any matter under part C of the Act through a mediation process, including matters arising prior to the filing of a due process complaint. Thus, under § 303.431 parties to disputes may request mediation at any time to resolve any matter arising under this part, regardless of whether a due process complaint or a State complaint is filed. We have amended § 303.431 to expressly provide that mediation may be used ''at any time.''

Changes: We have added the phrase ''at any time'' to the end of § 303.431(a).

Comment: One commenter requested that the phrase ''parent's right to a due process hearing'' in current § 303.419(b)(1)(ii) be maintained in § 303.431(b)(1)(ii).

Discussion: We agree with the commenter; the language ''parent's right to a due process hearing'' aligns with section 615(e)(2)(A)(ii) of the Act and should be used in these regulations.

Changes: We have replaced the phrase ''hearing on the parent's due process complaint'' with the phrase ''due process hearing'' in § 303.431(b)(1)(ii).

Adoption of State Complaint Procedures (§ 303.432)

Comment: None.

Discussion: We have moved in § 303.432(b)(1) the modifying phrase ''who is the subject of the complaint'' to follow the phrase ''the infant or toddler

with a disability'' to clarify that it is the infant or toddler with the disability who is the subject of the complaint.

Changes: We have moved in § 303.432(b)(1) the phrase ''who is the subject of the complaint'' to follow the phrase ''the infant or toddler with a disability.''

Comment: A few commenters requested that § 303.432 explicitly state that monetary reimbursement and compensatory education are potential remedies for State complaints.

Discussion: The lead agency is responsible for ensuring that all public agencies within its jurisdiction meet the requirements of the Act and its implementing regulations. In light of the lead agency's general supervisory authority under sections 634 and 635 of the Act, the lead agency should have the flexibility to determine the appropriate remedies or corrective actions necessary to resolve a complaint in which it has determined that a public agency has failed to provide appropriate services to an infant or toddler with a disability, including the award of compensatory services or monetary reimbursement. To make this clear, we have changed § 303.432(b)(1) to include compensatory services and monetary reimbursement as examples of corrective actions that may be appropriate to address the needs of an infant or toddler with a disability who is the subject of a complaint and the infant's or toddler's family.

Changes: We have added in § 303.432(b)(1) the parenthetical ''(such as compensatory services or monetary reimbursement).''

Minimum State Complaint Procedures (§ 303.433)

Comment: One commenter requested that § 303.433 be amended to indicate that either party may request an extension of the 60-day time limit in § 303.433 when there are legitimate reasons for such a request.

Discussion: Section 303.433 provides that each lead agency must include in its State complaint procedures a time limit of 60 days after a State complaint is filed to complete its review of the complaint and issue a written decision to the complainant that addresses each allegation in the complaint and that contains findings of fact and conclusions and the reasons for the lead agency's final decision. Section 303.433(b)(1) further provides that State complaint procedures must permit an extension of the 60-day time limit only if exceptional circumstances exist with respect to a particular complaint or the parties to the complaint agree to extend the time in order to engage in mediation pursuant to § 303.433(a)(3)(ii).

The lead agency determines when there are exceptional circumstances with respect to a particular complaint that would justify an extension of the 60-day time limit in that complaint. A lead agency may extend the 60-day time limit due to exceptional circumstances, such as a governmentwide shutdown, if the lead agency needs additional information under § 303.433(a)(2) or (a)(3) and the relevant party is unavailable due to hospitalization, or if a parent complainant is unavailable due to illness and cannot provide the additional information under § 303.433(a)(2). Thus, we decline to add the provision suggested by the commenter.

Changes: None.

Comment: One commenter stated that setting aside any part of a State complaint as provided in § 303.433(c) may not be possible because the information that was set aside may be needed to complete the fact finding in that complaint.

Discussion: Section 303.433(c) provides that if a State complaint is received that is also the subject of a due process hearing under § 303.430(d), or contains multiple issues of which one or more are part of a due process hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of that hearing. Although § 303.433(c) requires that matters raised in both a State complaint and a due process hearing be resolved only through the due process hearing procedures, that does not preclude fact finding in relation to an issue in a State complaint that is different from the matters covered by the due process hearing, even though the facts may be related to the subject of, or another issue in, a due process proceeding, because § 303.433(c) also provides that any issue in the State complaint that is not a part of the due process hearing must be resolved through the State complaint procedures.

Changes: None.

Comment: One commenter recommended that we not adopt § 303.433(c)(3), which requires that the lead agency resolve a complaint alleging that a lead agency or EIS provider failed to implement a due process hearing. The commenter stated that this requirement could limit a lead agency's ability to contract with a third party for State dispute resolution services because third party contractors are often given the authority to enforce due process hearing decisions.

Discussion: Nothing in the Act prohibits the lead agency from contracting with a third party for State dispute resolution services and § 303.433(c)(3) would not interfere with a lead agency's ability to enter into such contracts. We note, however, in accepting funds under this part, the lead agency is responsible for the administration of part C in the State and the use of part C funds under sections 635(a)(10) and 637(a)(1) of the Act. Therefore, the lead agency retains the responsibility for full implementation of the requirements of this part, including the ultimate responsibility for the implementation of State dispute resolution decisions even if the services are being carried out by a third party under contract with the lead agency.

Changes: None.

Comment: None.

Discussion: To be consistent within § 303.433, we have added the term ''public agency'' to § 303.433(b)(1)(ii) and (c)(3).

Changes: We have added the term ''public agency'' to § 303.433(b)(1)(ii) and (c)(3).

Filing a Complaint (§ 303.434)

Comment: Several commenters supported the requirement in § 303.434(c) that a State complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received. However, one commenter recommended retaining the requirement in current § 303.511(b)(1) providing that the one-year timeline for filing a State complaint may be extended if the allegation that forms the basis of the complaint is continuing or recurring.

Discussion: A one-year timeline is reasonable and will assist lead agencies in ensuring the effective implementation of State complaint procedures and State part C programs. Limiting a State complaint to an allegation of a violation that occurred not more than one year prior to the date the lead agency receives the complaint will ensure that problems regarding a State's part C program are raised and addressed promptly. For these reasons, we decline to revise § 303.434(c) as requested by the commenter.

Changes: None.

Comment: Several commenters expressed concern that § 303.434(d), which requires the party filing the complaint to forward a copy of the complaint to the public agency or EIS provider, breaches parent confidentiality, may deter parents from filing complaints and, at a minimum, creates an additional barrier to filing a State complaint. One commenter recommended that § 303.434 specify the action that would be taken if a

complainant sends its State complaint only to the lead agency.

Discussion: Section 303.434(d) provides that the party filing the State complaint must forward a copy of the complaint to the public agency or EIS provider serving the child at the same time the party files the complaint with the lead agency. Requiring the complaint to be forwarded to the public agency or EIS provider serving the child at the same time the party files the complaint with the lead agency enables the public agency or EIS provider to be informed of the issues in the State complaint in order to provide an opportunity for the voluntary resolution of the complaint as set forth in § 303.433(a)(3).

We believe that providing the public agency or EIS provider with information about the complaint enables the parties to have the opportunity to resolve disputes directly at the earliest possible time and that this benefit outweighs the minimal burden placed on the complainant. Concerning the commenters' confidentiality concerns, the information that is provided by the complainant generally is information that should already be available to the public agency or EIS provider who is responsible for providing services to a particular child. In addition, the public agency or EIS provider needs to know the identity of the complainant and relevant allegations in the complaint (consistent with § 303.434) in order to propose a resolution of the issues.

Regarding the commenter's request that § 303.434(d) specify the consequences for failure by the complainant to forward a copy of the complaint to the public agency or EIS provider, we do not believe we need to require specific consequences for complainants for two reasons. First, parents file few State complaints under part C of the Act. States reported an average of fewer than two State complaints received by each lead agency in FFY 2006. Second, under § 303.433(a)(3), the lead agency must provide the public agency or EIS provider an opportunity to respond to the complaint, thereby implicitly requiring the lead agency to inform the public agency or EIS provider of the relevant allegations in the complaint. Thus, we decline to regulate as requested by the commenter.

Changes: None.

Appointment of an Impartial Due Process Hearing Officer (§ 303.435)

Comment: One commenter requested that § 303.435 include the relevant part B requirements in 34 CFR 300.511(c), concerning the specific qualifications required for due process hearing officers.

Discussion: Section 303.435 addresses the qualifications for due process hearing officers in States that choose to adopt the part C due process procedures under section 639 of the Act. These qualifications are substantively the same as those in 34 CFR 300.511(c) of the part B regulations and the qualifications in § 303.443(c) for States that choose to adopt the part B due process procedures under section 615 of the Act. While the language in § 303.435 and 34 CFR 300.511(c) is not identical, both sections require a due process hearing officer to have specific knowledge about the Act and the proper conduct of legal proceedings. Additionally, § 303.435 and 34 CFR 300.511(c) both require that the due process hearing officer be impartial using similar criteria regarding personal and professional conflicts of interest and employment status. Since there is no substantive difference between § 303.435 and 34 CFR 300.511(c), it is not necessary to amend § 303.435 as requested.

Changes: None.

Comment: One commenter requested that the Department clarify § 303.435(b)(2). Specifically, the commenter asked whether § 303.435(b)(2) would permit an employee of a lead agency who is an administrative law judge, to act as a hearing officer if that employee's job is to adjudicate disputes such as presiding over due process hearings under the Act and that employee is operating under a system of mandates pursuant to a State executive order designed to ensure his or her independence and impartiality.

Discussion: Section 303.435(b)(1) provides that a hearing officer may not be an employee of the lead agency or an EIS provider involved in the provision of early intervention services or care of the child, and the hearing officer may not have a personal or professional interest that would conflict with his or her objectivity in implementing due process hearing procedures. Section 303.435(b)(2) provides that a person who otherwise qualifies under paragraph (b)(1) of this section is not an employee of an agency for purposes of the prohibition in § 303.435(b)(1) solely because the person is paid by the agency to implement the due process hearing procedures. Under § 303.435(b)(2), the sole fact that an administrative law judge is an employee does not trigger the prohibition in § 303.435(b)(1) if that employee's job as an administrative law judge is to preside over due process hearings under the Act and is operating under a system of mandates pursuant to a State executive order designed to ensure his or her independence and impartiality.

Changes: None.

Parental Rights in Due Process Hearing Proceedings (§ 303.436)

Comment: A few commenters requested that § 303.436 stipulate that parents who pursue a due process hearing are entitled to due process hearing records, findings, and conclusions at no cost to the parent.

Discussion: We agree that a parent involved in a due process hearing should receive a copy of the transcription of the hearing (*i.e.,* a record of the hearing), the findings of fact, and the decisions at no cost.

Changes: Section 303.436(b)(4) and (b)(5) has been changed to specify that a parent involved in a due process hearing has the right to receive a written or electronic verbatim transcription of the hearing and a copy of the written findings of fact and decisions at no cost to the parent.

Convenience of Hearings and Timelines (§ 303.437)

Comment: Several commenters recommended that § 303.437, like 34 CFR 300.515(c) of the part B regulations, allow hearing officers to grant specific extensions of time beyond the period set out in 34 CFR 300.515 of the part B regulations at the request of either party.

Discussion: Sections 303.435 through 303.438 are substantively unchanged from current §§ 303.420 through 303.423, which prescribe a 30-day timeline for due process proceedings in States that adopt part C due process procedures under section 639 of the Act. However, we agree with the commenters that extensions to the 30-day timeline in § 303.437(b) may be necessary under certain circumstances (such as, unavailability of witnesses, exceptional child and family circumstances, and pending evaluations and assessments). Therefore, we have added a new paragraph (c) to this section providing that a hearing officer may grant specific extensions of time beyond the periods set out in paragraph (b) of this section at the request of either party.

Changes: We have added a new § 303.437(c), which provides that a hearing officer may grant specific extensions of time beyond the period set out in paragraph (b) of this section at the request of either party.

States That Choose To Adopt the Part B Due Process Procedures Under Section 615 of the Act (§§ 303.440 Through 303.447)

Comment: A few commenters recommended that the final regulations

clarify that the requirements in §§ 303.440 through 303.447 apply only to States that choose to adopt the part B due process procedures. Another commenter stated that the designated heading is confusing and may lead States to believe that they must adopt part B due process procedures.

Discussion: Grouping the requirements for due process procedures under two designated headings in this subpart, ''States That Choose To Adopt the part C Due Process Procedures under Section 639 of the Act'' and ''States That Choose to Adopt the part B Due Process Procedures under Section 615 of the Act'' clarifies that a lead agency may elect to adopt for the State either part C or part B procedures. The regulations clearly specify which due process procedures apply when the lead agency has made its choice under § 303.430(d).

Changes: None.

Comment: One commenter suggested that the regulations should encourage States to be innovative and create a due process hearing system that is specifically designed for part C of the Act, rather than adopt the part B due process hearing procedures. Another commenter suggested that allowing lead agencies to adopt the part B due process hearing procedures may not be consistent with the Act.

Discussion: We believe that providing States the option of adopting the part B due process procedures in lieu of using the part C due process hearing procedures is consistent with the Act. States were provided this option under the original part C regulations promulgated in 1989 to implement the Education of the Handicapped Act amendments of 1986 (Pub. L. 99–457), which established the early intervention program for infants and toddlers with disabilities.

We have maintained this option in these regulations because there are advantages and disadvantages for particular States to use the due process procedures under part C as opposed to part B of the Act. The vast majority of States use, and will likely continue to use, the part C due process procedures in §§ 303.435 through 303.438 instead of exercising the option to use the part B due process procedures to resolve disputes under part C of the Act. This is in part because the part B due process procedures in §§ 303.440 through 303.447 contain additional steps and procedures. Finally, even in the approximately 25 percent of States that have adopted the part B due process procedures, each State must update its State policies and procedures to reflect the requirements in §§ 303.440 through 303.447 and subject its updated policies and procedures to the public participation requirements in § 303.208(b).

In FFY 2006, approximately 15 States reported exercising the option to adopt the part B due process procedures while the remaining 41 States (which include the territories and outlying areas) reported adopting the part C due process procedures. In some of the 15 States that reported using the part B due process procedures, the lead agency is the SEA and administers both parts B and C of the Act. In a few other States that reported adopting the part B due process procedures, children receiving services under part C of the Act are also entitled to receive, under State law, FAPE, and thus, these States must provide parents with procedural protections under both parts B and C of the Act.

For these reasons, we will continue to allow States the option to adopt the due process procedures (with applicable public and stakeholder input) that are most appropriate for that State.

Changes: None.

Filing a Due Process Complaint (§ 303.440)

Comment: One commenter requested that the Department clarify the phrase ''or should have known'' as used in § 303.440(a)(2), regarding an alleged violation that forms the basis of a due process complaint.

Discussion: As provided in § 303.440(a)(2), in States that choose to adopt the part B due process procedures under section 615 of the Act, a due process complaint must allege a violation that occurred not more than two years before the date the parent or EIS provider knew, or should have known, about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint, in the time allowed by that State law. Whether a parent or public agency ''should have known'' about the action cited as the basis of the complaint is a determination that a due process hearing officer must make based on the individual facts of each case. Thus, further clarification of the term is not necessary or appropriate.

Changes: None.

Comment: One commenter expressed concern that § 303.440(c) allows States to choose either a 30- or 45-day timeline to resolve a due process complaint. The commenter stated that 30 days is sufficient and should be mandated, particularly given the short amount of time that infants and toddlers are eligible for part C services.

Discussion: The option in § 303.440(c) that allows lead agencies to adopt either a 30- or 45-day timeline to resolve a due process complaint is specific to States that choose to adopt part B due process procedures under section 615 of the Act. The part B regulations in 34 CFR 300.515(a) provide for a 45-day timeline for the due process hearing. Section 303.440(c) incorporates the 45-day timeline under the part B procedures, but also allows States that choose to adopt the part B procedures, to elect the shorter 30-day timeline provided under the part C due process procedures. This gives States that choose to adopt the part B due process procedures the flexibility to put in place a timeline shorter than that required under the part B due process procedures. Therefore, we do not believe it is appropriate to revise the regulation as requested by the commenter.

Changes: None.

Due Process Complaint (§ 303.441)

Comment: One commenter requested that the Department clarify whether the 15 days referred to in § 303.441(d)(1) are calendar days or working days.

Discussion: The 15 days are calendar days. As defined in § 303.9, a *day* means calendar day, unless otherwise indicated.

Changes: None.

Comment: One commenter recommended amending § 303.441(b) to reflect the part B provisions in 34 CFR 300.153(b)(4), which recognize that a homeless family may not have an address to list when filing a complaint.

Discussion: The commenter's concern is addressed in § 303.441(b)(4), which requires, in the case of a homeless child (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act), that the due process complaint include available contact information for the child and the name of the EIS provider serving the child.

Changes: None.

Comment: One commenter requested that § 303.441(d) specify that hearing officers must allow parties to amend their due process complaint notices unless doing so would prejudice the other party. The commenter stated that generally, parents may not understand fully the due process procedures and should be allowed to modify their due process complaint without having to file a new complaint and begin the process again.

Discussion: Section 303.441(d)(3)(i), consistent with section 615(c)(2)(E) of the Act, provides that a party may amend its due process complaint only if the other party consents in writing to the amendment and is given the

opportunity to resolve the due process complaint through a meeting; or, as provided in § 303.441(d)(3)(ii), the hearing officer grants permission to amend the complaint, except that the hearing officer may only grant permission to amend the complaint at any time not later than five days before the due process hearing begins. We further note that a party may withdraw its complaint, and re-file it. The regulation aligns with the Act and, therefore, we decline to revise the regulation as requested by the commenter.

Changes: None.

Comment: One commenter recommended extending the time when a party receiving a due process complaint must send a response that specifically addresses the issues raised in the due process complaint. The commenter stated that the 10 days provided in § 303.441(f) is not enough time to research and develop an appropriate response.

Discussion: Section 303.441(f) incorporates the requirements in section 615(c)(2)(B)(ii) of the Act, which provides that the receiving party must provide the party that filed the complaint a response to the complaint within 10 days of receiving the complaint. We do not have the authority to extend this time period.

Changes: None.

Resolution Process (§ 303.442)

Comment: One commenter requested that the Department revise the paragraph heading of § 303.442(a), ''Resolution meeting'' to read ''Meeting to obtain facts and details.''

Discussion: Section 303.442(a)(2) states that the purpose of the resolution meeting is for the parent of the child to discuss the due process complaint and the facts that form the basis of the due process complaint, so that the lead agency has the opportunity to resolve the dispute. ''Resolution meeting'' is thus, the appropriate paragraph heading for § 303.442(a).

Changes: None.

Comment: A few commenters stated that there is no statutory basis for the 30-day resolution timeline in § 303.442 and that the timeline is too long for a time-sensitive program like part C of the Act.

Discussion: Section 303.442, regarding the resolution process, only applies in cases where a State has chosen to adopt the part B due process procedures under section 615 of the Act. Section 303.442(b)(1) incorporates the 30-day resolution timeline specified in section 615(f)(1)(B)(ii) of the Act.

Changes: None.

Comment: A few commenters requested that § 303.442(b)(4) include a definition of the term ''reasonable effort.''

Discussion: Section 303.442(b)(4) provides that, if the lead agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made, including documenting its efforts, the lead agency may, at the conclusion of the 30-day period, request that the hearing officer dismiss the parent's due process complaint. We would expect that throughout the 30-day resolution period the lead agency would make those efforts necessary, as dictated by the individual circumstances of each particular case, to encourage the parent to participate in the resolution meeting. If the lead agency requests the hearing officer to dismiss the parent's due process complaint pursuant to § 303.442(b)(4), it would be up to the hearing officer to determine whether the lead agency has made reasonable efforts to obtain the participation of the parent in the resolution meeting. Thus, specifying activities that would constitute reasonable efforts under § 303.442(b)(4) in all cases is not appropriate.

Changes: None.

Comment: Several commenters suggested that § 303.442(b)(4) is incompatible with the nature of the part C program because dismissing a case when a parent does not agree to participate in a resolution session may establish an adversarial relationship between the parents and the lead agency.

Discussion: Section 303.442(b)(4) provides that when a parent does not participate in the resolution meeting, despite the lead agency's reasonable efforts to persuade the parent to participate (which efforts must be documented), the lead agency may request that the hearing officer dismiss the due process complaint. Although this section provides the lead agency with the option to request dismissal, the lead agency is not required to request a dismissal and may agree instead to an extension of the time to conduct a resolution meeting in order for the parties to continue mediation efforts. Additionally, it is the due process hearing officer who determines whether dismissal of the due process complaint is warranted, based not only on the lead agency's request, if one is made, but also based on any parent's response. The availability of both the lead agency's option to request dismissal and the impartial hearing officer's determination ensures that dismissal of a due process complaint is based on case-specific circumstances.

Changes: None.

Comment: One commenter recommended that § 303.442(b) be amended to require the lead agency to present the requirements in this section to a parent verbally or in the parent's primary mode of communication, in order to ensure that a parent understands these requirements.

Discussion: Section 303.421(b)(3), regarding the content of the prior written notice and procedural safeguards notice, provides that the notice must be in sufficient detail to inform the parents about, among other things, how to file a due process complaint in the due process procedures the State has adopted pursuant to § 303.430(d), and any timelines under those procedures. Further, § 303.421(c)(1)(ii) requires that the notice be provided in the *native language,* as defined in § 303.25, of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. Thus, the regulations already address the commenter's concern regarding providing the notice in a parent's primary mode of communication and we do not believe that it is appropriate to amend the regulations to require verbal reading of the notice. We would expect that the notice would be read to a parent if the parent requested this assistance.

Changes: None.

Hearing Rights (§ 303.444)

Comment: One commenter questioned whether it is appropriate to have an infant or toddler at a due process hearing.

Discussion: While parents always have the right to determine whether their infant or toddler is present at a hearing, we do not believe it is necessary to specify this right in § 303.444(c)(1) because, in general, infants and toddlers with disabilities do not need to be present to either serve as witnesses at, or required participants in, a due process hearing. However, we note that under either the part B or part C due process hearing procedures, a parent is in the best position to decide whether an infant or toddler will attend the due process hearing.

Changes: We have removed § 303.444(c)(1) and renumbered paragraphs (c)(2) and (c)(3) as paragraphs (c)(1) and (c)(2) of this section.

Hearing Decisions (§ 303.445)

Comment: One commenter recommended eliminating the

provisions distinguishing between substantive and procedural violations of part C of the Act in § 303.445, stating that it is not appropriate to make this distinction in the part C regulations. According to the commenter, this regulation violates section 607(a) of the Act.

Discussion: Section 303.445 applies to States that choose to adopt the part B due process procedures under section 615 of the Act. Thus, it is appropriate to include language in § 303.445 that is parallel to 34 CFR 300.513, which reflects section 615(f)(3)(E) of the Act concerning the nature of hearing officer decisions, including the requirement that decisions be based on substantive grounds, and to include the standards under which a hearing officer may find that a child was denied appropriate identification, evaluation, placement, or provision of early intervention services based on procedural inadequacies. Section 303.445(a) is based on the requirements specified in section 615(f)(3)(E) of the Act and thus, is consistent with section 607(a) of the Act, which requires the Secretary to issue regulations that are necessary to ensure that there is compliance with the specific requirements of the Act.

Changes: None.

Comment: One commenter recommended that the heading of § 303.445(a) be amended to reflect the standard that a hearing officer must use to make decisions—which is whether the infant or toddler with a disability and his or her family were provided appropriate early intervention services.

Discussion: Section 303.445(a) incorporates section 615(f)(3)(E) of the Act, which provides the substantive and procedural grounds upon which the decision of a due process hearing officer may be based; these substantive and procedural grounds are broader than the standard suggested by the commenter. Therefore, we decline to amend the heading of this paragraph.

Changes: None.

Comment: None.

Discussion: In order to make § 303.446(b) consistent with § 303.443(b), which requires the lead agency to conduct the due process hearing, and section 635(a)(10) of the Act, which requires the lead agency to have a single line of responsibility, we have removed in § 303.446(b) the authority for a public agency (other than the lead agency) to conduct due process hearings when a State adopts under § 303.430(d) the part B due process procedures. However, we have retained the authority for the lead agency to establish procedures that would allow any party aggrieved by the findings and decision in the due process hearing to appeal to, or request reconsideration of the decision by, the lead agency. If the lead agency establishes such procedures, those procedures must meet the same requirements in § 303.446(b), (c), and (d).

Changes: We have removed the authority for public agencies (other than the lead agency) to conduct due process hearings in § 303.446(b), consistent with § 303.443(b), which requires the lead agency to conduct the due process hearing. We amended § 303.446(b) to permit the lead agency to establish procedures that would allow any party aggrieved by the findings and decision in the due process hearing to appeal to, or request reconsideration of the decision by, the lead agency.

Timelines and Convenience of Hearings and Reviews (§ 303.447)

Comment: One commenter requested that the word ''child'' as used in § 303.447(d), concerning the requirement that each hearing and each review involving oral arguments be conducted at a time and place that is reasonably convenient to the parents and child involved, be defined or removed.

Discussion: Section 303.6 defines the term *child* as it is used throughout this part.

Changes: None.

Civil Action (§ 303.448)

Comment: A few commenters recommended that § 303.448 stipulate that courts have subject-matter jurisdiction over actions brought under sections 615 and 639 of the Act, concerning procedural safeguards.

Discussion: Section 303.448 incorporates sections 615(i)(2), 615(i)(3)(A), 615(l), and 639 of the Act, which provide for the right of an aggrieved party to bring a civil action to appeal the findings and final decision of a due process hearing. Concerning the commenter's request to clarify subject-matter jurisdiction of courts to hear such a civil action, section 615(i)(2)(A) of the Act states that a civil action to appeal a due process decision may be brought in a district court of the United States without regard to the amount in controversy. These sections of the Act set forth the requisite subject-matter jurisdiction for Federal and State courts to hear such civil actions. Thus, it is not necessary to clarify subject-matter jurisdictional grounds beyond those identified in sections 615(i)(2), 615(i)(3)(A), 615(l), and 639 of the Act.

Changes: None.

Subpart F—Use of Funds and Payor of Last Resort

Use of funds, payor of Last Resort, and System of Payments (§ 303.500)

Comment: None.

Discussion: Given that the provisions in § 303.500 address the general requirements for each State's fiscal policies, we have moved the provision in proposed § 303.521(a), concerning the general option that a State may establish a system of payments (*i.e.,* financial sources such as insurance or family fees to pay for part C services), to § 303.500(b) and renumbered the other provisions in § 303.521 accordingly. We have added the term ''premiums'' to the examples of cost participation fees for clarity in § 303.500(b).

Changes: We have renumbered proposed § 303.500 as § 303.500(a) and moved the general requirement in the introductory text of proposed § 303.521(a) to § 303.500(b). We also added the phrase ''system of payments'' to the heading of § 303.500 and the word ''premiums'' to § 303.500(b).

Permissive Use of Funds by the Lead Agency (§ 303.501)

Comment: None.

Discussion: To ensure that the use of funds requirements in § 303.501 are also subject to other fiscal application requirements in §§ 303.120 through 303.122 and §§ 303.220 through 303.226 (concerning fiscal assurances each State must include in its application for funds), we have added references to these other fiscal provisions in §§ 303.120 through 303.122 and §§ 303.220 through 303.226.

Changes: We have added in the introductory text of § 303.501 references to §§ 303.120 through 303.122 and §§ 303.220 through 303.226.

Comment: One commenter requested clarification on the implementation of the requirement in § 303.501(a) that part C funds be used for direct early intervention services ''that are not otherwise funded through other public or private sources.'' This commenter also noted that funding sources might vary by child, which is difficult for a State to monitor.

Discussion: The purpose of § 303.501(a) is to ensure that Federal funds are used to supplement or increase the level of resources available in a State for the provision of early intervention services and are not used to replace existing resources. Section 303.501(a) incorporates the language in section 638(1) of the Act that permits, but does not require, States to use part C funds for direct early intervention services when there are no other public

or private sources available to pay for these services, subject to the requirements in §§ 303.510 through 303.521. In a State that uses part C funds to pay for direct early intervention services, the State must ensure implementation of the payor of last resort provisions in section 640 of the Act and in §§ 303.510 through 303.521.

With respect to the commenter's concern about identifying and monitoring funding sources to pay for a service for a particular child, under § 303.344(d)(1)(iv), the child's IFSP Team must identify in the IFSP the payment arrangements, which include identifying the funding source(s) that will be used to pay for each early intervention service identified in the IFSP. Consistent with § 303.33(b)(9), the role of a service coordinator includes coordinating the funding sources for early intervention services specified in the IFSP. States may monitor and implement the payor of last resort requirements in § 303.501(a) in a variety of ways. For example, a State may provide IFSP Teams with a list of resources that may be available to pay for a specific IFSP early intervention service in that State. A State may require service coordinators to review with parents available funding sources to pay for a specific IFSP service based on family-specific circumstances (*e.g.,* military families or children already enrolled in Title V or other programs) in order to implement the payor of last resort provisions in § 303.501(a). Given the parallel requirements in §§ 303.33(b)(9) and 303.344(d)(1)(iv) and the variety of ways in which States may implement the requirements in § 303.501(a), it is not feasible to further clarify how this provision might be implemented.

Changes: None.

Comment: Many commenters opposed the provision in § 303.501(d), which allows the use of part C funds to serve children over the age of three, because existing appropriations for part C are not sufficient to cover the cost of providing early intervention services to eligible infants and toddlers under age three and their families. Some commenters requested that the Department clarify that § 303.501(d) should not take effect until sufficient appropriations are available to trigger incentive funding under section 643(e) of the Act. One commenter supported § 303.501(e), which allows any State that does not provide services under § 303.204 for at-risk infants and toddlers, as defined in § 303.5, to strengthen the statewide system by initiating, expanding, or improving collaborative efforts related to at-risk infants and toddlers.

Discussion: The provisions in § 303.501(d) and (e), concerning a State's option to make available early intervention services in lieu of FAPE to children with disabilities beyond age three and strengthening the statewide system, directly reflect the language in section 638(4) and (5) of the Act. Under sections 632(5)(B)(ii) and 635(c) of the Act and § 303.211, States have the option, but are not required, to make part C services available to eligible children over the age of three. While the provision in section 643(e) of the Act requires the Department, in any fiscal year for which the appropriation for the part C program exceeds $460,000,000, to reserve a portion of the funds as incentive funds for States to serve children three years of age until entrance into elementary school, nothing in the Act (including sections 632(5)(B)(ii) and 635(c)) links the availability of the option to make part C services available to eligible children over the age of three to the availability of funding under section 643(e) of the Act.

Changes: None.

Payor of Last Resort (§ 303.510)

Comment: Several commenters requested that the language from the note following current § 303.527 (concerning the intent of Congress that other funding sources continue for services that would be available to eligible children but for the existence of programs under part C of the Act) be incorporated in the payor of last resort requirements in § 303.510. These commenters noted that the language in the note supports congressional intent for an interagency structure to finance early intervention services and is an important statement supporting States' efforts to develop the necessary partnerships to fund the part C system.

Discussion: The substance of the note that follows current § 303.527 is included in § 303.510(c) as a rule of construction. The rule of construction, which references funding sources under the Social Security Act, 42 U.S.C. 701, *et seq.* (SSA), clarifies that nothing in part C of the Act may be construed to permit a State (including the lead agency and other agencies in the State) to withdraw funding for services that currently are or would be made available to eligible children but for the existence of part C of the Act. Thus, funding from other sources would continue to be available to support services that are included in the IFSP. To make this clearer, we have amended § 303.510(c) to include a reference to section 1903(a) of the SSA, the specific section of the SSA regarding medical assistance for services and have clarified that nothing in this part may be construed to permit a State to reduce medical or other assistance available in the State.

Changes: We have amended § 303.510(c) by removing the final phrase ''within the State'' and including the phrases: (1) ''in the State'' and (2) ''including section 1903(a) of the SSA regarding medical assistance for services furnished to an infant or toddler with a disability when those services are included in the child's IFSP adopted pursuant to part C of the Act.''

Comment: One commenter opposed referencing § 303.520, regarding use of insurance for payment of services, in § 303.510(a), regarding payor of last resort. The commenter noted that in light of part C's payor of last resort requirements parental consent should not be required for the use of private insurance in § 303.520 because the requirement to obtain parental consent diminishes the lead agency's capacity to implement a consistent payor of last resort policy. The commenter requested that the Department clarify, amend, or remove the reference to § 303.520 in § 303.510(a).

Discussion: The requirement in § 303.510(a) directly incorporates the long-standing payor of last resort requirements in section 640(a) of the Act (and reflected in current § 303.527(a) and (b)). The reference to § 303.520 in § 303.510(a) was added to ensure that States do not interpret part C payor of last resort provisions to override the requirements in §§ 303.520 and 303.521, concerning use of insurance and systems of payments.

As discussed in response to comments on § 303.520, the Department has determined that funds from public health insurance or benefits (*e.g.,* Medicaid or CHIP) or private insurance are not considered available funding sources under part C's payor of last resort provisions, unless a parent has provided the consent required under § 303.520(a)(1) and (b)(1), concerning parental consent for use of public benefits or insurance or private insurance, or one of the exceptions under § 303.520(a)(2) or (b)(2) applies. When other public funds are available to pay for part C services, such as funds from the Department of Defense's TRI–CARE medical assistance program or TANF, part C funds are the payor of last resort.

Changes: None.

Comment: Several commenters recommended adding a reference to the Children's Health Insurance Program

(CHIP) in § 303.510(c), which requires that nothing in this part be construed to permit a State to reduce medical or other available assistance or to alter eligibility under Title V of the SSA or Title XIX of the SSA, within the State, because CHIP is a potential Federal funding source for early intervention services.

Discussion: Section 303.510(c) directly incorporates the payor of last resort provisions in section 640 of the Act, which only expressly reference Titles V and XIX of the SSA (which are the statutory authorities respectively for the Maternal and Child Health and Medicaid public benefits programs). No other statutory authorities are cited. We believe it would be inappropriate to add a reference to CHIP without also adding statutory authorities for all other funding sources.

Changes: None.

Methods To Ensure the Provision of, and Financial Responsibility for, Part C Services (§ 303.511)

Comment: None.

Discussion: We have changed the title of § 303.511 to better align with the title of section 640(b)(1) of the Act, which addresses methods of ensuring and establishing financial responsibility for part C services.

Changes: We have changed the title of § 303.511 to ''*Methods to ensure the provision of, and financial responsibility for, Part C services*''.

Comment: One commenter requested that § 303.511(a) be clarified to require States to have in place methods for establishing financial responsibility and for providing early intervention services using one of the three methods listed in § 303.511(a). The commenter stated that, as proposed, § 303.511(a) appeared to require that States (a) establish financial responsibility in State law or regulation, (b) sign interagency and intra-agency agreements, and (c) have other written methods determined by the Governor, or the Governor's designee, and approved by the Secretary as part of the State's application.

Discussion: We agree that clarification of this provision is necessary and have amended proposed § 303.511(a) and removed proposed § 303.511(b). New § 303.511(a) has been added to track the language of section 640(b)(1)(A) of the Act, requiring each State to ensure that has in place methods for State interagency coordination such that the Chief Executive Officer of a State or designee of the Chief Executive Officer shall ensure that the interagency agreement or other method for interagency coordination is in effect between each State public agency and the designated lead agency. New § 303.511(a)(1) incorporates proposed § 303.511(b), providing that the interagency coordination must ensure the provision of, and financial responsibility for, early intervention services provided under this part. New § 303.511(a)(2) requires that such services be consistent with the requirements of section 635 of the Act and the State's application under section 637 of the Act, including the provision of such services during the pendency of any dispute between the State agencies.

Proposed § 303.511(a) has been redesignated as § 303.511(b) and has been revised to indicate that States must meet the requirements of this section using one of the three methods listed.

Changes: We have added new paragraph § 303.511(a), removed proposed § 303.511(b), and redesignated proposed paragraph (a) as new paragraph (b). We revised § 303.511(b) by adding the phrase ''in one of the following''.

Comment: Two commenters supported the addition of proposed § 303.511(a)(2), redesignated § 303.511(b)(2), permitting States to use signed interagency and intra-agency agreements to establish financial responsibility and provide early intervention services. Other commenters requested that the Department require States to report to the Secretary the dollar amounts that flow into the system based on the use of interagency and intra-agency agreements.

Discussion: The Department does not require States to submit data to the Secretary on the amount of funding obtained for part C services through interagency or intra-agency agreements because the Department does not have a programmatic or regulatory need to collect such information at this time and we do not want to place an additional data collection burden on States. However, States may choose to collect such data and may need these data to track the amount of funds expended and budgeted for the provision of early intervention services in order to meet part C's nonsupplanting requirements in § 303.225.

Changes: None.

Comment: One commenter requested, for clarity, that the word ''method'' in proposed § 303.511(b), regarding methods for establishing financial responsibility and providing early intervention services, be replaced with ''formal interagency agreement or other written method.''

Discussion: Proposed § 303.511(b), redesignated § 303.511(a)(1), directly incorporates the language in section 640(b) of the Act concerning obligations to ensure, and methods of ensuring, services. Section 640(b) of the Act and § 303.511(a)(1) make clear that ''method'' refers to the manner in which a State ensures the fiscal responsibility of each agency for paying for part C services, which could include a State law, regulation, signed interagency or intra-agency agreement, or other appropriate written method. Adding the phrase ''formal interagency agreement or other written method'' to the regulation could appear to limit the options a State has for meeting these requirements or indicate a preference for the method to be used.

Changes: None.

Comments: None.

Discussion: As part of the State's responsibility to have methods in place for establishing financial responsibility, it is critical that not only should such methods be consistent with the State's funding policies adopted under Subpart F (including the system of payments) but such methods must expressly include any provisions the State has adopted under § 303.520 regarding the use of insurance to pay for part C services. Many of the provisions in § 303.520 regarding use of public benefits or insurance or use of private insurance can only be implemented with one of the express methods identified in section 640 of the Act and in § 303.511 (such as an interagency agreement, State statute, or Medicaid State plan) and the State must include its provisions regarding use of insurance in one of these methods to ensure adherence to these requirements.

Changes: We have added to the end of § 303.511(d)(2) the phrase ''and include any provisions the State has adopted under § 303.520 regarding the use of insurance to pay for part C services.''

Policies Related To Use of Insurance To Pay for Part C Services (§ 303.520)

Use of Public Benefits or Insurance To Pay for Part C Services (§ 303.520(a))

Comment: We received many comments on the use of public benefits or insurance to pay for part C services. Most commenters, including parents, parent advocacy groups, State lead agencies, and EIS providers, supported proposed § 303.520(a)(1)(iii), which would have required parental consent for enrollment in a public benefits or insurance program when a parent is eligible under, but not already enrolled in, such a program. These commenters maintained that a State should not be able to require a parent to enroll in a public benefits or insurance program,

such as Medicaid, as a condition of receiving IDEA part C services because the act of enrollment could impose costs on parents and families, affect their rights under other Federal programs, and have an impact on a parent's credit rating.

However, the vast majority of commenters, including parents, parent advocacy groups, State lead agencies, and EIS providers, opposed proposed § 303.520(a)(1)(i) that would have required parental consent for using a child's or parent's public benefits or insurance to pay for part C services when the child or parent is already enrolled in such a program. Several commenters, including a State Interagency Coordinating Council and a parent advocacy group, recommended that States be required to provide notice to parents in lieu of obtaining parental consent when the child or parent is already enrolled in such a program, particularly if the child or parent does not incur specified costs.

Commenters gave the following reasons for opposing the parental consent requirement in proposed § 303.520(a)(1)(i) when a child or parent is already enrolled in a public benefits or insurance program: (1) The use of public benefits or insurance is an important funding source for IDEA part C services, (2) there may be an administrative burden on State lead agencies and EIS providers in obtaining parental consent that could result in a delay in providing services to children and families, (3) IDEA statutory provisions, including sections 635(a)(10) and 640, require State lead agencies to coordinate all funding sources and to use IDEA part C funds as a payor of last resort, respectively; (4) Federal IDEA part C funds are designed to be the ''glue money,'' and not the primary funding source and thus only to be used when other Federal, State, and local funds are not available to pay for IDEA part C services; and (5) when a child or parent is already enrolled in a public benefits or insurance program, a consent requirement does nothing to protect privacy given that the agency responsible for the administration of public insurance or public benefits already has personal information about the child and family and that other concerns, such as avoiding the potential negative impact on a parent's credit rating, do not apply when a child or parent is already enrolled in a public insurance or benefits program. Additionally, two commenters who opposed the parental consent requirement when a child or parent is already enrolled in a public benefits or insurance program noted that parents already have the right under part C of the Act to consent to each and every part C service on the IFSP and that a separate consent provision provided parents with no additional protections.

