



# Federal Register

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**Wednesday,  
May 9, 2007**

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**Part II**

## **Department of Education**

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**34 CFR Part 303**

**Early Intervention Program for Infants  
and Toddlers With Disabilities; Proposed  
Rule**

**DEPARTMENT OF EDUCATION****34 CFR Part 303****[Docket ID ED-2007-OSERS-131]****RIN 1820-AB59****Early Intervention Program for Infants and Toddlers With Disabilities**

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Secretary proposes to amend the regulations governing the Early Intervention Program for Infants and Toddlers with Disabilities. The proposed regulations would implement changes made to the Individuals with Disabilities Education Act by the Individuals with Disabilities Education Improvement Act of 2004.

**DATES:** We must receive your comments on or before July 23, 2007.

We will hold public meetings about this NPRM. The dates, times, and places of the meetings will be published in a separate notice in the **Federal Register**.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>, select "Department of Education" from the agency drop-down menu, then click "Submit." In the Docket ID column, select ED-2007-OSERS-131 to add or view public comments and to view supporting and related materials available electronically. Information on using [Regulations.gov](http://www.regulations.gov), including instructions for submitting comments, accessing documents, and viewing the docket after the close of the comment period, is available through the site's "User Tips" link.

- *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to Alexa Posny, U.S. Department of Education, 400 Maryland Avenue, SW., room 4109, Potomac Center Plaza, Washington, DC 20202-2600.

**Privacy Note:** The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions

available for public viewing on the Federal eRulemaking Portal at <http://www.regulations.gov>. All submissions will be posted to the Federal eRulemaking Portal without change, including personal identifiers and contact information.

**FOR FURTHER INFORMATION CONTACT:**

Alexa Posny, U.S. Department of Education, 400 Maryland Avenue, SW., room 4109, Potomac Center Plaza, Washington, DC 20202-2600.

*Telephone:* (202) 245-7459, extension 3.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (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:****Invitation to Comment**

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should provide to reduce the potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing [Regulations.gov](http://www.regulations.gov). You may also inspect the comments, in person, in room 4165, Potomac Center Plaza, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking

record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Public Meetings**

We will hold public meetings about this NPRM. Each meeting will take place from 4 p.m. to 7:30 p.m. We will be providing more specific information on meeting dates and locations in a separate notice published in the **Federal Register**.

**Assistance to Individuals With Disabilities at the Public Meetings**

The meeting sites will be accessible to individuals with disabilities and sign language interpreters will be available. If you need an auxiliary aid or service other than a sign language interpreter to participate in the meeting (e.g., interpreting service such as oral, cued speech, or tactile interpreter; assisted listening device; or materials in alternate format), notify the contact person listed under **FOR FURTHER INFORMATION CONTACT** at least two weeks before the scheduled meeting date. Although we will attempt to meet a request we receive after this date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

**Background**

On December 3, 2004, the Individuals with Disabilities Education Improvement Act of 2004 was enacted into law as Public Law 108-446. This statute, as passed by Congress and signed by the President, reauthorizes and makes significant changes to the Individuals with Disabilities Education Act.

Part C of the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Act or IDEA), provides Federal funds to States to make available early intervention services for infants and toddlers with disabilities (from birth to age three) and their families. In 2004, the Act was revised to—(1) Emphasize child find for underserved populations of infants and toddlers; (2) increase accountability for the success of early intervention services; (3) ensure a seamless transition for children and families when they exit from the Part C program to other appropriate programs; (4) provide States with flexibility to provide early intervention services to children with disabilities who are age three and older; (5) provide States with alternatives to dispute resolution under

Part C's procedural safeguards; (6) clarify certain definitions including specific early intervention services, qualified personnel, and natural environments; and (7) streamline Part C grant application requirements.

Changes to the current Part C regulations (34 CFR part 303) are necessary in order for the Department to appropriately and effectively address the provisions of the law and to assist State lead agencies and early intervention service programs and providers in implementing their responsibilities under the law.

On December 29, 2004, the Secretary published a notice in the **Federal Register** requesting advice and recommendations from the public on regulatory issues under the Act, and announcing a series of seven public meetings during January and February of 2005 to seek further input and suggestions for developing regulations based on the new statute.