A minority of commenters supported proposed § 303.520(a)(1)(i). The primary reasons cited by commenters for supporting a parental consent requirement when a child or family is already enrolled in a public benefits or insurance program were that: (1) Parents should be informed of all potential costs regarding use of their benefits; (2) parents should understand any potential limitations in coverage or future negative consequences and consent ensures accountability; (3) the IDEA part C consent regulations should align with the IDEA part B consent regulations; and (4) the consent provisions for public and private insurance should be aligned.

The commenters who expressed concern regarding the potential costs for parents of using public benefits or insurance to pay for IDEA part C services cited costs such as decreasing available lifetime coverage for a child or parent; paying for services that would otherwise be covered by the public benefits or insurance program; increasing premiums or discontinuing public benefits or insurance for that child or parent as a result of such use; and risking loss of eligibility for Medicaid home and community-based waivers based on overall health expenses.

Discussion: We are restructuring and revising § 303.520(a) regarding the use of public benefits or insurance to pay for part C services in response to commenters' concerns. As described in the following paragraphs, we believe this approach is consistent with the statutory framework and the provisions in sections 632(4)(B), 635(a)(10), 639(a)(2), and 640 of the Act.

Statutory framework. Section 632(4)(B) of IDEA, which defines early intervention services, includes in the definition a requirement that such services must be provided at no cost, except where Federal or State law provides for a system of payments by families, which can include costs such as charging parents a sliding scale fee for part C services. Section 635(a)(10)(B) requires the State lead agency to identify and coordinate all available resources in the State from Federal, State, local, and private sources. Section 639(a)(2) of the Act requires the State to ensure the confidentiality of personally identifiable information, including the right of parents to written notice of and written consent to the exchange of such information among agencies consistent with Federal and State law. Section 640 of IDEA requires the State lead agency to use Federal IDEA part C funds as a payor of last resort; requires State interagency mechanisms to ensure the timely provision of, and payment for, early intervention services; and explicitly references the use of other public funding sources, such as Medicaid, to pay for part C services. Read together, these IDEA part C statutory provisions require States to use public benefits or insurance (when available) to pay for part C services instead of using Federal IDEA part C funds, and also require States to protect the privacy rights of parents and their children.

Consent to enroll in a public benefits or insurance program. We appreciate the commenters' concerns that the act of enrolling in a public benefits or insurance program may impose costs on parents and families, affect parents' and families' rights under other Federal programs, or have an effect on a parent's credit rating. The act of enrollment involves disclosure of personally identifiable information regarding the child and family. Therefore, we are retaining the provision in proposed § 303.520(a)(1)(iii) in new paragraph (a)(2)(i) of § 303.520. This provision specifies that a State may not require a parent to sign up for or enroll in public benefits or insurance programs as a condition of receiving part C services and must obtain parental consent prior to requiring enrollment. A consent requirement for enrollment protects parents' financial interests by allowing them to consider the costs they may incur by enrolling in a public benefits or insurance program. Additionally, a consent requirement for enrollment protects parents' rights regarding the disclosure of personally identifiable information.

Children and parents who are already enrolled in a public benefits or insurance program. We are persuaded by commenters who opposed the requirement in proposed § 303.520(a)(1)(i) to obtain parental consent when a child or parent is already enrolled in a public benefits or insurance program. The commenters argued that requiring consent could affect the timely provision of part C services to children and families and that requiring parental consent when a child or parent is already enrolled in a public benefits or insurance program would not provide additional privacy protections given that the public benefits or insurance program already has personal information about the child or parent. We also note that the consent provisions in § 303.414

regarding the confidentiality of personally identifiable information (where applicable) already provide parents with privacy protections. Additionally, we recognize the importance of public benefits or insurance as a funding source for part C services and the provisions in sections 632(4)(B), 635(a)(10), and 640 of the Act, which include a reference to State systems of payments, require States to coordinate all resources, and require States to use part C funds as a payor of last resort, respectively. Therefore, we are replacing proposed § 303.520(a)(1)(i) with § 303.520(a)(3) regarding written notification to parents.

No-cost protections. We agree with commenters who noted that parents must understand the implications of using their public benefits or insurance to pay for part C services and the importance of parents understanding their confidentiality rights. We also agree with commenters who expressed concern that the State should not use a child's or parent's public benefits or insurance if the parent would incur specific costs as a result of the use of those benefits or insurance. Thus, we are making the following changes in these final regulations:

(1) Adding new § 303.520(a)(1) explicitly stating that the State may not use the public benefits or insurance of a child or parent to pay for part C services unless the State both provides parents with written notification about the IDEA part C no-cost protections and applicable confidentiality provisions and meets the additional specific no-cost protections identified in new § 303.520(a)(2);

(2) Adding new § 303.520(a)(2)(ii) stating that parental consent must be obtained if use of a child's or parent's public benefits or insurance would result in the following specified costs: (a) A decrease in the available lifetime coverage for a child or parent; (b) payment for services that would otherwise be covered by the public benefits or insurance program; (c) increases in premiums or discontinuation of public benefits or insurance for that child or the parents as a result of such use; or (d) a risk of loss of eligibility for the child or the parents for Medicaid home and community-based waivers based on aggregate health expenses.

(3) Adding new § 303.520(a)(2)(iii) stating that if a parent does not provide consent under new § 303.520(a)(2)(ii), the State must still make available those part C services in the IFSP to which the parent has provided consent.

Written notification to parents. As noted previously, we agree that parents must be informed regarding the implications of a public agency using their public benefits or insurance. Therefore, we are adding in new § 303.520(a)(3) that, prior to using a child's or parent's public benefits or insurance to pay for part C services, the State must provide written notification to the child's parents. This notification may be provided at any time but in no case later than when the State seeks to use the public benefits or insurance to pay for part C services; without providing the notice, the State may not use such funds to pay for part C services. The written notification must include the following four important pieces of information.

First, the notice must include a statement that parental consent must be obtained under § 303.414, if that provision applies, before the State lead agency or EIS provider discloses, for billing purposes, a child's personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time. The consent provision in § 303.414 applies in States where the State lead agency is not the State Medicaid or public benefits or insurance agency or if the State lead agency chooses to adopt a consent provision even if it is the State Medicaid or public benefits or insurance agency.

Second, the notice must include a statement of the no-cost protection provisions in new § 303.520(a)(2) (*i.e.,* that parents cannot be required to enroll in public insurance or benefits programs and consent must be obtained if use of such insurance or benefits would result in specified costs) and that if the parent does not provide the consent under § 303.520(a)(2), the State lead agency must still make available those part C services in the IFSP for which the parent has provided consent.

Third, the notice must include a statement that parents have the right under § 303.414, if that provision applies, to withdraw their consent to disclosure of personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time.

Fourth, the notice must include a statement of the general categories of costs that the parent could incur as a result of participating in a public benefits or insurance program (such as co-payments or deductibles). We believe it is important to include this last element in the written notice to ensure that parents are informed of the general potential costs that may result from using their public benefits or insurance to pay for part C services. Additionally, we are adding this last element in response to the many comments we received about the need to make parents aware of these general costs.

Finally, we note that, under Title VI of the Civil Rights Act of 1964 and implementing regulations (42 U.S.C. 2000d *et seq.* and 34 CFR 100.1 *et seq.*), State lead agencies, as recipients of Federal funds, must take reasonable steps to ensure that persons of limited English proficiency (LEP) have meaningful access to programs and activities funded by the Federal government, including part C services and any notices required under these regulations and part C of the Act. Providing meaningful access may require the State lead agency to ensure that the notice is provided in a language other than English either through oral or written translation.

Consent provisions under Part C and Part B of the Act and alignment between public and private insurance. In response to commenters' concerns about other part C consent provisions and alignment between parts B and C of IDEA, we note that under section 639(a)(3) of the Act and § 303.420, parents have a separate right to consent to part C services in the IFSP and to any changes in the frequency or intensity of services in the IFSP and the right to decline at any time the receipt of a particular part C service without jeopardizing the right to any other part C service in the IFSP. Thus, while we appreciate the commenters' desire to align the provisions related to the use of public insurance under parts B and C of the Act, the differences in how these two programs treat costs to families, the responsibility for funding, and the consent for services, as well as the administrative structure of part C programs argue against treating this issue in precisely the same manner in both programs.

We have aligned where practicable the consent provisions for the use of public and private insurance to pay for part C services, partly in response to commenters. Specifically, for a State to use private insurance or to use public benefits or insurance to pay for part C services, the State may use such funding sources without obtaining parental consent when the State ensures that parents do not incur specific costs (as set forth in §§ 303.520(a)(2) and 303.520(b)(2)), but must obtain parental consent when such costs are incurred as a result of using such funding sources. We also place continued importance on informing parents of the potential costs through the notification provisions in §§ 303.520(a)(3) and (a)(4) for public

benefits or insurance and ensuring that States provide parents with a copy of the State's system of payments policies under § 303.520(b)(1)(iii) for private insurance. The one unique scenario for public benefits or insurance is the initial act of enrollment for which there is no parallel for private insurance and we are maintaining a parent consent requirement in new § 303.520(a)(2)(i) for this circumstance for the reasons described earlier.

Costs associated with using public benefits or insurance. We are retaining in new § 303.520(a)(4) the provisions in proposed § 303.520(a)(2), which require the State to identify in its system of payments policies under § 303.521 any costs that the parent would incur as a result of a State using a child's or parent's public benefits or insurance to pay for part C services (such as co-payments or deductibles, or the required use of private insurance as the primary insurance). New § 303.520(a)(4) also specifies that the written notification provided under new § 303.520(a)(3) must identify these costs. The State must comply with both of these requirements in order to use the child's or parent's public benefits or insurance for part C services. The Secretary believes the notification provision is vital to parents being informed about these potential costs and the system of payments policies requirement ensures that as the State's system of payments policies are being developed and subject to public participation, these potential costs are identified as part of the overall costs in the State's system of payments for part C services.

Changes: We have restructured § 303.520 to add a new paragraph (a)(1) that requires the State to provide parents with written notification of the no-cost and confidentiality provisions in paragraph (a)(3) and to meet the no-cost protections identified in paragraph (a)(2) before it may use the public benefits or insurance of a child or parent to pay for part C services.

New § 303.520(a)(2)(i) provides that with regard to using the public benefits or insurance of a child or parent to pay for part C services, a State may not require a parent to enroll in a public benefits or insurance program as a condition of receiving part C services, and clarifies that the State must obtain parental consent prior to using those benefits or insurance if the child or parent is not already enrolled in a public benefits or insurance program.

We have added in new § 303.520(a)(2)(ii) the requirement that, in addition to providing the parent the written notification, a State must obtain parental consent if use of a child's or parent's public benefits or insurance would result in the following specified costs: A decrease in the available lifetime coverage or any other insured benefit for a child or parent; payment for services that would otherwise be covered by the public benefits or insurance program; increases in premiums or discontinuation of public insurance or benefits for that child or parent as a result of such use; or a risk of loss of eligibility for the child or the parent for Medicaid home and community-based waivers based on aggregate health expenses.

We have added, in new § 303.520(a)(2)(iii), a provision clarifying that if a parent does not provide consent under new § 303.520(a)(2)(ii), the State must still make available those part C services in the IFSP to which the parent has provided consent.

The contents of the written notification are specified in § 303.520(a)(3). Specifically, the notification must include: (1) A statement that parental consent must be obtained under § 303.414, if that provision applies, before the State lead agency or EIS provider discloses, for billing purposes, a child's personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid); (2) a statement of the no-cost protection provisions in new § 303.520(a)(2) and that if the parent does not provide the consent under § 303.520(a)(2), the State lead agency must still make available those part C services in the IFSP for which the parent has provided consent; (3) a statement that the parents have the right under § 303.414, if that provision applies, to withdraw consent to disclose a child's personally identifiable information at any time; and (4) a statement of the general categories of costs that the parent would incur as a result of participating in a public benefits or insurance program (such as co-payments or deductibles, or the required use of private insurance as the primary insurance).

Finally, new § 303.520(a)(4) requires the State to identify both, in its system of payments policies under § 303.521 and the written notification provided under new § 303.520(a)(3), any costs that the parent would incur as a result of the State's using a child's or parent's public benefits or insurance to pay for part C services (such as co-payments or deductibles, or the required use of private insurance as the primary insurance).

Comment: One commenter supported proposed § 303.520(a)(1)(ii), which would allow a public agency to use public insurance or benefits for Medicaid-eligible children in foster care without parental consent. Two commenters suggested that this section should specifically refer to both children in ''foster care'' and ''wards of the State.''

Discussion: We are removing proposed § 303.520(a)(1)(ii) because there is no cost for the use of Medicaid for children who are automatically considered eligible and enrolled under Medicaid because of their status in foster care under section 472 in Title XIX of the Social Security Act (SSA). We also do not need to explicitly add a reference to ''wards of the State'' because section 472 of the SSA applies to children who are ''wards of the State;'' therefore, there would be no consent requirement for such children.

Changes: We have removed proposed § 303.520(a)(1)(ii).

Use of Private Insurance To Pay for Part C Services (§ 303.520(b))

Comment: Most commenters, including lead agencies, parent groups, professional organizations, EIS providers, national organizations, a State interagency coordinating council, and individuals, supported the requirement in proposed § 303.520(b)(1)(i) that a State may access a parent's private insurance to pay for part C services only if it obtains consent from the parent. Commenters supported the requirement that consent be provided in accordance with the definition of this term in § 303.7, which requires that the parent be informed of all relevant information and that the consent be in writing.

Several commenters opposed requiring parental consent before accessing private insurance stating that requiring consent would result in a loss of funding for States. A few of these commenters recognized the need to protect a family's confidential information, but encouraged the Department to consider other means to protect personally identifiable information that may not adversely affect funding for early intervention services under part C of the Act. One commenter opposed the parental consent requirement in proposed § 303.520(b) because the commenter noted that the State already must obtain parental consent for services under § 303.420 and questioned how the State could bill private insurance without parental knowledge.

Discussion: The Department agrees with the majority of commenters that a

State must obtain parental consent before accessing a parent's private insurance because of the potential costs that can be incurred by a family with a privately insured child or parent as a direct result of using such insurance, as well as the other potential negative effects on the availability of private insurance for other family medical expenses, including services needed by the child that are not covered by part C. The Department believes that parental consent must be required when the lead agency or EIS provider seeks to use private insurance to pay for the initial provision of any early intervention service in the IFSP and each time consent for services is required due to an increase in the provision of services in the child's IFSP.

With regard to the potential loss of funds to a State, the Department believes that the potential costs to parents outweigh the need to make private insurance funds available to lead agencies unless the cost protections in proposed § 303.520(b)(2) are adopted by the State. We disagree with the commenter who opposed the requirement for separate parental consent for the use of private insurance. We believe separate consent is needed because States implement the IFSP provisions in a variety of ways and may not have identified all funding sources for each service when they obtain consent for that service under § 303.420.

Changes: We have added new § 303.520(b)(1)(i) to specify that parental consent is required when the lead agency or EIS provider seeks to use private insurance to pay for the initial provision of any early intervention service in the IFSP and each time consent for services is required due to an increase in the provision of services in the child's IFSP.

Comment: Some commenters requested clarification on when consent is required if a State wishes to use insurance or benefits for a parent who is determined unable to pay. Some commenters expressed concerns that parents who had been determined unable to pay would still incur costs as a result of using their insurance or benefits for part C services.

Discussion: We agree that the requirements in this section could be more clearly presented. We have restructured § 303.520(b) for clarity. Paragraph (b)(1) of this section sets forth the general parental consent requirement and paragraph (b)(2) of this section sets forth the specific exceptions to parental consent. We have reworded the heading for this section to make clear that this section applies to any State that uses private insurance to pay for part C services. We also have moved the substance of proposed § 303.520(b)(1)(iv) concerning a parent's inability to pay and a State's obligation to provide part C services, to new § 303.520(c).

Regarding commenters' concerns that parents who had been determined unable to pay would still incur costs as a result of using their insurance or benefits for part C services, § 303.521(a)(6) requires the lead agency to pay for costs such as co-payments or deductibles if a parent is determined unable to pay.

Changes: We have revised the language in paragraph (b), and added a new paragraph (c).

Comment: Some commenters expressed concern that the use of private insurance under § 303.520(b) for part C services could make private insurance benefits unavailable for additional medical or other services that are not covered by part C of the Act. One commenter recommended that exemptions be available to families if using their private insurance to pay for early intervention services reduces the benefits they receive through private providers. The commenter stated that families should not be penalized for allowing a State to use their insurance to pay for early intervention services.

Discussion: It is the Department's position that including an exception to parental consent is not necessary because consent is voluntary. A parent may always decline a request from the lead agency or EIS provider to consent to the use of the parent's private insurance for all or any specific part C service.

In those very few States that have adopted statutory protections concerning private health insurance coverage for early intervention services under part C of the Act that meet the requirements in § 303.520(b)(2) we agree that is important for a parent to be informed of potential costs if a State were to use a parent's private insurance. Thus, we have added a provision in new § 303.520(b)(1)(iii) that requires a State to provide parents with a copy of its system of payments policies when using the parent's private insurance to pay for part C services. Moreover, the parent may elect to decline services at any time under § 303.420(a)(3).

Changes: We have added the phrase ''or initially using benefits under a child or parent's private insurance policy to pay for an early intervention service under paragraph (b)(2) of this section'' in § 303.520(b)(1)(iii).

Comment: None.

Discussion: For consistency with § 303.520(b)(1)(iii), we have added ''premiums'' as an example of a potential cost in § 303.520(b)(1)(ii), which requires a State to identify in its system of payments policies the potential costs that parents would incur if the State uses their private insurance policy to pay for part C services.

Changes: We have added a reference to premiums in § 303.520(b)(1)(ii).

Comment: Commenters supported the requirement in proposed § 303.520(b)(1)(iii) that a State provide a copy of its system of payments policies when obtaining consent to use the parent's private insurance and some commenters requested that the regulation clarify that this copy be provided to the parent because it is the parent who needs to be informed of potential costs as a result of the use of the parent's private insurance to pay for early intervention services. One commenter requested that a State include in its system of payments policies specific information about any potential effect the use of private insurance could have on the parent's annual or lifetime caps under the parent's private insurance.

Discussion: Section 303.520(b)(1)(iii), as proposed, specifically stated that the lead agency, when obtaining consent, must provide parents with a copy of the State's system of payments policies that identify the potential costs that the parent may incur as a result of the use of the parent's insurance to pay for part C early intervention services. We agree that notifying parents of potential costs under § 303.520(b)(1)(iii) requires States to identify out-of-pocket costs such as co-payments, premiums, or deductibles as well as other long-term costs such as loss of benefits due to annual or lifetime insurance caps.

We also have revised § 303.520(b)(1)(iii) to clarify that the State system of payments policies must identify the potential costs that parents may incur when their private insurance is used to pay for early intervention services under this part.

Changes: We have revised proposed § 303.520(b)(1)(iii) to add a reference to parents and to clarify that potential costs identified in the policies may include other long-term costs such as loss of benefits resulting from annual or lifetime insurance caps under a private insurance policy. We also have replaced the phrase ''while enrolled in a private insurance program'' with the phrase ''when their private insurance is used to pay for early intervention services under this part.''

Comment: Some commenters supported proposed § 303.520(b)(2), which does not require the lead agency to obtain parental consent when a State

has enacted specific statutory cost protections. These commenters stated that § 303.520(b)(2) would protect families while balancing the need to make private insurance funds available to pay for part C services. A few commenters requested clarification of § 303.520(b)(2).

Some commenters opposed this exception to the parental consent requirement because it: (1) Would result in litigation; (2) lacks statutory authority; (3) is inconsistent with the part B regulations in 34 CFR 300.154(e) concerning accessing private insurance to pay for services under part B of the Act; (4) is inconsistent with confidentiality protections under the Act and HIPAA and also with the Employee Retirement Income Security Act of 1974 (ERISA); and (5) could not be uniformly applied because not all private insurance policies are subject to State statutes.

Discussion: The purpose of the exception in § 303.520(b)(2) is to enable the lead agency in a State that has adopted specific statutory cost protections to use private insurance to pay for part C services. In those States that have adopted such protections, private insurance funds are used to pay for part C services (*e.g.,* occupational or speech therapy) that are considered medically necessary for an infant or toddler with a disability. We have clarified proposed § 303.520(b)(2) to make clear that the exception to parental consent applies only if the State's statutory protections expressly provide that for the protections listed in new § 303.520(b)(2)(i), (b)(2)(ii), and (b)(2)(iii).

The implementation of such State statutory protections is consistent with sections 632(4)(B) and 640 of the Act. Section 632(4)(B) of the Act requires early intervention services to be provided at no cost except where a State has enacted a system of payments. Section 640 of the Act requires Federal part C funds to be used as the payor of last resort. Providing an exception to parental consent when a State statute expressly provides specific cost protections is consistent with sections 632(4)(B) and 640 of the Act.

These statutory cost protections include providing that: (1) A child or parent would not experience a loss of benefits because of annual or lifetime caps under a policy when private insurance is used to pay for part C services; (2) a child, parent, or family member's health insurance cannot be discontinued because the coverage was used to pay for early intervention services; and (3) health insurance premiums cannot be increased due to use of the health insurance to pay for part C services.

We understand the commenters' concerns about potential litigation by families and the commenters' question about whether all private insurance policies in a State are subject to that State's statutory protections. The exceptions to parental consent identified in proposed § 303.520(b)(2) apply only to the extent that the State statute provides the protections in that section for private insurance policies in the State. Additionally, several State statutes that fall under this exception have been in place for years without any litigation.

We recognize that this exception to parental consent for use of private insurance to pay for services differs from the implementing regulations of part B of the Act, which do not contain a similar exception. However, part B of the Act requires FAPE be provided at no cost. In contrast, part C of the Act explicitly authorizes States to establish a system of payments that may result in a parent incurring some costs. The exception in proposed § 303.520(b)(2) ensures that parents are afforded needed protections while providing the lead agency with the ability to use private insurance to pay for part C services in those States, maximize funding sources, and use part C funds as a payor of last resort.

The Secretary believes these part C regulations protect parents in all States by providing them with information about the State's system of payments, including (if applicable) the relevant use of private insurance and exceptions regarding specific statutory no-cost protections. Additionally, parents ultimately retain the right to decline or revoke consent for any particular part C service in the IFSP for their child if they do not wish to have their private insurance used for a particular service.

Concerning the commenter's concern that personally identifiable information would be disclosed to private insurers without consent, we recognize that the filing of claims for early intervention services may reveal limited personally identifiable information not already disclosed to the insurer, but on balance, it is the Department's position that this disclosure is necessary in this limited circumstance to implement the requirements of sections 632(4)(B) and 640 of the Act.

Changes: We have clarified § 303.520(b)(2) by moving the phrase ''the use of private health insurance to pay for part C services cannot'' to each of § 303.520(b)(2)(i), (b)(2)(ii), and (b)(2)(iii). We also have replaced the word ''or'' that appears at the end of § 303.520(b)(2)(ii) with the word ''and''. Finally, we have added the phrase ''expressly provides'' to the introductory text of § 303.520(b)(2).

Inability to Pay (§ 303.520(c))

Comment: None.

Discussion: Proposed § 303.520(b)(1)(iv) should have applied to both the use of public insurance and benefits and private insurance for payment for services. We have removed proposed § 303.520(b)(1)(iv), and added a new § 303.520(c) to reflect the requirement that the inability to pay provisions in this section apply to both the use of public insurance and benefits and private insurance.

Changes: We have removed proposed § 303.520(b)(1)(iv) and added new § 303.520(c).

Proceeds or Funds From Public Insurance or Benefits or From Private Insurance (§ 303.520(c), Redesignated § 303.520(d))

Comment: Some commenters requested clarification on proposed § 303.520(c)(3), which provided that States could exclude from the calculation of State and local expenditures under proposed § 303.225 (prohibition against supplanting), the State portion of funds from a Federal public benefits program such as Medicaid. Some commenters objected to the provision because they viewed it as administratively burdensome and stated it would create significant challenges with data collection and reporting.

Discussion: As discussed in the *Analysis of Comments and Changes* section accompanying § 303.225, since the publication of the IDEA part C NPRM in May 2007, part C State lead agencies have raised a number of issues regarding the MOE provisions in the part C regulations (which implement part C's supplement not supplant requirements). Therefore, we are removing proposed § 303.520(c)(3) and intend to issue an NPRM addressing MOE requirements under part C of the Act.

Changes: We have removed proposed paragraph (c)(3) and renumbered the paragraphs in this section accordingly.

Comment: Several commenters, including a few lead agencies, supported proposed § 303.520(c), redesignated § 303.520(d), which provided that proceeds or funds from public insurance or benefits or private insurance are not treated as program income for purposes of 34 CFR 80.25, the EDGAR provision regarding program income. However, some commenters, including most lead agencies under part C of the Act, opposed this provision

stating that lead agencies under part C of the Act generally do not have a mechanism to track or account for the use of funds from public insurance or benefits or private insurance or the ability to direct how these funds will be used.

Discussion: The commenters have misinterpreted proposed § 303.520(c)(1), redesignated § 303.520(d)(1). Proposed § 303.520(c)(1), redesignated § 303.520(d)(1), states that for purposes of 34 CFR 80.25, proceeds or funds from public insurance or benefits or from private insurance are not treated as program income. Therefore, States do not need to maintain data on these funds for program income purposes.

Changes: None.

Comment: A few commenters recommended that under section 618 of the Act, the Department require States to collect and report to the Secretary data on the costs assessed to parents and the payments obtained from public and private insurance for early intervention services. These commenters recommended that the Department conduct a study to determine how the regulations concerning the use of private insurance in § 303.520 and the States' systems of payments and fees in § 303.521 affect family participation in part C of the Act.

Discussion: Section 618 of the Act does not require States to report data on their use of insurance or a system of payments, and we do not want to place this added data collection and paperwork burden on States. The Department has long required each State that adopts a system of payments (including the use of insurance or family fees to pay for part C services) to submit its policies and procedures as part of the State's part C grant application. This requirement is reflected in § 303.203(b). Data from FY 2009 indicate that approximately 23 States have a system of payments that includes express authority to charge parents for some part C services. Data from the last few years indicate an increase in the number of States that have adopted a system of payments and an increase in the fees parents are charged for part C services in those States that have the authority to charge a parent a fee for part C services. Through the application process, the Department will continue to obtain information on whether and how a State is implementing a system of payments (including the use of insurance).

Each State is unique and its system of payments policies and procedures are subject to the public participation requirements in § 303.208. Through the public participation process, all stakeholders, including parents of infants and toddlers with disabilities, have an opportunity to comment on whether and what policies and procedures should be adopted by the State. The decision of whether the Department needs to conduct a study on the impact of a system of payments (including the use of insurance) on a family's decision to participate in part C of the Act is a policy decision that is best left to the Department and should not be a subject of these regulations.

Changes: None.

System of Payments and Fees (§ 303.521)

Comment: Commenters requested that we define the term, ''actual cost of the part C services'' in proposed § 303.521, which stated that a State's system of payments policies must include an assurance that families will not be charged any more than the actual cost of the part C service. Two commenters requested that this provision expressly specify that a State can bill both insurance and parents for early intervention services as long as the combination of the two does not exceed the actual cost of services. One commenter asked whether family fees can exceed the actual cost of services.

Discussion: Subject to any consent requirements in §§ 304.420 and 303.520, the lead agency may use, as part of its system of payments, funds from multiple sources (*e.g.,* public insurance or benefits, private insurance, and family fees) to pay for each part C service in an IFSP. However, the lead agency may not receive funds (whether from one or a variety of sources, such as family fees or insurance, to pay for a particular service) that exceed the actual cost of providing the service. Under a State's system of payments, the State may not charge a family an amount that exceeds the actual cost of providing a particular part C service. Nor may the State charge a family for amounts received by the State from other funding sources for that service. Also, families may not be charged for the cost of services specified in § 303.521(b)(2), including evaluations and assessments.

The actual cost for a part C early intervention service may vary by State and, therefore, it is not appropriate to define the term ''actual costs of service.''

Proposed § 303.521(a)(4)(iii) included two distinct requirements relating to families not being charged more than the actual cost of service and families with insurance not being charged disproportionately more than those without insurance. We have clarified this section by separating the two requirements into paragraphs (a)(4)(iii) and (a)(4)(iv) of this section, respectively. The language in new § 303.521(a)(4)(iv) is the same as proposed § 303.521(a)(4)(iii), regarding the prohibition that families with public insurance or benefits or private insurance not be charged disproportionately more than families who do not have public insurance or benefits or private insurance. In § 303.521(a)(4)(iii), we have further clarified in a parenthetical that a family may not be charged any more than the actual cost of the part C service (factoring in any amount received from other sources for payment for that service).

Changes: We have added the following parenthetical ''(factoring in any amount received from other sources for payment for that service)'' to revised § 303.521(a)(4)(iii), regarding the requirement that the lead agency cannot charge a family more than the actual cost of a service. We have moved the language from proposed § 303.521(a)(4)(iii) to a new § 303.521(a)(4)(iv) regarding the provision that families with public insurance or benefits or private insurance will not be charged disproportionately more than families who do not have public insurance or benefits or private insurance.

Comment: One commenter recommended that the ''or'' in § 303.521(a) should be ''and/or.''

Discussion: We agree with the commenter that the language in the second parenthetical in the introductory text of § 303.521(a) should be amended to make clear that the fees charged to a family under a State system of payments can include one or more of the following funding sources: A child's or parent's public insurance, public benefits, or private insurance. Therefore, we have amended § 303.521(a) accordingly.

Changes: We have amended the second parenthetical in the introductory text of § 303.521(a) to say ''(including any fees charged to the family as a result of using one or more of the family's public insurance, public benefits, or private insurance).''

Comment: One commenter requested that the regulations in § 303.521(a) specify how and how often a State must evaluate a family's ability or inability to pay.

Discussion: A State is not required to reevaluate a parent's ability or inability to pay. Therefore, it is the Department's position that it is not appropriate to add such a provision to § 303.521(a) because some States may not wish to reevaluate a parent's ability to pay given that a

child may receive services at most for three years and many children do not enter the part C program until they are at least 18 months of age.

However, if a State requires that a lead agency's determination of a parent's ability or inability to pay be reevaluated on an annual or other basis, the State must include such a provision in its system of payments policies that is provided to parents under § 303.521(e) in order for parents to be informed of when and how they may be required to provide financial information. We are adding language requiring the policies to specify when and how the State makes its determination of the ability or inability to pay.

Upon further review of proposed § 303.521(a)(3), we realized that the State's policies must define not only a parent's inability to pay but also a parent's ability to pay. We have added ''ability to pay'' to the definitional requirement. Additionally, we are clarifying that in defining a parent's ability to pay, the State must include consideration of family expenses such as extraordinary medical expenses as many families with infants and toddlers with disabilities have unusually high medical expenses.

Changes: We have revised § 303.521(a)(3) to provide that the State's system of payments policies must indicate when and how the State makes its determination regarding a parent's ability or inability to pay, and, in defining the ability to pay, include extraordinary medical expenses as an example of family expenses.

Comment: One commenter requested that the final regulations provide further guidance on developing a State system of payments. The commenter recommended that, to ensure that a system of payments does not discourage families from participating in early intervention programs, the Department should develop regulations that set a maximum contribution limit by families.

Discussion: Section 632(4)(B) of the Act, concerning the definition of ''early intervention services,'' and § 303.521, concerning a system of payments and fees, provide States with the option to establish a system of payments that sets forth policies specifying the amount of fees (including any fees charged to the family as a result of using one or more of the family's public insurance, public benefits, or private insurance) that are subject to the State's system of payments. While we appreciate the commenter's request that the regulations identify maximum fiscal contributions for parents, the Department's position is that States must have flexibility in determining the system of payments, including any fee structure.

However, the State's fee structure is subject to the requirements in § 303.521(a), which requires that families not be charged more than the actual cost of the part C service and that a parent's inability to pay will not result in a delay or denial of services under this part. We also expect to provide additional technical assistance and guidance to States on State system of payments.

Changes: None.

Comment: Two commenters recommended that we revise § 303.521(a) to require that States provide families with an explanation of each item that is billed to them or to their insurance to ensure that the parents can confirm that the charges match the level or amount of service provided to children and their families.

Discussion: Part C of the Act does not address the methods that States must use to bill parents for part C services. However, many lead agencies have developed policies and procedures regarding billing parents for part C services. With regard to insurance billing, lead agencies may, but are not required under part C of the Act to, develop methods or a process to inform a parent of each item billed to the insurance of the parent or the amount of insurance proceeds received for payment of early intervention services for their infant or toddler with a disability and the child's family. The Department's position is that including such provisions in the regulations is not necessary because it is best left to States to determine which billing methods are most compatible with established State policies and procedures.

Changes: None.

Comment: One commenter recommended requiring States to provide an assurance that the quality of part C services will be maintained regardless of the financial situation of the child or family.

Discussion: Consistent with section 635(a)(4) of the Act, regarding requirements for a statewide system, and § 303.340, regarding IFSPs, each lead agency under part C must ensure, for each infant or toddler with a disability, regardless of financial situation, the development, review, and implementation of an IFSP that is consistent with the definition of that term in § 303.20, and meets the requirements in §§ 303.342 through 303.345. The lead agency under part C of the Act also must ensure the provision of the early intervention services identified in the child's IFSP, regardless of the financial situation of the child or family. Given these provisions, the Department's position is that requiring States to provide the additional assurance suggested by the commenter is not necessary.

Changes: None.

Comment: One commenter opposed the language in § 303.521(a)(6) that permits the lead agency to use part C or other funds to pay the parent's share in a State with a system of payments with family fees, when the parent is determined able to pay. According to the commenter, this provision could be read to permit an agency to obligate part C funds for costs or fees that a parent might otherwise be required to pay. The commenter requested that this paragraph be clarified or that part C funds be increased to fund this requirement.

Discussion: Section 303.521(a)(6) provides States with a system of payments the option of using part C funds to pay for those costs, such as co-payments, that would be incurred by the parent based on the use of the child's or parent's public benefits or insurance or private insurance to pay for part C services. By permitting, but not requiring, lead agencies to use part C funds to pay for a parent's out-of-pocket costs even when the parent is able to pay, the lead agency may be able to neutralize the financial impact on a parent and thus encourage the parent to provide any consent needed under § 303.520. We also have revised this section to further clarify that if a parent is determined unable to pay, the lead agency must use part C or other funds to pay for the costs identified in § 303.520(b)(2) or the fees charged to the parent under § 303.521(a)(1).

Changes: We have revised § 303.521(a)(6) to clarify that the lead agency may use part C funds to pay for costs such as premiums, deductibles, or copayments identified in § 303.520(b)(2) that it must use part C or other funds to pay for the costs identified in § 303.520(b)(2) or the fees charged to the parent under § 303.521(a)(1) for a parent determined unable to pay.

Comment: One commenter recommended that a State with a system of payments that requires a family cost share or private insurance component should not be allowed to charge families for services that must be provided to a child in order for the child to receive FAPE under part B of the Act, particularly once a child turns three and services are provided at no cost to parents.

Discussion: If a child is eligible at or before age three under part B of the Act to receive FAPE and the service is

identified on the child's IEP as part of FAPE for that child, then, under 34 CFR 300.17(a), that service must be provided at no cost to the parent. If a State elects to continue to provide part C services for children age three and older who were receiving part C services, and a parent provides consent for such services, the part C provisions apply, including those relating to a State system of payments.

Changes: None.

Comment: One commenter asked, with respect to § 303.521(c), whether a State that has a FAPE mandate for children under the age of three or a State that uses funds under part B of the Act to serve children under age three can have a system of payments to provide part C services to children from age three until kindergarten.

Discussion: A State that elects to offer services under § 303.211 and has a State law mandating FAPE for children with disabilities for particular ages (such as ages three through five) must ensure that services that are a part of FAPE for an eligible child in that age range are provided at no cost. If there are part C services that are available to a child with a disability under § 303.211 that are not part of FAPE for that child, the State may adopt a system of payments for such services.

Changes: None.

Comment: One commenter requested clarification on § 303.521(b), concerning mandatory public agency functions that are not subject to fees that public agencies must perform. The commenter expressed concern that requiring these functions ''to be carried out at public expense by a State'' prohibits local early intervention programs from using local funds to pay for these functions.

Discussion: The requirement in § 303.521(b) does not prohibit local early intervention programs from using local funds to pay for these functions. For clarity, we have removed the phrase ''by a State.''

Changes: We have removed the phrase ''by a State'' from § 303.521(b).

Comment: Several commenters recommended that we require a State to include in its system of payments policies information on the family's procedural safeguards.

Discussion: We agree with commenters that States must inform parents about procedural safeguards when the State determines a parent's ability to pay or imposes a fee on parents. We have added in new § 303.521(e) the requirement that States establish written policies as part of their system of payments to inform parents about the availability of procedural safeguards.

We have clarified that the State must inform parents of the availability of existing dispute resolution procedures, including participating in mediation in accordance with § 303.431, requesting a due process hearing under § 303.436 or § 303.441, whichever is applicable, or filing a State complaint under § 303.434. Additionally, we have provided States with the flexibility to use any other procedure established by the State for speedy resolution of financial claims, provided that such use does not delay or deny a parent's procedural rights under this part. If a State uses such other procedures, it must inform parents of those procedures.

We also have clarified that a State may inform parents of these procedural safeguard options by either providing parents with a copy of the State's system of payments policies when obtaining consent for the provision of early intervention services under § 303.420(a)(3) or including this information with the notice provided to parents in § 303.421.

Changes: We have added a new § 303.521(e).

Subpart G—State Interagency Coordinating Council

Composition (§ 303.601)

Comment: One commenter requested that the Department require a State representative of the child protective services agency to serve as a member of the State Interagency Coordinating Council (Council).

Discussion: Neither section 641(b) of the Act nor § 303.601 requires the Governor to appoint, nor prohibits the Governor from appointing, to the Council a State representative from the agency responsible for child protective services. Under section 641(b)(1)(L) of the Act and § 303.601(a)(12), the Governor must appoint a representative from the State child welfare agency that is responsible for foster care in that State (*i.e.,* the State agency that is responsible for administering Title IV–E of the SSA in the State). In many States, this State child welfare agency is also the State child protective services agency that is responsible for administering CAPTA.

Section 641(b)(2) of the Act and § 303.601(c) permit the Governor to appoint to the Council members other than those specified by the Act. The Governor may appoint to the Council a representative from the State agency responsible for administering CAPTA if the Governor determines it is appropriate in that particular State. Responsibilities of this State agency also may include coordinating child find efforts or implementing section 637(a)(6) of the Act, which requires the State to have referral policies for a child under the age of three who is involved in a substantiated case of child abuse or neglect or who is identified as affected by either illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. Additionally, nothing in the Act would prevent the Governor from appointing a representative from the State agency responsible for implementing other early childhood programs such as the Maternal, Infant, and Early Childhood Home Visiting Program passed on March 23, 2010, amending Title V of the Social Security Act or a representative from the State's EHDI system.

Given that the decision to appoint any other members to the Council (other than those specified in section 641(b)(1) of the Act) is at the discretion of the Governor of the State according to the needs of that State, we decline to include in § 303.601 the appointment suggested by the commenter.

Changes: None.

Comment: A few commenters supported proposed § 303.601(a)(1)(iii), which stated that a parent could not be appointed as a member of the Council if he or she was an employee of a public or private agency involved in providing early intervention services because, in their view, including parents who are also EIS providers on the Council would be a conflict of interest. However, the majority of commenters opposed this proposal because, in their view, parents who are also EIS providers may bring a valuable perspective to the Council in terms of understanding issues from different standpoints and may be able to anticipate the impact of a given policy or procedure in unique ways. Some commenters questioned whether preventing parents from serving on the Council somehow suggests that the contribution and comments of parents of children with disabilities who are not also employed by EIS providers are more valuable than parents who are employed by EIS providers. One commenter recommended that these regulations require that the Council's bylaws or State law stipulate that no member, including parents who are EIS providers, may vote on an issue that may represent a conflict of interest.

Discussion: We agree that the appointment to the Council of parents of children with disabilities who are also employed by EIS providers could bring a unique perspective to the work of the Council. For this reason, we have removed proposed § 303.601(a)(1)(iii), which would have prohibited an employee of a public or private agency

involved in providing early intervention services from being appointed and serving as a parent member of the Council. The language in proposed § 303.601(a)(1)(iii) reflected the Department's recommendation in the note to current § 303.600 that parents selected to serve on the Council not be employees of any agency involved in providing early intervention services. With the removal of proposed § 303.601(a)(1)(iii), parents who are employees of a public or private agency involved in providing early intervention services could serve as parent members of the Council in accordance with the requirements that at least 20 percent of the Council be comprised of parent members of children with disabilities aged 12 or younger and at least one parent member be the parent of an infant or toddler with a disability or a child with a disability aged six years or younger. Finally, like all Council members, pursuant to § 303.601(d), a parent member of the Council who is an employee of a public or private agency involved in providing early intervention services may not cast a vote on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

Changes: We have removed proposed § 303.601(a)(1)(iii), which stated that a parent member on the Council may not be an employee of a public or private agency involved in providing early intervention services.