Over 6000 public comments were received in response to the **Federal Register** notice and the seven public meetings, including letters from parents, public agency personnel, early intervention personnel, and parent-advocate and professional organizations. The comments addressed the major provisions of the law. These comments were reviewed and considered in developing this NPRM. The Secretary appreciates the interest and thoughtful attention of the commenters responding to the December 29, 2004 notice and participating in the seven public meetings.

### General Proposed Regulatory Plan and Structure

In developing this NPRM, we have elected to prepare one comprehensive document that incorporates the majority of the requirements from the law along with the applicable regulations, rather than publishing a regulation that does not include statutory provisions. The rationale for doing this is to create a single reference document for parents, State lead agencies, early intervention service programs and providers, State Interagency Coordinating Councils, and others to use, so there is no need to shift between one document for regulations and a separate document for the statute. Although this approach will result in longer regulations, it is our impression that there is support for this practice.

We have reorganized the regulations by following the general order, substance, and structure of provisions in the statute, rather than using the arrangement of the current regulations. We believe this change will be helpful to parents, State lead agencies, early

intervention service providers and the public both in reading the regulations, and in finding the direct link between a given statutory requirement and the regulation related to that requirement.

The proposed regulations contain Part C statutory provisions (even where those provisions are not in the current regulations but were in the statute prior to 2004). For example, proposed § 303.104 (Acquisition of equipment and construction or alteration of facilities) contains new regulatory language that incorporates the longstanding statutory language in section 605 of the Act, which was unchanged by the 2004 amendments to the Act. Because these changes in the proposed regulations do not involve new substantive requirements, but rather incorporate longstanding statutory requirements, they are not identified in this preamble as substantive changes. The changes in these proposed regulations are identified in the appropriate locations in the preamble.

In general, the requirements related to a given statutory section will be included in one location and in the same general order as in the statute, rather than being spread throughout several subparts, as the statutory sections are in the current regulations. One exception to this approach is that the regulations implementing section 638 of the Act (Uses of funds), are combined with the regulations implementing section 632 (System of payments) and section 640 of the Act (Payor of last resort) in proposed subpart F, because both relate to financial and interagency matters.

As restructured in this NPRM, these proposed regulations are divided into eight major subparts, each of which is directly linked to, and comports with, the general order of provisions in a specific section of the Act. For example, we have revised subpart H in the proposed regulations to include all provisions regarding the allocation of Part C funds (from section 643 of the Act), rather than having those provisions dispersed among several different subparts, as in the current Part C regulations.

In addition, these proposed regulations do not contain notes following the regulatory text as in the current regulations. Where necessary and relevant, language from the notes in the current regulations has been incorporated into the proposed regulations.

Finally, these proposed regulations incorporate, where practicable, applicable Part B regulations in order to align the two systems, minimize

administrative costs (particularly for lead agencies that are also State educational agencies (SEAs) responsible for administering both Parts B and C of the Act in a State), and promote a seamless system of services for infants, toddlers, children, and youth with disabilities birth through 21 years of age.

### Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

#### Subpart A—General

Proposed subpart A would incorporate the provisions in sections 601, 602, 631, and 632 of the Act regarding the purpose of and definitions under Part C of the Act.

#### Purpose and Applicable Regulations

Proposed § 303.1(a) through (d) (Purpose) would be substantively unchanged and would incorporate sections 601(d)(2) and 631(a)(5) and (b)(1) through (3) of the Act regarding the purposes of Part C of the Act. Proposed § 303.1(e), regarding expanding opportunities for children under three who would be at risk of developmental delay, would be added to incorporate the language from section 631(b)(4) of the Act.

Proposed § 303.2, regarding eligible recipients under Part C of the Act would remain substantively unchanged from current § 303.2, and would be consistent with the definition of *State* in section 602(31) of the Act and in proposed § 303.34.

Current § 303.3, regarding use of funds for activities supported under Part C of the Act, would be incorporated into proposed § 303.501 regarding permissive use of funds by the lead agency in subpart F of these proposed regulations. Current § 303.4 regarding the limitation on eligible children would be removed because the definitions of *child* and *infant or toddler with a disability* in proposed §§ 303.6 and 303.21, respectively, make clear that part 303 applies to infants and toddlers with disabilities who are under the age of three and therefore does not apply to children with disabilities ages three and older who may be entitled to receive a free appropriate public education under Part B of the Act.