Comment: Section 303.601(b), which permits a Governor to appoint a member of the Council to represent more than one program or agency from the list in section 641(b) of the Act, drew a number of comments. Most commenters objected to this provision due primarily to concerns that an individual representing more than one program or agency on the Council may have potential conflicts of interest in carrying out his or her duties.

Discussion: Section 641(b) of the Act is silent on the issue of whether the Governor must appoint separate individuals to represent each of the constituencies that must be represented on the Council. The Department's position is that it is a reasonable interpretation to allow one individual to serve more than one required Council member role because, in some States, a single agency performs multiple functions that coincide with the Council representation requirements in section 641(b) of the Act. Additionally, allowing a member of the Council to represent more than one program or agency would not result in actual or apparent conflicts of interest because, pursuant to § 303.601(d), no member of the Council may cast a vote (and, thus, would need to recuse himself or herself from the vote) on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

Changes: None.

Use of Funds by the Council (§ 303.603)

Comment: One commenter requested clarification on when or why the Council, which is an advisory body, would conduct hearings pursuant to § 303.603(a)(1). The commenter stated that while the Council may participate in hearings, given its advisory nature, it would not be appropriate for the Council to hold hearings.

Discussion: Section 641(d) of the Act specifically allows the Council, subject to the approval of the Governor, to prepare and approve a budget using part C funds to conduct hearings and forums as may be necessary to carry out its functions under part C of the Act. The Act does not specify the circumstances under which the Council may convene a hearing or forum. It is not appropriate for the Department to stipulate such circumstances, as that decision is best left to the Council.

Changes: None.

Comment: One commenter requested that the Department revise the regulations to provide compensation for parents who serve on the Council. A few commenters recommended that parent members of the Council receive compensation regardless of their employment status.

Discussion: Providing compensation for parents who serve on the Council is specifically addressed in § 303.603(a)(2) and (a)(3), which is consistent with section 641(d) of the Act. Section 303.603(a)(2) and (a)(3) provides that all Council members, including parents, may be reimbursed for reasonable and necessary expenses for attending Council meetings and performing Council duties (including child care for parent members) and may receive compensation if not employed or if required to forfeit wages from other employment when performing official Council business.

Changes: None.

Functions of the Council—Required Duties (§ 303.604)

Comment: One commenter recommended that the final regulations expressly state that the Council may continue to work with the lead agency on preparing the mandatory annual report that the Council must submit to the Governor and to the Secretary, and that if the Council concurs with the State's APR that is prepared by the lead agency, the Council may elect to sign a statement indicating its concurrence with the lead agency's APR in lieu of the Council preparing its own separate annual performance report.

Discussion: Section 303.604(c), regarding the requirement that the Council annually report to the Governor and the Secretary on the status of early intervention service programs for infants and toddlers with disabilities and their families under part C of the Act, remains substantively unchanged from current § 303.654 and is consistent with section 641(e)(1)(D) of the Act. Section 303.604(c)(2) expressly provides that the Council's annual report must contain the information required by the Secretary.

Under current Departmental policy, the Council may choose to prepare and submit its own annual report to meet the requirements in section 641(e)(1)(D) of the Act (current § 303.654 and new § 303.604(c)), or certify its concurrence with the APR submitted by the lead agency under § 303.702(b)(2). Therefore, it is the Department's position that adding language regarding how the Council may meet its annual reporting requirement is not necessary.

Changes: None.

Comment: A few commenters recommended that § 303.604(a)(3), regarding the promotion of methods for intra-agency and interagency collaboration on child find, monitoring, financial responsibility, and the provision of early intervention services and transition, be deleted because, according to these commenters, the language in this section is not aligned with section 641(e) of the Act. Specifically, the commenters suggested that section 641(e) of the Act does not include or imply that the functions of the Council include promoting methods for interagency collaboration regarding child find, monitoring, financial responsibility, provision of early intervention services, and transition. Another commenter requested that the Department clarify the meaning of the term ''methods,'' as it is used in § 303.604(a)(3).

Discussion: Under section 641(e) of the Act, the functions of the Council include, among other duties, advising and assisting the lead agency in carrying out its single line of responsibility for the State's part C statewide system under 635(a)(10) of the Act. The single line of responsibility covers, in part, general supervision and monitoring; coordination of Federal, State, local and private resources; assignment of financial responsibility to the appropriate agency; development of

procedures that ensure timely service provision; resolution of intra-agency and interagency disputes; and entry into interagency agreements that define each agency's financial responsibility for early intervention services and that include all additional components necessary for ensuring cooperation and coordination between agencies. One of the Council's roles under section 641(e)(1)(C) of the Act is to advise the lead agency and the SEA on early childhood transition policies. The Department has found that noncompliance with part C requirements can be due to barriers identified by lead agencies in intra-agency and interagency coordination that correspond to the areas under the lead agency's single line of responsibility (*i.e.,* child find, monitoring, financial responsibility, provision of early intervention services, and transition).

Thus, the Department's position is that the language in § 303.604(a)(3) is consistent with section 641(e) of the Act. Section 303.604(a)(3) ensures that the Council advises the lead agency in exercising its authority under section 635(a)(10) of the Act to ensure that there is a single line of responsibility for the State's part C statewide system.

Additionally, although section 641(e)(1)(A) of the Act only refers to interagency agreements, we have included in § 303.604(a)(3), the Council's role in promoting intra-agency agreements. We have included the reference to intra-agency agreements because within many lead agencies that are also SEAs, separate offices administer the early intervention service program under part C of the Act and the preschool program under part B of the Act. To facilitate the identification of, and the provision of early intervention services to, infants and toddlers with disabilities and their families, many SEA lead agencies have developed intra-agency memoranda or agreements to meet the lead agency's general supervision responsibilities under section 635(a)(10) of the Act (including specifically the areas of child find, monitoring, financial responsibility, provision of early intervention services, and transition).

In § 303.604(a)(3), we have intentionally used the word ''methods'' rather than ''interagency agreements.'' The term ''methods'' is intended to be broader than ''interagency agreements'' and to include entering into interagency agreements; this use of the term ''methods'' aligns § 303.604(a)(3) with the reference in section 640(b) of the Act to methods of ensuring services (which may include an interagency agreement or other mechanism for interagency coordination). We believe that further clarification of the term ''method'' is not needed.

Changes: None.

Comment: One commenter recommended revising the reporting period for the annual report to the Governor and to the Secretary in § 303.604(c)(2). The commenter stated that the reporting period is inconsistent with section 641(e)(1)(D) of the Act.

Discussion: Section 641(e)(1)(D) of the Act does not specify the reporting period; rather, it requires the Council to prepare and submit to the Governor and to the Secretary an annual report on the status of early intervention programs for infants and toddlers with disabilities and their families in the State. The language in § 303.604(c)(2) is consistent with this requirement and clarifies that the information in the report be ''for the year for which the report is made.'' Thus, if the Council submits a report to the Governor and Secretary for FFY 2006, § 303.604(c)(2) simply requires that the information in that report be from the FFY 2006 reporting period (*i.e.,* July 1, 2006 through June 30, 2007).

Changes: None.

Comment: A few commenters expressed concern that the regulations no longer stipulate that the Council must advise and assist the lead agency in the development and implementation of the policies that constitute the statewide system and suggested that the omission of this requirement would diminish the authority of the Council.

Discussion: Sections 303.604 and 303.605 incorporate the requirements in section 641(e)(1) and (e)(2) of the Act, regarding the functions, duties, and authorized activities of the Council. Section 641(e)(1)(B) and § 303.604(a)(4) continue to require the Council to advise and assist the lead agency in preparing the State's part C application and any amendments thereto. The requirement in current § 303.650(a)(1) that the Council advise and assist the lead agency in the development and implementation of the policies that constitute the part C statewide system was based on the requirement in section 641(e)(1)(B) of the Act that the Council advise and assist the lead agency in preparing its State's part C application. Prior to the 2004 amendments, the Act required each State to submit, as part of its part C application, the State's policies that constituted its part C statewide system.

However, in 2004, section 634 of the Act was revised to no longer require each State to submit, as part of its part C application, all of the State's policies for the statewide system identified in section 635 of the Act; instead only those policies, procedures, descriptions, methods, certifications, and other items that are identified or referenced in, or the Department determines are needed under, section 637(a) of the Act and subpart C of these regulation must be included in a State's grant application. Thus, the function of the Council in advising and assisting the lead agency in the preparation of its part C application, would include advice and assistance concerning any policies the lead agency developed to meet the requirements in section 637(a) of the Act. The Council also has an opportunity to comment on other State part C policies when the lead agency adopts or revises its policies that are part of the State's part C statewide system because the lead agency must make those policies available for public comment and hearing based on the requirements in § 303.208(b).

Changes: None.

Authorized Activities by the Council (§ 303.605)

Comment: None.

Discussion: With The Improving Head Start for School Readiness Act of 2007, Congress amended the Head Start Act. Section 642B of the Head Start Act now requires the Governor of each State to designate or establish a council to serve as the State Advisory Council on Early Childhood Education and Care (referred to as State Advisory Councils). 42 U.S.C. 9837b(b)(1)(A)(i). The overall responsibility of each State Advisory Council on Early Childhood Education and Care is to lead the development or enhancement of a high-quality, comprehensive system of early childhood development and care that ensures statewide coordination and collaboration among the wide range of early childhood programs and services in the State, including child care, Head Start, the IDEA programs (including the IDEA program under part C of the Act and the preschool program under section 619 and part B of the Act), and pre-kindergarten programs and services. Because this requirement regarding State Advisory Councils on Early Childhood Education and Care was established after the proposed part C regulations were published, in final § 303.605 we have added coordination with these State Advisory Councils as an authorized activity of the SICC. Such coordination may allow States to offer joint professional development opportunities for EIS professionals with other early learning professionals including those who work in child care, Head Start and Early Head Start, State funded preschool, 619 programs, and

early elementary education to address such issues as school readiness across all the major domains of early learning and transition to elementary school. This change will not impose an additional burden on the SICC because it is an optional duty under § 303.605 and not a required duty under § 303.604.

Changes: New § 303.605(c) has been added to allow the SICC to coordinate and collaborate with the State Advisory Council on Early Childhood Education and Care, as described in section 642B(b)(1)(A)(i) of the Head Start Act, 42 U.S.C. 9837b(b)(1)(A)(i).

Subpart H—Federal and State Monitoring and Enforcement; Reporting; and Allocation of Funds

Comment: None.

Discussion: We have revised the heading of subpart H to reflect the titles and sequence of the sections in this subpart.

Changes: We have changed the title of subpart H by removing the terms ''administration'' and ''technical assistance'' and adding the term ''reporting.'' We also have reordered the words in the title to better reflect the order of the sections in this subpart.

State Monitoring and Enforcement (§ 303.700)

Comment: One commenter recommended that § 303.700(a)(2), which requires lead agencies to make determinations annually about the performance of EIS programs using the categories in § 303.703(b), be deleted because the requirements have no statutory authority.

Discussion: We disagree with the commenter. Section 303.700(a)(2) requires lead agencies to make annual determinations about the performance of EIS programs. This requirement is consistent with sections 616(a)(1)(C), (a)(3), (b)(2)(C)(i), (b)(2)(C)(ii)(I), and (e) and 642 of the Act.

Sections 616(a)(1)(C) and 642 of the Act require the Secretary to require States (and the designated lead agencies charged with implementing part C of the Act in the State under section 635(a)(10) of the Act) to monitor and enforce part C of the Act in accordance with the monitoring priorities established by the Secretary under section 616(a)(3) of the Act (as modified by section 642 of the Act) and the statutory enforcement options identified in section 616(e) of the Act.

Sections 616(a)(3) and 642 of the Act require the Secretary to require States to monitor EIS providers located in the State using quantifiable indicators in each of the priority areas specified in section 616(a)(3) of the Act (as modified by section 642 of the Act), as well as any qualitative indicators that are needed to measure performance in those priority areas, except the State exercise of its general supervisory responsibility because ''State general supervisory responsibility'' applies only to States. Section 616(a)(1)(C)(ii) of the Act requires each State to enforce part C of the Act in accordance with sections 616(e) and 642 of the Act. Section 616(e) of the Act describes the enforcement actions the Secretary must take if the Secretary determines, based on the information provided by the State in its APR, information obtained through monitoring visits, and any other publicly available information, that the State needs assistance, needs intervention, or needs substantial intervention in implementing the requirements of part C of the Act.

These statutory provisions must be read in conjunction with sections 616(b)(2)(C) and 642 of the Act, which require State lead agencies to: (1) Publicly report on the performance of each EIS program using the State's targets established in its SPP under the priority areas described in section 616(a)(3) of the Act, and (2) report annually to the Secretary through the APR on the performance of the State in meeting the State's targets in the SPP.

Thus, lead agencies must make annual determinations about the performance of each EIS program using the categories in section 616(d)(2) and (e) of the Act and § 303.703(b). This requirement stems from the statutory requirement that lead agencies must monitor EIS providers located in the State using quantifiable and qualitative indicators as specified in section 616(a)(3) of the Act (as modified by section 642 of the Act), enforce part C of the Act in accordance with section 616(e) of the Act (which refers to the requirement that the Secretary make annual determinations about the performance of each State using these same determination categories), and from sections 616(b)(2)(C)(i) and (b)(2)(C)(ii)(I) and 642 of the Act, which require lead agencies to analyze and publicly report on the performance of each EIS program on an annual basis.

Changes: None.

Comment: One commenter expressed concern that the Department uses the terms ''program'' and ''provider'' inconsistently throughout these regulations and that the reference in § 303.700(a)(3) to EIS program should instead or also include a reference to an EIS provider.

Discussion: We recognize that clarification is needed in the use of the term EIS program in § 303.700(a)(3), regarding the available appropriate enforcement mechanisms identified in §§ 303.700(a)(3) and 303.704(a)(2) that the lead agency must use if it determines (for two consecutive years) that an EIS program needs assistance. If the lead agency determines for two consecutive years that an EIS program needs assistance, it must take one of two actions: (1) Advise the EIS program of available sources of technical assistance that may help the EIS program or (2) impose conditions on the funds it provides to the EIS program, or if the lead agency provides funds to an EIS provider (that is part of the EIS program) that is partially the reason the EIS program is in need of assistance for two years, then the EIS provider. If the lead agency provides part C funds to an EIS provider, it may be appropriate for the lead agency to impose conditions on the part C funds that the lead agency provides to the EIS provider. The lead agency may impose conditions on its funding of an EIS program or EIS provider in lieu of, or in addition to, providing technical assistance under § 303.700(a)(3).

Changes: We have added the phrase ''or, if the lead agency does not provide part C funds to the EIS program, an EIS provider'' to the parenthetical in § 303.700(a)(3).

Comment: One commenter recommended that § 303.700(a)(4) be revised to require the lead agency to report ''frequently,'' and not ''annually,'' on the performance of its State and each EIS program located in its State.

Discussion: Section 303.700(a)(4) reflects the requirements in sections 616(b)(2)(C)(ii)(I) and 642 of the Act, which require State lead agencies to report annually to the public on the performance of each EIS program located in the State in relation to the State's SPP targets. While a lead agency may elect to report more frequently to the public on the performance of its EIS programs, we do not believe that these regulations should require a lead agency to do so.

Changes: None.

Comment: One commenter stated that the proposed language in § 303.700(b), while placing particular emphasis on requirements that are most closely related to improving early intervention results for infants and toddlers with disabilities and their families, was excessive and may not result in better services. The commenter further recommended that every effort be made to clarify and minimize the words in this paragraph to better focus on direct services, child and family outcomes,

and the IFSP process and service implementation.

Discussion: Section 303.700(b) incorporates the language from section 616(a)(2) of the Act (as modified by section 642 of the Act), regarding the primary focus of Federal and State monitoring. State monitoring requirements are addressed in more detail, including the areas mentioned by the commenter, through the SPP/APR process. For example, as part of the SPP/APR process, the Secretary has established monitoring priorities and indicators for States that reflect the goals of improving early intervention results and functional outcomes for infants and toddlers with disabilities while ensuring that EIS programs comply with key part C requirements, including those relating to the timely provision of early intervention services, child outcomes, family capacity, timely evaluations, assessments, initial IFSP development, and transition. Thus, the revisions to § 303.700(b) recommended by the commenter are not necessary.

Changes: None.

Comment: A few commenters recommended adding child find, public awareness, eligibility, and service provision to § 303.700(d), which lists the areas on which the State must annually collect and report data. One commenter recommended that we include in these regulations the Department's SPP indicator that requires States to evaluate the effectiveness of their part C program as it relates to family outcomes. Another commenter recommended that these regulations require States to report to the Secretary on family outcomes. The commenter also recommended that, if States are required to report on family outcomes, the regulations should clarify the definition of family supports and services that are identified through the family assessment.

Discussion: Section 616(a) of the Act (as modified by section 642 of the Act) requires States to focus their monitoring activities on improving early intervention results and functional outcomes for infants and toddlers with disabilities and meeting the program requirements in part C of the Act. Section 616 of the Act further requires that the Secretary establish indicators to adequately measure performance in several priority areas.

The Secretary has established 14 such indicators under part C of the Act for State reporting in the SPP/APR, and, through the OMB public review process for information collections, has solicited public comments on these indicators several times since the 2004 amendments to the Act. These indicators address critical, substantive requirements of part C of the Act, including those relating to child find for children ages birth to one year and birth to three years; provision of early intervention services in natural environments; early intervention child outcomes; family capacity; timely initial evaluations, assessments and IFSP development; timely service provision; and transition services. While not specifically included as an SPP/APR indicator, the Department's position is that public awareness is covered under the two child find indicators. For example, a State must have an effective public awareness program to ensure that eligible infants and toddlers are identified for early intervention services.

Finally, issues related to family outcomes are adequately addressed by the SPP/APR indicator that measures family capacity because that indicator is designed to evaluate whether families know their rights, can effectively communicate their needs, and can assist their children to develop and learn. Moreover, we believe that it is not appropriate to include in these regulations any specific SPP/APR indicator because the Secretary must retain flexibility to revise indicators as necessary.

Changes: None.

Comment: One commenter objected to the language in § 303.700(e) that requires a State, when it identifies noncompliance with the requirements of part C of the Act by EIS programs and EIS providers, to ensure that the noncompliance is corrected as soon as possible and in no case later than one year after the State's identification of the noncompliance. The commenter suggested that a one-year timeline for correction is unreasonable. In contrast, a few commenters recommended that § 303.700(e) be revised to require that all identified noncompliance be corrected as soon as possible, but no later than 90 days after identification.

Discussion: Correcting noncompliance as soon as possible is a critical responsibility of lead agencies and EIS providers, and, as discussed in the preamble of subpart B of these regulations, the Department's position is that correction as soon as possible but no later than one year is a reasonable timeframe for an EIS provider to correct noncompliant policies, procedures, or practices and for the lead agency to verify that the EIS program or EIS provider is complying with the requirements of part C of the Act.

The Department's position is that a 90-day period from the identification of noncompliance would not be workable because it is unlikely that all instances of noncompliance could be corrected in that timeframe. For example, if a lead agency identified an EIS provider as noncompliant in making individualized decisions concerning the settings in which infants or toddlers with disabilities receive early intervention services, the lead agency would need to determine the potential causes of the noncompliance and appropriate corrective actions, which might include training service coordinators, reviewing IFSP Team guidelines, or examining other policies, procedures or practices, to ensure that the EIS provider had corrected any noncompliant policies, procedures, or practices, and that the IFSP Teams, subsequent to those corrections, were making EIS setting determinations consistent with part C requirements. To take corrective action and verify correction in a case such as this would likely require more than 90 days to complete.

Through our monitoring experience, we have observed that, in most cases, when a lead agency makes a good faith effort, the needed corrective actions can be accomplished and their effectiveness verified within one year from identification of the noncompliance. Timely correction of noncompliance is critical to ensure proper and effective implementation of part C of the Act. Therefore, it is the Department's position that correction as soon as possible, but not later than one year from identification, is appropriate.

Changes: None.

State Performance Plans and Data Collection (§ 303.701)

Comment: One commenter supported the requirement in § 303.701(a) that each State include in its SPP a description of how the State will improve its implementation of part C requirements. Another commenter supported the requirement in § 303.701(c) that each State collect valid and reliable information on all SPP indicators. This commenter requested that the regulations also require each State to document the process used to verify the validity and reliability of the data provided on the SPP indicators.

Discussion: As noted elsewhere in this preamble, the Secretary has established 14 indicators in the SPP for part C of the Act. One of these indicators (Indicator 14) requires each State to demonstrate that it reports timely and accurate data under the reporting requirements in section 618 of the Act and in the SPP and APR. Further, to ensure valid and reliable data for each SPP/APR indicator, States must report data in their SPP/APR

submissions according to required measurements and from specified data sources. In addition to the percentages required in the indicators, lead agencies are required to provide the actual numbers used in their calculations. The Department's position is that these SPP/APR requirements address the commenter's concern that States document how they verify the validity and reliability of the data they report under the indicators in their APRs.

Changes: None.

Comment: One commenter recommended that the Secretary not be permitted to impose additional data collection requirements on States unless existing data collection elements are eliminated.

Discussion: The majority of the information collected by the Secretary under part C of the Act is required by sections 616 and 618 of the Act (as those sections are modified by section 642 of the Act). Restricting the Secretary's ability to collect information, as requested by the commenter, is not appropriate because the Secretary needs the flexibility to collect information necessary to ensure the effective operation and implementation of the part C program. This responsibility comes not only from the Act, but also from the Department's inherent authority to ensure that the laws it is charged with implementing are carried out. Additionally, as discussed elsewhere in this preamble, the Department is required to solicit public comments through the OMB public review process whenever it intends to remove or add information collections.

Changes: None.

State Use of Targets and Reporting (§ 303.702)

Comment: One commenter recommended that § 303.702(a), which requires each State to use the targets established in the SPP to analyze the performance of each EIS program in implementing part C of the Act, be amended to require each lead agency to define geographically the local lead agency or EIS program.

Discussion: There is no local lead agency under part C of the Act, but rather a State lead agency that is designated by the Governor in accordance with section 635(a)(10) of the Act to be responsible for implementing part C of the Act in the State. The lead agency implements the requirements of a statewide system under part C of the Act either by using its own personnel, through contracts with EIS providers or through other arrangements, such as interagency agreements, with State public agencies.

Section 303.12 defines *EIS providers* as entities or individuals that provide early intervention services under part C of the Act. As clarified in section 642(2) of the Act, EIS providers often serve a comparable role under part C of the Act that LEAs serve under part B of the Act. The definition of an *EIS program,* in contrast, is an entity designated by the lead agency to be responsible for performance reporting to the Secretary and the public under §§ 303.700 through 303.702 (see the definition of *EIS program* in § 303.11). Although we expect, in most cases, that the lead agency will designate its EIS programs on a geographic basis (*e.g.,* counties, parishes, and health or school districts), it is not always feasible to do so. Therefore, it is the Department's position that it is not necessary to require States to make EIS program designations by geographic areas. States currently administer their part C programs through a variety of administrative structures. For example, multiple EIS providers may provide services in one or more overlapping geographic areas. Therefore, States cannot be expected to revise their existing administrative structures for the sole purpose of reporting performance data by geographic areas within a State.

Changes: None.

Comment: Section 303.702(b)(1)(i)(A) requires that the lead agency report annually to the public on the performance of each EIS program located in the State in relation to the targets in its SPP no later than 60 days following the State's submission of its APR to the Secretary. One commenter supported this 60-day timeline. Another commenter disagreed, stating that the 60-day reporting timeline is not realistic. This commenter recommended that the lead agency be required to report to the public as soon as practicable, but not later than the end of the calendar year in which the State's APR is due to the Secretary.

Discussion: We believe that it is important for the public to be informed in a timely manner regarding the performance of each EIS program in meeting the targets in the State's SPP. States are generally required to submit their APRs to the Secretary by February 1st following the end of the Federal fiscal reporting period. For example, the FFY 2006 APR, which requires data to be reported for the period July 1, 2006 to June 30, 2007 for the FFY 2006 reporting year, was due February 1, 2008. Some data reported in the February 2008 APR submission were collected by States in the fall of 2006. To ensure the usefulness of these data, we agree with the commenter that States must make the data publicly available as soon as practicable.

We also agree with the commenter that additional time may be needed beyond the 60 days from the date the State submits its APR. We consider 120 days to be an appropriate timeframe for States to develop and make public the reports on the performance of EIS programs on the targets in the SPP and have made this change in the regulations. With this change, a State will have four months before the State reports its APR data by EIS program to the public. Given that States will have reported to the public on this information at least two times prior to the effective date of these regulations, the Department's position is that States will already have effective and efficient systems in place to report within the 120-day timeframe.

Changes: We have revised the timeline in § 303.702(b) for the State to report annually to the public on the performance of each EIS program located in the State on the targets in the State's performance plan to be ''as soon as practicable but no later than 120 days'' following the State's APR submission.

Enforcement (§ 303.704)

Comment: One commenter stated that § 303.704, regarding enforcement under part C of the Act, requires significant clarification. For example, the commenter questioned whether the Department would impose sanctions if it determined that a State needed assistance one year and the following year determined that the State needed intervention.

Another commenter argued that the two consecutive year and three consecutive year timeframes in § 303.704(a) and (b) are unrealistic and that these timeframes, which relate to the Secretary's annual determinations regarding State performance under part C of the Act, should refer to program years, not consecutive years.

Discussion: Section 303.704 incorporates the language in section 616(e)(1) through (e)(3) of the Act, which provides the minimum enforcement actions the Secretary must take to ensure compliance with the Act when the Secretary determines that a State needs assistance for two consecutive years in implementing the requirements of part C of the Act, or is in need of intervention in implementing the requirements of part C for three consecutive years, or any time the Secretary determines that a State needs substantial intervention in implementing the requirements of part C of the Act. It is expected that under

most circumstances, the Department will follow the procedures specified in section 616(e)(1) through (e)(3) of the Act and § 303.707 in enforcing part C of the Act. However, sections 616(g) and 642 of the Act make clear that the Secretary has the authority to use enforcement mechanisms, including sanctions under GEPA and EDGAR, to monitor and enforce the implementation of part C of the Act.

In instances where the determinations for a State are different in consecutive years (*e.g.,* ''needs assistance'' in year one and ''needs intervention'' in the following year), the Department may use the enforcement mechanisms under GEPA and EDGAR in addition to those identified in the Act and § 303.707. Whether the Department will need to use additional enforcement mechanisms will depend on the unique facts of the situation. Thus, it is not possible for the Department to identify in these regulations all situations in which the use of those enforcement mechanisms may be appropriate.

Finally, we decline to change the references in this section from ''consecutive years'' to ''program years'' because section 616(e) of the Act, which is the statutory authority for § 303.704, refers to consecutive years.

Changes: None.

Comment: None.

Discussion: To be consistent with section 642(3) of the Act, the terms ''instructional'' and ''instruction'' in § 303.704(a)(1)(ii) have been revised to refer to ''early intervention service provision.''

Changes: The terms ''instructional'' and ''instruction'' in § 303.704(a)(1)(ii) have been revised to refer to ''early intervention service provision.''

Withholding Funds (§ 303.705)

Comment: One commenter requested that the phrase ''minimum reasonable notice,'' as used in this section, be explicitly defined.

Discussion: The term ''minimum reasonable notice'' is not in § 303.705(a), which incorporates the requirement in section 616(e)(4) of the Act that the Secretary must provide reasonable notice and an opportunity for a hearing to a State prior to the withholding of any funds under the Act to that State. We believe that ''reasonable notice'' as used in § 303.705(a) reflects the common understanding of the term—that the notice should be sufficiently informative and timely given the circumstances. Thus, we do not believe that it would be appropriate to further clarify ''reasonable notice'' as used in § 303.705(a) because what constitutes reasonable notice will, by necessity, depend on the nature of the details in each particular situation.

Changes: None.

Comment: One commenter expressed concern that the terms ''program'' and ''provider'' are used inconsistently throughout these regulations. The commenter specifically suggested that the term ''EIS program'' be added to § 303.705(c)(1)(ii), as an entity subject to the lead agency's suspension of further payments of part C funds when the Secretary withholds those funds to the State.

Discussion: We agree with the commenter that the term EIS programs should be added to § 303.705(c)(1)(ii) in addition to the existing reference to EIS providers because the terms have different definitions.

Under § 303.12, *EIS providers* are entities or individuals that provide early intervention services under part C of the Act, regardless of whether they receive part C Federal funds, and may include, where appropriate, the lead agency and other public agencies responsible for providing early intervention services to infants and toddlers with disabilities in the State. EIS programs are different; under § 303.11, an *EIS program* is an entity designated by the lead agency for reporting under sections 616 and 642 of the Act and §§ 303.700 through 303.702.

Lead agencies do not always provide part C funds directly to an EIS provider, but instead may provide part C funds to an EIS program. Thus, it would be appropriate to clarify in § 303.705(c)(1)(ii) that the lead agency must not make further payments of funds under part C of the Act to specified State agencies, EIS programs or, if the lead agency does not provide part C funds to the EIS program, EIS providers that caused or were involved in the Secretary's determination under § 303.703(b)(1).

Changes: We have added to § 303.705(c)(1)(ii) a reference to ''EIS programs'' and the phrase ''if the lead agency does not provide part C funds to the EIS program,''.

Public Attention (§ 303.706)

Comment: A few commenters stated that § 303.706 should not specify the methods of public notification that States must use, and that the public notification language in § 303.706 should be the same as the language in the corresponding part B regulation, which allows the State to determine the methods of notification to the public.

Discussion: The public notification requirement in § 303.706 is consistent with other public reporting requirements in subpart H of these regulations, specifically the public reporting requirements relating to the SPP and APRs and public reporting on EIS program performance in § 303.702(b)(1)(i)(B). The Department's position is that it is important for States to provide information to the public related to its monitoring and enforcement actions in a consistent manner. Therefore, we decline to revise § 303.706 as requested by the commenters.

Changes: None.

Reports—Program Information

Annual Report of Children Served—Report Requirement (§ 303.721)

Comment: One commenter asked the Department to clarify the child count reporting requirements in § 303.721. Specifically, the commenter asked for clarification on whether States are required to pick one date between October 1st and December 1st and report the count for that date or report cumulatively on every child served between those two dates. Two other commenters stated that the data reported to Congress should not be based on point-in-time counts, but on cumulative counts of all infants and toddlers served during the entire program fiscal year.

One commenter recommended that the Department establish a single due date for all reports that are required to be submitted annually under section 618 of the Act and § 303.721. Another commenter supported the language in this section because it provides flexibility for States.

Discussion: Section 303.721 describes the annual report of children served under part C of the Act that is required by section 618 of the Act (as modified by section 642 of the Act). Section 303.721 provides States with the flexibility to determine the specific date between October 1st and December 1st on which to collect the State's child count and service settings data under part C of the Act. States must choose a date between October 1st and December 1st of each year and collect point-in-time child count and settings data on that date. To ensure consistency, States are encouraged to use the same date from year to year. We believe it is appropriate to continue to require States to report point-in-time data on child count and settings because the Department has required point-in-time data under part C of the Act since 1992. Revising this standard would impose burdens on States as they would need to redesign their data collection systems, and it also would affect the Department's ability to compare data from multiple years and develop trend

data. While States are not required to submit cumulative child count data, they may provide such additional information in the child count data information collection form (Table 1—Report of Children Receiving Early Intervention Services in Accordance with part C).

Concerning combining due dates for State submissions required under section 618 of the Act and § 303.721, States currently have two submission dates, one for child count data and service setting data and a second for child exit and dispute resolution data. The child count and service setting data are point-in-time collections taken on a date between October 1 and December 1 and due the following February 1st. The child exit and dispute resolution data are collected throughout the year and due the November 1st following the end of the reporting year (July 1 through June 30). Combining the due dates for these collections is not appropriate since they are different types of collections. Regulating on the due dates of these data requirements is not necessary because these data collections are reviewed through the OMB data collection process. Nothing prevents a State from collecting child count and service setting data at the same point in time for a particular reporting period if that reduces the State's burden in the data collection process.

Changes: None.

Comment: One commenter recommended that data elements for the annual report of children served be merged and condensed. One commenter requested that lead agencies be required to track: (1) Premature infants who, at a later date, receive early intervention services but could have been served earlier if the State had presumptive eligibility criteria; and (2) families who decline services due to cost-sharing requirements.

Discussion: Following the amendments to the Act in 2004, the Department examined all of the then-existing part C data collection requirements under section 618 of the Act. Based on that examination, the Department eliminated two collections (reporting on numbers of service personnel and types of early intervention services) for the section 618 data collection. It is not appropriate to condense or merge additional data elements at this time because the data currently collected are either (1) required by section 618 of the Act, or (2) expressly authorized under the Act and necessary for the Secretary to ensure proper implementation of the part C program and to measure program performance under the Government Performance and Results Act of 1993.

We decline to add, as requested by the commenter, data collection requirements for the part C program in these regulations at this time because we are sensitive to the concerns of States and local entities about increasing data collection burden. We believe that the data States must collect under the regulations will enable the Secretary to effectively monitor and measure the implementation of the part C program. We are not convinced that the benefits associated with collecting additional data, including that data suggested by the commenter, would outweigh the burden on States and local entities required to collect the data.

Changes: None.

Comment: One commenter recommended that § 303.721(b) be deleted because the tracking and reporting requirements in the section relate to children ages three and older who are eligible for services under section 619 of part B of the Act and should be the responsibility of the part B program.

Discussion: Section 303.721(b) provides that if a State adopts the option under section 635(c) of the Act and § 303.211 to make early intervention services under part C of the Act available to children ages three and older, the lead agency must report on the number and percentage of children with disabilities who are eligible for services under section 619 of the Act but whose parents choose for such children to continue to receive early intervention services. Therefore, because these children are being served under part C of the Act, it is appropriate for the State part C program, and not the State part B program, to be responsible for reporting these data under section 618(a)(1)(B) and 635(c)(3) of the Act and § 303.721(b).

Changes: None.

Annual Report of Children Served—Certification (§ 303.723)

Comment: One commenter expressed support for the requirement in § 303.723 that the lead agency certify the accuracy of the data submitted under § 303.721. Two other commenters recommended deleting this section in its entirety. One commenter stated that any count based on sampling cannot be ''accurate and unduplicated.'' The other commenter stated that accurate and unduplicated counts should not require extra certification.

Discussion: It is critical that data reported by States be accurate. One way to ensure accuracy of that data is to require lead agency officials to submit a certification attesting to the data's accuracy, as is required by § 303.723. Concerning the accuracy of data collected through sampling, when a State uses sampling as a methodology to obtain its child count data, the State must first, in accordance with OMB-approved information collection requirements, have its sampling plan approved by the Department. Prior to receiving approval of a sampling plan, the State must demonstrate that its proposed sampling plan will result in the collection of valid, reliable, and accurate data. Currently no State has elected to use sampling when collecting the data required under section 618 of the Act and § 303.721. For these reasons, we decline to delete § 303.723 as requested by the commenters.

Changes: None.

Annual Report of Children Served—Other Responsibilities of the Lead Agency (§ 303.724)

Comment: One commenter expressed support for § 303.724, citing the importance of having States establish procedures to verify the accuracy of the data they collect and report. One commenter recommended that this section be amended to be consistent with section 618(b)(2) of the Act, which provides that the Secretary may permit States to obtain the data required under section 618 of the Act through sampling, to avoid a duplication of effort in States that sample to obtain section 618 data. Several commenters suggested that complying with the requirements in § 303.724 would place a significant burden on States and their data collection contractors. One commenter stated that some States use electronic systems to collect and track part C data and that these systems do not necessarily rely on EIS providers to submit child counts to the lead agency, and thus, an EIS provider could not be expected to certify child count data. The commenter recommended that EIS provider certification only be required when applicable to a State's procedures for reporting unduplicated and accurate child counts.

Discussion: Collection of accurate, unduplicated data begins at the EIS provider level. Therefore, requiring the lead agency to establish procedures that must be implemented by EIS providers, including certifications about the accuracy of the data and the dates by which EIS providers must report that data to the lead agency, is reasonable and necessary. The Department's position is that § 303.724 is consistent with the requirement in section 618 of the Act that allows States to use sampling when collecting section 618

data because, pursuant to the OMB-approved information collection forms for section 618 State-reported data, States are required to ensure collection of accurate data when they use sampling and have a plan approved by the Department prior to collecting data through sampling.

We agree with commenters that in some States with electronic systems for collecting and maintaining data, the State lead agency does not use EIS providers to collect State child count data. However, in those States where EIS providers still play a key role in collecting State child count data, it is appropriate for each EIS provider to certify that the data it reports to the lead agency are unduplicated and accurate. Therefore, we have revised § 303.724 to only require that, as one of the commenters suggested, the EIS provider certify the accuracy and nonduplication of data that the EIS provider is required to collect and report to the lead agency.

Changes: We have added to the lead-in to § 303.724 the following language ''conduct its own child count or use EIS providers to complete its child count. If the lead agency uses EIS providers to complete its child count, then the lead agency must:''

Allocation of Funds

Payments to Indians (§ 303.731)

Comment: One commenter requested that the Department clarify how the 1.25 percent amount in § 303.731, regarding part C funds provided by the Department to the Secretary of the Interior, is calculated or from where this percent is derived. The commenter suggested that the funding for tribes should be determined by the same funding formula that is used for States.

A few commenters suggested revising this section to require tribes and States to continue to collaborate and coordinate services and also to describe the role of the Secretary of the Interior related to the funding of all tribes that wish to participate as partners in the part C program. The commenters further recommended adding a non-supplanting clause to this section. One commenter recommended that the title of this section be revised to read: ''Payments to Indian Tribes, Tribal Organizations, or Consortia'' because the current heading is misleading and may be offensive to some.

Discussion: Section 303.731(a) provides that the Secretary will make payments to the Secretary of the Interior in the amount of 1.25 percent of the aggregate amount available to all States under part C of the Act so that the Secretary of the Interior can distribute funds to tribes, tribal organizations, and consortia to coordinate assistance in providing early intervention services by States to infants and toddlers with disabilities and their families on reservations served by elementary and secondary schools operated or funded by the Secretary of the Interior. The 1.25 percent payment by the Department of Education to the Secretary of the Interior is required by section 643(b)(1) of the Act, which provides that this percentage be taken from the aggregate amount of part C funds available to all States.

Section 643(b)(1) of the Act and § 303.731(a)(1) clearly state that funds provided under this section are to be used for the coordination of assistance in the provision of early intervention services by States to infants and toddlers with disabilities and their families on reservations served by elementary schools and secondary schools for Indian children operated or funded by the Department of the Interior. Under section 634(1), the lead agency is responsible for ensuring that early intervention services are available to all infants and toddlers with disabilities and their families, including Indian infants and toddlers residing on a reservation geographically located in the State. Under section 643(b)(4), Indian tribes, tribal organizations, and consortia that receive funds from the Secretary of the Interior must coordinate with the State, through the lead agency responsible for providing early intervention services under part C of the Act in that State. This coordination is to ensure that eligible Indian infants and toddlers with disabilities under the age of three in the State are identified, evaluated, and provided early intervention services. Including a requirement for additional coordination may be unnecessarily restrictive as States, through their lead agencies, and Indian tribes, tribal organizations, and consortia currently use a variety of mechanisms through their child find efforts, interagency agreements, and other methods to meet their respective responsibilities under part C of the Act.

It is not appropriate to add a nonsupplanting clause to this section because there is no statutory provision that requires Indian tribes, tribal organizations, and consortia to meet a nonsupplanting requirement. Rather, it is the State, under section 637(b)(5)(B) of the Act that must ensure that Federal funds made available under section 643 of the Act will be used to supplement not supplant the levels of State and local funds expended for infants and toddlers with disabilities and their families.

The U.S. Department of Interior performs two roles under section 643 of the Act. First, section 643(b) of the Act requires the Secretary of the Interior to distribute the entirety of part C funds received from the Secretary of Education to tribes, tribal organizations, or consortia of those entities for the coordination of assistance and provision of early intervention services by States to infants and toddlers with disabilities and their families on reservations served by elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. Second, the Secretary of the Interior, in accordance with section 643(b)(5) of the Act, must submit to the Secretary of Education on a biennial basis a report that includes a summary of the information that tribes, tribal organizations, or consortia that receive part C funds must submit to the Secretary of the Interior under this section.

Finally, in order to avoid confusion and to ensure consistency between the language in the Act and the language in the regulations, we have maintained the heading of this regulatory section to be the same as the corresponding section in the Act (the heading ''Payments to Indians'' is taken directly from the Act).

Changes: None.

Comment: None.

Discussion: To be consistent with section 643(b)(1) of the Act, we have deleted the words ''after the Secretary determines the amount of payments to be made to the jurisdictions under § 303.730(a)'' from § 303.731(a)(3).

Changes: We have deleted the words ''after the Secretary determines the amount of payments to be made to the jurisdictions under § 303.730(a)'' from § 303.731(a)(3).

State Allotments (§ 303.732)

Comment: One commenter stated that the Federal part C funding formula is not sound and should be modified. Several commenters recommended revising § 303.732, regarding State allotments of funds available under part C of the Act, to give States at least 120 days notice of their actual allocation for the next fiscal year. One commenter recommended defining the phrase ''ratably reduce'' as used in paragraph (c) of this section. Another commenter requested that the Department define the phrase ''most recent satisfactory data'' as used in paragraph (d)(2) of this section.

Discussion: Section 643 of the Act sets forth the statutory funding formula for distributing part C funds to States and the formula in § 303.732 is taken directly from section 643(c) of the Act.

This formula requires data on the number of children under the age of three in each State. The phrase ''ratably reduce'' in section 643(c)(3) of the Act, and reflected in § 303.732(c)(1), has the plain meaning that any reduction in the appropriation for part C of the Act will be proportionately reflected in the allotment for each State. Further clarification is not necessary.

Additionally, it is not necessary to define ''most recent satisfactory data'' because this phrase also has a plain meaning—that is, it refers to the most recent population data on the number of infants and toddlers in States that are available to the Department at the time the Department calculates State allocations under part C of the Act. For the purpose of these allocations, the Department uses the most recent data provided by the United States Bureau of the Census (U.S. Census Bureau) as the ''most recent satisfactory data.''

It is the Department's position that the regulations should not require the Secretary to inform States of their allocations 120 days prior to making the funds available to the States because the Department believes that the final allocations should be based on the most recent U.S. Census Bureau data available at the time the Department issues part C grants, and that data could, in some years, result in changes in the estimated allocations within 120 days of making awards.

Changes: None.

Comment: None.

Discussion: To be consistent with section 643(c)(1) of the Act, we have added the words ''and any amount to be reserved for State incentive grants under § 303.734'' to § 303.732(d)(1).

Changes: We have added ''and any amount to be reserved for State incentive grants under § 303.734'' to § 303.732(d)(1).

Reservation for State Incentive Grants (§ 303.734)

Comment: A few commenters supported § 303.734(a), which requires the Secretary to reserve 15 percent of the appropriated amount exceeding $460,000,000 to make available State incentive grants to States that implement the option to continue to provide early intervention services to children age three and older. However, many commenters objected to the set-aside for States that are carrying out a policy under section 635(c) of the Act stating that the overall funding levels for the part C program are inadequate to serve the current population of children ages birth to age three, let alone the population of children age three and older. Another commenter expressed concern that this set-aside provision takes away funds from States that do not adopt a policy under section 635(a) of the Act. Other commenters requested that § 303.734(a) not be implemented until the part C program is fully funded.

Discussion: Consistent with section 643 of the Act and under the provisions in § 303.734, the Secretary is required, in any fiscal year that the appropriation exceeds $460,000,000, to reserve 15 percent of the appropriated amount exceeding $460,000,000 to make available State incentive grants (SIG) to States that choose the option to make services available to children ages three and older under § 303.211. We do not agree that the provisions in § 303.734 take funds away from States that do not adopt a policy under section 635(a) of the Act and § 303.211. Any State has the option to make IDEA part C services available to eligible children with disabilities ages three and older under § 303.211. States have the option under § 303.211 to make IDEA part C services available to eligible children with disabilities beyond age three regardless of whether funds are available and granted under section 643(e) of the Act and § 303.734. However, the State incentive grant funds available and granted undersection 643(e) of the Act and § 303.734 must be used to facilitate the implementation of the provisions in § 303.211.

Changes: None.

Comment: One commenter recommended that § 303.734(a) be revised to clarify that a State is eligible to receive part C funds under this section even if the State elects to make part C services available only to a subset of children from the age of three to when the child enters, or is eligible under State law to enter, kindergarten or elementary school in the State, instead of children throughout the entire age range. Another commenter recommended defining the method the Department will use to distribute funds under § 303.734(a).

Discussion: We agree that § 303.734(a) should clarify that a State that elects to make part C services available to a subset of children specified in § 303.211(a)(2) is eligible for any part C funds that are available under section 643(e) of the Act, and we have made this change. With regard to clarifying the method of distributing funds under this section, section 643(e) of the Act provides that for any fiscal year for which the amount appropriated under section 644 of the Act exceeds $460,000,000, the Secretary shall reserve 15 percent of such appropriated amount to provide grants to States that elect, under section 635(c) of the Act, to serve children beyond age three. In FY 2009, the appropriation exceeded $460,000,000 due to the enactment of ARRA and the Department reserved funding for SIG grants under section 643(c) of the Act. The Department received applications from, and made SIG grants to, two States that submitted policies under section 635(c) of the Act to serve children beyond age three and four. No States applied to implement section 635(c) of the Act in FY 2005 through FY 2008 or FY 2010, which the Department believes can be explained by the lack of funding in those years for the SIG grants.

Changes: We have added language to § 303.734(a) to clarify that a State that makes part C services available according to a subset of children specified in § 303.211(a)(2) would be eligible for any funds available pursuant to section 643(e) of the Act.

Executive Order 12866

Regulatory Impact Analysis

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action. The potential costs associated with these final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

The Department has also reviewed these regulations pursuant to Executive Order 13563, published on January 21, 2011 (76 FR 3821). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct

regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

We emphasize as well that Executive Order 13563 requires agencies ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' In its February 2, 2011, memorandum (M–11–10) on Executive Order 13563, improving regulation and regulatory review, the Office of Information and Regulatory Affairs has emphasized that such techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these regulations only upon a reasoned determination that their benefits justify their costs and we selected, in choosing among alternative regulatory approaches, those approaches that maximize net benefits. Based on the analysis below, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Potential Costs and Benefits

This analysis does not attempt to cover every change in the regulations implementing part C of the Act governing the Early Intervention Program for Infants and Toddlers with Disabilities. We have included an analysis of the costs and benefits of the most significant changes. In conducting this analysis, the Department examined the extent to which changes made by these regulations add to or reduce the costs for State lead agencies and others, as compared to the costs of implementing the part C program under the previously existing regulations. Based on the following analysis, the Secretary has concluded that the changes reflected in the final regulations will not impose significant costs on the States.

Section 303.211—State Option To Make Part C Services Available to Children Ages Three and Older

Section 303.211 incorporates the provisions of section 635(c) of the Act, which allow States to continue to serve children with disabilities ages three through five under part C of the Act if those children previously received services under part C of the Act and are eligible for services under section 619 of part B of the Act. Offering services under part C of the Act is a State option. In addition, § 303.211(a)(2) clarifies that a State may choose to serve a subset of this age range.

In the NPRM, we requested comments from the public on initial costs related to establishing or enhancing the infrastructure of the part C lead agencies necessary to serve children ages three through five; differences in the costs of providing the services required by the Act to children with disabilities ages three through five years old under part C of the Act versus part B of the Act; the benefits to parents and children of receiving continued services under part C of the Act rather than under part B of the Act; the extent to which States expect families to choose continuation of part C services beyond age two; the extent to which States may choose to exercise the option of serving children with disabilities ages three through five years old under part C of the Act; and possible sources of funding for providing part C services to these children. However, we did not receive comments on possible costs related to these changes.

If a State elects to exercise the option to serve three through five year olds under part C of the Act, the lead agency is responsible for the costs of providing the direct part C services to children whose families elect to continue services under part C. In addition, the State's part C lead agency could incur some transition costs in implementing this option. For example, if the part C lead agency is not the SEA, it would need to develop the capacity to serve older children. The intensity and type of services and settings needed for three through five year olds would be different from those that are appropriate for children ages birth through two, and the program would need to include an educational component, which is not required for preschool children being served under part B of the Act. The part C lead agency may also have to establish relationships with different providers or, at the very least, amend agreements or contracts with existing providers. On the other hand, part C of the Act provides for establishment of a system of payments, which might reduce the cost to the State of providing services to children ages three through five served under part C of the Act.

The SEA is the lead agency in 14 of the 56 State agencies. In these States, extending the age range of children served by the part C program would primarily involve a shifting of costs among programs within the same agency. The State may incur some transition costs related to training and administration. However, these costs would not be significant.

If a State elects to provide services under part C to children ages three through five, and the lead agency is not the SEA, the SEA and LEAs in that State would experience savings because they would be responsible for providing services under part B of the Act to fewer children ages three through five, but this is not likely to result in overall savings for the State because the lead agency would incur higher costs, and the SEA and LEAs would still be required to maintain their Section 619 preschool programs to serve children with disabilities ages three through five years old who are not served under this option because parents have the right to choose between part C or part B services.

If a State elects to make part C services available to children ages three and older, § 303.209(f)(2) requires the State to make the annual notice required under § 303.211(b)(1) available to parents at the transition conference when the parent is presented with the initial option for the child to receive services under § 303.211 or under section 619 of the Act. Although this requirement adds to the cost of implementing the State option, we estimate that the costs would be insignificant, even if all States elected to exercise the option and proposed to make services available to children until their 5th birthday.

Based on the experience of the two States that have already opted to make part C services available to children three and older, we estimate that the annual notice would be approximately five pages long. We further estimate that it would cost approximately $.25 to photocopy a single notice and that approximately 220,000 notices would be needed, based on the number of three and four year old children we would expect to be eligible to continue to receive services under part C, for an annual cost of $55,000. This estimate would represent a lower-bound insofar as it assumes the notice would be limited to addressing the specific requirements of the Act and these regulations. In order to ensure that all families of eligible children are aware of the potential benefits of continuing to receive services under the part C programs, States may opt to develop brochures and other materials to publicize this option. For example, the two States that received State incentive grants in FY 2009 each requested approximately $30,000 to support the development and printing of brochures about the part C option. If all States

opted to extend part C services to eligible children beyond their third birthday and developed and printed similar materials, we estimate that States could spend as much as $1.6 million to provide information on the part C option to eligible children.

Sections 303.301 Through 303.320—Public Awareness, Comprehensive Child Find System, Referrals, and Screening

Sections 303.301 and 303.302 combine the child find and public awareness requirements from section 635(a)(5) and (a)(6) of the Act and reflect the Act's increased emphasis on specific subpopulations of infants and toddlers with disabilities who may potentially be eligible for and need early intervention services under part C of the Act. Section 303.302 requires States, consistent with the Act, to identify, locate, and evaluate all eligible infants and toddlers with disabilities, including children who are covered by CAPTA, homeless, in foster care, or wards of the State. Section 303.303 requires the State to have referral procedures to be used by specified primary referral sources and requires such procedures to provide for the referral of certain children covered by CAPTA. Section 303.303(b) clarifies that referral of children covered by CAPTA is limited to children under the age of three who are the subject of a substantiated case of child abuse or neglect or who are identified as directly affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. This change is consistent with the CAPTA provision in 43 U.S.C. 5106a(b)(2)(A)(xxi) that became effective in June 2003, which requires States receiving CAPTA funds to adopt policies providing for children under the age of three who are involved in a substantiated case of child abuse or neglect to be referred to the part C program. Section 303.301 also provides that, under a State's public awareness program, the lead agency must prepare information on the availability of early intervention services and disseminate such information to all primary referral sources so that these sources may give the information to parents of infants and toddlers, especially parents with premature infants or infants with other physical risk factors associated with learning or developmental complications.

Since States have been required under the Act to conduct child find activities to identify all infants and toddlers with disabilities since the part C program began in 1989, and the CAPTA requirements have been in place since June 2003, we are not estimating any increase in costs as a result of these changes. Part C lead agencies should already have the infrastructure needed to meet all of the IDEA child find requirements, including those requirements relating to children covered by CAPTA and those who are homeless, in foster care, or wards of the State.

In addition, § 303.320 allows the lead agency to adopt procedures for screening to determine whether a child is suspected of having a disability. The use of screening as a vehicle to identify children potentially eligible for part C services may reduce the number of evaluations and assessments that would otherwise need to be conducted and, thus, reduce potential evaluation and assessment costs for the State. As discussed previously in the *Analysis of Comments and Changes,* some commenters suggested that § 303.320(a)(3), which allows a parent to request an evaluation even after the lead agency determines—using its screening procedures—that the child is not suspected of having a disability, would diminish the cost-effectiveness of screening. However, we believe that parents are in a unique position to observe their child's development and may notice things which suggest a developmental delay or disability that could be missed by a screening. For this reason, it is the Department's position that this parental right to request an evaluation—along with other regulations in this part—provide for a rigorous child find system, which ensures that infants and toddlers with disabilities will receive the early intervention services they need. This is cost-effective because providing these services may reduce the need for special education and related services for these children when they reach school age.

Section 303.344(e)—Content of an IFSP

The current regulations in § 303.344(e) require the IFSP to include, to the extent appropriate, those medical and other services that the child needs, but are not required by part C of the Act, and the funding sources to be used in paying for those services or the steps that will be taken to secure those services through public or private sources. Section 303.344(e) of the final regulations retains the requirement for the IFSP Team to identify in the IFSP, to the extent appropriate, medical and other services that the child or family needs or is receiving, but that are not required by part C of the Act, and, if those services are not currently being provided, the steps that will be taken to assist the family in securing those services through public or private sources. However, the IFSP Teams are no longer required to identify funding sources for these services.

Eliminating the requirement that IFSPs identify the funding sources for services not required by part C of the Act will reduce the burden on service coordinators and will save IFSP Teams time during meetings and time preparing the IFSP. The requirement to identify funding for other services is overly burdensome, given that there may be many other services that infants and toddlers with disabilities and their families receive (*e.g.,* foster care, services through individualized safe plans of care, and medical and other services), and IFSP Teams may have limited knowledge about funding for these services.

The service coordinator typically would be responsible for obtaining this information. While we do not have any data on the number of hours service coordinators spend on this activity, we do know that many children served under part C of the Act have significant health care needs, and it could take several hours or more to identify funding for medical services needed by these children. For purposes of this analysis, we assume that service coordinators spend, on average, a minimum of two hours per year per child identifying funding for services not required by IDEA and describing this information in the IFSP. Based on employee compensation costs for health care and social assistance personnel calculated by the Bureau of Labor Statistics (BLS),[2] we estimate average compensation for service coordinators to be approximately $34.99 per hour. Pursuant to section 637(b)(4) of the Act, each State submits an annual count to the Department of the number of children with disabilities ages birth through two served in the State. An analysis of trends in the annual count and in census data for this age range indicates that the States will serve approximately 352,000 children under part C of the Act in fiscal year 2011. Based on these estimates, we estimate that savings from this change could be as much as $24.6 million.

Since the BLS health care and social assistance personnel category is broad and may overestimate salaries for service coordinators, we also examined available data on wages and salaries for early intervention specialists employed by non-profit organizations, school districts, private companies, State and

[2] U.S. Department of Labor, Bureau of Labor Statistics, Table 4, State and local government, by occupational and industry group, last modified September 8, 2010, *http://www.bls.gov/news.release/ecec.t04.htm.*

local governments, and colleges and universities to derive a lower-bound estimate for these savings based on an hourly wage of $14.60.[3] Using the BLS estimate of fringe benefit costs for health care and social assistance personnel of $12.67 per hour, the lower-bound estimate of the savings from this change would be $19.2 million per year.

Section 303.409(c)—Fees for Records

Section 303.409(c) requires the lead agency to provide parents with a copy of each evaluation, assessment, and IFSP pertaining to their child at no cost to the parents as soon as possible after the IFSP meeting. We do not anticipate that requiring States to provide a copy of evaluations, assessments, and IFSPs to parents, from the child's early intervention record, would result in a significant cost burden to States. Assuming that these documents, in total, would average no more than 100 pages, the cost of providing a copy to parents for the estimated 352,000 children served under the part C program in 2011 would be $3.8 million, at a cost of $0.05 per photocopied page and no more than 10 minutes of a service coordinator's time using the previous compensation estimate of $34.99 per hour. As a standard practice, most States already provide these documents at no cost to parents, so the effective cost of this change would be minimal.

Section 303.436(b)—Parental Rights in Due Process Hearing Proceedings

Section 303.436(b)(4) and (b)(5) has been changed to specify that a parent involved in a due process hearing has the right to receive a written or electronic verbatim transcription of the hearing and a copy of the written findings of fact and decisions at no cost to the parent. The cost impact of this requirement is likely to be minimal because there are very few due process hearings under the part C program. According to APR data submitted by States for FY 2008 (2008–09 reporting period), only 18 due process hearings were held during this period. If a typical due process hearing lasts no more than 16 hours and an hour of testimony results in roughly 40 pages of printed text, the cost to a State of providing an additional copy of the hearing transcript at $0.50 per page would be $320.00. Assuming that there could be as many as 20 due process hearings, the annual cost of this requirement would be no more than $6,400.

Section 303.520(a)—Policies Related to the Use of Public Benefits or Insurance To Pay for Part C Services

This section addresses the use of public benefits or insurance to pay for part C services, which is not addressed in the current regulations. Section 303.520(a) establishes three new requirements that are designed to provide important protections for parents of infants and toddlers with disabilities balanced against the need for States to have access to public benefits and public insurance to finance part C services while implementing the system of payments, coordination of funding sources, and payor of last resort requirements under sections 632(4), 635(a)(10)(B) and 640 of the Act.

Section 303.520(a)(2)(i) prohibits a State from requiring a parent to enroll in a public benefits or insurance program as a condition of receiving part C services. Under this section, a State may seek to enroll a parent in a public benefits or insurance program, but a parent can decline to enroll without affecting any right to receive part C services. The purpose of this provision is to protect the parent's right to confidentiality of personally identifiable information (where the lead agency is the same State agency that administers the public benefits or insurance program, such as Medicaid) and to protect the parents from incurring costs involuntarily. We expect this clarification to affect a limited number of States as the majority of States with systems of payments on file with the Department in FFY 2009 that address the use of public benefits or insurance to pay for part C services do not require families to enroll in those programs in order to receive part C services. Moreover, we believe that most parents will agree to enroll their infants and toddlers in programs like Medicaid voluntarily since it is generally to the family's advantage to obtain health insurance for all family members to pay for general medical care, including well baby visits and routine immunizations.

However, the few States that currently require parents to enroll in public benefits or insurance programs in order to receive part C services could potentially lose revenue if eligible parents decline to enroll in these programs. However, this potential loss of public benefits or insurance funds is outweighed by the benefits of protecting the privacy and autonomy of parents (including minimizing any potential negative financial impact that use of public benefits or insurance may have on parents). Moreover, the loss of public benefits or insurance does not increase the cost of early intervention services; it shifts the cost of those services to another revenue source.

Section 303.520(a)(2)(ii) requires the State to obtain consent to use a child's or parent's public benefits or insurance to pay for part C services if such use would have a cost impact on the family, specifically if that use would decrease available lifetime coverage or any other insured benefit of the child or parent, result in the parents paying for services that would otherwise be covered by the program, result in any increase in premiums or discontinuation of benefits or insurance, or risk loss of eligibility for the child or parents for home and community-based waivers based on aggregate health-related expenditures.

We would expect that there would be few instances in which parental consent would be required under this provision because Medicaid is the primary source of public insurance for part C services and Medicaid generally does not have limitations on lifetime coverage, pose any risk of increased premiums, or present any risk of loss of eligibility or discontinuation of benefits or insurance that would trigger the consent requirement. However, in those instances where there was a risk of increased premiums or out-of-pocket costs, States may create incentives for parents to provide consent by ensuring that the State's system of payments ensures that no out-of-pocket costs (including premium costs) are incurred by those parents eligible for Medicaid (currently 133% of the Federal poverty level).

Finally, § 303.520(a)(1) permits the State to access a child's or parent's public benefits or insurance if the State provides written notification to the child's parents and so long as the parent would not incur the specified costs identified above as a result of the use of those benefits, unless the parent had provided consent to use of such benefits for those services.

Section 303.520(a)(3) specifies that this written notification must include: (1) A statement that parental consent must be obtained under § 303.414 (where applicable) before the public agency discloses, for billing purposes, their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program; (2) a statement of the no cost provisions in new § 303.520(a)(2) and that if the parent does not provide the consent under § 303.520(a)(2), the State lead agency must still make available those part C services in the IFSP for which the

[3] Estimate based on an analysis of early intervention specialist salaries conducted by the PayScale Corporation and updated on November 12, 2010 (*http://www.payscale.com/research/US/Job=Early_Intervention_Specialist/Salary*).

parent has provided consent; (3) a statement that the parents have the right under § 303.414, if that provision applies, to withdraw their consent to disclosure of personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program at any time; and (4) a statement of the general categories of costs that the parent could incur as a result of participating in a public benefits or insurance program (such as co-payments or deductibles, or the required use of private insurance as the primary insurance).

Although the specific format and content may vary by State, we estimate that it would take no more than 10 hours per State to draft a written notice that complied with these requirements and that the notice would not exceed 4 pages in length.

According to the National Compensation Survey from the Bureau of Labor Statistics, the median hourly wage for lawyers employed full-time in State or local government is $38.46.[4] With benefit costs of approximately 35 percent, we estimate that the cost per State of drafting and translating this notice into other languages, if applicable, would be no more than $520, for a national cost of $29,120.

We also expect that providing this notification to parents will not have a significant cost impact because the timing of the written notification is left to the discretion of the State lead agency. In many instances, States would have an opportunity to provide this notification, either by mail or in person, in conjunction with the prior written notice already required under § 303.421 or other required documentation (such as a copy of the IFSP) or at the IFSP meeting or periodic review and would incur only the additional cost of photocopying the notification.

The National Early Intervention Longitudinal Study (NEILS) collected data on a representative sample of 3,338 children who entered the part C program for the first time between September 1997 and November 1998 and at various points until the children entered Kindergarten. These data indicate that 44 percent of the families participating in the part C program participate in a government-assisted health insurance or public benefits program such as Medicaid or the Children's Health Insurance Program (CHIP).[5] Although we do not have the benefit of more recent data, we assume that the percentage of part C families enrolled in public benefits or insurance programs has remained fairly constant and that approximately 155,000 of the 353,028 infants and toddlers served under part C in the fall of 2009 are in families that also participate in public benefits or insurance programs. For the reasons already described, we assume for this analysis that virtually all of the families participating in a public benefits or insurance program would be covered by the notification requirements and not the consent requirements that apply if use of the parent's insurance is expected to result in certain specified costs.

We estimate that the cost of producing this notification for the estimated 155,000 infants and toddlers who participate in both the part C program and a public benefits or insurance program would be at most $341,000 per year for all States, if each 4-page notice cost 20 cents to photocopy and required 5 minutes of administrative personnel time.[6]

In some instances, States would be unable to provide this written notification at the initial or other IFSP meeting in person during a service visit, or in conjunction with other mailings, and may need to provide written notification by mail separately. Assuming that sending written notification by mail is required for one quarter of the eligible infants and toddlers and would require 44 cents in postage and 10 cents for an envelope, the additional cost of mailing these notifications would be an estimated $20,925 annually.

We believe that the potential cost to States of implementing this required notification is very minor and would be offset by the benefits of ensuring that parents are aware that their child's personally identifiable information will be disclosed to the State agency responsible for the State's public benefits or insurance program, that this disclosure and billing cannot result in specified costs to them, that they have the right under § 303.414 (where applicable) to withdraw consent for this disclosure at any time, and that refusal to provide consent or withdrawal of this consent will not jeopardize their child's access to services under the part C program.

Section 303.520(b)—Policies Related to Use of Private Insurance To Pay for Part C Services

Under § 303.520(b), a State may not access a parent's private insurance to pay for part C services unless the parent provides consent to do so, except in States that have enacted legislation that provides certain no-cost protections. Overall, we do not believe the final regulations will have a significant effect on States because private insurance funds represent a more limited proportion of States' part C budgets than funds from public benefits or insurance programs. Twenty-six States reported in either their FFY 2001 or 2002 part C APRs that they used funds from private insurance and/or family fees to pay for part C services.[7] For 21 of these 26 jurisdictions, the average percentage of the State's overall part C budget that represented funds from private insurance and/or family fees was 4.9 percent. Notably, those few States for which private insurance represents a relatively larger share of their budget (*i.e.,* more than 10 percent) are States that would not be subject to the general consent requirement because they have enacted State statutes providing the requisite protections. That is, as required by § 303.520(b), the State legislation ensures that the use of private health insurance to pay for part C services would not: (1) 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 or family, (2) negatively affect the availability of health insurance for the child and family, (3) result in the discontinuation of health insurance coverage, or (4) be the basis for increasing the private insurance premiums for the child or family. In States without these statutes, it is unlikely that these States are accessing private insurance to any significant extent without parental consent.

Part C services must be provided free of charge unless the State has established a system of payments. States wishing to use a parent's or child's private insurance funds to pay for part C services should have already included this option in a system of payments, especially in cases where the use of private insurance involves co-payments and deductibles. Even in cases where the State might be willing to cover the up-front costs (*e.g.,* the co-payment) in order to obtain parental consent to use private insurance, the State could not

[4] *http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf.*

[5] Unpublished analysis of NEILS data by SRI, International, for the U.S. Department of Education. Additional information on the NEILS, including access to a public use dataset, is available on the study Web site (*http://www.sri.com/neils*).

[6] Calculated using the median hourly wage for secretaries and administrative assistants employed full-time by State or local governments of $17.75 (*http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf*) with benefit costs of 35 percent.

[7] The 2002 Part C APR was the last APR in which State lead agencies were required to report data on funding sources.

have done so without access to personally identifiable information that could not be obtained without consent. As such, the requirement to obtain parental consent to use private insurance is not a change in practice. Any potential loss of revenue to States from not being able to access private insurance because parents will not provide consent would be offset by the benefits of protecting the autonomy of the family and the benefits of ensuring that they are not unknowingly incurring costs.

Section 303.521(c)—States With FAPE Mandates or That Use Part B Funds To Provide Services to Infants and Toddlers With Disabilities

This provision incorporates long-standing policy and requirements under part B of the Act that, if a State is required under State law to provide FAPE for, or uses funds under part B of the Act to pay for, services for infants and toddlers with disabilities or a subset of children with disabilities under the age of three, the State must ensure that those services that constitute FAPE are provided at no cost. For example, if a State has established a system of payments under part C of the Act, but under State law mandates FAPE for a particular subgroup of children under the age of three (either by age and/or disability group, such as individuals who are blind), the State cannot charge for any services that are part of FAPE for that child or family. Because § 303.521(c) clarifies current requirements and practice, this change is not expected to result in any change in costs for State agencies, early intervention service providers, or families.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control numbers assigned to the collections of information in these final regulations at the end of each of the affected sections of the regulations.

These final regulations include the following five information collection requirements associated with the following provisions: §§ 303.101, 303.111 through 303.126, 303.200 through 303.227, 303.301, 303.430, 303.431(a)(2)(i), 303.432 through 303.434, 303.440(b), 303.443(c)(3), 303.520(a), 303.701, 303.702, and 303.720 through 303.724.

A description of these provisions is given below with an estimate of the annual recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

Collection of information: IDEA part C State Performance Plan (SPP) and Annual Performance Report (APR), (Information Collection 1820–0578). Affected regulation sections for this information collection are §§ 303.124, 303.701 and 303.702.

Each statewide system must include a system for compiling and timely reporting accurate data. Each State must have in place, a performance plan that evaluates the State's efforts to implement the requirements and purposes of part C of the Act and describes how the State will improve implementation. Each State also must report annually to the public on the performance of each EIS provider in the State on the targets in the State's performance plan, and the State must report annually to the Secretary on the performance of the State under the State's performance plan.

Annual reporting and recordkeeping burden for this collection of information is estimated to be 180 hours annually for maintaining the SPP and 1800 hours completing the APR, for each of 56 respondents. The total annual burden to States for maintaining the SPP is estimated to be 10,080 hours. Of the total 180 hours, it is estimated that 100 hours will be spent planning the report, 50 hours will be spent writing the report, and 30 hours will be spent typing and compiling the report. Of the estimated 1800 hours for completing the APR, it is estimated that 1720 hours will be spent planning (*i.e.,* setting up data collection processes, reporting data, cleaning and analyzing the data, *etc.*) the report, 40 hours will be spent writing the report, and 40 hours will be spent typing and compiling the report. The total annual burden to States for completing the APR is estimated to be 100,800. The Council reviews, provides comments on, and certifies the lead agency's report, and either agrees or disagrees with the report. The estimated annual burden for the Council is two hours to review, certify, and add comments to each report, as needed.

Collection of information: Annual State Application under part C of the Individuals with Disabilities Education Act, as amended. (Information Collection 1820–0550) Affected regulation sections for this information collection are §§ 303.101, 303.111 through 303.126, and 303.200 through 303.227. Under § 303.101, States are required to submit in the grant application new and/or revised State policies, procedures, methods, certifications, and descriptions that are described in §§ 303.201 through 303.212 of subpart C of these regulations and assurances for the application requirements in §§ 303.111 through 303.126 and 303.221 through 303.227.

There are 56 respondents who are required to submit the part C Annual State Application if they seek to receive Federal part C funds. The annual data burden for this collection is estimated to average 10 hours per respondent. Thus, the annual total burden estimate for this information collection is 560 hours. No changes are expected to the version of Information Collection 1820–0550 that is approved by OMB through December 31, 2010.

Collection of information: Report of Infants and Toddlers Receiving Early Intervention Services in Accordance with part C; Report of Program Settings Where Early Intervention Services are Provided to Infants and Toddlers with Disabilities and Their Families in Accordance with part C of the Act: (Information Collection 1820–0557) Affected regulation sections for this information collection are §§ 303.124 and 303.720 through 303.724.

Each lead agency that receives assistance under part C of the Act must provide data each year to the Secretary and the public on infants and toddlers with disabilities. There are 56 respondents who are required to provide part C data on infants and toddlers with disabilities. There are three Tables found in this collection. The estimated burden for this collection is 107 hours per State agency or 5,987 hours total.

Collection of Information: Report of Dispute Resolution Under part C of the Individuals With Disabilities Education Act Complaints, Mediations, and Due Process Hearings (Information Collection 1820–0678) The affected regulation section for this information collection is § 303.430. Under sections 616(a)(3)(B), 618(a)(1)(F), (a)(1)(H), and (a)(3), 639(a)(1), and 642 of the Act, the Secretary requires States to report data on the dispute resolution procedures the State is required to maintain under § 303.430. Each State must report the number of due process complaints, number of due process hearings conducted and the number of mediations held and the number of settlement agreements reached through such mediations. Additionally, if the State has adopted under § 303.430(d)(2) the part B due process hearing procedures, the State must report on the number of dispute resolution sessions and the number of settlement

agreements reached through such resolution sessions. The data collection form provides instructions and information for States for submitting their dispute resolution data.

There are 56 respondents who are required to submit data regarding the part C dispute resolution process. The total burden for all States was calculated by multiplying the average number of hours by 56. For lead agencies, the estimated average burden is 60 hours per lead agency, representing a total burden estimate of 3,360 hours. The required number of hours needed to produce these data is expected to decline as systems are expanded to collect all required data elements, personnel are trained on reporting these data, and edits are implemented to automate data cleaning.

Collection of Information: State and EIS Record Keeping, Notification, Reporting, and Third Party Disclosure Requirements under part C (Information Collection 1820–0682). Affected regulation sections for this information collection are §§ 303.430(c) and (d)(2), 303.431(b)(2)(i), 303.432 through 303.434, 303.440(b), 303.443(c)(3), and 303.520(a). The Act requires State lead agencies and EIS providers to gather, maintain, report, and disclose various information and data, but the Act does not require this information and data to be submitted to the Department.

Each State lead agency must have on file a list of mediators and procedures to ensure the timely resolution of State complaints. There are 56 State-level record keepers who must maintain a list of mediators. It is estimated to take approximately three hours annually for record keepers to update and maintain the lists, representing a total burden of 168 hours. Each of the 56 State lead agencies process on average three complaints annually. It takes approximately 24 hours for a State lead agency to issue a written decision to a complaint, representing a total burden of 4032 hours. If the State lead agency adopts part B due process hearing procedures, then the lead agency must also have on file a list of hearing officers and must provide parents information on low-cost legal and other services under specific circumstances. There are approximately 45 State due process complaints annually, and the data burden is expected to require an average of 30 minutes per hearing request to inform parents of the availability of low-cost legal services, representing a total burden of 22.5 hours. Approximately 15 States have adopted part B due process procedures for part C. It is estimated to take approximately three hours annually for record keepers to update and maintain the lists, representing a total burden of 45 hours. Additionally, each State lead agency must provide a written notification to parents prior to accessing a child's or parent's public benefits or insurance. For each State lead agency, it takes an average of about 10 hours to draft the notice, representing a total burden of 560 hours. As discussed in the supporting statement, other requirements identified in the NPRM as potential information collections, were not specific collections but rather affirmative responsibilities of lead agencies and EIS providers regarding fiscal and programmatic requirements.

The estimated average burden is 86 hours per lead agency. Annual reporting, notification, and recordkeeping burden for this collection of information is estimated to be approximately 4827.5 hours for 56 respondents (State lead agencies).

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with this order, we intend this document to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the NPRM published in the **Federal Register** on May 9, 2007, and in accordance with section 441 of the General Education Provisions Act, 20 U.S.C. 1221e–4, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available. Based on the response to the NPRM and on our own review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number 84.181)

List of Subjects in 34 CFR Part 303

Education of individuals with disabilities, Grant programs—education, Infants and toddlers, Reporting and recordkeeping requirements.

Dated: August 31, 2011.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations by revising part 303 to read as follows:

PART 303—EARLY INTERVENTION PROGRAM FOR INFANTS AND TODDLERS WITH DISABILITIES

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Authority: 20 U.S.C. 1431 through 1444, unless otherwise noted.

Subpart A—General

Purpose and Applicable Regulations

§ 303.1 Purpose of the early intervention program for infants and toddlers with disabilities.

The purpose of this part is to provide financial assistance to States to—

(a) Develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides early intervention services for infants and toddlers with disabilities and their families;

(b) Facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage);

(c) Enhance State capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities and their families;

(d) Enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of all children, including historically underrepresented populations, particularly minority, low-income, inner-city, and rural children, and infants and toddlers in foster care; and

(e) Encourage States to expand opportunities for children under three years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services.

(Authority: 20 U.S.C. 1400(d)(2), 1431(a)(5), 1431(b))

§ 303.2 Eligible recipients of an award and applicability of this part.

(a) *Eligible recipients of an award.* Eligible recipients include the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, the Secretary of the Interior, and the following jurisdictions: Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(b) *Applicability of this part.*

(1) The provisions of this part apply to—

(i) The State lead agency and any EIS provider that is part of the statewide system of early intervention, regardless of whether that EIS provider receives funds under part C of the Act; and

(ii) All children referred to the part C program, including infants and toddlers with disabilities consistent with the definitions in §§ 303.6 and 303.21, and their families.

(2) The provisions of this part do not apply to any child with a disability receiving a free appropriate public education or FAPE under 34 CFR part 300.

(Authority: 20 U.S.C. 1401(31), 1434, 1435(a)(10)(A))

§ 303.3 Applicable regulations.

(a) The following regulations apply to this part:

(1) The regulations in this part 303.

(2) The Education Department General Administrative Regulations (EDGAR), including 34 CFR parts 76 (except for § 76.103), 77, 79, 80, 81, 82, 84, 85, and 86.

(b) In applying the regulations cited in paragraph (a)(2) of this section, any reference to—

(1) *State educational agency* means the lead agency under this part; and

(2) *Education records* or *records* means early intervention records.

(Authority: 20 U.S.C. 1221(b), 1221e–3, 1431–1444)

Definitions Used in This Part

§ 303.4 Act.

Act means the Individuals with Disabilities Education Act, as amended.

(Authority: 20 U.S.C. 1400(a))

§ 303.5 At-risk infant or toddler.

At-risk infant or toddler means an individual under three years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided to the individual. At the State's discretion, *at-risk infant or toddler* may include an infant or toddler who is at risk of experiencing developmental delays because of biological or environmental factors that can be identified (including low birth weight, respiratory distress as a newborn, lack of oxygen, brain hemorrhage, infection, nutritional deprivation, a history of abuse or neglect, and being directly affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure).

(Authority: 20 U.S.C. 1432(1), 1432(5)(B)(i) and 1437(a)(6))

§ 303.6 Child.

Child means an individual under the age of six and may include an *infant or toddler with a disability,* as that term is defined in § 303.21.

(Authority: 20 U.S.C. 1432(5))

§ 303.7 Consent.

Consent means that—

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language, as defined in § 303.25;

(b) The parent understands and agrees in writing to the carrying out of the activity for which the parent's consent is sought, and the consent form describes that activity and lists the early intervention records (if any) that will be released and to whom they will be released; and

(c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(2) If a parent revokes consent, that revocation is not retroactive (*i.e.,* it does not apply to an action that occurred before the consent was revoked).

(Authority: 20 U.S.C. 1439)

§ 303.8 Council.

Council means the State Interagency Coordinating Council that meets the requirements of subpart G of this part.

(Authority: 20 U.S.C. 1432(2))

§ 303.9 Day.

Day means calendar day, unless otherwise indicated.

(Authority: 20 U.S.C. 1221e–3)

§ 303.10 Developmental delay.

Developmental delay, when used with respect to a child residing in a State, has the meaning given that term by the State under § 303.111.

(Authority: 20 U.S.C. 1432(3))

§ 303.11 Early intervention service program.

Early intervention service program or *EIS program* means an entity designated by the lead agency for reporting under §§ 303.700 through 303.702.

(Authority: 20 U.S.C. 1416, 1431–1444)

§ 303.12 Early intervention service provider.

(a) *Early intervention service provider* or *EIS provider* means an entity (whether public, private, or nonprofit) or an individual that provides early intervention services under part C of the Act, whether or not the entity or individual receives Federal funds under part C of the Act, and may include, where appropriate, the lead agency and a public agency responsible for providing early intervention services to infants and toddlers with disabilities in the State under part C of the Act.

(b) An EIS provider is responsible for—

(1) Participating in the multidisciplinary individualized family service plan (IFSP) Team's ongoing assessment of an infant or toddler with a disability and a family-directed assessment of the resources, priorities, and concerns of the infant's or toddler's family, as related to the needs of the infant or toddler, in the development of integrated goals and outcomes for the IFSP;

(2) Providing early intervention services in accordance with the IFSP of the infant or toddler with a disability; and

(3) Consulting with and training parents and others regarding the provision of the early intervention services described in the IFSP of the infant or toddler with a disability.

(Authority: 20 U.S.C. 1431–1444)

§ 303.13 Early intervention services.

(a) *General. Early intervention services* means developmental services that—

(1) Are provided under public supervision;

(2) Are selected in collaboration with the parents;

(3) Are provided at no cost, except, subject to §§ 303.520 and 303.521, where Federal or State law provides for a system of payments by families, including a schedule of sliding fees;

(4) Are designed to meet the developmental needs of an infant or toddler with a disability and the needs of the family to assist appropriately in the infant's or toddler's development, as identified by the IFSP Team, in any one or more of the following areas, including—

(i) Physical development;

(ii) Cognitive development;

(iii) Communication development;

(iv) Social or emotional development; or

(v) Adaptive development;

(5) Meet the standards of the State in which the early intervention services are provided, including the requirements of part C of the Act;

(6) Include services identified under paragraph (b) of this section;

(7) Are provided by *qualified personnel* (as that term is defined in § 303.31), including the types of personnel listed in paragraph (c) of this section;

(8) To the maximum extent appropriate, are provided in natural environments, as defined in § 303.26 and consistent with §§ 303.126 and 303.344(d); and

(9) Are provided in conformity with an IFSP adopted in accordance with section 636 of the Act and § 303.20.

(b) *Types of early intervention services.* Subject to paragraph (d) of this section, early intervention services include the following services defined in this paragraph:

(1) *Assistive technology device and service* are defined as follows:

(i) *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of an infant or toddler with a disability. The term does not include a medical device that is surgically implanted, including a cochlear implant, or the optimization (*e.g.,* mapping), maintenance, or replacement of that device.