Proposed § 303.3, regarding applicable regulations, would incorporate the provisions from current § 303.5. Proposed § 303.3(a)(1) would incorporate the language from current

§ 303.5(a)(2). Proposed § 303.3(a)(2) would include the references from the Education Department General Administrative Regulations (EDGAR) in current § 303.5(a)(1). The references to the Part B regulations in current § 303.3(a)(3) would be removed because all applicable provisions from the Part B regulations would be included in these proposed regulations. For example, the provisions in the Part B regulations regarding confidentiality and the procedures for the Secretary's determination of State eligibility to receive a grant, which are cross-referenced in current § 303.5(a)(3), would appear, respectively, in proposed §§ 303.402 through 303.417 and proposed §§ 303.231 through 303.236.

Proposed § 303.3(b) would incorporate the language from current § 303.5(b)(1), regarding the meaning of *State educational agency*, to indicate that any reference to the term *State educational agency* means the *lead agency* under this part.

Current § 303.5(b)(2) through (b)(5) regarding the meaning of terms and cross-references from the Part B regulations as applied to the Part C regulations would be removed as unnecessary because we would incorporate applicable definitions and provisions from the Part B regulations in these proposed regulations.

#### Definitions Used in This Part

Proposed § 303.4 (*Act*) would incorporate the statutory definition of *Act* from section 601(a) of the Act and current § 303.6, and would further clarify that the Act has been amended.

Proposed § 303.5 (*At-risk infant or toddler*) would incorporate the statutory definition from section 632(1) of the Act. This section would also include the examples of biological and environmental at-risk factors listed in Note 2 following current § 303.16 as follows: Low birth weight, respiratory distress as a newborn, lack of oxygen, brain hemorrhage, infection, nutritional deprivation, and history of abuse or neglect. With this change, Note 2 following current § 303.16 would be removed from the regulations. Proposed § 303.5 would also include as an example of at-risk infants and toddlers whom the State may elect to serve those infants and toddlers directly affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure to reflect the new provisions described in section 637(a)(6)(B) of the Act.

Proposed § 303.6 (*Child*) would modify the definition of *child* in current § 303.7 to mean an individual under age six and would be consistent with the

State option outlined in proposed § 303.211 to serve children ages three and older.

Proposed § 303.7 (*Consent*) would incorporate the provisions of current § 303.401(a), except that proposed § 303.7(c)(2) would add that if the parent revokes consent, that revocation is not retroactive (i.e., it does not apply to an action that has occurred before the consent was revoked), consistent with the Part B regulations in 34 CFR 300.9 (71 FR 46757).

Proposed § 303.8 (*Council*) would remain substantively unchanged from current § 303.8 and would reflect the statutory definition in section 632(2) of the Act.

Proposed § 303.9 (*Day*) would remain substantively unchanged from current § 303.9.

Proposed § 303.10 (*Developmental delay*) would remain substantively unchanged from current § 303.10 and would cross-reference proposed § 303.111 regarding the State definition of developmental delay and proposed § 303.203(c) regarding the requirement that the State must include its rigorous definition of developmental delay in its application to the Department.

Proposed § 303.11 (*Early intervention service program* or *EIS program*) would replace current § 303.11 and would clarify that the EIS program is an entity designated by the lead agency for reporting under sections 616(b)(2)(C) and 642 of the Act and proposed §§ 303.700 through 303.702.

Proposed § 303.12(a) (*Early intervention service provider* or *EIS provider*) would clarify that an EIS provider can be an entity (whether public, private, or nonprofit) or an individual that provides early intervention services under Part C of the Act in the State whether or not the entity or individual receives Federal funds under Part C of the Act and may include the lead agency and a public agency under Part C of the Act, where appropriate. For example, an EIS provider may include the lead agency, a public agency, or individuals if these entities or individuals are responsible for conducting evaluations and assessments, providing service coordination, or other Part C services.