(ii) *Assistive technology service* means any service that directly assists an infant or toddler with a disability in the selection, acquisition, or use of an assistive technology device. The term includes—

(A) The evaluation of the needs of an infant or toddler with a disability, including a functional evaluation of the infant or toddler with a disability in the child's customary environment;

(B) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by infants or toddlers with disabilities;

(C) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(D) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) Training or technical assistance for an infant or toddler with a disability or, if appropriate, that child's family; and

(F) Training or technical assistance for professionals (including individuals providing education or rehabilitation services) or other individuals who provide services to, or are otherwise substantially involved in the major life functions of, infants and toddlers with disabilities.

(2) *Audiology services* include—

(i) Identification of children with auditory impairments, using at-risk criteria and appropriate audiologic screening techniques;

(ii) Determination of the range, nature, and degree of hearing loss and

communication functions, by use of audiological evaluation procedures;

(iii) Referral for medical and other services necessary for the habilitation or rehabilitation of an infant or toddler with a disability who has an auditory impairment;

(iv) Provision of auditory training, aural rehabilitation, speech reading and listening devices, orientation and training, and other services;

(v) Provision of services for prevention of hearing loss; and

(vi) Determination of the child's individual amplification, including selecting, fitting, and dispensing appropriate listening and vibrotactile devices, and evaluating the effectiveness of those devices.

(3) *Family training, counseling, and home visits* means services provided, as appropriate, by social workers, psychologists, and other qualified personnel to assist the family of an infant or toddler with a disability in understanding the special needs of the child and enhancing the child's development.

(4) *Health services* has the meaning given the term in § 303.16.

(5) *Medical services* means services provided by a licensed physician for diagnostic or evaluation purposes to determine a child's developmental status and need for early intervention services.

(6) *Nursing services* include—

(i) The assessment of health status for the purpose of providing nursing care, including the identification of patterns of human response to actual or potential health problems;

(ii) The provision of nursing care to prevent health problems, restore or improve functioning, and promote optimal health and development; and

(iii) The administration of medications, treatments, and regimens prescribed by a licensed physician.

(7) *Nutrition services* include—

(i) Conducting individual assessments in—

(A) Nutritional history and dietary intake;

(B) Anthropometric, biochemical, and clinical variables;

(C) Feeding skills and feeding problems; and

(D) Food habits and food preferences;

(ii) Developing and monitoring appropriate plans to address the nutritional needs of children eligible under this part, based on the findings in paragraph (b)(7)(i) of this section; and

(iii) Making referrals to appropriate community resources to carry out nutrition goals.

(8) *Occupational therapy* includes services to address the functional needs of an infant or toddler with a disability related to adaptive development, adaptive behavior, and play, and sensory, motor, and postural development. These services are designed to improve the child's functional ability to perform tasks in home, school, and community settings, and include—

(i) Identification, assessment, and intervention;

(ii) Adaptation of the environment, and selection, design, and fabrication of assistive and orthotic devices to facilitate development and promote the acquisition of functional skills; and

(iii) Prevention or minimization of the impact of initial or future impairment, delay in development, or loss of functional ability.

(9) *Physical therapy* includes services to address the promotion of sensorimotor function through enhancement of musculoskeletal status, neurobehavioral organization, perceptual and motor development, cardiopulmonary status, and effective environmental adaptation. These services include—

(i) Screening, evaluation, and assessment of children to identify movement dysfunction;

(ii) Obtaining, interpreting, and integrating information appropriate to program planning to prevent, alleviate, or compensate for movement dysfunction and related functional problems; and

(iii) Providing individual and group services or treatment to prevent, alleviate, or compensate for, movement dysfunction and related functional problems.

(10) *Psychological services* include—

(i) Administering psychological and developmental tests and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and child and family conditions related to learning, mental health, and development; and

(iv) Planning and managing a program of psychological services, including psychological counseling for children and parents, family counseling, consultation on child development, parent training, and education programs.

(11) *Service coordination services* has the meaning given the term in § 303.34.

(12) *Sign language and cued language services* include teaching sign language, cued language, and auditory/oral language, providing oral transliteration services (such as amplification), and providing sign and cued language interpretation.

(13) *Social work services* include—

(i) Making home visits to evaluate a child's living conditions and patterns of parent-child interaction;

(ii) Preparing a social or emotional developmental assessment of the infant or toddler within the family context;

(iii) Providing individual and family-group counseling with parents and other family members, and appropriate social skill-building activities with the infant or toddler and parents;

(iv) Working with those problems in the living situation (home, community, and any center where early intervention services are provided) of an infant or toddler with a disability and the family of that child that affect the child's maximum utilization of early intervention services; and

(v) Identifying, mobilizing, and coordinating community resources and services to enable the infant or toddler with a disability and the family to receive maximum benefit from early intervention services.

(14) *Special instruction* includes—

(i) The design of learning environments and activities that promote the infant's or toddler's acquisition of skills in a variety of developmental areas, including cognitive processes and social interaction;

(ii) Curriculum planning, including the planned interaction of personnel, materials, and time and space, that leads to achieving the outcomes in the IFSP for the infant or toddler with a disability;

(iii) Providing families with information, skills, and support related to enhancing the skill development of the child; and

(iv) Working with the infant or toddler with a disability to enhance the child's development.

(15) *Speech-language pathology services* include—

(i) Identification of children with communication or language disorders and delays in development of communication skills, including the diagnosis and appraisal of specific disorders and delays in those skills;

(ii) Referral for medical or other professional services necessary for the habilitation or rehabilitation of children with communication or language disorders and delays in development of communication skills; and

(iii) Provision of services for the habilitation, rehabilitation, or prevention of communication or language disorders and delays in development of communication skills.

(16) *Transportation and related costs* include the cost of travel and other costs that are necessary to enable an infant or

toddler with a disability and the child's family to receive early intervention services.

(17) *Vision services* mean—

(i) Evaluation and assessment of visual functioning, including the diagnosis and appraisal of specific visual disorders, delays, and abilities that affect early childhood development;

(ii) Referral for medical or other professional services necessary for the habilitation or rehabilitation of visual functioning disorders, or both; and

(iii) Communication skills training, orientation and mobility training for all environments, visual training, and additional training necessary to activate visual motor abilities.

(c) *Qualified personnel.* The following are the types of qualified personnel who provide early intervention services under this part:

(1) Audiologists.

(2) Family therapists.

(3) Nurses.

(4) Occupational therapists.

(5) Orientation and mobility specialists.

(6) Pediatricians and other physicians for diagnostic and evaluation purposes.

(7) Physical therapists.

(8) Psychologists.

(9) Registered dieticians.

(10) Social workers.

(11) Special educators, including teachers of children with hearing impairments (including deafness) and teachers of children with visual impairments (including blindness).

(12) Speech and language pathologists.

(13) Vision specialists, including ophthalmologists and optometrists.

(d) *Other services.* The services and personnel identified and defined in paragraphs (b) and (c) of this section do not comprise exhaustive lists of the types of services that may constitute early intervention services or the types of qualified personnel that may provide early intervention services. Nothing in this section prohibits the identification in the IFSP of another type of service as an early intervention service provided that the service meets the criteria identified in paragraph (a) of this section or of another type of personnel that may provide early intervention services in accordance with this part, provided such personnel meet the requirements in § 303.31.

(Authority: 20 U.S.C. 1432(4))

§ 303.14 Elementary school.

Elementary school means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

(Authority: 20 U.S.C. 1401(6))

§ 303.15 Free appropriate public education.

Free appropriate public education or *FAPE,* as used in §§ 303.211, 303.501, and 303.521, means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the State educational agency (SEA), including the requirements of part B of the Act;

(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 CFR 300.320 through 300.324.

(Authority: 20 U.S.C. 1401(9))

§ 303.16 Health services.

(a) *Health services* mean services necessary to enable an otherwise eligible child to benefit from the other early intervention services under this part during the time that the child is eligible to receive early intervention services.

(b) The term includes—

(1) Such services as clean intermittent catheterization, tracheostomy care, tube feeding, the changing of dressings or colostomy collection bags, and other health services; and

(2) Consultation by physicians with other service providers concerning the special health care needs of infants and toddlers with disabilities that will need to be addressed in the course of providing other early intervention services.

(c) The term does not include—

(1) Services that are—

(i) Surgical in nature (such as cleft palate surgery, surgery for club foot, or the shunting of hydrocephalus);

(ii) Purely medical in nature (such as hospitalization for management of congenital heart ailments, or the prescribing of medicine or drugs for any purpose); or

(iii) Related to the implementation, optimization (*e.g.,* mapping), maintenance, or replacement of a medical device that is surgically implanted, including a cochlear implant.

(A) Nothing in this part limits the right of an infant or toddler with a disability with a surgically implanted device (*e.g.,* cochlear implant) to receive the early intervention services that are identified in the child's IFSP as being needed to meet the child's developmental outcomes.

(B) Nothing in this part prevents the EIS provider from routinely checking that either the hearing aid or the external components of a surgically implanted device (*e.g.,* cochlear implant) of an infant or toddler with a disability are functioning properly;

(2) Devices (such as heart monitors, respirators and oxygen, and gastrointestinal feeding tubes and pumps) necessary to control or treat a medical condition; and

(3) Medical-health services (such as immunizations and regular ''well-baby'' care) that are routinely recommended for all children.

(Authority: 20 U.S.C. 1432(4))

§ 303.17 Homeless children.

Homeless children means children who meet the definition given the term *homeless children and youths* in section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11431 *et seq.*

(Authority: 20 U.S.C. 1401(11))

§ 303.18 Include; including.

Include or *including* means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1221e–3)

§ 303.19 Indian; Indian tribe.

(a) *Indian* means an individual who is a member of an Indian tribe.

(b) *Indian tribe* means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*).

(c) Nothing in this definition is intended to indicate that the Secretary of the Interior is required to provide services or funding to a State Indian Tribe that is not listed in the **Federal Register** list of Indian entities recognized as eligible to receive services from the United States, published pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a–1.

(Authority: 20 U.S.C. 1401(12)–(13))

§ 303.20 Individualized family service plan.

Individualized family service plan or *IFSP* means a written plan for providing early intervention services to an infant or toddler with a disability under this part and the infant's or toddler's family that—

(a) Is based on the evaluation and assessment described in § 303.321;

(b) Includes the content specified in § 303.344;

(c) Is implemented as soon as possible once parental consent for the early

intervention services in the IFSP is obtained (consistent with § 303.420); and

(d) Is developed in accordance with the IFSP procedures in §§ 303.342, 303.343, and 303.345.

(Authority: 20 U.S.C. 1401(15), 1435(a)(4), 1436)

§ 303.21 Infant or toddler with a disability.

(a) *Infant or toddler with a disability* means an individual under three years of age who needs early intervention services because the individual—

(1) Is experiencing a developmental delay, as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas:

(i) Cognitive development.

(ii) Physical development, including vision and hearing.

(iii) Communication development.

(iv) Social or emotional development.

(v) Adaptive development; or

(2) Has a diagnosed physical or mental condition that—

(i) Has a high probability of resulting in developmental delay; and

(ii) Includes conditions such as chromosomal abnormalities; genetic or congenital disorders; sensory impairments; inborn errors of metabolism; disorders reflecting disturbance of the development of the nervous system; congenital infections; severe attachment disorders; and disorders secondary to exposure to toxic substances, including fetal alcohol syndrome.

(b) *Infant or toddler with a disability* may include, at a State's discretion, an *at-risk infant or toddler* (as defined in § 303.5).

(c) *Infant or toddler with a disability* may include, at a State's discretion, a child with a disability who is eligible for services under section 619 of the Act and who previously received services under this part until the child enters, or is eligible under State law to enter, kindergarten or elementary school, as appropriate, provided that any programs under this part must include—

(1) An educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children ages three and older who receive part C services pursuant to § 303.211; and

(2) A written notification to parents of a child with a disability who is eligible for services under section 619 of the Act and who previously received services under this part of their rights and responsibilities in determining whether their child will continue to receive services under this part or participate in preschool programs under section 619 of the Act.

(Authority: 20 U.S.C. 1401(16), 1432(5))

§ 303.22 Lead agency.

Lead agency means the agency designated by the State's Governor under section 635(a)(10) of the Act and § 303.120 that receives funds under section 643 of the Act to administer the State's responsibilities under part C of the Act.

(Authority: 20 U.S.C. 1435(a)(10))

§ 303.23 Local educational agency.

(a) *General. Local educational agency* or *LEA* means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(b) *Educational service agencies and other public institutions or agencies.* The term includes the following:

(1) *Educational service agency,* defined as a regional public multiservice agency—

(i) Authorized by State law to develop, manage, and provide services or programs to LEAs; and

(ii) Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State.

(2) Any other public institution or agency having administrative control and direction of a public elementary school or secondary school, including a public charter school that is established as an LEA under State law.

(3) Entities that meet the definition of *intermediate educational unit* or *IEU* in section 602(23) of the Act, as in effect prior to June 4, 1997. Under that definition an *intermediate educational unit* or *IEU* means any public authority other than an LEA that—

(i) Is under the general supervision of a State educational agency;

(ii) Is established by State law for the purpose of providing FAPE on a regional basis; and

(iii) Provides special education and related services to children with disabilities within the State.

(c) *BIE-funded schools.* The term includes an elementary school or secondary school funded by the Bureau of Indian Education, and not subject to the jurisdiction of any SEA other than the Bureau of Indian Education, but only to the extent that the inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under the Act with the smallest student population.

(Authority: 20 U.S.C. 1401(5), 1401(19))

§ 303.24 Multidisciplinary.

Multidisciplinary means the involvement of two or more separate disciplines or professions and with respect to—

(a) Evaluation of the child in §§ 303.113 and 303.321(a)(1)(i) and assessments of the child and family in § 303.321(a)(1)(ii), may include one individual who is qualified in more than one discipline or profession; and

(b) The IFSP Team in § 303.340 must include the involvement of the parent and two or more individuals from separate disciplines or professions and one of these individuals must be the service coordinator (consistent with § 303.343(a)(1)(iv)).

(Authority: 20 U.S.C. 1221e–3, 1435(a)(3), 1436(a)(1), 1436(a)(3))

§ 303.25 Native language.

(a) *Native language,* when used with respect to an individual who is limited English proficient or LEP (as that term is defined in section 602(18) of the Act), means—

(1) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in paragraph (a)(2) of this section; and

(2) For evaluations and assessments conducted pursuant to § 303.321(a)(5) and (a)(6), the language normally used by the child, if determined developmentally appropriate for the child by qualified personnel conducting the evaluation or assessment.

(b) *Native language,* when used with respect to an individual who is deaf or hard of hearing, blind or visually impaired, or for an individual with no written language, means the mode of communication that is normally used by the individual (such as sign language, braille, or oral communication).

(Authority: 20 U.S.C. 1401(20))

§ 303.26 Natural environments.

Natural environments means settings that are natural or typical for a same-aged infant or toddler without a disability, may include the home or

community settings, and must be consistent with the provisions of § 303.126.

(Authority: 20 U.S.C. 1432, 1435, 1436)

§ 303.27 Parent.

(a) *Parent* means—

(1) A biological or adoptive parent of a child;

(2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the child's parent, or authorized to make early intervention, educational, health or developmental decisions for the child (but not the State if the child is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(5) A surrogate parent who has been appointed in accordance with § 303.422 or section 639(a)(5) of the Act.

(b)(1) Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational or early intervention service decisions for the child.

(2) If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (a)(4) of this section to act as the ''parent'' of a child or to make educational or early intervention service decisions on behalf of a child, then the person or persons must be determined to be the ''parent'' for purposes of part C of the Act, except that if an EIS provider or a public agency provides any services to a child or any family member of that child, that EIS provider or public agency may not act as the parent for that child.

(Authority: 20 U.S.C. 1401(23), 1439(a)(5))

§ 303.28 Parent training and information center.

Parent training and information center means a center assisted under section 671 or 672 of the Act.

(Authority: 20 U.S.C. 1401(25))

§ 303.29 Personally identifiable information.

Personally identifiable information means personally identifiable information as defined in 34 CFR 99.3, as amended, except that the term ''student'' in the definition of personally identifiable information in 34 CFR 99.3 means ''child'' as used in this part and any reference to ''school'' means ''EIS provider'' as used in this part.

(Authority: 20 U.S.C. 1415, 1439)

§ 303.30 Public agency.

As used in this part, *public agency* means the lead agency and any other agency or political subdivision of the State.

(Authority: 20 U.S.C. 1435(a)(10))

§ 303.31 Qualified personnel.

Qualified personnel means personnel who have met State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the areas in which the individuals are conducting evaluations or assessments or providing early intervention services.

(Authority: 20 U.S.C. 1432(4)(F))

§ 303.32 Scientifically based research.

Scientifically based research has the meaning given the term in section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). In applying the ESEA to the regulations under part C of the Act, any reference to ''education activities and programs'' refers to ''early intervention services.''

(Authority: 20 U.S.C. 1435(a)(2))

§ 303.33 Secretary.

Secretary means the Secretary of Education.

(Authority: 20 U.S.C. 1401(28))

§ 303.34 Service coordination services (case management).

(a) *General.* (1) As used in this part, *service coordination services* mean services provided by a service coordinator to assist and enable an infant or toddler with a disability and the child's family to receive the services and rights, including procedural safeguards, required under this part.

(2) Each infant or toddler with a disability and the child's family must be provided with one service coordinator who is responsible for—

(i) Coordinating all services required under this part across agency lines; and

(ii) Serving as the single point of contact for carrying out the activities described in paragraphs (a)(3) and (b) of this section.

(3) Service coordination is an active, ongoing process that involves—

(i) Assisting parents of infants and toddlers with disabilities in gaining access to, and coordinating the provision of, the early intervention services required under this part; and

(ii) Coordinating the other services identified in the IFSP under § 303.344(e) that are needed by, or are being provided to, the infant or toddler with a disability and that child's family.

(b) *Specific service coordination services.* Service coordination services include—

(1) Assisting parents of infants and toddlers with disabilities in obtaining access to needed early intervention services and other services identified in the IFSP, including making referrals to providers for needed services and scheduling appointments for infants and toddlers with disabilities and their families;

(2) Coordinating the provision of early intervention services and other services (such as educational, social, and medical services that are not provided for diagnostic or evaluative purposes) that the child needs or is being provided;

(3) Coordinating evaluations and assessments;

(4) Facilitating and participating in the development, review, and evaluation of IFSPs;

(5) Conducting referral and other activities to assist families in identifying available EIS providers;

(6) Coordinating, facilitating, and monitoring the delivery of services required under this part to ensure that the services are provided in a timely manner;

(7) Conducting follow-up activities to determine that appropriate part C services are being provided;

(8) Informing families of their rights and procedural safeguards, as set forth in subpart E of this part and related resources;

(9) Coordinating the funding sources for services required under this part; and

(10) Facilitating the development of a transition plan to preschool, school, or, if appropriate, to other services.

(c) *Use of the term service coordination or service coordination services.* The lead agency's or an EIS provider's use of the term *service coordination* or *service coordination services* does not preclude characterization of the services as case management or any other service that is covered by another payor of last resort (including Title XIX of the Social Security Act—Medicaid), for purposes of claims in compliance with the requirements of §§ 303.501 through 303.521 (Payor of last resort provisions).

(Authority: 20 U.S.C. 1432(4), 1435(a)(4), 1436(d)(7), 1440)

§ 303.35 State.

Except as provided in § 303.732(d)(3) (regarding State allotments under this part), *State* means each of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, and the four outlying areas and jurisdictions of Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(Authority: 20 U.S.C. 1401(31))

§ 303.36 State educational agency.

(a) *State educational agency* or *SEA* means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(b) The term includes the agency that receives funds under sections 611 and 619 of the Act to administer the State's responsibilities under part B of the Act.

(Authority: 20 U.S.C. 1401(32))

§ 303.37 Ward of the State.

(a) *General.* Subject to paragraph (b) of this section, *ward of the State* means a child who, as determined by the State where the child resides, is—

(1) A foster child;

(2) A ward of the State; or

(3) In the custody of a public child welfare agency.

(b) *Exception. Ward of the State* does not include a foster child who has a foster parent who meets the definition of a *parent* in § 303.27.

(Authority: 20 U.S.C. 1401(36))

Subpart B—State Eligibility for a Grant and Requirements for a Statewide System

General Authority and Eligibility

§ 303.100 General authority.

The Secretary, in accordance with part C of the Act, makes grants to States (from their allotments under section 643 of the Act) to assist each State to maintain and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system to provide early intervention services for infants and toddlers with disabilities and their families.

(Authority: 20 U.S.C. 1433)

§ 303.101 State eligibility—requirements for a grant under this part.

In order to be eligible for a grant under part C of the Act for any fiscal year, a State must meet the following conditions:

(a) *Assurances regarding early intervention services and a statewide system.* The State must provide assurances to the Secretary that—

(1) The State has adopted a policy that appropriate early intervention services, as defined in § 303.13, are available to all infants and toddlers with disabilities in the State and their families, including—

(i) Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State;

(ii) Infants and toddlers with disabilities who are homeless children and their families; and

(iii) Infants and toddlers with disabilities who are wards of the State; and

(2) The State has in effect a statewide system of early intervention services that meets the requirements of section 635 of the Act, including policies and procedures that address, at a minimum, the components required in §§ 303.111 through 303.126.

(b) *State application and assurances.* The State must provide information and assurances to the Secretary, in accordance with subpart C of this part, including—

(1) Information that shows that the State meets the State application requirements in §§ 303.200 through 303.212; and

(2) Assurances that the State also meets the requirements in §§ 303.221 through 303.227.

(c) *Approval before implementation.* The State must obtain approval by the Secretary before implementing any policy or procedure required to be submitted as part of the State's application in §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1434, 1435, 1437)

State Conformity With Part C of the Act and Abrogation of State Sovereign Immunity

§ 303.102 State conformity with Part C of the Act.

Each State that receives funds under part C of the Act must ensure that any State rules, regulations, and policies relating to this part conform to the purposes and requirements of this part.

(Authority: 20 U.S.C. 1407(a)(1))

§ 303.103 Abrogation of State sovereign immunity.

(a) *General.* A State is not immune under the 11th amendment of the Constitution of the United States from suit in Federal court for a violation of part C of the Act.

(b) *Remedies.* In a suit against a State for a violation of part C of the Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in a suit against any public entity other than a State.

(c) *Effective date.* Paragraphs (a) and (b) of this section apply with respect to violations that occur in whole or part after October 30, 1990, the date of enactment of the Education of the Handicapped Act Amendments of 1990.

(Authority: 20 U.S.C. 1403)

Equipment and Construction

§ 303.104 Acquisition of equipment and construction or alteration of facilities.

(a) *General.* If the Secretary determines that a program authorized under part C of the Act will be improved by permitting program funds to be used to acquire appropriate equipment or to construct new facilities or alter existing facilities, the Secretary may allow the use of those funds for those purposes.

(b) *Compliance with certain regulations.* Any construction of new facilities or alteration of existing facilities under paragraph (a) of this section must comply with the requirements of—

(1) Appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the ''Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities''); or

(2) Appendix A of subpart 101–19.6 of title 41, Code of Federal Regulations (commonly known as the ''Uniform Federal Accessibility Standards'').

(Authority: 20 U.S.C. 1404)

Positive Efforts To Employ and Advance Qualified Individuals With Disabilities

§ 303.105 Positive efforts to employ and advance qualified individuals with disabilities.

Each recipient of assistance under part C of the Act must make positive efforts to employ and advance in employment, qualified individuals with disabilities in programs assisted under part C of the Act.

(Authority: 20 U.S.C. 1405)

Minimum Components of a Statewide System

§ 303.110 Minimum components of a statewide system.

Each statewide system (system) must include, at a minimum, the components

described in §§ 303.111 through 303.126.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a))

§ 303.111 State definition of developmental delay.

Each system must include the State's rigorous definition of *developmental delay,* consistent with §§ 303.10 and 303.203(c), that will be used by the State in carrying out programs under part C of the Act in order to appropriately identify infants and toddlers with disabilities who are in need of services under part C of the Act. The definition must—

(a) Describe, for each of the areas listed in § 303.21(a)(1), the evaluation and assessment procedures, consistent with § 303.321, that will be used to measure a child's development; and

(b) Specify the level of developmental delay in functioning or other comparable criteria that constitute a developmental delay in one or more of the developmental areas identified in § 303.21(a)(1).

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(1))

§ 303.112 Availability of early intervention services.

Each system must include a State policy that is in effect and that ensures that appropriate early intervention services are based on scientifically based research, to the extent practicable, and are available to all infants and toddlers with disabilities and their families, including—

(a) Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State; and

(b) Infants and toddlers with disabilities who are homeless children and their families.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(2))

§ 303.113 Evaluation, assessment, and nondiscriminatory procedures.

(a) Subject to paragraph (b) of this section, each system must ensure the performance of—

(1) A timely, comprehensive, multidisciplinary evaluation of the functioning of each infant or toddler with a disability in the State; and

(2) A family-directed identification of the needs of the family of the infant or toddler to assist appropriately in the development of the infant or toddler.

(b) The evaluation and family-directed identification required in paragraph (a) of this section must meet the requirements of § 303.321.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(3))

§ 303.114 Individualized family service plan (IFSP).

Each system must ensure, for each infant or toddler with a disability and his or her family in the State, that an IFSP, as defined in § 303.20, is developed and implemented that meets the requirements of §§ 303.340 through 303.345, and that includes service coordination services, as defined in § 303.34.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(4))

§ 303.115 Comprehensive child find system.

Each system must include a comprehensive child find system that meets the requirements in §§ 303.302 and 303.303.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(5))

§ 303.116 Public awareness program.

Each system must include a public awareness program that—

(a) Focuses on the early identification of infants and toddlers with disabilities; and

(b) Provides information to parents of infants and toddlers through primary referral sources in accordance with § 303.301.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(6))

§ 303.117 Central directory.

Each system must include a central directory that is accessible to the general public (*i.e.,* through the lead agency's Web site and other appropriate means) and includes accurate, up-to-date information about—

(a) Public and private early intervention services, resources, and experts available in the State;

(b) Professional and other groups (including parent support, and training and information centers, such as those funded under the Act) that provide assistance to infants and toddlers with disabilities eligible under part C of the Act and their families; and

(c) Research and demonstration projects being conducted in the State relating to infants and toddlers with disabilities.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(7))

§ 303.118 Comprehensive system of personnel development (CSPD).

Each system must include a comprehensive system of personnel development, including the training of paraprofessionals and the training of primary referral sources with respect to the basic components of early intervention services available in the State. A comprehensive system of personnel development—

(a) Must include—

(1) Training personnel to implement innovative strategies and activities for the recruitment and retention of EIS providers;

(2) Promoting the preparation of EIS providers who are fully and appropriately qualified to provide early intervention services under this part; and

(3) Training personnel to coordinate transition services for infants and toddlers with disabilities who are transitioning from an early intervention service program under part C of the Act to a preschool program under section 619 of the Act, Head Start, Early Head Start, an elementary school program under part B of the Act, or another appropriate program.

(b) May include—

(1) Training personnel to work in rural and inner-city areas;

(2) Training personnel in the emotional and social development of young children; and

(3) Training personnel to support families in participating fully in the development and implementation of the child's IFSP; and

(4) Training personnel who provide services under this part using standards that are consistent with early learning personnel development standards funded under the State Advisory Council on Early Childhood Education and Care established under the Head Start Act, if applicable.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(8))

§ 303.119 Personnel standards.

(a) *General.* Each system must include policies and procedures relating to the establishment and maintenance of qualification standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(b) *Qualification standards.* The policies and procedures required in paragraph (a) of this section must provide for the establishment and maintenance of qualification standards that are consistent with any State-

approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the profession, discipline, or area in which personnel are providing early intervention services.

(c) *Use of paraprofessionals and assistants.* Nothing in part C of the Act may be construed to prohibit the use of paraprofessionals and assistants who are appropriately trained and supervised in accordance with State law, regulation, or written policy to assist in the provision of early intervention services under part C of the Act to infants and toddlers with disabilities.

(d) *Policy to address shortage of personnel.* A State may adopt a policy that includes making ongoing good-faith efforts to recruit and hire appropriately and adequately trained personnel to provide early intervention services to infants and toddlers with disabilities, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards described in paragraphs (a) and (b) of this section.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(9), 1435(b))

§ 303.120 Lead agency role in supervision, monitoring, funding, interagency coordination, and other responsibilities.

Each system must include a single line of responsibility in a lead agency designated or established by the Governor that is responsible for the following:

(a)(1) The general administration and supervision of programs and activities administered by agencies, institutions, organizations, and EIS providers receiving assistance under part C of the Act.

(2) The monitoring of programs and activities used by the State to carry out part C of the Act (whether or not the programs or activities are administered by agencies, institutions, organizations, and EIS providers that are receiving assistance under part C of the Act), to ensure that the State complies with part C of the Act, including—

(i) Monitoring agencies, institutions, organizations, and EIS providers used by the State to carry out part C of the Act;

(ii) Enforcing any obligations imposed on those agencies, institutions, organizations, and EIS providers under part C of the Act and these regulations;

(iii) Providing technical assistance, if necessary, to those agencies, institutions, organizations, and EIS providers;

(iv) Correcting any noncompliance identified through monitoring as soon as possible and in no case later than one year after the lead agency's identification of the noncompliance; and

(v) Conducting the activities in paragraphs (a)(2)(i) through (a)(2)(iv) of this section, consistent with §§ 303.700 through 303.707, and any other activities required by the State under those sections.

(b) The identification and coordination of all available resources for early intervention services within the State, including those from Federal, State, local, and private sources, consistent with subpart F of this part.

(c) The assignment of financial responsibility in accordance with subpart F of this part.

(d) The development of procedures in accordance with subpart F of this part to ensure that early intervention services are provided to infants and toddlers with disabilities and their families under part C of the Act in a timely manner, pending the resolution of any disputes among public agencies or EIS providers.

(e) The resolution of intra- and interagency disputes in accordance with subpart F of this part.

(f) The entry into formal interagency agreements or other written methods of establishing financial responsibility, consistent with § 303.511, that define the financial responsibility of each agency for paying for early intervention services (consistent with State law) and procedures for resolving disputes and that include all additional components necessary to ensure meaningful cooperation and coordination as set forth in subpart F of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1416, 1435(a)(10), 1442)

§ 303.121 Policy for contracting or otherwise arranging for services.

Each system must include a policy pertaining to the contracting or making of other arrangements with public or private individuals or agency service providers to provide early intervention services in the State, consistent with the provisions of part C of the Act, including the contents of the application, and the conditions of the contract or other arrangements. The policy must—

(a) Include a requirement that all early intervention services must meet State standards and be consistent with the provisions of this part; and

(b) Be consistent with the Education Department General Administrative Regulations in 34 CFR part 80.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(11))

§ 303.122 Reimbursement procedures.

Each system must include procedures for securing the timely reimbursement of funds used under part C of the Act, in accordance with subpart F of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(12), 1440(a))

§ 303.123 Procedural safeguards.

Each system must include procedural safeguards that meet the requirements of subpart E of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(13), 1439)

§ 303.124 Data collection.

(a) Each statewide system must include a system for compiling and reporting timely and accurate data that meets the requirements in paragraph (b) of this section and §§ 303.700 through 303.702 and 303.720 through 303.724.

(b) The data system required in paragraph (a) of this section must include a description of the process that the State uses, or will use, to compile data on infants or toddlers with disabilities receiving early intervention services under this part, including a description of the State's sampling methods, if sampling is used, for reporting the data required by the Secretary under sections 616 and 618 of the Act and §§ 303.700 through 303.707 and 303.720 through 303.724.

(Approved by Office of Management and Budget under control number 1820–0550, 1820–0557 and 1820–0578)

(Authority: 20 U.S.C. 1416, 1418(a)-(c), 1435(a)(14), 1442)

§ 303.125 State interagency coordinating council.

Each system must include a State Interagency Coordinating Council (Council) that meets the requirements of subpart G of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(15))

§ 303.126 Early intervention services in natural environments.

Each system must include policies and procedures to ensure, consistent with §§ 303.13(a)(8) (early intervention services), 303.26 (natural environments), and 303.344(d)(1)(ii)

(content of an IFSP), that early intervention services for infants and toddlers with disabilities are provided—

(a) To the maximum extent appropriate, in natural environments; and

(b) In settings other than the natural environment that are most appropriate, as determined by the parent and the IFSP Team, only when early intervention services cannot be achieved satisfactorily in a natural environment.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(16))

Subpart C—State Application and Assurances

General

§ 303.200 State application and assurances.

Each application must contain—

(a) The specific State application requirements (including certifications, descriptions, methods, and policies and procedures) required in §§ 303.201 through 303.212; and

(b) The assurances required in §§ 303.221 through 303.227.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437)

Application Requirements

§ 303.201 Designation of lead agency.

Each application must include the name of the State lead agency, as designated under § 303.120, that will be responsible for the administration of funds provided under this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(a)(1))

§ 303.202 Certification regarding financial responsibility.

Each application must include a certification to the Secretary that the arrangements to establish financial responsibility for the provision of part C services among appropriate public agencies under § 303.511 and the lead agency's contracts with EIS providers regarding financial responsibility for the provision of part C services both meet the requirements in subpart F of this part (§§ 303.500 through 303.521) and are current as of the date of submission of the certification.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(a)(2))

§ 303.203 Statewide system and description of services.

Each application must include —

(a) A description of services to be provided under this part to infants and toddlers with disabilities and their families through the State's system;

(b) The State's policies and procedures regarding the identification and coordination of all available resources within the State from Federal, State, local, and private sources as required under subpart F of this part and including—

(1) Policies or procedures adopted by the State as its system of payments that meet the requirements in §§ 303.510, 303.520 and 303.521 (regarding the use of public insurance or benefits, private insurance, or family costs or fees); and

(2) Methods used by the State to implement the requirements in § 303.511(b)(2) and (b)(3); and

(c) The State's rigorous definition of developmental delay as required under §§ 303.10 and 303.111.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1432(3), 1432(4)(B), 1432(4)(C), 1435(a)(1), 1435(a)(10)(B), 1437(a)(3), 1440)

§ 303.204 Application's definition of at-risk infants and toddlers and description of services.

If the State provides services under this part to at-risk infants and toddlers through the statewide system, the application must include—

(a) The State's definition of at-risk infants and toddlers with disabilities who are eligible in the State for services under part C of the Act (consistent with §§ 303.5 and 303.21(b)); and

(b) A description of the early intervention services provided under this part to at-risk infants and toddlers with disabilities who meet the State's definition described in paragraph (a) of this section.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(a)(4))

§ 303.205 Description of use of funds.

(a) *General.* Each State application must include a description of the uses for funds under this part for the fiscal year or years covered by the application. The description must be presented separately for the lead agency and the Council and include the information required in paragraphs (b) through (e) of this section.

(b) *State administration funds including administrative positions.* For lead agencies other than State educational agencies (SEAs), each application must include the total—

(1) Amount of funds retained by the lead agency for administration purposes, including the amount in paragraph (b)(2) of this section; and

(2) Number of full-time equivalent administrative positions to be used to implement part C of the Act, and the total amount of salaries (including benefits) for those positions.

(c) *Maintenance and implementation activities.* Each application must include a description of the nature and scope of each major activity to be carried out under this part, consistent with § 303.501, and the approximate amount of funds to be spent for each activity.

(d) *Direct services.* Each application must include a description of any direct services that the State expects to provide to infants and toddlers with disabilities and their families with funds under this part, consistent with § 303.501, and the approximate amount of funds under this part to be used for the provision of each direct service.

(e) *Activities by other public agencies.* If other public agencies are to receive funds under this part, the application must include—

(1) The name of each agency expected to receive funds;

(2) The approximate amount of funds each agency will receive; and

(3) A summary of the purposes for which the funds will be used.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(10)(B), 1435(a)(10)(F), 1437(a)(3), 1437(a)(5))

§ 303.206 Referral policies for specific children.

Each application must include the State's policies and procedures that require the referral for early intervention services under this part of specific children under the age of three, as described in § 303.303(b).

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1412(a)(3)(A), 1431, 1434(1), 1435(a)(2), 1435(a)(5), 1435(c)(2)(G), 1437(a)(6), 1437(a)(10), 1441)

§ 303.207 Availability of resources.

Each application must include a description of the procedure used by the State to ensure that resources are made available under this part for all geographic areas within the State.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(a)(7))

§ 303.208 Public participation policies and procedures.

(a) *Application.* At least 60 days prior to being submitted to the Department,

each application for funds under this part (including any policies, procedures, descriptions, methods, certifications, assurances and other information required in the application) must be published in a manner that will ensure circulation throughout the State for at least a 60-day period, with an opportunity for public comment on the application for at least 30 days during that period.

(b) *State Policies and Procedures.* Each application must include a description of the policies and procedures used by the State to ensure that, before adopting any new policy or procedure (including any revision to an existing policy or procedure) needed to comply with part C of the Act and these regulations, the lead agency—

(1) Holds public hearings on the new policy or procedure (including any revision to an existing policy or procedure);

(2) Provides notice of the hearings held in accordance with paragraph (b)(1) of this section at least 30 days before the hearings are conducted to enable public participation; and

(3) Provides an opportunity for the general public, including individuals with disabilities, parents of infants and toddlers with disabilities, EIS providers, and the members of the Council, to comment for at least 30 days on the new policy or procedure (including any revision to an existing policy or procedure) needed to comply with part C of the Act and these regulations.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1231d, 1221e–3, 1437(a)(8))

§ 303.209 Transition to preschool and other programs.

(a) *Application requirements.* Each State must include the following in its application:

(1) A description of the policies and procedures it will use to ensure a smooth transition for infants and toddlers with disabilities under the age of three and their families from receiving early intervention services under this part to—

(i) Preschool or other appropriate services (for toddlers with disabilities); or

(ii) Exiting the program for infants and toddlers with disabilities.

(2) A description of how the State will meet each of the requirements in paragraphs (b) through (f) of this section.

(3)(i)(A) If the lead agency is not the SEA, an interagency agreement between the lead agency and the SEA; or

(B) If the lead agency is the SEA, an intra-agency agreement between the program within that agency that administers part C of the Act and the program within the agency that administers section 619 of the Act.

(ii) To ensure a seamless transition between services under this part and under part B of the Act, an interagency agreement under paragraph (a)(3)(i)(A) of this section or an intra-agency agreement under paragraph (a)(3)(i)(B) of this section must address how the lead agency and the SEA will meet the requirements of paragraphs (b) through (f) of this section (including any policies adopted by the lead agency under § 303.401(d) and (e)), § 303.344(h), and 34 CFR 300.101(b), 300.124, 300.321(f), and 300.323(b).

(4) Any policy the lead agency has adopted under § 303.401(d) and (e).

(b) *Notification to the SEA and appropriate LEA.* (1) The State lead agency must ensure that—

(i) Subject to paragraph (b)(2) of this section, not fewer than 90 days before the third birthday of the toddler with a disability if that toddler may be eligible for preschool services under part B of the Act, the lead agency notifies the SEA and the LEA for the area in which the toddler resides that the toddler on his or her third birthday will reach the age of eligibility for services under part B of the Act, as determined in accordance with State law;

(ii) Subject to paragraph (b)(2) of this section, if the lead agency determines that the toddler is eligible for early intervention services under part C of the Act more than 45 but less than 90 days before that toddler's third birthday and if that toddler may be eligible for preschool services under part B of the Act, the lead agency, as soon as possible after determining the child's eligibility, notifies the SEA and the LEA for the area in which the toddler with a disability resides that the toddler on his or her third birthday will reach the age of eligibility for services under part B of the Act, as determined in accordance with State law; or

(iii) Subject to paragraph (b)(2) of this section, if a toddler is referred to the lead agency fewer than 45 days before that toddler's third birthday and that toddler may be eligible for preschool services under part B of the Act, the lead agency, with parental consent required under § 303.414, refers the toddler to the SEA and the LEA for the area in which the toddler resides; but, the lead agency is not required to conduct an evaluation, assessment, or an initial IFSP meeting under these circumstances.

(2) The State must ensure that the notification required under paragraphs (b)(1)(i) and (b)(1)(ii) of this section is consistent with any policy that the State has adopted, under § 303.401(e), permitting a parent to object to disclosure of personally identifiable information.

(c) *Conference to discuss services.* The State lead agency must ensure that—

(1) If a toddler with a disability may be eligible for preschool services under part B of the Act, the lead agency, with the approval of the family of the toddler, convenes a conference, among the lead agency, the family, and the LEA not fewer than 90 days—and, at the discretion of all parties, not more than 9 months—before the toddler's third birthday to discuss any services the toddler may receive under part B of the Act; and.