Proposed § 303.12(b) would be similar to current § 303.12(c) in that it would continue to clarify that the EIS provider is responsible for: participating in the multidisciplinary team's assessment of an infant or toddler to develop integrated goals and outcomes for the individualized family service plan (IFSP); and providing early intervention services in accordance with the infant's or toddler's IFSP because States must

ensure EIS providers are providing direct services to eligible children in addition to their other roles. However, proposed § 303.12(b) would further identify that the EIS provider would be responsible for consulting with and training parents and others regarding the provision of the early intervention services described in the infant's or toddler's IFSP.

Proposed § 303.13, regarding the definition of *early intervention services*, would replace current § 303.12(a) and (b) and would incorporate the provisions of the definition of this term in section 632(4) of the Act. In addition, proposed § 303.13(a)(2) would retain the language in current § 303.12(a)(2) to clarify that the early intervention services are selected in collaboration with parents. Proposed § 303.13(a)(4) would clarify that early intervention services 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 to assist appropriately in the infant's or toddler's development, as identified by the IFSP team. Proposed § 303.13(a)(8) would clarify that early intervention services, to the maximum extent appropriate, are provided in natural environments, as defined in proposed § 303.26 and consistent with proposed § 303.126.

Proposed § 303.13(b) regarding types of early intervention services would substantively incorporate the provisions of current § 303.12(d) but would not include the references from current § 303.12(d)(6) and (d)(7) to nursing services and nutrition services, which are not specifically listed in section 632(4)(E) of the Act. Only those types of services identified in section 602(4)(E) of the Act would be retained. The list of services identified in this proposed section is not intended to comprise an exhaustive list of the types of services that may be provided to an infant or toddler with a disability as an early intervention service. Nursing services or nutrition services could be deemed early intervention services if they are provided by qualified personnel and otherwise meet the definition of early intervention services.

Proposed § 303.13(b)(1)(i) (*Assistive technology device*) and (b)(1)(ii) (*Assistive technology service*) would reflect the statutory definition of these terms in section 602(1) and 602(2) of the Act. The definition of *assistive technology device* as well as the definition of *health services* in proposed § 303.16(c)(1)(iii) (*Health services*) would exclude, as a covered service under Part C of the Act, a medical device that is surgically implanted,

including cochlear implants, or the optimization or maintenance or replacement of such a device, consistent with section 602(1)(B) of the Act and 34 CFR 300.34(b) of the Part B regulations (71 FR 46760).

Optimization or “mapping” of a cochlear implant means the adjustment or fine tuning of the electrical stimulation levels provided by the cochlear implant. These adjustments are required as an infant or toddler learns to discriminate signals to a finer degree. Optimization services are generally provided at specialized clinics by specially trained professionals. These mapping or remapping services are not the responsibility of the lead agency under Part C of the Act.

Although mapping is not an early intervention service, the need for it and the use of a cochlear implant by an infant or toddler with a disability may indicate a need for services, some of which would be considered early intervention services such as speech therapy, assistive listening devices and auditory training. In addition, for a child who has been receiving Part C services, the implantation of a device may require a reevaluation of the child’s level of functioning and review and, if appropriate, revision of the child’s IFSP.

Nothing in proposed § 303.13(b)(1)(i) (*Assistive technology device*), proposed § 303.13(b)(1)(ii) (*Assistive technology service*), and proposed § 303.16(c)(1)(iii) (*Health services*) would limit the right of an infant or toddler with a disability with a surgically implanted device (such as a cochlear implant) and the child’s family to receive the early intervention services that are determined by the IFSP team to be necessary to meet the unique developmental needs of the infant or toddler. Thus, although a cochlear implant is expressly excluded from being an assistive technology device under Part C of the Act, funds under Part C of the Act may under certain circumstances be used to pay for a hearing aid. A hearing aid in general is not covered because it is considered a personal device used for daily purposes. However, if the hearing aid is identified as a needed assistive technology device by the infant’s or toddler’s IFSP team in order to meet the specific developmental outcomes of the infant or toddler with a disability, funds under Part C of the Act may be used to provide this early intervention service.