(2) If the lead agency determines that a toddler with a disability is not potentially eligible for preschool services under part B of the Act, the lead agency, with the approval of the family of that toddler, makes reasonable efforts to convene a conference among the lead agency, the family, and providers of other appropriate services for the toddler to discuss appropriate services that the toddler may receive.

(d) *Transition plan.* The State lead agency must ensure that for all toddlers with disabilities—

(1)(i) It reviews the program options for the toddler with a disability for the period from the toddler's third birthday through the remainder of the school year; and

(ii) Each family of a toddler with a disability who is served under this part is included in the development of the transition plan required under this section and § 303.344(h);

(2) It establishes a transition plan in the IFSP not fewer than 90 days—and, at the discretion of all parties, not more than 9 months—before the toddler's third birthday; and

(3) The transition plan in the IFSP includes, consistent with § 303.344(h), as appropriate—

(i) Steps for the toddler with a disability and his or her family to exit from the part C program; and

(ii) Any transition services that the IFSP Team identifies as needed by that toddler and his or her family.

(e) *Transition conference and meeting to develop transition plan.* Any conference conducted under paragraph (c) of this section or meeting to develop the transition plan under paragraph (d) of this section (which conference and meeting may be combined into one meeting) must meet the requirements in §§ 303.342(d) and (e) and 303.343(a).

(f) *Applicability of transition requirements.* (1) The transition requirements in paragraphs (b)(1)(i) and (b)(1)(ii), (c)(1), and (d) of this section apply to all toddlers with disabilities receiving services under this part before those toddlers turn age three, including any toddler with a disability under the age of three who is served by a State that offers services under § 303.211.

(2) In a State that offers services under § 303.211, for toddlers with disabilities identified in § 303.209(b)(1)(i), the parent must be provided at the transition conference conducted under paragraph (c)(1) of this section:

(i) An explanation, consistent with § 303.211(b)(1)(ii), of the toddler's options to continue to receive early intervention services under this part or preschool services under section 619 of the Act.

(ii) The initial annual notice referenced in § 303.211(b)(1).

(3) For children with disabilities age three and older who receive services pursuant to § 303.211, the State must ensure that it satisfies the separate transition requirements in § 303.211(b)(6)(ii).

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1412(a)(3) and (a)(9), 1436(a)(3), 1437(a)(9))

§ 303.210 Coordination with Head Start and Early Head Start, early education, and child care programs.

(a) Each application must contain a description of State efforts to promote collaboration among Head Start and Early Head Start programs under the Head Start Act (42 U.S.C. 9801, *et seq.,* as amended), early education and child care programs, and services under this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(b) The State lead agency must participate, consistent with section 642B(b)(1)(C)(viii) of the Head Start Act, on the State Advisory Council on Early Childhood Education and Care established under the Head Start Act.

(Authority: 20 U.S.C. 1437(a)(10))

§ 303.211 State option to make services under this part available to children ages three and older.

(a) *General.* (1) Subject to paragraphs (a)(2) and (b) of this section, a State may elect to include in its application for a grant under this part a State policy, developed and implemented jointly by the lead agency and the SEA, under which a parent of a child with a disability who is eligible for preschool services under section 619 of the Act and who previously received early intervention services under this part, may choose the continuation of early intervention services under this part for his or her child after the child turns three until the child enters, or is eligible under State law to enter, kindergarten or elementary school.

(2) A State that adopts the policy described in paragraph (a)(1) of this section may determine whether it applies to children with disabilities—

(i) From age three until the beginning of the school year following the child's third birthday;

(ii) From age three until the beginning of the school year following the child's fourth birthday; or

(iii) From age three until the beginning of the school year following the child's fifth birthday.

(3) In no case may a State provide services under this section beyond the age at which the child actually enters, or is eligible under State law to enter, kindergarten or elementary school in the State.

(b) *Requirements.* If a State's application for a grant under this part includes the State policy described in paragraph (a) of this section, the system must ensure the following:

(1) Parents of children with disabilities who are eligible for services under section 619 of the Act and who previously received early intervention services under this part will be provided an annual notice that contains—

(i) A description of the rights of the parents to elect to receive services pursuant to this section or under part B of the Act; and

(ii) An explanation of the differences between services provided pursuant to this section and services provided under part B of the Act, including—

(A) The types of services and the locations at which the services are provided;

(B) The procedural safeguards that apply; and

(C) Possible costs (including the costs or fees to be charged to families as described in §§ 303.520 and 303.521), if any, to parents of children eligible under this part.

(2) Consistent with § 303.344(d), services provided pursuant to this section will include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills.

(3) The State policy ensures that any child served pursuant to this section has the right, at any time, to receive FAPE (as that term is defined at § 303.15) under part B of the Act instead of early intervention services under part C of the Act.

(4) The lead agency must continue to provide all early intervention services identified in the toddler with a disability's IFSP under § 303.344 (and consented to by the parent under § 303.342(e)) beyond age three until that toddler's initial eligibility determination under part B of the Act is made under 34 CFR 300.306. This provision does not apply if the LEA has requested parental consent for the initial evaluation under 34 CFR 300.300(a) and the parent has not provided that consent.

(5) The lead agency must obtain informed consent from the parent of any child with a disability for the continuation of early intervention services pursuant to this section for that child. Consent must be obtained before the child reaches three years of age, where practicable.

(6)(i) For toddlers with disabilities under the age of three in a State that offers services under this section, the lead agency ensures that the transition requirements in § 303.209(b)(1)(i) and (b)(1)(ii), (c)(1), and (d) are met.

(ii) For toddlers with disabilities age three and older in a State that offers services under this section, the lead agency ensures a smooth transition from services under this section to preschool, kindergarten or elementary school by—

(A) Providing the SEA and LEA where the child resides, consistent with any State policy adopted under § 303.401(e), the information listed in § 303.401(d)(1) not fewer than 90 days before the child will no longer be eligible under paragraph (a)(2) of this section to receive, or will no longer receive, early intervention services under this section;

(B) With the approval of the parents of the child, convening a transition conference, among the lead agency, the parents, and the LEA, not fewer than 90 days—and, at the discretion of all parties, not more than 9 months—before the child will no longer be eligible under paragraph (a)(2) of this section to receive, or no longer receives, early intervention services under this section, to discuss any services that the child may receive under part B of the Act; and

(C) Establishing a transition plan in the IFSP not fewer than 90 days—and, at the discretion of all parties, not more than 9 months—before the child will no longer be eligible under paragraph (a)(2) of this section to receive, or no longer receives, early intervention services under this section.

(7) In States that adopt the option to make services under this part available to children ages three and older pursuant to this section, there will be a referral to the part C system, dependent upon parental consent, of a child under the age of three who directly

experiences a substantiated case of trauma due to exposure to family violence, as defined in section 320 of the Family Violence Prevention and Services Act, 42 U.S.C. 10401, *et seq.*

(c) *Reporting requirement.* If a State includes in its application a State policy described in paragraph (a) of this section, the State must submit to the Secretary, in the State's report under § 303.124, the number and percentage of children with disabilities who are eligible for services under section 619 of the Act but whose parents choose for their children to continue to receive early intervention services under this part.

(d) *Available funds.* The State policy described in paragraph (a) of this section must describe the funds—including an identification as Federal, State, or local funds—that will be used to ensure that the option described in paragraph (a) of this section is available to eligible children and families who provide the consent described in paragraph (b)(5) of this section, including fees, if any, to be charged to families as described in §§ 303.520 and 303.521.

(e) *Rules of construction.* (1) If a statewide system includes a State policy described in paragraph (a) of this section, a State that provides services in accordance with this section to a child with a disability who is eligible for services under section 619 of the Act will not be required to provide the child FAPE under part B of the Act for the period of time in which the child is receiving services under this part.

(2) Nothing in this section may be construed to require a provider of services under this part to provide a child served under this part with FAPE.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(c), 1437(a)(11))

§ 303.212 Additional information and assurances.

Each application must contain—

(a) A description of the steps the State is taking to ensure equitable access to, and equitable participation in, the part C statewide system as required by section 427(b) of GEPA; and

(b) Other information and assurances as the Secretary may reasonably require.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1228a(b), 1437(a)(11))

Assurances

§ 303.220 Assurances satisfactory to the Secretary.

Each application must contain assurances satisfactory to the Secretary that the State has met the requirements in §§ 303.221 through 303.227.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b))

§ 303.221 Expenditure of funds.

The State must ensure that Federal funds made available to the State under section 643 of the Act will be expended in accordance with the provisions of this part, including §§ 303.500 and 303.501.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(1))

§ 303.222 Payor of last resort.

The State must ensure that it will comply with the requirements in §§ 303.510 and 303.511 in subpart F of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(2))

§ 303.223 Control of funds and property.

The State must ensure that—

(a) The control of funds provided under this part, and title to property acquired with those funds, will be in a public agency for the uses and purposes provided in this part; and

(b) A public agency will administer the funds and property.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(3))

§ 303.224 Reports and records.

The State must ensure that it will—

(a) Make reports in the form and containing the information that the Secretary may require; and

(b) Keep records and afford access to those records as the Secretary may find necessary to ensure compliance with the requirements of this part, the correctness and verification of reports, and the proper disbursement of funds provided under this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(4))

§ 303.225 Prohibition against supplanting; indirect costs.

(a) Each application must provide satisfactory assurance that the Federal funds made available under section 643 of the Act to the State:

(1) Will not be commingled with State funds; and

(2) Will be used so as to supplement the level of State and local funds expended for infants and toddlers with disabilities and their families and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section, the total amount of State and local funds budgeted for expenditures in the current fiscal year for early intervention services for children eligible under this part and their families must be at least equal to the total amount of State and local funds actually expended for early intervention services for these children and their families in the most recent preceding fiscal year for which the information is available. Allowance may be made for—

(1) A decrease in the number of infants and toddlers who are eligible to receive early intervention services under this part; and

(2)) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of facilities.

(c) *Requirement regarding indirect costs.* (1) Except as provided in paragraph (c)(2) of this section, a lead agency under this part may not charge indirect costs to its part C grant.

(2) If approved by the lead agency's cognizant Federal agency or by the Secretary, the lead agency must charge indirect costs through either—

(i) A restricted indirect cost rate that meets the requirements in 34 CFR 76.560 through 76.569; or

(ii) A cost allocation plan that meets the non-supplanting requirements in paragraph (b) of this section and 34 CFR part 76 of EDGAR.

(3) In charging indirect costs under paragraph (c)(2)(i) and (c)(2)(ii) of this section, the lead agency may not charge rent, occupancy, or space maintenance costs directly to the part C grant, unless those costs are specifically approved in advance by the Secretary.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(5))

§ 303.226 Fiscal control.

The State must ensure that fiscal control and fund accounting procedures will be adopted as necessary to ensure proper disbursement of, and accounting for, Federal funds paid under this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(6))

§ 303.227 Traditionally underserved groups.

The State must ensure that policies and practices have been adopted to ensure—

(a) That traditionally underserved groups, including minority, low-income, homeless, and rural families and

children with disabilities who are wards of the State, are meaningfully involved in the planning and implementation of all the requirements of this part; and

(b) That these families have access to culturally competent services within their local geographical areas.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1231d, 1437(b)(7))

Subsequent Applications and Modifications, Eligibility Determinations, and Standard of Disapproval

§ 303.228 Subsequent State application and modifications of application.

(a) *Subsequent State application.* If a State has on file with the Secretary a policy, procedure, method, or assurance that demonstrates that the State meets an application requirement in this part, including any policy, procedure, method, or assurance filed under this part (as in effect before the date of enactment of the Act, December 3, 2004), the Secretary considers the State to have met that requirement for purposes of receiving a grant under this part.

(b) *Modification of application.* An application submitted by a State that meets the requirements of this part remains in effect until the State submits to the Secretary such modifications as the State determines necessary. This section applies to a modification of an application to the same extent and in the same manner as this paragraph applies to the original application.

(c) *Modifications required by the Secretary.* The Secretary may require a State to modify its application under this part to the extent necessary to ensure the State's compliance with this part if—

(1) An amendment is made to the Act or to a Federal regulation issued under the Act;

(2) A new interpretation of the Act is made by a Federal court or the State's highest court; or

(3) An official finding of noncompliance with Federal law or regulations is made with respect to the State.

(Authority: 20 U.S.C. 1437(d)–(f))

§ 303.229 Determination by the Secretary that a State is eligible.

If the Secretary determines that a State is eligible to receive a grant under part C of the Act, the Secretary notifies the State of that determination.

(Authority: 20 U.S.C. 1437)

§ 303.230 Standard for disapproval of an application.

The Secretary does not disapprove an application under this part unless the Secretary determines, after notice and opportunity for a hearing in accordance with the procedures in §§ 303.231 through 303.236, that the application fails to comply with the requirements of this part.

(Authority: 20 U.S.C. 1437(c))

Department Procedures

§ 303.231 Notice and hearing before determining that a State is not eligible.

(a) *General.* (1) The Secretary does not make a final determination that a State is not eligible to receive a grant under part C of the Act until providing the State—

(i) Reasonable notice; and

(ii) An opportunity for a hearing.

(2) In implementing paragraph (a)(1)(i) of this section, the Secretary sends a written notice to the lead agency by certified mail with a return receipt requested.

(b) *Content of notice.* In the written notice described in paragraph (a)(2) of this section, the Secretary—

(1) States the basis on which the Secretary proposes to make a final determination that the State is not eligible;

(2) May describe possible options for resolving the issues;

(3) Advises the lead agency that it may request a hearing and that the request for a hearing must be made not later than 30 days after it receives the notice of the proposed final determination that the State is not eligible; and

(4) Provides the lead agency with information about the hearing procedures that will be followed.

(Authority: 20 U.S.C. 1437(c))

§ 303.232 Hearing Official or Panel.

(a) If the lead agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.

(b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(Authority: 20 U.S.C. 1437(c))

§ 303.233 Hearing procedures.

(a) As used in §§ 303.231 through 303.235, the term *party* or *parties* means any of the following:

(1) A lead agency that requests a hearing regarding the proposed disapproval of the State's eligibility under this part.

(2) The Department official who administers the program of financial assistance under this part.

(3) A person, group, or agency with an interest in, and having relevant information about, the case that has applied for and been granted leave to intervene by the Hearing Official or Hearing Panel.

(b) Within 15 days after receiving a request for a hearing, the Secretary designates a Hearing Official or Hearing Panel and notifies the parties.

(c) The Hearing Official or Hearing Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Hearing Official or Hearing Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of the case.

(2) The Hearing Official or Hearing Panel may schedule a prehearing conference with the Hearing Official or Hearing Panel and the parties.

(3) Any party may request the Hearing Official or Hearing Panel to schedule a prehearing or other conference. The Hearing Official or Hearing Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or Hearing Panel and the parties may consider subjects such as—

(i) Narrowing and clarifying issues;

(ii) Assisting the parties in reaching agreements and stipulations;

(iii) Clarifying the positions of the parties;

(iv) Determining whether an evidentiary hearing or oral argument should be held; and

(v) Setting dates for—

(A) The exchange of written documents;

(B) The receipt of comments from the parties on the need for oral argument or an evidentiary hearing;

(C) Further proceedings before the Hearing Official or Hearing Panel, including an evidentiary hearing or oral argument, if either is scheduled;

(D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and an estimation of time for each presentation; and

(E) Completion of the review and the initial decision of the Hearing Official or Hearing Panel.

(5) A prehearing or other conference held under paragraph (c)(4) of this section may be conducted by telephone conference call.

(6) At a prehearing or other conference, the parties must be prepared to discuss the subjects listed in paragraph (c)(4) of this section.

(7) Following a prehearing or other conference, the Hearing Official or Hearing Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(d) The Hearing Official or Hearing Panel may require the parties to state their positions and to provide all or part of their evidence in writing.

(e) The Hearing Official or Hearing Panel may require the parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Hearing Panel may direct the parties to exchange relevant documents, information, and lists of witnesses, and to send copies to the Hearing Official or Hearing Panel.

(g) The Hearing Official or Hearing Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Hearing Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Hearing Panel may examine witnesses.

(j) The Hearing Official or Hearing Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Hearing Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Hearing Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m)(1) The parties must present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Hearing Panel must determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Hearing Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Hearing Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Hearing Panel gives each party, in addition to the opportunity to be represented by counsel—

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Hearing Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p)(1) The Hearing Official or Hearing Panel—

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party must file with the Hearing Official or Hearing Panel all written motions, briefs, and other documents and must at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. 1437(c))

§ 303.234 Initial decision; final decision.

(a) The Hearing Official or Hearing Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the lead agency under § 303.231, including any amendments to or further clarification of the issues under § 303.233(c).

(b) The initial decision of a Hearing Panel is made by a majority of Hearing Panel members.

(c) The Hearing Official or Hearing Panel mails, by certified mail with return receipt requested, a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secretary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Hearing Panel within 15 days of the date the party receives the Panel's decision.

(e) The Hearing Official or Hearing Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Hearing Panel within seven days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Hearing Panel forwards the parties' initial and responsive comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Hearing Panel becomes the final decision of the Secretary unless, within 25 days after the end of the time for receipt of written comments, the Secretary informs the Hearing Official or Hearing Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary rejects or modifies the initial decision of the Hearing Official or Hearing Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the transcript of the Hearing Official's or Hearing Panel's proceedings, and written comments.

(j) The Secretary may remand the matter to the Hearing Official or Hearing Panel for further proceedings.

(k) Unless the Secretary remands the matter as provided in paragraph (j) of this section, the Secretary issues the final decision, with any necessary modifications, within 30 days after notifying the Hearing Official or Hearing Panel that the initial decision is being further reviewed.

(Authority: 20 U.S.C. 1437(c))

§ 303.235 Filing requirements.

(a) Any written submission by a party under §§ 303.230 through 303.236 must be filed with the Secretary by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary, the Hearing Official, or the Panel, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. 1437(c))

§ 303.236 Judicial review.

If a State is dissatisfied with the Secretary's final decision with respect to the eligibility of the State under part C of the Act, the State may, not later than 60 days after notice of that decision, file with the United States Court of Appeals for the circuit in which that State is located a petition for review of that decision. A copy of the petition must be transmitted by the clerk of the court to the Secretary. The Secretary then files in the court the record of the proceedings upon which the Secretary's action was based, as provided in 28 U.S.C. 2112.

(Authority: 20 U.S.C. 1437(c))

Subpart D—Child Find, Evaluations and Assessments, and Individualized Family Service Plans

§ 303.300 General.

The statewide comprehensive, coordinated, multidisciplinary interagency system to provide early intervention services for infants and toddlers with disabilities and their families referenced in § 303.100 must include the following components:

(a) Pre-referral policies and procedures that include—

(1) A public awareness program as described in § 303.301; and

(2) A comprehensive child find system as described in § 303.302.

(b) Referral policies and procedures as described in § 303.303.

(c) Post-referral policies and procedures that ensure compliance with the timeline requirements in § 303.310 and include—

(1) Screening, if applicable, as described in § 303.320;

(2) Evaluations and assessments as described in §§ 303.321 and 303.322; and

(3) Development, review, and implementation of IFSPs as described in §§ 303.340 through 303.346.

Pre-Referral Procedures—Public Awareness Program and Child Find System

§ 303.301 Public awareness program—information for parents.

(a) *Preparation and dissemination.* In accordance with § 303.116, each system must include a public awareness program that requires the lead agency to—

(1)(i) Prepare information on the availability of early intervention services under this part, and other services, as described in paragraph (b) of this section; and

(ii) Disseminate to all primary referral sources (especially hospitals and physicians) the information to be given to parents of infants and toddlers, especially parents with premature infants or infants with other physical risk factors associated with learning or developmental complications; and

(2) Adopt procedures for assisting the primary referral sources described in § 303.303(c) in disseminating the information described in paragraph (b) of this section to parents of infants and toddlers with disabilities.

(b) *Information to be provided.* The information required to be prepared and disseminated under paragraph (a) of this section must include—

(1) A description of the availability of early intervention services under this part;

(2) A description of the child find system and how to refer a child under the age of three for an evaluation or early intervention services; and

(3) A central directory, as described in § 303.117.

(c) *Information specific to toddlers with disabilities.* Each public awareness program also must include a requirement that the lead agency provide for informing parents of toddlers with disabilities of the availability of services under section 619 of the Act not fewer than 90 days prior to the toddler's third birthday.

(Authority: 20 U.S.C. 1435(a)(6), 1437(a)(9))

§ 303.302 Comprehensive child find system.

(a) *General.* Each system must include a comprehensive child find system that—

(1) Is consistent with part B of the Act (see 34 CFR 300.111);

(2) Includes a system for making referrals to lead agencies or EIS providers under this part that—

(i) Includes timelines; and

(ii) Provides for participation by the primary referral sources described in § 303.303(c);

(3) Ensures rigorous standards for appropriately identifying infants and toddlers with disabilities for early intervention services under this part that will reduce the need for future services; and

(4) Meets the requirements in paragraphs (b) and (c) of this section and §§ 303.303, 303.310, 303.320, and 303.321.

(b) *Scope of child find.* The lead agency, as part of the child find system, must ensure that—

(1) All infants and toddlers with disabilities in the State who are eligible for early intervention services under this part are identified, located, and evaluated, including—

(i) Indian infants and toddlers with disabilities residing on a reservation geographically located in the State (including coordination, as necessary, with tribes, tribal organizations, and consortia to identify infants and toddlers with disabilities in the State based, in part, on the information provided by them to the lead agency under § 303.731(e)(1)); and

(ii) Infants and toddlers with disabilities who are homeless, in foster care, and wards of the State; and

(iii) Infants and toddlers with disabilities that are referenced in § 303.303(b); and

(2) An effective method is developed and implemented to identify children who are in need of early intervention services.

(c) *Coordination.* (1) The lead agency, with the assistance of the Council, as defined in § 303.8, must ensure that the child find system under this part—

(i) Is coordinated with all other major efforts to locate and identify children by other State agencies responsible for administering the various education, health, and social service programs relevant to this part, including Indian tribes that receive payments under this part, and other Indian tribes, as appropriate; and

(ii) Is coordinated with the efforts of the—

(A) Program authorized under part B of the Act;

(B) Maternal and Child Health program, including the Maternal, Infant, and Early Childhood Home Visiting Program, under Title V of the Social Security Act, as amended, (MCHB or Title V) (42 U.S.C. 701(a));

(C) Early Periodic Screening, Diagnosis, and Treatment (EPSDT) under Title XIX of the Social Security Act (42 U.S.C. 1396(a)(43) and 1396(a)(4)(B));

(D) Programs under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*);

(E) Head Start Act (including Early Head Start programs under section 645A of the Head Start Act) (42 U.S.C. 9801 *et seq.*);

(F) Supplemental Security Income program under Title XVI of the Social Security Act (42 U.S.C. 1381);

(G) Child protection and child welfare programs, including programs administered by, and services provided through, the foster care agency and the State agency responsible for administering the Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C. 5106(a));

(H) Child care programs in the State;

(I) The programs that provide services under the Family Violence Prevention

and Services Act (42 U.S.C. 10401 *et seq.*);

(J) Early Hearing Detection and Intervention (EHDI) systems (42 U.S.C. 280g–1) administered by the Centers for Disease Control (CDC); and

(K) Children's Health Insurance Program (CHIP) authorized under Title XXI of the Social Security Act (42 U.S.C. 1397aa *et seq.*).

(2) The lead agency, with the advice and assistance of the Council, must take steps to ensure that—

(i) There will not be unnecessary duplication of effort by the programs identified in paragraph (c)(1)(ii) of this section; and

(ii) The State will make use of the resources available through each public agency and EIS provider in the State to implement the child find system in an effective manner.

(Authority: 20 U.S.C. 1412(a)(3)(A), 1431, 1434(1), 1435(a)(2), 1435(a)(5), 1435(c)(2)(G), 1437(a)(6), 1437(a)(10), 1441)

Referral Procedures

§ 303.303 Referral procedures.

(a) *General.* (1) The lead agency's child find system described in § 303.302 must include the State's procedures for use by primary referral sources for referring a child under the age of three to the part C program.

(2) The procedures required in paragraph (a)(1) of this section must—

(i) Provide for referring a child as soon as possible, but in no case more than seven days, after the child has been identified; and

(ii) Meet the requirements in paragraphs (b) and (c) of this section.

(b) *Referral of specific at-risk infants and toddlers.* The procedures required in paragraph (a) of this section must provide for requiring the referral of a child under the age of three who—

(1) Is the subject of a substantiated case of child abuse or neglect; or

(2) Is identified as directly affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure.

(c) *Primary referral sources.* As used in this subpart, primary referral sources include—

(1) Hospitals, including prenatal and postnatal care facilities;

(2) Physicians;

(3) Parents, including parents of infants and toddlers;

(4) Child care programs and early learning programs;

(5) LEAs and schools;

(6) Public health facilities;

(7) Other public health or social service agencies;

(8) Other clinics and health care providers;

(9) Public agencies and staff in the child welfare system, including child protective service and foster care;

(10) Homeless family shelters; and

(11) Domestic violence shelters and agencies.

(Authority: 20 U.S.C. 1412(a)(3)(A), 1431, 1434(1), 1435(a)(2), 1435(a)(5), 1435(a)(6), 1435(c)(2)(G), 1437(a)(6), 1437(a)(10), 1441)

§§ 303.304–303.309 [Reserved]

Post-Referral Procedures—Screenings, Evaluations, and Assessments

§ 303.310 Post-referral timeline (45 days).

(a) Except as provided in paragraph (b) of this section, any screening under § 303.320 (if the State has adopted a policy and elects, and the parent consents, to conduct a screening of a child); the initial evaluation and the initial assessments of the child and family under § 303.321; and the initial IFSP meeting under § 303.342 must be completed within 45 days from the date the lead agency or EIS provider receives the referral of the child.

(b) Subject to paragraph (c) of this section, the 45-day timeline described in paragraph (a) of this section does not apply for any period when—

(1) The child or parent is unavailable to complete the screening (if applicable), the initial evaluation, the initial assessments of the child and family, or the initial IFSP meeting due to exceptional family circumstances that are documented in the child's early intervention records; or

(2) The parent has not provided consent for the screening (if applicable), the initial evaluation, or the initial assessment of the child, despite documented, repeated attempts by the lead agency or EIS provider to obtain parental consent.

(c) The lead agency must develop procedures to ensure that in the event the circumstances described in (b)(1) or (b)(2) of this section exist, the lead agency or EIS provider must—

(1) Document in the child's early intervention records the exceptional family circumstances or repeated attempts by the lead agency or EIS provider to obtain parental consent;

(2) Complete the screening (if applicable), the initial evaluation, the initial assessments (of the child and family), and the initial IFSP meeting as soon as possible after the documented exceptional family circumstances described in paragraph (b)(1) of this section no longer exist or parental consent is obtained for the screening (if applicable), the initial evaluation, and the initial assessment of the child; and

(3) Develop and implement an interim IFSP, to the extent appropriate and consistent with § 303.345.

(d) The initial family assessment must be conducted within the 45-day timeline in paragraph (a) of this section if the parent concurs and even if other family members are unavailable.

(Authority: 20 U.S.C. 1433, 1435(a), 1436(c))

§§ 303.311–303.319 [Reserved]

§ 303.320 Screening procedures (optional).

(a) *General.* (1) The lead agency may adopt procedures, consistent with the requirements of this section, to screen children under the age of three who have been referred to the part C program to determine whether they are suspected of having a disability under this part. If the lead agency or EIS provider proposes to screen a child, it must—

(i) Provide the parent notice under § 303.421 of its intent to screen the child to identify whether the child is suspected of having a disability and include in that notice a description of the parent's right to request an evaluation under § 303.321 at any time during the screening process; and

(ii) Obtain parental consent as required in § 303.420(a)(1) before conducting the screening procedures.

(2) If the parent consents to the screening and the screening or other available information indicates that the child is—

(i) Suspected of having a disability, after notice is provided under § 303.421 and once parental consent is obtained as required in § 303.420, an evaluation and assessment of the child must be conducted under § 303.321; or

(ii) Not suspected of having a disability, the lead agency or EIS provider must ensure that notice of that determination is provided to the parent under § 303.421, and that the notice describes the parent's right to request an evaluation.

(3) If the parent of the child requests and consents to an evaluation at any time during the screening process, evaluation of the child must be conducted under § 303.321, even if the lead agency or EIS provider has determined under paragraph (a)(2)(ii) of this section that the child is not suspected of having a disability.

(b) *Definition of screening procedures. Screening procedures*—

(1) Means activities under paragraphs (a)(1) and (a)(2) of this section that are carried out by, or under the supervision of, the lead agency or EIS provider to identify, at the earliest possible age, infants and toddlers suspected of having a disability and in need of early intervention services; and

(2) Includes the administration of appropriate instruments by personnel trained to administer those instruments.

(c) *Condition for evaluation or early intervention services.* For every child under the age of three who is referred to the part C program or screened in accordance with paragraph (a) of this section, the lead agency is not required to—

(1) Provide an evaluation of the child under § 303.321 unless the child is suspected of having a disability or the parent requests an evaluation under paragraph (a)(3) of this section; or

(2) Make early intervention services available under this part to the child unless a determination is made that the child meets the definition of *infant or toddler with a disability* under § 303.21.

(Authority: 20 U.S.C. 1432(4)(E)(ix), 1434(1), 1435(a)(2), 1435(a)(5) and (a)(6), 1435(c)(2)(G), 1437(a)(6), 1439(a)(6))

§ 303.321 Evaluation of the child and assessment of the child and family.

(a) *General.* (1) The lead agency must ensure that, subject to obtaining parental consent in accordance with § 303.420(a)(2), each child under the age of three who is referred for evaluation or early intervention services under this part and suspected of having a disability, receives—

(i) A timely, comprehensive, multidisciplinary evaluation of the child in accordance with paragraph (b) of this section unless eligibility is established under paragraph (a)(3)(i) of this section; and

(ii) If the child is determined eligible as an infant or toddler with a disability as defined in § 303.21-—

(A) A multidisciplinary assessment of the unique strengths and needs of that infant or toddler and the identification of services appropriate to meet those needs;

(B) A family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of that infant or toddler. The assessments of the child and family are described in paragraph (c) of this section and these assessments may occur simultaneously with the evaluation, provided that the requirements of paragraph (b) of this section are met.

(2) As used in this part—

(i) *Evaluation* means the procedures used by qualified personnel to determine a child's initial and continuing eligibility under this part, consistent with the definition of *infant or toddler with a disability* in § 303.21. An *initial evaluation* refers to the child's evaluation to determine his or her initial eligibility under this part;

(ii) *Assessment* means the ongoing procedures used by qualified personnel to identify the child's unique strengths and needs and the early intervention services appropriate to meet those needs throughout the period of the child's eligibility under this part and includes the assessment of the child, consistent with paragraph (c)(1) of this section and the assessment of the child's family, consistent with paragraph (c)(2) of this section; and

(iii) *Initial assessment* refers to the assessment of the child and the family assessment conducted prior to the child's first IFSP meeting.

(3)(i) A child's medical and other records may be used to establish eligibility (without conducting an evaluation of the child) under this part if those records indicate that the child's level of functioning in one or more of the developmental areas identified in § 303.21(a)(1) constitutes a developmental delay or that the child otherwise meets the criteria for an infant or toddler with a disability under § 303.21. If the child's part C eligibility is established under this paragraph, the lead agency or EIS provider must conduct assessments of the child and family in accordance with paragraph (c) of this section.

(ii) Qualified personnel must use informed clinical opinion when conducting an evaluation and assessment of the child. In addition, the lead agency must ensure that informed clinical opinion may be used as an independent basis to establish a child's eligibility under this part even when other instruments do not establish eligibility; however, in no event may informed clinical opinion be used to negate the results of evaluation instruments used to establish eligibility under paragraph (b) of this section.

(4) All evaluations and assessments of the child and family must be conducted by qualified personnel, in a nondiscriminatory manner, and selected and administered so as not to be racially or culturally discriminatory.

(5) Unless clearly not feasible to do so, all evaluations and assessments of a child must be conducted in the native language of the child, in accordance with the definition of *native language* in § 303.25.

(6) Unless clearly not feasible to do so, family assessments must be conducted in the native language of the family members being assessed, in accordance with the definition of *native language* in § 303.25.

(b) *Procedures for evaluation of the child.* In conducting an evaluation, no single procedure may be used as the sole criterion for determining a child's eligibility under this part. Procedures must include—

(1) Administering an evaluation instrument;

(2) Taking the child's history (including interviewing the parent);

(3) Identifying the child's level of functioning in each of the developmental areas in § 303.21(a)(1);

(4) Gathering information from other sources such as family members, other care-givers, medical providers, social workers, and educators, if necessary, to understand the full scope of the child's unique strengths and needs; and

(5) Reviewing medical, educational, or other records.

(c) *Procedures for assessment of the child and family.* (1) An assessment of each infant or toddler with a disability must be conducted by qualified personnel in order to identify the child's unique strengths and needs and the early intervention services appropriate to meet those needs. The assessment of the child must include the following—

(i) A review of the results of the evaluation conducted under paragraph (b) of this section;

(ii) Personal observations of the child; and

(iii) The identification of the child's needs in each of the developmental areas in § 303.21(a)(1).

(2) A family-directed assessment must be conducted by qualified personnel in order to identify the family's resources, priorities, and concerns and the supports and services necessary to enhance the family's capacity to meet the developmental needs of the family's infant or toddler with a disability. The family-directed assessment must—

(i) Be voluntary on the part of each family member participating in the assessment;

(ii) Be based on information obtained through an assessment tool and also through an interview with those family members who elect to participate in the assessment; and

(iii) Include the family's description of its resources, priorities, and concerns related to enhancing the child's development.

(Authority: 20 U.S.C. 1435(a)(3), 1435(a)(5), 1436(a)(1)–(2))

§ 303.322 Determination that a child is not eligible.

If, based on the evaluation conducted under § 303.321, the lead agency determines that a child is not eligible under this part, the lead agency must provide the parent with prior written notice required in § 303.421, and include in the notice information about

the parent's right to dispute the eligibility determination through dispute resolution mechanisms under § 303.430, such as requesting a due process hearing or mediation or filing a State complaint.

(Authority: 20 U.S.C. 1439(a)(6))

Individualized Family Service Plan (IFSP)

§ 303.340 Individualized family service plan—general.

For each infant or toddler with a disability, the lead agency must ensure the development, review, and implementation of an individualized family service plan or IFSP developed by a multidisciplinary team, which includes the parent, that—

(a) Is consistent with the definition of that term in § 303.20; and

(b) Meets the requirements in §§ 303.342 through 303.346 of this subpart.

(Authority: 20 U.S.C. 1435(a)(4), 1436)

§ 303.341 [Reserved]

§ 303.342 Procedures for IFSP development, review, and evaluation.

(a) *Meeting to develop initial IFSP—timelines.* For a child referred to the part C program and determined to be eligible under this part as an infant or toddler with a disability, a meeting to develop the initial IFSP must be conducted within the 45-day time period described in § 303.310.

(b) *Periodic review.* (1) A review of the IFSP for a child and the child's family must be conducted every six months, or more frequently if conditions warrant, or if the family requests such a review. The purpose of the periodic review is to determine—

(i) The degree to which progress toward achieving the results or outcomes identified in the IFSP is being made; and

(ii) Whether modification or revision of the results, outcomes, or early intervention services identified in the IFSP is necessary.

(2) The review may be carried out by a meeting or by another means that is acceptable to the parents and other participants.

(c) *Annual meeting to evaluate the IFSP.* A meeting must be conducted on at least an annual basis to evaluate and revise, as appropriate, the IFSP for a child and the child's family. The results of any current evaluations and other information available from the assessments of the child and family conducted under § 303.321 must be used in determining the early intervention services that are needed and will be provided.

(d) *Accessibility and convenience of meetings.* (1) IFSP meetings must be conducted—

(i) In settings and at times that are convenient for the family; and

(ii) In the native language of the family or other mode of communication used by the family, unless it is clearly not feasible to do so.

(2) Meeting arrangements must be made with, and written notice provided to, the family and other participants early enough before the meeting date to ensure that they will be able to attend.

(e) *Parental consent.* The contents of the IFSP must be fully explained to the parents and informed written consent, as described in § 303.7, must be obtained, as required in § 303.420(a)(3), prior to the provision of early intervention services described in the IFSP. Each early intervention service must be provided as soon as possible after the parent provides consent for that service, as required in § 303.344(f)(1).

(Authority: 20 U.S.C. 1435(a)(4), 1436)

§ 303.343 IFSP Team meeting and periodic review.

(a) *Initial and annual IFSP Team meeting.* (1) Each initial meeting and each annual IFSP Team meeting to evaluate the IFSP must include the following participants:

(i) The parent or parents of the child.

(ii) Other family members, as requested by the parent, if feasible to do so.

(iii) An advocate or person outside of the family, if the parent requests that the person participate.

(iv) The service coordinator designated by the public agency to be responsible for implementing the IFSP.

(v) A person or persons directly involved in conducting the evaluations and assessments in § 303.321.

(vi) As appropriate, persons who will be providing early intervention services under this part to the child or family.

(2) If a person listed in paragraph (a)(1)(v) of this section is unable to attend a meeting, arrangements must be made for the person's involvement through other means, including one of the following:

(i) Participating in a telephone conference call.

(ii) Having a knowledgeable authorized representative attend the meeting.

(iii) Making pertinent records available at the meeting.

(b) *Periodic review.* Each periodic review under § 303.342(b) must provide for the participation of persons in paragraphs (a)(1)(i) through (a)(1)(iv) of this section. If conditions warrant, provisions must be made for the participation of other representatives identified in paragraph (a) of this section.

(Authority: 20 U.S.C. 1435(a)(4), 1436)

§ 303.344 Content of an IFSP.

(a) *Information about the child's status.* The IFSP must include a statement of the infant or toddler with a disability's present levels of physical development (including vision, hearing, and health status), cognitive development, communication development, social or emotional development, and adaptive development based on the information from that child's evaluation and assessments conducted under § 303.321.

(b) *Family information.* With the concurrence of the family, the IFSP must include a statement of the family's resources, priorities, and concerns related to enhancing the development of the child as identified through the assessment of the family under § 303.321(c)(2).

(c) *Results or outcomes.* The IFSP must include a statement of the measurable results or measurable outcomes expected to be achieved for the child (including pre-literacy and language skills, as developmentally appropriate for the child) and family, and the criteria, procedures, and timelines used to determine—

(1) The degree to which progress toward achieving the results or outcomes identified in the IFSP is being made; and

(2) Whether modifications or revisions of the expected results or outcomes, or early intervention services identified in the IFSP are necessary.

(d) *Early intervention services.* (1) The IFSP must include a statement of the specific early intervention services, based on peer-reviewed research (to the extent practicable), that are necessary to meet the unique needs of the child and the family to achieve the results or outcomes identified in paragraph (c) of this section, including—

(i) The length, duration, frequency, intensity, and method of delivering the early intervention services;

(ii)(A) A statement that each early intervention service is provided in the natural environment for that child or service to the maximum extent appropriate, consistent with §§ 303.13(a)(8), 303.26 and 303.126, or, subject to paragraph (d)(1)(ii)(B) of this section, a justification as to why an early intervention service will not be provided in the natural environment.

(B) The determination of the appropriate setting for providing early intervention services to an infant or

toddler with a disability, including any justification for not providing a particular early intervention service in the natural environment for that infant or toddler with a disability and service, must be—

(1) Made by the IFSP Team (which includes the parent and other team members);

(2) Consistent with the provisions in §§ 303.13(a)(8), 303.26, and 303.126; and

(3) Based on the child's outcomes that are identified by the IFSP Team in paragraph (c) of this section;

(iii) The location of the early intervention services; and

(iv) The payment arrangements, if any.

(2) As used in paragraph (d)(1)(i) of this section—

(i) *Frequency and intensity* mean the number of days or sessions that a service will be provided, and whether the service is provided on an individual or group basis;

(ii) *Method* means how a service is provided;

(iii) *Length* means the length of time the service is provided during each session of that service (such as an hour or other specified time period); and

(iv) *Duration* means projecting when a given service will no longer be provided (such as when the child is expected to achieve the results or outcomes in his or her IFSP).

(3) As used in paragraph (d)(1)(iii) of this section, *location* means the actual place or places where a service will be provided.

(4) For children who are at least three years of age, the IFSP must include an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills.

(e) *Other services.* To the extent appropriate, the IFSP also must—

(1) Identify medical and other services that the child or family needs or is receiving through other sources, but that are neither required nor funded under this part; and

(2) If those services are not currently being provided, include a description of the steps the service coordinator or family may take to assist the child and family in securing those other services.

(f) *Dates and duration of services.* The IFSP must include—

(1) The projected date for the initiation of each early intervention service in paragraph (d)(1) of this section, which date must be as soon as possible after the parent consents to the service, as required in §§ 303.342(e) and 303.420(a)(3); and

(2) The anticipated duration of each service.