Proposed § 303.13(b)(2) (*Audiology services*) would be substantively unchanged from current § 303.12(d)(2), except that the term in current § 303.12(d)(2) would be changed from *audiology* to *audiology services* because

the section outlines specific audiology services provided.

Proposed § 303.13(b)(3) (*Family training, counseling, and home visits*) would be substantively unchanged from current § 303.12(d)(3).

Proposed § 303.13(b)(4) (*Health services*) would reference the definition of *health services* in proposed § 303.16, consistent with the reference to the definition of health services in current § 303.12(d)(4).

Proposed § 303.13(b)(5) (*Medical services*) would be substantively unchanged from current § 303.12(d)(5) (Medical services only for diagnostic or evaluation). Proposed § 303.13(b)(5) would clarify that the term *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.

Proposed § 303.13(b)(6) (*Occupational therapy*) would be substantively unchanged from current § 303.12(d)(8).

Proposed § 303.13(b)(7) (*Physical therapy*) would be substantively unchanged from current § 303.12(d)(9).

Proposed § 303.13(b)(8) (*Psychological services*) would be substantively unchanged from current § 303.12(d)(10).

Proposed § 303.13(b)(9) (*Service coordination services*) would cross-reference the definition of service coordination services in proposed § 303.33, which substantively includes the language in current § 303.12(d)(11) regarding the meaning of service coordination services.

Proposed § 303.13(b)(10) (*Social work services*) would be substantively unchanged from current § 303.12(d)(12).

Proposed § 303.13(b)(11) (*Special instruction*) would be substantively unchanged from current § 303.12(d)(13).

Proposed § 303.13(b)(12) (*Speech-language pathology services*) would reflect the definition of speech-language pathology in current § 303.12(d)(14) and the language from section 632(4)(E)(iii) of the Act, which includes sign language and cued language services, such as speech-language pathology services, as early intervention services. The definition also would clarify that interpreting or transliteration services include oral transliteration (such as amplification) services. The definition would also add that auditory/oral language services would be used with respect to infants and toddlers with disabilities who are hearing impaired, which would include services to the infant or toddler with a disability and the family to teach auditory/oral language.

Proposed § 303.13(b)(13) (*Transportation and related costs*) would be substantively unchanged from current § 303.12(d)(15) except that we would remove taxi from among the examples because transportation via taxi is less common than transportation via the other examples such as common carriers. Proposed § 303.13(b)(14) (*Vision services*) would be substantively unchanged from current § 303.12(d)(16).

Proposed § 303.13(c) (*Qualified personnel*) would be similar to current § 303.12(e) except for the following changes. As previously described in the discussion related to proposed § 303.13(b) regarding the types of early intervention services, registered dietitians would be included in the list of types of qualified personnel to reflect the provisions of section 632(4)(F)(viii) of the Act. The reference to nutritionists in current § 303.12(e)(4) would not be included in proposed § 303.13(c) consistent with section 632(4) of the Act.

Proposed § 303.13(c)(11) also would provide that teachers of infants or toddlers with hearing impairments (including deafness) and teachers of the visually impaired (including blindness) are special educators. As stated in note 284 of the U.S. House of Representatives Conference Report No. 108–779 (Conf. Rpt.), the “Conferees commend the Office of Special Education and Rehabilitative Services for developing updated early intervention materials that set out the full range of options for families with deaf and hard of hearing children who now have the potential to develop age appropriate language in whatever modality their parents choose.” Note 285 in the Conf. Rpt. further states that “[t]he conferees intend that the term ‘special educators’ include ‘teachers of the deaf.’” We propose to use the term “teachers of the hearing impaired” rather than the term “teachers of the deaf” because the former includes teachers of the deaf, and provides States with broader flexibility to provide teachers to meet the language and communication needs of infants or toddlers who are hearing impaired, including infants and toddlers who are deaf. It is the intent of the Department and these proposed regulations to continue to ensure that such qualified personnel are available for infants and toddlers with hearing impairments including deafness.

The Department requests comment on whether it is necessary to classify teachers of the visually impaired as special educators as we have proposed in proposed § 303.13(c)(11). We believe that such classification in the regulations is necessary to ensure that

qualified personnel are available for infants and toddlers with visual impairments, including blindness. Additionally, to conform to section 632(4)(F) of the Act, proposed § 303.13(c)(13) would include vision specialists, ophthalmologists, and optometrists to meet the service and sensory needs of infants and toddlers who are visually impaired, including infants and toddlers who are blind.