(g) *Service coordinator.* (1) The IFSP must include the name of the service coordinator from the profession most relevant to the child's or family's needs (or who is otherwise qualified to carry out all applicable responsibilities under this part), who will be responsible for implementing the early intervention services identified in a child's IFSP, including transition services, and coordination with other agencies and persons.

(2) In meeting the requirements in paragraph (g)(1) of this section, the term ''profession'' includes ''service coordination.''

(h) *Transition from Part C services.* (1) The IFSP must include the steps and services to be taken to support the smooth transition of the child, in accordance with §§ 303.209 and 303.211(b)(6), from part C services to—

(i) Preschool services under part B of the Act, to the extent that those services are appropriate;

(ii) Part C services under § 303.211; or

(iii) Other appropriate services.

(2) The steps required in paragraph (h)(1) of this section must include—

(i) Discussions with, and training of, parents, as appropriate, regarding future placements and other matters related to the child's transition;

(ii) Procedures to prepare the child for changes in service delivery, including steps to help the child adjust to, and function in, a new setting;

(iii) Confirmation that child find information about the child has been transmitted to the LEA or other relevant agency, in accordance with § 303.209(b) (and any policy adopted by the State under § 303.401(e)) and, with parental consent if required under § 303.414, transmission of additional information needed by the LEA to ensure continuity of services from the part C program to the part B program, including a copy of the most recent evaluation and assessments of the child and the family and most recent IFSP developed in accordance with §§ 303.340 through 303.345; and

(iv) Identification of transition services and other activities that the IFSP Team determines are necessary to support the transition of the child.

(Authority: 20 U.S.C. 1435(a)(10)(B), 1435(a)(16), 1436(a)(3), 1436(d), 1437(a)(9)–(10), 1440)

§ 303.345 Interim IFSPs—provision of services before evaluations and assessments are completed.

Early intervention services for an eligible child and the child's family may commence before the completion of the evaluation and assessments in § 303.321, if the following conditions are met:

(a) Parental consent is obtained.

(b) An interim IFSP is developed that includes—

(1) The name of the service coordinator who will be responsible, consistent with § 303.344(g), for implementing the interim IFSP and coordinating with other agencies and persons; and

(2) The early intervention services that have been determined to be needed immediately by the child and the child's family.

(c) Evaluations and assessments are completed within the 45-day timeline in § 303.310.

(Authority: 20 U.S.C. 1436(c))

§ 303.346 Responsibility and accountability.

Each public agency or EIS provider who has a direct role in the provision of early intervention services is responsible for making a good faith effort to assist each eligible child in achieving the outcomes in the child's IFSP. However, part C of the Act does not require that any public agency or EIS provider be held accountable if an eligible child does not achieve the growth projected in the child's IFSP.

(Authority: 20 U.S.C. 1436)

Subpart E—Procedural Safeguards

General

§ 303.400 General responsibility of lead agency for procedural safeguards.

Subject to paragraph (c) of this section, each lead agency must—

(a) Establish or adopt the procedural safeguards that meet the requirements of this subpart, including the provisions on confidentiality in §§ 303.401 through 303.417, parental consent and notice in §§ 303.420 and 303.421, surrogate parents in § 303.422, and dispute resolution procedures in § 303.430;

(b) Ensure the effective implementation of the safeguards by each participating agency (including the lead agency and EIS providers) in the statewide system that is involved in the provision of early intervention services under this part; and

(c) Make available to parents an initial copy of the child's early intervention record, at no cost to the parents.

(Authority: 20 U.S.C. 1439(a))

Confidentiality of Personally Identifiable Information and Early Intervention Records

§ 303.401 Confidentiality and opportunity to examine records.

(a) *General.* Each State must ensure that the parents of a child referred under this part are afforded the right to confidentiality of personally identifiable information, including the right to written notice of, and written consent to, the exchange of that information among agencies, consistent with Federal and State laws.

(b) *Confidentiality procedures.* As required under sections 617(c) and 642 of the Act, 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 the protections under the Family Educational Rights and Privacy Act (FERPA) in 20 U.S.C. 1232g and 34 CFR part 99. Each State must have procedures in effect to ensure that—

(1) Participating agencies (including the lead agency and EIS providers) comply with the part C confidentiality procedures in §§ 303.401 through 303.417; and

(2) The parents of infants or toddlers who are referred to, or receive services under this part, are afforded the opportunity to inspect and review all part C early intervention records about the child and the child's family that are collected, maintained, or used under this part, including records related to evaluations and assessments, screening, eligibility determinations, development and implementation of IFSPs, provision of early intervention services, individual complaints involving the child, or any part of the child's early intervention record under this part.

(c) *Applicability and timeframe of procedures.* The confidentiality procedures described in paragraph (b) of this section apply to the personally identifiable information of a child and the child's family that—

(1) Is contained in early intervention records collected, used, or maintained under this part by the lead agency or an EIS provider; and

(2) Applies from the point in time when the child is referred for early intervention services under this part until the later of when the participating agency is no longer required to maintain or no longer maintains that information under applicable Federal and State laws.

(d) *Disclosure of information.* (1) Subject to paragraph (e) of this section, the lead agency must disclose to the SEA and the LEA where the child resides, in accordance with § 303.209(b)(1)(i) and (b)(1)(ii), the following personally identifiable information under the Act:

(i) A child's name.

(ii) A child's date of birth.

(iii) Parent contact information (including parents' names, addresses, and telephone numbers).

(2) The information described in paragraph (d)(1) of this section is needed to enable the lead agency, as well as LEAs and SEAs under part B of the Act, to identify all children potentially eligible for services under § 303.211 and part B of the Act.

(e) *Option to inform a parent about intended disclosure.* (1) A lead agency, through its policies and procedures, may require EIS providers, prior to making the limited disclosure described in paragraph (d)(1) of this section, to inform parents of a toddler with a disability of the intended disclosure and allow the parents a specified time period to object to the disclosure in writing.

(2) If a parent (in a State that has adopted the policy described in paragraph (e)(1) of this section) objects during the time period provided by the State, the lead agency and EIS provider are not permitted to make such a disclosure under paragraph (d) of this section and § 303.209(b)(1)(i) and (b)(1)(ii).

(Authority: 20 U.S.C. 1412(a)(8), 1412(a)(9), 1417(c), 1435(a)(5), 1437(a)(9), 1439(a)(2), 1439(a)(4), 1439(a)(6), 1442)

§ 303.402 Confidentiality.

The Secretary takes appropriate action, in accordance with section 444 of GEPA, to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected, maintained, or used 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 the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and 34 CFR part 99.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1442)

§ 303.403 Definitions.

The following definitions apply to §§ 303.402 through 303.417 in addition to the definition of personally identifiable information in § 303.29 and disclosure in 34 CFR 99.3:

(a) *Destruction* means physical destruction of the record or ensuring that personal identifiers are removed from a record so that the record is no longer personally identifiable under § 303.29.

(b) *Early intervention records* mean all records regarding a child that are required to be collected, maintained, or used under part C of the Act and the regulations in this part.

(c) *Participating agency* means any individual, agency, entity, or institution that collects, maintains, or uses personally identifiable information to implement the requirements in part C of the Act and the regulations in this part with respect to a particular child. A participating agency includes the lead agency and EIS providers and any individual or entity that provides any part C services (including service coordination, evaluations and assessments, and other part C services), but does not include primary referral sources, or public agencies (such as the State Medicaid or CHIP program) or private entities (such as private insurance companies) that act solely as funding sources for part C services.

(Authority: 20 U.S.C. 1221e–3, 1417(c), 1435(a)(5), 1439(a)(2), 1442)

§ 303.404 Notice to parents.

The lead agency must give notice when a child is referred under part C of the Act that is adequate to fully inform parents about the requirements in § 303.402, including—

(a) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(b) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information;

(c) A description of all the rights of parents and children regarding this information, including their rights under the part C confidentiality provisions in §§ 303.401 through 303.417; and

(d) A description of the extent that the notice is provided in the native languages of the various population groups in the State.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1442)

§ 303.405 Access rights.

(a) Each participating agency must permit parents to inspect and review any early intervention records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a parent's request to inspect and review records without unnecessary delay and before any meeting regarding an IFSP, or any hearing pursuant to §§ 303.430(d) and 303.435 through 303.439, and in no case more than 10 days after the request has been made.

(b) The right to inspect and review early intervention records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the early intervention records;

(2) The right to request that the participating agency provide copies of the early intervention records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the early intervention records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been provided documentation that the parent does not have the authority under applicable State laws governing such matters as custody, foster care, guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.406 Record of access.

Each participating agency must keep a record of parties obtaining access to early intervention records collected, maintained, or used under part C of the Act (except access by parents and authorized representatives and employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the early intervention records.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1439(a)(4), 1442)

§ 303.407 Records on more than one child.

If any early intervention record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.408 List of types and locations of information.

Each participating agency must provide parents, on request, a list of the types and locations of early intervention records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.409 Fees for records.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records, except as provided in paragraph (c) of this section.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(c) A participating agency must provide at no cost to parents, a copy of each evaluation, assessment of the child, family assessment, and IFSP as soon as possible after each IFSP meeting.

(Authority: 20 U.S.C. 1417(c), 1432(4)(B), 1439(a)(2), 1439(a)(4), 1442)

§ 303.410 Amendment of records at a parent's request.

(a) A parent who believes that information in the early intervention records collected, maintained, or used under this part is inaccurate, misleading, or violates the privacy or other rights of the child or parent may request that the participating agency that maintains the information amend the information.

(b) The participating agency must decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the participating agency refuses to amend the information in accordance with the request, it must inform the parent of the refusal and advise the parent of the right to a hearing under § 303.411.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.411 Opportunity for a hearing.

The participating agency must, on request, provide parents with the opportunity for a hearing to challenge information in their child's early intervention records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child or parents. A parent may request a due process hearing under the procedures in § 303.430(d)(1) provided that such hearing procedures meet the requirements of the hearing procedures in § 303.413 or may request a hearing directly under the State's procedures in § 303.413 (*i.e.,* procedures that are consistent with the FERPA hearing requirements in 34 CFR 99.22).

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.412 Result of hearing.

(a) If, as a result of the hearing, the participating agency decides that the information is inaccurate, misleading or in violation of the privacy or other rights of the child or parent, it must amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or in violation of the privacy or other rights of the child or parent, it must inform the parent of the right to place in the early intervention records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the early intervention records of the child under this section must—

(1) Be maintained by the agency as part of the early intervention records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the early intervention records of the child or the contested portion are disclosed by the agency to any party, the explanation must also be disclosed to the party.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.413 Hearing procedures.

A hearing held under § 303.411 must be conducted according to the procedures under 34 CFR 99.22.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.414 Consent prior to disclosure or use.

(a) Except as provided in paragraph (b) of this section, prior parental consent must be obtained before personally identifiable information is—

(1) Disclosed to anyone other than authorized representatives, officials, or employees of participating agencies collecting, maintaining, or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) A lead agency or other participating agency may not disclose personally identifiable information, as defined in § 303.29, to any party except participating agencies (including the lead agency and EIS providers) that are part of the State's part C system without parental consent unless authorized to do so under—

(1) Sections 303.401(d), 303.209(b)(1)(i) and (b)(1)(ii), and 303.211(b)(6)(ii)(A); or

(2) One of the exceptions enumerated in 34 CFR 99.31 (where applicable to part C), which are expressly adopted to apply to part C through this reference. In applying the exceptions in 34 CFR 99.31 to this part, participating agencies must also comply with the pertinent conditions in 34 CFR 99.32, 99.33, 99.34, 99.35, 99.36, 99.38, and 99.39; in applying these provisions in 34 CFR part 99 to part C, the reference to—

(i) 34 CFR 99.30 means § 303.414(a);

(ii) ''Education records'' means early intervention records under § 303.403(b);

(iii) ''Educational'' means early intervention under this part;

(iv) ''Educational agency or institution'' means the participating agency under § 303.404(c);

(v) ''School officials and officials of another school or school system'' means qualified personnel or service coordinators under this part;

(vi) ''State and local educational authorities'' means the lead agency under § 303.22; and

(vii) ''Student'' means child under this part.

(c) The lead agency must provide policies and procedures to be used when a parent refuses to provide consent under this section (such as a meeting to explain to parents how their failure to consent affects the ability of their child to receive services under this part), provided that those procedures do not override a parent's right to refuse consent under § 303.420.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.415 Safeguards.

(a) Each participating agency must protect the confidentiality of personally identifiable information at the collection, maintenance, use, storage, disclosure, and destruction stages.

(b) One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under §§ 303.401 through 303.417 and 34 CFR part 99.

(d) Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1439(a)(4), 1442)

§ 303.416 Destruction of information.

(a) The participating agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide services to the child under part C of the Act, the GEPA provisions in 20 U.S.C. 1232f, and EDGAR, 34 CFR parts 76 and 80.

(b) Subject to paragraph (a) of this section, the information must be destroyed at the request of the parents. However, a permanent record of a child's name, date of birth, parent contact information (including address and phone number), names of service coordinator(s) and EIS provider(s), and exit data (including year and age upon exit, and any programs entered into upon exiting) may be maintained without time limitation.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1439(a)(4), 1442)

§ 303.417 Enforcement.

The lead agency must have in effect the policies and procedures, including sanctions and the right to file a complaint under §§ 303.432 through 303.434, that the State uses to ensure that its policies and procedures, consistent with §§ 303.401 through 303.417, are followed and that the requirements of the Act and the regulations in this part are met.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1439(a)(4), 1442)

Parental Consent and Notice

§ 303.420 Parental consent and ability to decline services.

(a) The lead agency must ensure parental consent is obtained before—

(1) Administering screening procedures under § 303.320 that are used to determine whether a child is suspected of having a disability;

(2) All evaluations and assessments of a child are conducted under § 303.321;

(3) Early intervention services are provided to the child under this part;

(4) Public benefits or insurance or private insurance is used if such consent is required under § 303.520; and

(5) Disclosure of personally identifiable information consistent with § 303.414.

(b) If a parent does not give consent under paragraph (a)(1), (a)(2), or (a)(3) of this section, the lead agency must make reasonable efforts to ensure that the parent—

(1) Is fully aware of the nature of the evaluation and assessment of the child or early intervention services that would be available; and

(2) Understands that the child will not be able to receive the evaluation, assessment, or early intervention service unless consent is given.

(c) The lead agency may not use the due process hearing procedures under this part or part B of the Act to challenge a parent's refusal to provide any consent that is required under paragraph (a) of this section.

(d) The parents of an infant or toddler with a disability—

(1) Determine whether they, their infant or toddler with a disability, or other family members will accept or decline any early intervention service under this part at any time, in accordance with State law; and

(2) May decline a service after first accepting it, without jeopardizing other early intervention services under this part.

(Authority: 20 U.S.C. 1436(e), 1439(a)(3))

§ 303.421 Prior written notice and procedural safeguards notice.

(a) *General.* Prior written notice must be provided to parents a reasonable time before the lead agency or an EIS provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of their infant or toddler, or the provision of early intervention services to the infant or toddler with a disability and that infant's or toddler's family.

(b) *Content of notice.* The notice must be in sufficient detail to inform parents about—

(1) The action that is being proposed or refused;

(2) The reasons for taking the action; and

(3) All procedural safeguards that are available under this subpart, including a description of mediation in § 303.431, how to file a State complaint in §§ 303.432 through 303.434 and a due process complaint in the provisions adopted under § 303.430(d), and any timelines under those procedures.

(c) *Native language.* (1) The notice must be—

(i) Written in language understandable to the general public; and

(ii) Provided in the native language, as defined in § 303.25, of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency or designated EIS provider must take steps to ensure that—

(i) The notice is translated orally or by other means to the parent in the parent's native language or other mode of communication;

(ii) The parent understands the notice; and

(iii) There is written evidence that the requirements of this paragraph have been met.

(Authority: 20 U.S.C. 1439(a)(6)–(7))

Surrogate Parents

§ 303.422 Surrogate parents.

(a) *General.* Each lead agency or other public agency must ensure that the rights of a child are protected when—

(1) No parent (as defined in § 303.27) can be identified;

(2) The lead agency or other public agency, after reasonable efforts, cannot locate a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of lead agency and other public agencies.* (1) The duty of the lead agency, or other public agency under paragraph (a) of this section, includes the assignment of an individual to act as a surrogate for the parent. This assignment process must include a method for—

(i) Determining whether a child needs a surrogate parent; and

(ii) Assigning a surrogate parent to the child.

(2) In implementing the provisions under this section for children who are wards of the State or placed in foster care, the lead agency must consult with the public agency that has been assigned care of the child.

(c) *Wards of the State.* In the case of a child who is a ward of the State, the surrogate parent, instead of being appointed by the lead agency under paragraph (b)(1) of this section, may be appointed by the judge overseeing the infant or toddler's case provided that the surrogate parent meets the requirements in paragraphs (d)(2)(i) and (e) of this section.

(d) *Criteria for selection of surrogate parents.* (1) The lead agency or other public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies must ensure that a person selected as a surrogate parent—

(i) Is not an employee of the lead agency or any other public agency or EIS provider that provides early intervention services, education, care, or other services to the child or any family member of the child;

(ii) Has no personal or professional interest that conflicts with the interest of the child he or she represents; and

(iii) Has knowledge and skills that ensure adequate representation of the child.

(e) *Non-employee requirement; compensation.* A person who is otherwise qualified to be a surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(f) *Surrogate parent responsibilities.* The surrogate parent has the same rights as a parent for all purposes under this part.

(g) *Lead agency responsibility.* The lead agency must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent.

(Authority: 20 U.S.C. 1439(a)(5))

Dispute Resolution Options

§ 303.430 State dispute resolution options.

(a) *General.* Each statewide system must include written procedures for the timely administrative resolution of complaints through mediation, State complaint procedures, and due process hearing procedures, described in paragraphs (b) through (e) of this section.

(b) *Mediation.* Each lead agency must make available to parties to disputes involving any matter under this part the opportunity for mediation that meets the requirements in § 303.431.

(c) *State complaint procedures.* Each lead agency must adopt written State complaint procedures to resolve any State complaints filed by any party regarding any violation of this part that meet the requirements in §§ 303.432 through 303.434.

(d) *Due process hearing procedures.* Each lead agency must adopt written due process hearing procedures to resolve complaints with respect to a particular child regarding any matter identified in § 303.421(a), by either adopting—

(1) The part C due process hearing procedures under section 639 of the Act that—

(i) Meet the requirements in §§ 303.435 through 303.438; and

(ii) Provide a means of filing a due process complaint regarding any matter listed in § 303.421(a); or

(2) The part B due process hearing procedures under section 615 of the Act and §§ 303.440 through 303.449 (with either a 30-day or 45-day timeline for resolving due process complaints, as provided in § 303.440(c)).

(e) *Status of a child during the pendency of a due process complaint.* (1) During the pendency of any proceeding involving a due process complaint under paragraph (d) of this section, unless the lead agency and parents of an infant or toddler with a disability otherwise agree, the child must continue to receive the appropriate early intervention services in the setting identified in the IFSP that is consented to by the parents.

(2) If the due process complaint under paragraph (d) of this section involves an application for initial services under part C of the Act, the child must receive those services that are not in dispute.

(Approved by Office of Management and Budget under control number 1820–0678 and 1820–NEW)

(Authority: 20 U.S.C. 1415(e), 1415(f)(1)(A), 1415(f)(3)(A)–(D), 1439)

Mediation

§ 303.431 Mediation.

(a) *General.* Each lead agency must ensure that procedures are established and implemented to allow parties to disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process at any time.

(b) *Requirements.* The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process—

(i) Is voluntary on the part of the parties;

(ii) Is not used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under part C of the Act; and

(iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2)(i) The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of early intervention services.

(ii) The lead agency must select mediators on a random, rotational, or other impartial basis.

(3) The State must bear the cost of the mediation process, including the costs of meetings described in paragraph (d) of this section.

(4) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(5) If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that—

(i) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and

(ii) Is signed by both the parent and a representative of the lead agency who has the authority to bind such agency.

(6) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(7) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part.

(c) *Impartiality of mediator.* (1) An individual who serves as a mediator under this part—

(i) May not be an employee of the lead agency or an EIS provider that is involved in the provision of early intervention services or other services to the child; and

(ii) Must not have a personal or professional interest that conflicts with the person's objectivity.

(2) A person who otherwise qualifies as a mediator is not an employee of a lead agency or an early intervention provider solely because he or she is paid by the agency or provider to serve as a mediator.

(d) *Meeting to encourage mediation.* A lead agency may establish procedures to offer to parents and EIS providers that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party—

(1) Who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State established under section 671 or 672 of the Act; and

(2) Who would explain the benefits of, and encourage the use of, the mediation process to the parents.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1415(e), 1439(a)(8))

State Complaint Procedures

§ 303.432 Adoption of State complaint procedures.

(a) *General.* Each lead agency must adopt written procedures for—

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements in § 303.434 by providing for the filing of a complaint with the lead agency; and

(2) Widely disseminating to parents and other interested individuals, including parent training and information centers, Protection and Advocacy (P&A) agencies, and other appropriate entities, the State procedures under §§ 303.432 through 303.434.

(b) *Remedies for denial of appropriate services.* In resolving a complaint in which the lead agency has found a failure to provide appropriate services, the lead agency, pursuant to its general supervisory authority under part C of the Act, must address—

(1) The failure to provide appropriate services, including corrective actions appropriate to address the needs of the infant or toddler with a disability who is the subject of the complaint and the infant's or toddler's family (such as compensatory services or monetary reimbursement); and

(2) Appropriate future provision of services for all infants and toddlers with disabilities and their families.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1439(a)(1))

§ 303.433 Minimum State complaint procedures.

(a) *Time limit; minimum procedures.* Each lead agency must include in its complaint procedures a time limit of 60 days after a complaint is filed under § 303.434 to—

(1) Carry out an independent on-site investigation, if the lead agency determines that an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Provide the lead agency, public agency, or EIS provider with an opportunity to respond to the complaint, including, at a minimum—

(i) At the discretion of the lead agency, a proposal to resolve the complaint; and

(ii) An opportunity for a parent who has filed a complaint and the lead agency, public agency, or EIS provider to voluntarily engage in mediation, consistent with §§ 303.430(b) and 303.431;

(4) Review all relevant information and make an independent determination as to whether the lead agency, public agency, or EIS provider is violating a requirement of part C of the Act or of this part; and

(5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the lead agency's final decision.

(b) *Time extension; final decision; implementation.* The lead agency's procedures described in paragraph (a) of this section also must—

(1) Permit an extension of the time limit under paragraph (a) of this section only if—

(i) Exceptional circumstances exist with respect to a particular complaint; or

(ii) The parent (or individual or organization, if mediation is available to the individual or organization under State procedures) and the lead agency, public agency or EIS provider involved agree to extend the time to engage in mediation pursuant to paragraph (a)(3)(ii) of this section; and

(2) Include procedures for effective implementation of the lead agency's final decision, if needed, including—

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) *Complaints filed under this section and due process hearings under § 303.430(d).* (1) If a written complaint is received that is also the subject of a due process hearing under § 303.430(d), or contains multiple issues of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process hearing must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section.

(2) If an issue raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties—

(i) The due process hearing decision is binding on that issue; and

(ii) The lead agency must inform the complainant to that effect.

(3) A complaint alleging a lead agency, public agency, or EIS provider's failure to implement a due process hearing decision must be resolved by the lead agency.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1439(a)(1))

§ 303.434 Filing a complaint.

(a) An organization or individual may file a signed written complaint under the procedures described in §§ 303.432 and 303.433.

(b) The complaint must include—

(1) A statement that the lead agency, public agency, or EIS provider has violated a requirement of part C of the Act;

(2) The facts on which the statement is based;

(3) The signature and contact information for the complainant; and

(4) If alleging violations with respect to a specific child—

(i) The name and address of the residence of the child;

(ii) The name of the EIS provider serving the child;

(iii) A description of the nature of the problem of the child, including facts relating to the problem; and

(iv) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(c) The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with § 303.432.

(d) The party filing the complaint must forward a copy of the complaint to the public agency or EIS provider serving the child at the same time the party files the complaint with the lead agency.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1439(a)(1))

States That Choose To Adopt the Part C Due Process Hearing Procedures Under Section 639 of the Act

§ 303.435 Appointment of an impartial due process hearing officer.

(a) *Qualifications and duties.* Whenever a due process complaint is received under § 303.430(d), a due process hearing officer must be appointed to implement the complaint resolution process in this subpart. The person must—

(1) Have knowledge about the provisions of this part and the needs of, and early intervention services available for, infants and toddlers with disabilities and their families; and

(2) Perform the following duties:

(i)(A) Listen to the presentation of relevant viewpoints about the due process complaint.

(B) Examine all information relevant to the issues.

(C) Seek to reach a timely resolution of the due process complaint.

(ii) Provide a record of the proceedings, including a written decision.

(b) *Definition of impartial.* (1) *Impartial* means that the due process hearing officer appointed to implement the due process hearing under this part—

(i) Is not an employee of the lead agency or an EIS provider involved in the provision of early intervention services or care of the child; and

(ii) Does not have a personal or professional interest that would conflict with his or her objectivity in implementing the process.

(2) A person who otherwise qualifies under paragraph (b)(1) of this section is not an employee of an agency solely because the person is paid by the agency to implement the due process hearing procedures or mediation procedures under this part.

(Authority: 20 U.S.C. 1439(a)(1))

§ 303.436 Parental rights in due process hearing proceedings.

(a) *General.* Each lead agency must ensure that the parents of a child referred to part C are afforded the rights in paragraph (b) of this section in the due process hearing carried out under § 303.430(d).

(b) *Rights.* Any parent involved in a due process hearing has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to early intervention services for infants and toddlers with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to the parent at least five days before the hearing;

(4) Obtain a written or electronic verbatim transcription of the hearing at no cost to the parent; and

(5) Receive a written copy of the findings of fact and decisions at no cost to the parent.

(Authority: 20 U.S.C. 1439(a))

§ 303.437 Convenience of hearings and timelines.

(a) Any due process hearing conducted under this subpart must be carried out at a time and place that is reasonably convenient to the parents.

(b) Each lead agency must ensure that, not later than 30 days after the receipt of a parent's due process complaint, the due process hearing required under this subpart is completed and a written decision mailed to each of the parties.

(c) A hearing officer may grant specific extensions of time beyond the period set out in paragraph (b) of this section at the request of either party.

(Authority: 20 U.S.C. 1439(a)(1))

§ 303.438 Civil action.

Any party aggrieved by the findings and decision issued pursuant to a due process complaint has the right to bring a civil action in State or Federal court under section 639(a)(1) of the Act.

(Authority: 20 U.S.C. 1439(a)(1))

States That Choose To Adopt the Part B Due Process Hearing Procedures Under Section 615 of the Act

§ 303.440 Filing a due process complaint.

(a) *General.* (1) A parent, EIS provider, or a lead agency may file a due process complaint on any of the matters described in § 303.421(a), relating to the identification, evaluation, or placement of a child, or the provision of early intervention services to the infant or toddler with a disability and his or her family under part C of the Act.

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or EIS provider knew, or should have known, about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in § 303.443(f) apply to the timeline in this section.

(b) *Information for parents.* The lead agency must inform the parent of any free or low-cost legal and other relevant services available in the area if—

(1) The parent requests the information; or

(2) The parent or EIS provider files a due process complaint under this section.

(c) *Timeline for Resolution.* The lead agency may adopt a 30- or 45-day timeline, subject to § 303.447(a), for the resolution of due process complaints and must specify in its written policies and procedures under § 303.123 and in its prior written notice under § 303.421, the specific timeline it has adopted.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1415(b)(6), 1439)

§ 303.441 Due process complaint.

(a) *General.* (1) The lead agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential).

(2) The party filing a due process complaint must forward a copy of the due process complaint to the lead agency.

(b) *Content of complaint.* The due process complaint required in paragraph (a)(1) of this section must include—

(1) The name of the child;

(2) The address of the residence of the child;

(3) The name of the EIS provider serving the child;

(4) In the case of a homeless child (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the EIS provider serving the child;

(5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) *Notice required before a hearing on a due process complaint.* A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (b) of this section.

(d) *Sufficiency of complaint.* (1) The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in paragraph (b) of this section.

(2) Within five days of receipt of notification under paragraph (d)(1) of this section, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements in paragraph (b) of this section, and must immediately notify the parties in writing of that determination.

(3) A party may amend its due process complaint only if—

(i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to § 303.442; or

(ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(4) If a party files an amended due process complaint, the timelines for the resolution meeting in § 303.442(a) and the time period to resolve in § 303.442(b) begin again with the filing of the amended due process complaint.

(e) *Lead agency response to a due process complaint.* (1) If the lead agency has not sent a prior written notice under § 303.421 to the parent regarding the subject matter contained in the parent's due process complaint, the lead agency or EIS provider must, within 10 days of receiving the due process complaint, send to the parent a response that includes—

(i) An explanation of why the lead agency or EIS provider proposed or refused to take the action raised in the due process complaint;

(ii) A description of other options that the IFSP Team considered and the reasons why those options were rejected;

(iii) A description of each evaluation procedure, assessment, record, or report the lead agency or EIS provider used as the basis for the proposed or refused action; and

(iv) A description of the other factors that are relevant to the agency's or EIS provider's proposed or refused action.

(2) A response by the lead agency under paragraph (e)(1) of this section does not preclude the lead agency from asserting that the parent's due process complaint was insufficient, where appropriate.

(f) *Other party response to a due process complaint.* Except as provided in paragraph (e) of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

(Authority: 20 U.S.C. 1415(b)(7), 1415(c)(2), 1439)

§ 303.442 Resolution process.

(a) *Resolution meeting.* (1) Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under § 303.443, the lead agency must convene a meeting with the parent and the relevant member or members of the IFSP Team who have specific knowledge of the facts identified in the due process complaint that—

(i) Includes a representative of the lead agency who has decision-making authority on behalf of that agency; and

(ii) May not include an attorney of the lead agency unless the parent is accompanied by an attorney.

(2) The purpose of the resolution meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the lead agency has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraphs (a)(1) and (a)(2) of this section need not be held if—

(i) The parent and lead agency agree in writing to waive the meeting; or

(ii) The parent and lead agency agree to use the mediation process described in § 303.431.

(4) The parent and the lead agency must determine the relevant members of the IFSP Team to attend the meeting.

(b) *Resolution period.* (1) If the lead agency has not resolved the due process complaint to the satisfaction of the parties within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 303.447 begins at the expiration of the 30-day period in paragraph (b)(1) of this section.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (b)(2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(4) If the lead agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made, including documenting its efforts, the lead agency may, at the conclusion of the 30-day period, request that the hearing officer dismiss the parent's due process complaint.

(5) If the lead agency fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

(c) *Adjustments to 30-day resolution period.* The 30- or 45-day timeline adopted by the lead agency under § 303.440(c) for the due process hearing described in § 303.447(a) starts the day after one of the following events:

(1) Both parties agree in writing to waive the resolution meeting.

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible.

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or lead agency withdraws from the mediation process.

(d) *Written settlement agreement.* If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (a)(2) of this section, the parties must execute a legally binding agreement that is—

(1) Signed by both the parent and a representative of the lead agency who has the authority to bind the agency; and

(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States, or, by the lead agency, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements pursuant to this section.

(e) *Agreement review period.* If the parties execute an agreement pursuant to paragraph (d) of this section, a party may void the agreement within three business days of the agreement's execution.

(Authority: 20 U.S.C. 1415(f)(1)(B), 1439)

§ 303.443 Impartial due process hearing.

(a) *General.* Whenever a due process complaint is received consistent with § 303.440, the parents or the EIS provider involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in §§ 303.440 through 303.442.

(b) *Agency responsible for conducting the due process hearing.* The hearing described in paragraph (a) of this section must be conducted by the lead agency directly responsible for the early intervention services of the infant or toddler, as determined under State statute, State regulation, or a written policy of the lead agency.

(c) *Impartial hearing officer.* (1) At a minimum, a hearing officer—

(i) Must not be—

(A) An employee of the lead agency or the EIS provider that is involved in the early intervention services or care of the infant or toddler; or

(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(3) Each lead agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(d) *Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 303.441(b), unless the other party agrees otherwise.

(e) *Timeline for requesting a hearing.* A parent, lead agency, or EIS provider must request an impartial hearing on their due process complaint within two years of the date the parent, lead agency, or EIS provider knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

(f) *Exceptions to the timeline.* The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to—

(1) Specific misrepresentations by the lead agency or EIS provider that it had resolved the problem forming the basis of the due process complaint; or

(2) The lead agency's or EIS provider's failure to provide the parent information that was required under this part to be provided to the parent.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)–(D), 1439)

§ 303.444 Hearing rights.

(a) *General.* Any party to a hearing conducted pursuant to §§ 303.440 through 303.445, or an appeal conducted pursuant to § 303.446, has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of infants or toddlers with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written or, at the option of the parents, electronic findings of fact and decisions.

(b) *Additional disclosure of information.* (1) At least five business days prior to a hearing conducted pursuant to § 303.443(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) *Parental rights at hearings.* Parents involved in hearings must—

(1) Be given the right to open the hearing to the public; and

(2) Receive a copy of the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section at no cost.

(Authority: 20 U.S.C. 1415(f)(2), 1415(h), 1439)

§ 303.445 Hearing decisions.

(a) *Decision of hearing officer.* (1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether an infant or toddler was appropriately identified, evaluated, or placed, or whether the infant or toddler with a disability and his or her family were appropriately provided early intervention services under part C of the Act, must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child was not appropriately identified, evaluated, placed, or provided early intervention services under part C of the Act only if the procedural inadequacies—

(i) Impeded the child's right to identification, evaluation, and placement or provision of early intervention services for the child and that child's family under part C of the Act;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding identification, evaluation, placement or provision of early intervention services for the child and that child's family under part C of the Act; or

(iii) Caused a deprivation of educational or developmental benefit.

(3) Nothing in paragraph (a) of this section precludes a hearing officer from ordering the lead agency or EIS provider to comply with procedural requirements under §§ 303.400 through 303.449.

(b) *Construction clause.* Nothing in §§ 303.440 through 303.445 affects the right of a parent to file an appeal of the due process hearing decision with the lead agency under § 303.446(b), if the lead agency level appeal is available.

(c) *Separate due process complaint.* Nothing in §§ 303.440 through 303.449 precludes a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(d) *Findings and decisions to general public.* The lead agency, after deleting any personally identifiable information, must make the findings and decisions available to the public.

(Authority: 20 U.S.C. 1415(f)(3)(E)–(F), 1415(h)(4), 1415(o), 1439)

§ 303.446 Finality of decision; appeal; impartial review.

(a) *Finality of hearing decision.* A decision made in a hearing conducted pursuant to §§ 303.440 through 303.445 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and § 303.448.

(b) *Appeal of decisions; impartial review.* (1) The lead agency may provide for procedures to allow any party aggrieved by the findings and decision in the hearing to appeal to the lead agency.

(2) If there is an appeal, the lead agency must conduct an impartial review of the findings and decision appealed. The official conducting the review must—

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 303.444 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of the written or, at the option of the parents, electronic findings of fact and decisions to the parties.

(c) *Findings of fact and decision to the general public.* The lead agency, after deleting any personally identifiable information, must make the findings of fact and decisions described in paragraph (b)(2)(vi) of this section available to the general public.

(d) *Finality of review decision.* The decision made by the reviewing official is final unless a party brings a civil action under § 303.448.

(Authority: 20 U.S.C. 1415(g), 1415(h)(4), 1415(i)(1)(A), 1415(i)(2), 1439)

§ 303.447 Timelines and convenience of hearings and reviews.

(a) The lead agency must ensure that not later than either 30 days or 45 days (consistent with the lead agency's written policies and procedures adopted under § 303.440(c)) after the expiration of the 30-day period in § 303.442(b), or the adjusted 30-day time periods described in § 303.442(c))—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The lead agency must ensure that not later than 30 days after the receipt of a request for a review—

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1), 1439)

§ 303.448 Civil action.

(a) *General.* Any party aggrieved by the findings and decision made under §§ 303.440 through 303.445 who does not have the right to an appeal under § 303.446(b), and any party aggrieved by the findings and decision under § 303.446(b), has the right to bring a civil action with respect to the due process complaint under § 303.440. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) *Time limitation.* The party bringing the action has 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under part C of the Act, in the time allowed by that State law.

(c) *Additional requirements.* In any action brought under paragraph (a) of this section, the court—

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) *Jurisdiction of district courts.* The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(e) *Rule of construction.* Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under §§ 303.440 and 303.446 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(2), 1415(i)(3)(A), 1415(l), 1439)

§ 303.449 State enforcement mechanisms.

Notwithstanding §§ 303.431(b)(6) and 303.442(d)(2), which provide for judicial enforcement of a written agreement reached as a result of a mediation or a resolution meeting, there is nothing in this part that would prevent the State from using other mechanisms to seek enforcement of that agreement, provided that use of those mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a State court or competent jurisdiction or in a district court of the United States.

(Authority: 20 U.S.C. 1415(e)(2)(F), 1415(f)(1)(B), 1439)

Subpart F—Use of Funds and Payor of Last Resort

General

§ 303.500 Use of funds, payor of last resort, and system of payments.

(a) *Statewide system.* Each statewide system must include written policies and procedures that meet the requirements of the—

(1) Use of funds provisions in § 303.501; and

(2) Payor of last resort provisions in §§ 303.510 through 303.521 (regarding the identification and coordination of funding resources for, and the provision of, early intervention services under part C of the Act within the State).

(b) *System of Payments.* A State may establish, consistent with §§ 303.13(a)(3) and 303.203(b), a system of payments for early intervention services under part C of the Act, including a schedule

of sliding fees or cost participation fees (such as co-payments, premiums, or deductibles) required to be paid under Federal, State, local, or private programs of insurance or benefits for which the infant or toddler with a disability or the child's family is enrolled, that meets the requirements of §§ 303.520 and 303.521.

(Authority: 20 U.S.C. 1432(4)(B), 1435(a)(10)–(12), 1437(b), 1438, 1439(a), 1440)

Use of Funds

§ 303.501 Permissive use of funds by the lead agency.

Consistent with §§ 303.120 through 303.122 and §§ 303.220 through 303.226, a lead agency may use funds under this part for activities or expenses that are reasonable and necessary for implementing the State's early intervention program for infants and toddlers with disabilities including funds—

(a) For direct early intervention services for infants and toddlers with disabilities and their families under this part that are not otherwise funded through other public or private sources (subject to §§ 303.510 through 303.521);

(b) To expand and improve services for infants and toddlers with disabilities and their families under this part that are otherwise available;

(c)(1) To provide FAPE as that term is defined in § 303.15, in accordance with part B of the Act, to children with disabilities from their third birthday to the beginning of the following school year;

(2) The provision of FAPE under paragraph (c)(1) of this section does not apply to children who continue to receive early intervention services under this part in accordance with paragraph (d) of this section and § 303.211;

(d) With the written consent of the parents, to continue to provide early intervention services under this part, in lieu of FAPE provided in accordance with part B of the Act, to children with disabilities from their third birthday (pursuant to § 303.211) until those children enter, or are eligible under State law to enter, kindergarten; and

(e) In any State that does not provide services under § 303.204 for at-risk infants and toddlers, as defined in § 303.5, to strengthen the statewide system by initiating, expanding, or improving collaborative efforts related to at-risk infants and toddlers, including establishing linkages with appropriate public and private community-based organizations, services, and personnel for the purposes of—

(1) Identifying and evaluating at-risk infants and toddlers;

(2) Making referrals for the infants and toddlers identified and evaluated under paragraph (e)(1) of this section; and

(3) Conducting periodic follow-up on each referral, to determine if the status of the infant or toddler involved has changed with respect to the eligibility of the infant or toddler for services under this part.

(Authority: 20 U.S.C. 1435(a)(10)–(12), 1437(b), 1438)

Payor of Last Resort—General Provisions

§ 303.510 Payor of last resort.

(a) *Nonsubstitution of funds.* Except as provided in paragraph (b) of this section, funds under this part may not be used to satisfy a financial commitment for services that would otherwise have been paid for from another public or private source, including any medical program administered by the Department of Defense, but for the enactment of part C of the Act. Therefore, funds under this part may be used only for early intervention services that an infant or toddler with a disability needs but is not currently entitled to receive or have payment made from any other Federal, State, local, or private source (subject to §§ 303.520 and 303.521).