The note following current § 303.12 would be removed because the substance of the note would be reflected in proposed § 303.13(d). Proposed § 303.13(d) would clarify that the lists of early intervention services and personnel in proposed § 303.13(b) and (c) are not exhaustive. The list does not preclude the provision of other early intervention services for an infant or toddler with a disability and the child's family to enhance the developmental needs of the child. Such Part C services can include, for example, respite care if the IFSP team identifies it as a service necessary to enable the parent of an infant or toddler with a disability to participate in or receive other early intervention services in order to meet the developmental outcomes identified on the child's IFSP. In addition, persons other than those identified in proposed § 303.13(c) could provide early intervention services provided that the services otherwise met the requirements of this part.

Proposed § 303.14 (*Elementary school*) would incorporate the definition of this term from section 602(6) of the Act. We propose to add this definition here because Part C of the Act now includes references to elementary schools in the discussion of a State's option to make early intervention services under Part C of the Act available to children ages three and older under sections 632 and 635(c) of the Act.

Proposed § 303.15 (*Free appropriate public education* or (*FAPE*)) would be added to incorporate the definition of *FAPE* from section 602(9) of the Act, given the State's option to make early intervention services available to children in lieu of receiving *FAPE* under sections 632(5)(B)(ii) and 635(c) of the Act.

Proposed § 303.16 (*Health services*) would be substantively unchanged from current § 303.13 except that, consistent with the language in section 602(1) of the Act, the term would not include optimization (e.g., mapping), maintenance or replacement of surgically implanted medical devices, including cochlear implants. We have provided further clarification on the issue of cochlear implants elsewhere in

this preamble in the discussion of the definition of *assistive technology device*.

Additionally, proposed § 303.16(c)(1)(iii) would clarify that an infant or toddler with a surgically implanted device, such as a cochlear implant, is entitled to receive early intervention services that are identified on the child's IFSP as being needed to meet the child's developmental needs, and that nothing under Part C of the Act prevents the EIS provider from routinely checking either a hearing aid or external components of a surgically implanted device of an infant or toddler with a disability to determine whether they are functioning properly. This clarification in proposed § 303.16(c)(1)(iii) would be similar to the provision in 34 CFR 300.34(b)(2) of the Part B regulations (71 FR 46760).

Proposed § 303.16(c)(2), regarding devices necessary to control or treat a medical condition would be clarified by adding the following examples of devices that are necessary to control or treat a medical condition: heart monitors, respirators and oxygen, and gastrointestinal feeding tubes and pumps.

The note following current § 303.13 would be removed as unnecessary. The statement in the note regarding the distinction between health services required under Part C of the Act and services that are not required under Part C of the Act would be reflected in proposed § 303.16. The discussion regarding medical and other services the child needs or is receiving through other sources that are neither required nor funded under Part C of the Act would be included in the child's IFSP and addressed in proposed § 303.344(e).

Proposed § 303.17 (*Homeless children*) would incorporate the definition of homeless children from section 602(11) of the Act and would clarify that, for purposes of Part C of the Act, references to homeless children include only homeless children under the age of three.

Proposed § 303.18 (*Include; including*) would remain substantively unchanged from current § 303.15.

Proposed § 303.19(a) and (b), which provides the definitions of *Indian* and *Indian tribe*, respectively, would incorporate the definitions of these terms in section 602(12) and 602(13) of the Act. In addition, proposed § 303.19(c) would clarify that the Bureau of Indian Affairs (BIA) in the U.S. Department of the Interior, which is only authorized to provide funding to Federally Recognized tribes, is not required to provide funding to a State Indian tribe for which the BIA is not responsible.

Section 602(13) of the Act defines *Indian tribe* to include "any Federal or State Indian tribe" and does not exclude State Indian tribes that are not Federally Recognized tribes. The list of Indian entities recognized as eligible to receive services from the United States is published in the **Federal Register**, pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a-1. The Federal government does not maintain a list of other State Indian tribes. Under section 634(1) of the Act, the lead agency in the State is responsible for ensuring that 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.

Proposed § 303.20 (*Individualized family service plan* or *IFSP*) would incorporate the language from current § 303.340(b) and would clarify, consistent with the Act, that the IFSP must be implemented as soon as possible once parental consent to the early intervention services on the IFSP is obtained consistent with proposed § 303.420. The definition of *IFSP* also would provide that an IFSP is based on the evaluation and assessment described in proposed § 303.320, that it would include the content in proposed § 303.344, and that it would be developed under the IFSP procedures in proposed §§ 303.342, 303.343, and 303.345.

Proposed § 303.21(a) and (b) (*Infant or toddler with a disability*) would remain substantively unchanged from current § 303.16 and would reflect the statutory definition of the term in section 632(5) of the Act. In addition, the following examples of diagnosed conditions, listed in Note 1 following current § 303.16, would be included in proposed § 303.21(a)(2)(ii) as follows: chromosomal abnormalities, genetic or congenital disorders, severe sensory impairments, inborn errors of metabolism, disorders reflecting disturbance of the development of the nervous system, and disorders secondary to exposure to toxic substances, including fetal alcohol syndrome. With this change, Note 1 following current § 303.16 would be removed from the regulations. Note 2 following current § 303.16 would also be removed as the examples of at-risk infants or toddlers with disabilities would be incorporated into proposed § 303.5, the definition of *at-risk infant or toddler*.

Proposed § 303.21(b) would be substantively the same as current

§ 303.16(b), and would cross-reference the definition of an *at-risk infant or toddler* in proposed § 303.5.

Proposed § 303.21(c) would incorporate the language from section 632(5)(B) of the Act that an infant or toddler with a disability may include, at the State's discretion, children with disabilities who are ages three and older who are eligible for services under section 619 of the Act and who previously received Part C services.

Proposed § 303.22 (*Lead agency*) would be added to make clear that the lead agency is the State agency designated by the Governor to administer Part C of the Act in the State and would incorporate language from section 635(a)(10) of the Act.

Proposed § 303.23 (*Local educational agency or LEA*) would be added to incorporate the definitions of *LEA* and *educational service agency* under sections 602(19) and 602(5) of the Act, respectively. We would include these definitions because these terms are relevant to the State option to make early intervention services available to children ages three and older under sections 632 and 635(c) of the Act. In addition we would incorporate the applicable 1997 definition of the *intermediate educational unit (IEU)* in order to create a freestanding document and assist those lead agencies that are not SEAs.

Proposed § 303.24 (*Multidisciplinary*) would modify the definition in current § 303.17 to clarify that the term *multidisciplinary* is used with respect to an evaluation and assessment of a child, an IFSP team, or IFSP development, and means 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.

Proposed § 303.25(a)(1) (*Native language*) would incorporate the definition of native language from section 602(20) of the Act and current § 303.401(b). Proposed § 303.25(a)(2) would provide that in all direct contact with the child, the native language is that normally used by the child in the home or the learning environment. This addition would be consistent with the definition of this term in 34 CFR 300.29 of the Part B regulations (71 FR 46759–46760) and is appropriate here because it would clarify the language an EIS provider must use when providing services to the child. Proposed § 303.25(b) would reflect the requirements in current § 303.403(c)(3) and would clarify that, when used in connection with an individual with deafness or blindness or with no written language, “native language” refers to the

mode of communication that is normally used by that individual, such as sign language, Braille, or oral communication.

Proposed § 303.26 (*Natural environments*) would remain substantively unchanged from current § 303.18, and would add that the natural environment may include the home, and must be consistent with proposed § 303.126.

Proposed § 303.27 (*Parent*) would modify the regulatory definition of that term in current § 303.19 to reflect the revised statutory definition of *parent* in section 602(23) of the Act, and to be consistent with the definition of *parent* in 34 CFR 300.30 of the Part B regulations (71 FR 46760). Proposed § 303.27(a)(2) would recognize that State law may prohibit a foster parent from being considered a parent, but also would recognize that similar restrictions may exist in State regulations or in contractual agreements between a State or local entity and the foster parent, and should be accorded similar deference.