(b) *Interim payments—reimbursement.* If necessary to prevent a delay in the timely provision of appropriate early intervention services to a child or the child's family, funds under this part may be used to pay the provider of services (for services and functions authorized under this part, including health services, as defined in § 303.16 (but not medical services), functions of the child find system described in §§ 303.115 through 303.117 and §§ 303.301 through 303.320, and evaluations and assessments in § 303.321), pending reimbursement from the agency or entity that has ultimate responsibility for the payment.

(c) *Non-reduction of benefits.* Nothing in this part may be construed to permit a State to reduce medical or other assistance available in the State or to alter eligibility under Title V of the Social Security Act, 42 U.S.C. 701, *et seq.* (SSA) (relating to maternal and child health) or Title XIX of the SSA, 42 U.S.C. 1396 (relating to Medicaid), including section 1903(a) of the SSA regarding medical assistance for services furnished to an infant or toddler with a disability when those services are included in the child's IFSP adopted pursuant to part C of the Act.

(Authority: 20 U.S.C. 1435(a)(10)(B), 1437(a)(2), 1440(a), 1440(c))

§ 303.511 Methods to ensure the provision of, and financial responsibility for, Part C services.

(a) *General.* Each State must ensure that it has in place methods for State interagency coordination. Under these methods, the Chief Executive Officer of a State or designee of the Officer must ensure that the interagency agreement or other method for interagency coordination is in effect between each State public agency and the designated lead agency in order to ensure—

(1) The provision of, and establishing financial responsibility for, early intervention services provided under this part; and

(2) Such services are consistent with the requirement in section 635 of the Act and the State's application under section 637 of the Act, including the provision of such services during the pendency of any dispute between State agencies.

(b) The methods in paragraph (a) of this section must meet all requirements in this section and be set forth in one of the following:

(1) State law or regulation;

(2) Signed interagency and intra-agency agreements between respective agency officials that clearly identify the financial and service provision responsibilities of each agency (or entity within the agency); or

(3) Other appropriate written methods determined by the Governor of the State, or the Governor's designee, and approved by the Secretary through the review and approval of the State's application.

(c) *Procedures for resolving disputes.* (1) Each method must include procedures for achieving a timely resolution of intra-agency and interagency disputes about payments for a given service, or disputes about other matters related to the State's early intervention service program. Those procedures must include a mechanism for resolution of disputes within agencies and for the Governor, Governor's designee, or the lead agency to make a final determination for interagency disputes, which determination must be binding upon the agencies involved.

(2) The method must—

(i) Permit the agency to resolve its own internal disputes (based on the agency's procedures that are included in the agreement), so long as the agency acts in a timely manner; and

(ii) Include the process that the lead agency will follow in achieving resolution of intra-agency disputes, if a given agency is unable to resolve its own internal disputes in a timely manner.

(3) If, during the lead agency's resolution of the dispute, the Governor, Governor's designee, or lead agency determines that the assignment of financial responsibility under this section was inappropriately made—

(i) The Governor, Governor's designee, or lead agency must reassign the financial responsibility to the appropriate agency; and

(ii) The lead agency must make arrangements for reimbursement of any expenditures incurred by the agency originally assigned financial responsibility.

(d) *Delivery of services in a timely manner.* The methods adopted by the State under this section must—

(1) Include a mechanism to ensure that no services that a child is entitled to receive under this part are delayed or denied because of disputes between agencies regarding financial or other responsibilities; and

(2) Be consistent with the written funding policies adopted by the State under this subpart and include any provisions the State has adopted under § 303.520 regarding the use of insurance to pay for part C services.

(e) *Additional components.* Each method must include any additional components necessary to ensure effective cooperation and coordination among, and the lead agency's general supervision (including monitoring) of, EIS providers (including all public agencies) involved in the State's early intervention service programs.

(Authority: 20 U.S.C. 1435(a)(10), 1437(a)(2), 1440(b))

Payor of Last Resort & System of Payments Provisions—Use of Insurance, Benefits, Systems of Payments, and Fees

§ 303.520 Policies related to use of public benefits or insurance or private insurance to pay for Part C services.

(a) *Use of public benefits or public insurance to pay for Part C services.*

(1) A State may not use the public benefits or insurance of a child or parent to pay for part C services unless the State provides written notification, consistent with § 303.520(a)(3), to the child's parents, and the State meets the no-cost protections identified in paragraph (a)(2) of this section.

(2) With regard to using the public benefits or insurance of a child or parent to pay for part C services, the State—

(i) May not require a parent to sign up for or enroll in public benefits or insurance programs as a condition of receiving part C services and must obtain consent prior to using the public benefits or insurance of a child or parent if that child or parent is not already enrolled in such a program;

(ii) Must obtain consent, consistent with §§ 303.7 and 303.420(a)(4), to use a child's or parent's public benefits or insurance to pay for part C services if that use would—

(A) Decrease available lifetime coverage or any other insured benefit for that child or parent under that program;

(B) Result in the child's parents paying for services that would otherwise be covered by the public benefits or insurance program;

(C) Result in any increase in premiums or discontinuation of public benefits or insurance for that child or that child's parents; or

(D) Risk loss of eligibility for the child or that child's parents for home and community-based waivers based on aggregate health-related expenditures.

(iii) If the parent does not provide consent under paragraphs (a)(2)(i) or (a)(2)(ii) of this section, the State must still make available those part C services on the IFSP to which the parent has provided consent.

(3) Prior to using a child's or parent's public benefits or insurance to pay for part C services, the State must provide written notification to the child's parents. The notification must include—

(i) A statement that parental consent must be obtained under § 303.414, if that provision applies, before the State lead agency or EIS provider discloses, for billing purposes, a child's personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid);

(ii) A statement of the no-cost protection provisions in § 303.520(a)(2) and that if the parent does not provide the consent under § 303.520(a)(2), the State lead agency must still make available those part C services on the IFSP for which the parent has provided consent;

(iii) A statement that the parents have the right under § 303.414, if that provision applies, to withdraw their consent to disclosure of personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time; and

(iv) A statement of the general categories of costs that the parent would incur as a result of participating in a public benefits or insurance program (such as co-payments or deductibles, or the required use of private insurance as the primary insurance).

(4) If a State requires a parent to pay any costs that the parent would incur as a result of the State's using a child's or parent's public benefits or insurance to pay for part C services (such as co-payments or deductibles, or the required use of private insurance as the primary insurance), those costs must be identified in the State's system of payments policies under § 303.521 and included in the notification provided to the parent under paragraph (a)(3) of this section; otherwise, the State cannot charge those costs to the parent.

(b) *Use of private insurance to pay for Part C services.* (1)(i) The State may not use the private insurance of a parent of an infant or toddler with a disability to pay for part C services unless the parent provides parental consent, consistent with §§ 303.7 and 303.420(a)(4), to use private insurance to pay for part C services for his or her child or the State meets one of the exceptions in paragraph (b)(2) of this section. This includes the use of private insurance when such use is a prerequisite for the use of public benefits or insurance. Parental consent must be obtained—

(A) When the lead agency or EIS provider seeks to use the parent's private insurance or benefits to pay for the initial provision of an early intervention service in the IFSP; and

(B) Each time consent for services is required under § 303.420(a)(3) due to an increase (in frequency, length, duration, or intensity) in the provision of services in the child's IFSP.

(ii) If a State requires a parent to pay any costs that the parent would incur as a result of the State's use of private insurance to pay for early intervention services (such as co-payments, premiums, or deductibles), those costs must be identified in the State's system of payments policies under § 303.521; otherwise, the State may not charge those costs to the parent.

(iii) When obtaining parental consent required under paragraph (b)(1)(i) of this section or initially using benefits under a child or parent's private insurance policy to pay for an early intervention service under paragraph (b)(2) of this section, the State must provide to the parent a copy of the State's system of payments policies that identifies the potential costs that the parent may incur when their private insurance is used to pay for early intervention services under this part (such as co-payments, premiums, or deductibles or other long-term costs such as the loss of benefits because of annual or lifetime health insurance coverage caps under the insurance policy).

(2) The parental consent requirements in paragraph (b)(1) of this section do not apply if the State has enacted a State statute regarding private health

insurance coverage for early intervention services under part C of the Act, that expressly provides that—

(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 the child's family members covered under that health insurance policy.

(3) If a State has enacted a State statute that meets the requirements in paragraph (b)(2) of this section, regarding the use of private health insurance coverage to pay for early intervention services under part C of the Act, the State may reestablish a new baseline of State and local expenditures under § 303.225(b) in the next Federal fiscal year following the effective date of the statute.

(c) *Inability to pay.* 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 under § 303.521(a)(3) and does not provide consent under paragraph (b)(1), the lack of consent may not be used to delay or deny any services under this part to that child or family.

(d) *Proceeds or funds from public insurance or benefits or from private insurance.* (1) Proceeds or funds from public insurance or benefits or from private insurance are not treated as program income for purposes of 34 CFR 80.25.

(2) If the State receives reimbursements from Federal funds (*e.g.,* Medicaid reimbursements attributable directly to Federal funds) for services under part C of the Act, those funds are considered neither State nor local funds under § 303.225(b).

(3) If the State spends funds from private insurance for services under this part, those funds are considered neither State nor local funds under § 303.225.

(e) *Funds received from a parent or family member under a State's system of payments.* Funds received by the State from a parent or family member under the State's system of payments established under § 303.521 are considered program income under 34 CFR 80.25. These funds—

(1) Are not deducted from the total allowable costs charged under part C of the Act (as set forth in 34 CFR 80.25(g)(1));

(2) Must be used for the State's part C early intervention services program, consistent with 34 CFR 80.25(g)(2); and

(3) Are considered neither State nor local funds under § 303.225(b).

(Authority: 20 U.S.C. 1432(4)(B), 1435(a)(10), 1439(a))

§ 303.521 System of payments and fees.

(a) *General.* If a State elects to adopt a system of payments in § 303.500(b), the State's system of payments policies must be in writing and specify which functions or services, if any, are subject to the system of payments (including any fees charged to the family as a result of using one or more of the family's public insurance or benefits or private insurance), and include—

(1) The payment system and schedule of sliding or cost participation fees that may be charged to the parent for early intervention services under this part;

(2) The basis and amount of payments or fees;

(3) The State's definition of ability to pay (including its definition of income and family expenses, such as extraordinary medical expenses), its definition of inability to pay, and when and how the State makes its determination of the ability or inability to pay;

(4) An assurance that—

(i) Fees will not be charged to parents for the services that a child is otherwise entitled to receive at no cost (including those services identified under paragraphs (a)(4)(ii), (b), and (c) of this section);

(ii) The inability of the parents of an infant or toddler with a disability to pay for services will not result in a delay or denial of services under this part to the child or the child's family such that, if the parent or family meets the State's definition of inability to pay, the infant or toddler with a disability must be provided all part C services at no cost.

(iii) Families will not be charged any more than the actual cost of the part C service (factoring in any amount received from other sources for payment for that service); and

(iv) Families with public insurance or benefits or private insurance will not be charged disproportionately more than families who do not have public insurance or benefits or private insurance;

(5) Provisions stating that the failure to provide the requisite income information and documentation may result in a charge of a fee on the fee schedule and specify the fee to be charged; and

(6) Provisions that permit, but do not require, the lead agency to use part C or other funds to pay for costs such as the premiums, deductibles, or co-payments.

(b) *Functions not subject to fees.* The following are required functions that must be carried out at public expense, and for which no fees may be charged to parents:

(1) Implementing the child find requirements in §§ 303.301 through 303.303.

(2) Evaluation and assessment, in accordance with § 303.320, and the functions related to evaluation and assessment in § 303.13(b).

(3) Service coordination services, as defined in §§ 303.13(b)(11) and 303.33.

(4) Administrative and coordinative activities related to—

(i) The development, review, and evaluation of IFSPs and interim IFSPs in accordance with §§ 303.342 through 303.345; and

(ii) Implementation of the procedural safeguards in subpart E of this part and the other components of the statewide system of early intervention services in subpart D of this part and this subpart.

(c) *States with FAPE mandates, or that use funds under Part B of the Act to serve children under age three.* If a State has in effect a State law requiring the provision of FAPE for, or uses part B funds to serve, an infant or toddler with a disability under the age of three (or any subset of infants and toddlers with disabilities under the age of three), the State may not charge the parents of the infant or toddler with a disability for any services (*e.g.,* physical or occupational therapy) under this part that are part of FAPE for that infant or toddler and the child's family, and those FAPE services must meet the requirements of both parts B and C of the Act.

(d) *Family fees.* (1) Fees or costs collected from a parent or the child's family to pay for early intervention services under a State's system of payments are program income under 34 CFR 80.25. A State may add this program income to its part C grant funds, rather than deducting the program income from the amount of the State's part C grant. Any fees collected must be used for the purposes of the grant under part C of the Act.

(2) Fees collected under a system of payments are considered neither State nor local funds under § 303.225(b).

(e) *Procedural Safeguards.* (1) Each State system of payments must include written policies to inform parents that a parent who wishes to contest the imposition of a fee, or the State's determination of the parent's ability to pay, may do one of the following:

(i) Participate in mediation in accordance with § 303.431.

(ii) Request a due process hearing under § 303.436 or 303.441, whichever is applicable.

(iii) File a State complaint under § 303.434.

(iv) Use any other procedure established by the State for speedy resolution of financial claims, provided that such use does not delay or deny the parent's procedural rights under this part, including the right to pursue, in a timely manner, the redress options described in paragraphs (e)(2)(i) through (e)(2)(iii) of this section.

(2) A State must inform parents of these procedural safeguard options by either—

(i) Providing parents with a copy of the State's system of payments policies when obtaining consent for provision of early intervention services under § 303.420(a)(3); or

(ii) Including this information with the notice provided to parents under § 303.421.

(Authority: 20 U.S.C. 1432(4)(B), 1439(a), 1440)

Subpart G—State Interagency Coordinating Council

§ 303.600 Establishment of Council.

(a) A State that desires to receive financial assistance under part C of the Act must establish a State Interagency Coordinating Council (Council) as defined in § 303.8.

(b) The Council must be appointed by the Governor. The Governor must ensure that the membership of the Council reasonably represents the population of the State.

(c) The Governor must designate a member of the Council to serve as the chairperson of the Council or require the Council to do so. Any member of the Council who is a representative of the lead agency designated under § 303.201 may not serve as the chairperson of the Council.

(Authority: 20 U.S.C. 1441(a))

§ 303.601 Composition.

(a) The Council must be composed as follows:

(1)(i) At least 20 percent of the members must be parents, including minority parents, of infants or toddlers with disabilities or children with disabilities aged 12 years or younger, with knowledge of, or experience with, programs for infants and toddlers with disabilities.

(ii) At least one parent member must be a parent of an infant or toddler with a disability or a child with a disability aged six years or younger.

(2) At least 20 percent of the members must be public or private providers of early intervention services.

(3) At least one member must be from the State legislature.

(4) At least one member must be involved in personnel preparation.

(5) At least one member must—

(i) Be from each of the State agencies involved in the provision of, or payment for, early intervention services to infants and toddlers with disabilities and their families; and

(ii) Have sufficient authority to engage in policy planning and implementation on behalf of these agencies.

(6) At least one member must—

(i) Be from the SEA responsible for preschool services to children with disabilities; and

(ii) Have sufficient authority to engage in policy planning and implementation on behalf of the SEA.

(7) At least one member must be from the agency responsible for the State Medicaid and CHIP program.

(8) At least one member must be from a Head Start or Early Head Start agency or program in the State.

(9) At least one member must be from a State agency responsible for child care.

(10) At least one member must be from the agency responsible for the State regulation of private health insurance.

(11) At least one member must be a representative designated by the Office of the Coordination of Education of Homeless Children and Youth.

(12) At least one member must be a representative from the State child welfare agency responsible for foster care.

(13) At least one member must be from the State agency responsible for children's mental health.

(b) The Governor may appoint one member to represent more than one program or agency listed in paragraphs (a)(7) through (a)(13) of this section.

(c) The Council may include other members selected by the Governor, including a representative from the Bureau of Indian Education (BIE) or, where there is no school operated or funded by the BIE in the State, from the Indian Health Service or the tribe or tribal council.

(d) No member of the Council may cast a vote on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

(Authority: 20 U.S.C. 1231d, 1441(b), 1441(f))

§ 303.602 Meetings.

(a) The Council must meet, at a minimum, on a quarterly basis, and in such places as it determines necessary.

(b) The meetings must—

(1) Be publicly announced sufficiently in advance of the dates they are to be held to ensure that all interested parties have an opportunity to attend;

(2) To the extent appropriate, be open and accessible to the general public; and

(3) As needed, provide for interpreters for persons who are deaf and other necessary services for Council members and participants. The Council may use funds under this part to pay for those services.

(Authority: 20 U.S.C. 1441(c))

§ 303.603 Use of funds by the Council.

(a) Subject to the approval by the Governor, the Council may use funds under this part to—

(1) Conduct hearings and forums;

(2) Reimburse members of the Council for reasonable and necessary expenses for attending Council meetings and performing Council duties (including child care for parent representatives);

(3) Pay compensation to a member of the Council if the member is not employed or must forfeit wages from other employment when performing official Council business;

(4) Hire staff; and

(5) Obtain the services of professional, technical, and clerical personnel as may be necessary to carry out the performance of its functions under part C of the Act.

(b) Except as provided in paragraph (a) of this section, Council members must serve without compensation from funds available under part C of the Act.

(Authority: 20 U.S.C. 1441(d))

§ 303.604 Functions of the Council—required duties.

(a) *Advising and assisting the lead agency.* The Council must advise and assist the lead agency in the performance of its responsibilities in section 635(a)(10) of the Act, including—

(1) Identification of sources of fiscal and other support for services for early intervention service programs under part C of the Act;

(2) Assignment of financial responsibility to the appropriate agency;

(3) Promotion of methods (including use of intra-agency and interagency agreements) for intra-agency and interagency collaboration regarding child find under §§ 303.115 and 303.302, monitoring under § 303.120 and §§ 303.700 through 303.708, financial responsibility and provision of early intervention services under §§ 303.202 and 303.511, and transition under § 303.209; and

(4) Preparation of applications under this part and amendments to those applications.

(b) *Advising and assisting on transition.* The Council must advise and assist the SEA and the lead agency regarding the transition of toddlers with disabilities to preschool and other appropriate services.

(c) *Annual report to the Governor and to the Secretary.* (1) The Council must—

(i) Prepare and submit an annual report to the Governor and to the Secretary on the status of early intervention service programs for infants and toddlers with disabilities and their families under part C of the Act operated within the State; and

(ii) Submit the report to the Secretary by a date that the Secretary establishes.

(2) Each annual report must contain the information required by the Secretary for the year for which the report is made.

(Authority: 20 U.S.C. 1441(e)(1))

§ 303.605 Authorized activities by the Council.

The Council may carry out the following activities:

(a) Advise and assist the lead agency and the SEA regarding the provision of appropriate services for children with disabilities from birth through age five.

(b) Advise appropriate agencies in the State with respect to the integration of services for infants and toddlers with disabilities and at-risk infants and toddlers and their families, regardless of whether at-risk infants and toddlers are eligible for early intervention services in the State.

(c) Coordinate and collaborate with the State Advisory Council on Early Childhood Education and Care for children, as described in section 642B(b)(1)(A)(i) of the Head Start Act, 42 U.S.C. 9837b(b)(1)(A)(i), if applicable, and other State interagency early learning initiatives, as appropriate.

(Authority: 20 U.S.C. 1435(a)(10), 1441(e)(2))

Subpart H—State Monitoring and Enforcement; Federal Monitoring and Enforcement; Reporting; and Allocation of Funds

Federal and State Monitoring and Enforcement

§ 303.700 State monitoring and enforcement.

(a) The lead agency must—

(1) Monitor the implementation of this part;

(2) Make determinations annually about the performance of each EIS program using the categories identified in § 303.703(b);

(3) Enforce this part consistent with § 303.704, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in § 303.704(a)(1) (technical assistance) and § 303.704(a)(2) (imposing conditions on the lead agency's funding of an EIS program or, if the lead agency does not provide part C funds to the EIS program, an EIS provider), § 303.704(b)(2)(i) (corrective action or improvement plan) and § 303.704(b)(2)(iv) (withholding of funds, in whole or in part by the lead agency), and § 303.704(c)(2) (withholding of funds, in whole or in part by the lead agency); and

(4) Report annually on the performance of the State and of each EIS program under this part as provided in § 303.702.

(b) The primary focus of the State's monitoring activities must be on—

(1) Improving early intervention results and functional outcomes for all infants and toddlers with disabilities; and

(2) Ensuring that EIS programs meet the program requirements under part C of the Act, with a particular emphasis on those requirements that are most closely related to improving early intervention results for infants and toddlers with disabilities.

(c) As a part of its responsibilities under paragraph (a) of this section, the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in paragraph (d) of this section, and the indicators established by the Secretary for the State performance plans.

(d) The lead agency must monitor each EIS program located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:

(1) Early intervention services in natural environments.

(2) State exercise of general supervision, including child find, effective monitoring, the use of resolution sessions (if the State adopts part B due process hearing procedures under § 303.430(d)(2)), mediation, and a system of transition services as defined in section 637(a)(9) of the Act.

(e) In exercising its monitoring responsibilities under paragraph (d) of this section, the State must ensure that when it identifies noncompliance with the requirements of this part by EIS programs and providers, the noncompliance is corrected as soon as possible and in no case later than one year after the State's identification of the noncompliance.

(Approved by Office of Management and Budget under control number 1820–0578)

(Authority: 20 U.S.C. 1416(a), 1442)

§ 303.701 State performance plans and data collection.

(a) *General.* Each State must have in place a performance plan that meets the requirements described in section 616 of the Act; is approved by the Secretary; and includes an evaluation of the State's efforts to implement the requirements and purposes of part C of the Act, a description of how the State will improve implementation, and measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in § 303.700(d).

(b) *Review of State performance plan.* Each State must review its State performance plan at least once every six years and submit any amendments to the Secretary.

(c) *Data collection.* (1) Each State must collect valid and reliable information as needed to report annually to the Secretary under § 303.702(b)(2) on the indicators established by the Secretary for the State performance plans.

(2) If the Secretary permits States to collect data on specific indicators through State monitoring or sampling, and the State collects data for a particular indicator through State monitoring or sampling, the State must collect and report data on those indicators for each EIS program at least once during the six-year period of a State performance plan.

(3) Nothing in part C of the Act or these regulations may be construed to authorize the development of a nationwide database of personally identifiable information on individuals involved in studies or other collections of data under part C of the Act.

(Approved by Office of Management and Budget under control number 1820–0578)

(Authority: 20 U.S.C. 1416(b), 1442)

§ 303.702 State use of targets and reporting.

(a) *General.* Each State must use the targets established in the State's performance plan under § 303.701 and the priority areas described in § 303.700(d) to analyze the performance of each EIS program in implementing part C of the Act.

(b) *Public reporting and privacy.* (1) *Public report.* (i) Subject to paragraph (b)(1)(ii) of this section, the State must—

(A) Report annually to the public on the performance of each EIS program located in the State on the targets in the State's performance plan as soon as practicable but no later than 120 days following the State's submission of its annual performance report to the Secretary under paragraph (b)(2) of this section; and

(B) Make the State's performance plan under § 303.701(a), annual performance reports under paragraph (b)(2) of this section, and the State's annual reports on the performance of each EIS program under paragraph (b)(1)(i)(A) of this section available through public means, including by posting on the Web site of the lead agency, distribution to the media, and distribution to EIS programs.

(ii) If the State, in meeting the requirements of paragraph (b)(1)(i)(A) of this section, collects data through State monitoring or sampling, the State must include in its public report on EIS programs under paragraph (b)(1)(i)(A) of this section the most recently available performance data on each EIS program and the date the data were collected.

(2) *State performance report.* The State must report annually to the Secretary on the performance of the State under the State's performance plan.

(3) *Privacy.* The State must not report to the public or the Secretary any information on performance that would result in the disclosure of personally identifiable information about individual children, or where the available data are insufficient to yield statistically reliable information.

(Approved by Office of Management and Budget under control number 1820–0578)

(Authority: 20 U.S.C. 1416(b)(2)(B)–(C), 1442)

§ 303.703 Secretary's review and determination regarding State performance.

(a) *Review.* The Secretary annually reviews the State's performance report submitted pursuant to § 303.702(b)(2).

(b) *Determination.* (1) *General.* Based on the information provided by the State in the State's annual performance report, information obtained through monitoring visits, and any other public information made available, the Secretary determines if the State—

(i) Meets the requirements and purposes of part C of the Act;

(ii) Needs assistance in implementing the requirements of part C of the Act;

(iii) Needs intervention in implementing the requirements of part C of the Act; or

(iv) Needs substantial intervention in implementing the requirements of part C of the Act.

(2) *Notice and opportunity for a hearing.* (i) For determinations made under paragraphs (b)(1)(iii) and (b)(1)(iv) of this section, the Secretary provides reasonable notice and an opportunity for a hearing on those determinations.

(ii) The hearing described in paragraph (b)(2)(i) of this section consists of an opportunity to meet with the Assistant Secretary for Special Education and Rehabilitative Services to demonstrate why the Secretary should not make the determination described in paragraph (b)(1)(iii) or (b)(1)(iv) of this section.

(Authority: 20 U.S.C. 1416(d), 1442)

§ 303.704 Enforcement.

(a) *Needs assistance.* If the Secretary determines, for two consecutive years, that a State needs assistance under § 303.703(b)(1)(ii) in implementing the requirements of part C of the Act, the Secretary takes one or more of the following actions:

(1) Advises the State of available sources of technical assistance that may help the State address the areas in which the State needs assistance, which may include assistance from the Office of Special Education Programs, other offices of the Department of Education, other Federal agencies, technical assistance providers approved by the Secretary, and other federally funded nonprofit agencies, and requires the State to work with appropriate entities. This technical assistance may include—

(i) The provision of advice by experts to address the areas in which the State needs assistance, including explicit plans for addressing the areas of concern within a specified period of time;

(ii) Assistance in identifying and implementing professional development, early intervention service provision strategies, and methods of early intervention service provision that are based on scientifically based research;

(iii) Designating and using administrators, service coordinators, service providers, and other personnel from the EIS program to provide advice, technical assistance, and support; and

(iv) Devising additional approaches to providing technical assistance, such as collaborating with institutions of higher education, educational service agencies, national centers of technical assistance supported under part D of the Act, and private providers of scientifically based technical assistance.

(2) Identifies the State as a high-risk grantee and imposes special conditions on the State's grant under part C of the Act.

(b) *Needs intervention.* If the Secretary determines, for three or more consecutive years, that a State needs intervention under § 303.703(b)(1)(iii) in implementing the requirements of part C of the Act, the following apply:

(1) The Secretary may take any of the actions described in paragraph (a) of this section.

(2) The Secretary takes one or more of the following actions:

(i) Requires the State to prepare a corrective action plan or improvement plan if the Secretary determines that the State should be able to correct the problem within one year.

(ii) Requires the State to enter into a compliance agreement under section 457 of the General Education Provisions Act, as amended (GEPA), 20 U.S.C. 1234f, if the Secretary has reason to believe that the State cannot correct the problem within one year.

(iii) Seeks to recover funds under section 452 of GEPA, 20 U.S.C. 1234a.

(iv) Withholds, in whole or in part, any further payments to the State under part C of the Act.

(v) Refers the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(c) *Needs substantial intervention.* Notwithstanding paragraph (a) or (b) of this section, at any time that the Secretary determines that a State needs substantial intervention in implementing the requirements of part C of the Act or that there is a substantial failure to comply with any requirement under part C of the Act by the lead agency or an EIS program in the State, the Secretary takes one or more of the following actions:

(1) Recovers funds under section 452 of GEPA, 20 U.S.C. 1234a.

(2) Withholds, in whole or in part, any further payments to the State under part C of the Act.

(3) Refers the case to the Office of Inspector General of the Department of Education.

(4) Refers the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(d) *Report to Congress.* The Secretary reports to the Committee on Education and Labor of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate within 30 days of taking enforcement action pursuant to paragraph (a), (b), or (c) of this section, on the specific action taken and the reasons why enforcement action was taken.

(Authority: 20 U.S.C. 1416(e)(1)–(3), 1416(e)(5), 1442)

§ 303.705 Withholding funds.

(a) *Opportunity for hearing.* Prior to withholding any funds under part C of the Act, the Secretary provides reasonable notice and an opportunity for a hearing to the lead agency involved, pursuant to the procedures in §§ 303.231 through 303.236.

(b) *Suspension.* Pending the outcome of any hearing to withhold payments under paragraph (a) of this section, the Secretary may suspend payments to a recipient, suspend the authority of the recipient to obligate funds under part C of the Act, or both, after the recipient has been given reasonable notice and an opportunity to show cause why future payments or authority to obligate funds under part C of the Act should not be suspended.

(c) *Nature of withholding.* (1) *Limitation.* If the Secretary determines that it is appropriate to withhold further payments under section 616(e)(2) or (e)(3) of the Act, the Secretary may determine—

(i) That such withholding will be limited to programs or projects, or portions of programs or projects, that affected the Secretary's determination under § 303.703(b)(1); or

(ii) That the lead agency must not make further payments of funds under part C of the Act to specified State agencies, EIS programs or, if the lead agency does not provide part C funds to the EIS program, EIS providers that caused or were involved in the Secretary's determination under § 303.703(b)(1).

(2) *Withholding until rectified.* Until the Secretary is satisfied that the condition that caused the initial withholding has been substantially rectified—

(i) Payments to the State under part C of the Act must be withheld in whole or in part; and

(ii) Payments by the lead agency under part C of the Act must be limited to State agencies and EIS providers whose actions did not cause or were not involved in the Secretary's determination under § 303.703(b)(1).

(Authority: 20 U.S.C. 1416(e)(4), 1416(e)(6), 1442)

§ 303.706 Public attention.

Whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action pursuant to § 303.704, the State must, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to section 616(e) of the Act and § 303.704 of the regulations to the attention of the public within the State, including by posting the notice on the Web site of the lead agency and distributing the notice to the media and to EIS programs.

(Authority: 20 U.S.C. 1416(e)(7), 1442)

§ 303.707 Rule of construction.

Nothing in this subpart may be construed to restrict the Secretary from utilizing any authority under GEPA, 20 U.S.C. 1221 *et seq.,* and its regulations in 34 CFR parts 76, 77, 80, and 81, including the imposition of special conditions under 34 CFR 80.12, to monitor and enforce the requirements of the Act.

(Authority: 20 U.S.C. 1416(g), 1442)

§ 303.708 State enforcement.

Nothing in this subpart may be construed to restrict a State from utilizing any other authority available to it to monitor and enforce the requirements of the Act.

(Authority: 20 U.S.C. 1416(a)(1)(C), 1442)

Reports—Program Information

§ 303.720 Data requirements—general.

(a) The lead agency must annually report to the Secretary and to the public on the information required by section 618 of the Act at the times specified by the Secretary.

(b) The lead agency must submit the report to the Secretary in the manner prescribed by the Secretary.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418, 1435(a)(14), 1442)

§ 303.721 Annual report of children served—report requirement.

(a) For the purposes of the annual report required by section 618 of the Act and § 303.720, the lead agency must count and report the number of infants and toddlers receiving early intervention services on any date between October 1 and December 1 of each year. The report must include—

(1) The number and percentage of infants and toddlers with disabilities in the State, by race, gender, and ethnicity, who are receiving early intervention services (and include in this number any children reported to it by tribes, tribal organizations, and consortia under § 303.731(e)(1));

(2) The number and percentage of infants and toddlers with disabilities, by race, gender, and ethnicity, who, from birth through age two, stopped receiving early intervention services because of program completion or for other reasons; and

(3) The number and percentage of at-risk infants and toddlers (as defined in section 632(1) of the Act), by race and ethnicity, who are receiving early intervention services under part C of the Act.

(b) If a State adopts the option under section 635(c) of the Act and § 303.211 to make services under this part available to children ages three and older, the State must submit to the Secretary a report on the number and percentage of children with disabilities who are eligible for services under section 619 of the Act but whose parents choose for those children to continue to receive early intervention services.

(c) The number of due process complaints filed under section 615 of the Act, the number of hearings conducted and the number of mediations held, and the number of settlement agreements reached through such mediations.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418(a)(1)(B), (C), (F), (G), and (H), 1435(a)(14), 1435(c)(3), 1442)

§ 303.722 Data reporting.

(a) *Protection of identifiable data.* The data described in section 618(a) of the Act and in § 303.721 must be publicly reported by each State in a manner that does not result in disclosure of data identifiable to individual children.

(b) *Sampling.* The Secretary may permit States and outlying areas to obtain data in section 618(a) of the Act through sampling.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418(b), 1435(a)(14), 1442)

§ 303.723 Annual report of children served—certification.

The lead agency must include in its report a certification signed by an authorized official of the agency that the information provided under § 303.721 is an accurate and unduplicated count of infants and toddlers with disabilities receiving early intervention services.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418(a)(3), 1435(a)(14), 1442)

§ 303.724 Annual report of children served—other responsibilities of the lead agency.

In addition to meeting the requirements of §§ 303.721 through 303.723, the lead agency must conduct its own child count or use EIS providers to complete its child count. If the lead agency uses EIS providers to complete its child count, then the lead agency must—

(a) Establish procedures to be used by EIS providers in counting the number of children with disabilities receiving early intervention services;

(b) Establish dates by which those EIS providers must report to the lead agency to ensure that the State complies with § 303.721(a);

(c) Obtain certification from each EIS provider that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each EIS provider and prepare the report required under §§ 303.721 through 303.723; and

(e) Ensure that documentation is maintained to enable the State and the Secretary to audit the accuracy of the count.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418(a), 1435(a)(14), 1442)

Allocation of Funds

§ 303.730 Formula for State allocations.

(a) *Reservation of funds for outlying areas.* From the sums appropriated to carry out part C of the Act for any fiscal year, the Secretary may reserve not more than one percent for payments to American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the United States Virgin Islands in accordance with their respective needs for assistance under part C of the Act.

(b) *Consolidation of funds.* The provisions of the Omnibus Territories Act of 1977, Pub. L. 95–134, permitting the consolidation of grants to the outlying areas, do not apply to the funds provided under part C of the Act.

(Authority: 20 U.S.C. 1443(a))

§ 303.731 Payments to Indians.

(a) *General.* (1) The Secretary makes payments to the Secretary of the Interior under part C of the Act, which the Secretary of the Interior must distribute to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450b), or consortia of those entities, for the coordination of assistance in the provision of early intervention services by States to infants and toddlers with disabilities and their families on reservations served by elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior.

(2) A tribe, tribal organization, or consortium of those entities is eligible to receive a payment under this section if the tribe, tribal organization, or consortium of those entities is on a reservation that is served by an elementary or secondary school operated or funded by the Secretary of the Interior.

(3) The amount of the payment to the Secretary of the Interior under this section for any fiscal year is 1.25 percent of the aggregate amount available to all States under part C of the Act.

(b) *Allocation.* For each fiscal year, the Secretary of the Interior must distribute the entire payment received under paragraph (a)(1) of this section by providing to each tribe, tribal organization, or consortium an amount based on the number of infants and toddlers residing on the reservation, as determined annually, divided by the total number of those children served by all tribes, tribal organizations, or consortia.

(c) *Information.* To receive a payment under this section, the tribe, tribal organization, or consortium must submit the appropriate information to the Secretary of the Interior to determine the amounts to be distributed under paragraph (b) of this section.

(d) *Use of funds.* (1) The funds received by a tribe, tribal organization, or consortium must be used to assist States in child find, screening, and other procedures for the early identification of Indian children under three years of age and for parent training. The funds also may be used to provide early intervention services in accordance with part C of the Act. These activities may be carried out directly or through contracts or cooperative agreements with the Bureau of Indian Education, local educational agencies, and other public or private nonprofit organizations. The tribe, tribal organization, or consortium is encouraged to involve Indian parents in the development and implementation of these activities.

(2) The tribe, tribal organization, or consortium must, as appropriate, make referrals to local, State, or Federal entities for the provision of services or further diagnosis.

(e) *Reports.* (1) To be eligible to receive a payment under paragraph (b) of this section, a tribe, tribal organization, or consortium must make a biennial report to the Secretary of the Interior of activities undertaken under this section, including the number of contracts and cooperative agreements entered into, the number of infants and toddlers contacted and receiving services for each year, and the estimated number of infants and toddlers needing services during the two years following the year in which the report is made. This report must include an assurance that the tribe, tribal organization, or consortium has provided the lead agency in the State child find information (including the names and dates of birth and parent contact information) for infants or toddlers with disabilities who are included in the report in order to meet the child find coordination and child count requirements in sections 618 and 643 of the Act.

(2) The Secretary of the Interior must provide a summary of this information (including confirmation that each tribe, tribal organization, or consortium has provided to the Secretary of the Interior the assurance required under paragraph (e)(1) of this section) on a biennial basis to the Secretary along with such other information as required of the Secretary of the Interior under part C of the Act. The Secretary may require additional information from the Secretary of the Interior.

(3) Within 90 days after the end of each fiscal year the Secretary of the Interior must provide the Secretary with a report on the payments distributed under this section. The report must include—

(i) The name of each tribe, tribal organization, or combination of those entities that received a payment for the fiscal year;

(ii) The amount of each payment; and

(iii) The date of each payment.

(f) *Prohibited uses of funds.* None of the funds under this section may be used by the Secretary of the Interior for administrative purposes, including child count and the provision of technical assistance.

(Authority: 20 U.S.C. 1443(b))

§ 303.732 State allotments.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, for each fiscal year, from the aggregate amount of funds available under part C of the Act for distribution to the States, the Secretary allots to each State an amount that bears the same ratio to the aggregate amount as the number of infants and toddlers in the State bears to the number of infants and toddlers in all States.

(b) *Minimum allocations.* Except as provided in paragraph (c) of this section, no State may receive less than

0.5 percent of the aggregate amount available under this section or $500,000, whichever is greater.

(c) *Ratable reduction.* (1) If the sums made available under part C of the Act for any fiscal year are insufficient to pay the full amount that all States are eligible to receive under this section for that year, the Secretary ratably reduces the allotments to those States for such year.

(2) If additional funds become available for making payments under this section, allotments that were reduced under paragraph (c)(1) of this section will be increased on the same basis the allotments were reduced.

(d) *Definitions.* For the purpose of allotting funds to the States under this section—

(1) *Aggregate amount* means the amount available for distribution to the States after the Secretary determines the amount of payments to be made to the Secretary of the Interior under § 303.731, to the outlying areas under § 303.730, and any amount to be reserved for State incentive grants under § 303.734;

(2) *Infants and toddlers* means children from birth through age two in the general population, based on the most recent satisfactory data as determined by the Secretary; and

(3) *State* means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 1443(c))

§ 303.733 Reallotment of funds.

If a State (as defined in § 303.35) elects not to receive its allotment, the Secretary reallots those funds among the remaining States (as defined in § 303.732(d)(3)), in accordance with § 303.732(c)(2).

(Authority: 20 U.S.C. 1443(d))

§ 303.734 Reservation for State incentive grants.

(a) *General.* For any fiscal year for which the amount appropriated pursuant to the authorization of appropriations under section 644 of the Act exceeds $460,000,000, the Secretary reserves 15 percent of the appropriated amount exceeding $460,000,000 to provide grants to States that are carrying out the policy described in section 635(c) of the Act and in § 303.211 (including a State that makes part C services available under § 303.211(a)(2)), in order to facilitate the implementation of that policy.

(b) *Amount of grant.* (1) *General.* Notwithstanding section 643(c)(2) and (c)(3) of the Act, the Secretary provides a grant to each State under this section in an amount that bears the same ratio to the amount reserved under paragraph (a) of this section as the number of infants and toddlers in the State bears to the number of infants and toddlers in all States receiving grants under paragraph (a) of this section.

(2) *Maximum amount.* No State may receive a grant under paragraph (a) of this section for any fiscal year in an amount that is greater than 20 percent of the amount reserved under that paragraph for the fiscal year.

(c) *Carryover of amounts pursuant to section 643(e)(3) of the Act.* (1) *First succeeding fiscal year.* Pursuant to section 421(b) of GEPA, 20 U.S.C. 1221 *et seq.,* amounts under a grant provided under paragraph (a) of this section that are not obligated and expended prior to the beginning of the first fiscal year succeeding the fiscal year for which those amounts were appropriated must remain available for obligation and expenditure during the first succeeding fiscal year.

(2) *Second succeeding fiscal year.* Amounts under a grant provided under paragraph (a) of this section that are not obligated and expended prior to the beginning of the second fiscal year succeeding the fiscal year for which those amounts were appropriated must be returned to the Secretary and used to make grants to States under section 633 of the Act (from their allotments identified in §§ 303.731 through 303.733) during the second succeeding fiscal year.

(Authority: 20 U.S.C. 1443)

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