Proposed § 303.27(b)(1) would provide that the biological or adoptive parent would be presumed to be the parent for purposes of the regulations. If the biological or adoptive parent were attempting to act as the parent under proposed § 303.27 and more than one person is qualified to act as a parent under Part C of the Act, the biological or adoptive parent would be presumed to be the parent unless that person does not have legal authority to make decisions for the infant or toddler regarding early intervention services, or there is a judicial order or decree specifying some other person to act as the parent under Part C of the Act. Proposed § 303.27(b)(2) would provide that if a judicial order or decree specifies a person or persons to act as the parent, that person would be the parent under Part C of the Act. Proposed § 303.27(b)(2), however, would exclude an agency involved in providing early intervention services or care of the infant or toddler from serving as a parent, consistent with the statutory prohibition that applies to surrogate parents in section 639(a)(5) of the Act. The provisions in proposed § 303.27(b) are intended to assist EIS providers and public agencies in identifying the appropriate person to serve as the parent under Part C of the Act, especially in those difficult situations in which more than one caretaker is available to provide consent for evaluation or the provision of early intervention services and to make other decisions under Part C of the Act.

Proposed § 303.28 (*Parent training and information center*) would provide

that a *parent training and information center* means a center assisted under section 671 or 672 of the Act, in accordance with the statutory definition in section 602(25) of the Act.

Proposed § 303.29 (*Personally identifiable*) would remain substantively unchanged from current § 303.401(c).

Proposed § 303.30 (*Public agency*) would remain substantively unchanged from current § 303.21.

Proposed § 303.31 (*Qualified personnel*) would remain substantively unchanged from the definition of *qualified* in current § 303.22. In addition, the note following current § 303.22 would be removed because the content of that note would be addressed in proposed § 303.13(c) regarding the types of qualified personnel who provide early intervention services and proposed § 303.119 regarding the requirement that statewide systems have policies and procedures in place relating to personnel standards.

Proposed § 303.32 (*Secretary*) would incorporate the definition of *Secretary* from section 602(28) of the Act.

Proposed § 303.33 (*Service coordination services (case management)*) would replace current § 303.23. Proposed § 303.33(a) would provide a definition of *service coordination services* and explain that these services include, consistent with current § 303.23(a), coordinating all services required under Part C of the Act across agency lines (*i.e.*, coordinating Part C services provided by agencies other than the lead agency). Proposed § 303.33(a)(2) would clarify that: service coordinators must assist parents of infants and toddlers with disabilities in gaining access to and coordinating the provision of early intervention services and coordinating other services not provided under Part C of the Act that are needed by the infant or toddler with a disability and that child's family and that are identified on the IFSP in accordance with proposed § 303.344(e). Proposed § 303.33 would not require service coordinators to be responsible for identifying funding sources for those services not covered under Part C of the Act and identified as “other services” on the IFSP under proposed § 303.344(e).

Proposed § 303.33(a)(3) and (b) would continue to reflect that service coordinators are responsible for serving as the single point of contact for carrying out the responsibilities under proposed § 303.33(b). Proposed § 303.33(b) would require service coordinators to be responsible for coordinating the performance of evaluations and assessments, facilitating

and participating in the development of IFSPs, assisting families in identifying available Part C services, coordinating and monitoring the delivery of early intervention services required under Part C of the Act, informing families of their rights and procedural safeguards and related resources, coordinating the funding sources for early intervention services, and facilitating the development of a transition plan from the Part C program to other services. Proposed § 303.33(c) would incorporate the language from Note 2 following current § 303.23 to clarify 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 (including Medicaid), for purposes of claims in compliance with the requirements of proposed § 303.510 regarding the payor of last resort. With this clarification, Note 2 following current § 303.23 would be removed.

Current § 303.23(c) (Employment and assignment of service coordinators) and (d) (Qualification of service coordinators) would not be included in proposed § 303.33 because, under proposed § 303.13(a)(7), service coordination services must be provided by qualified personnel as that term is defined in proposed § 303.31. Under the definition of *qualified personnel*, personnel are qualified if they have met State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing early intervention services. Some States, for example, have developed qualified personnel criteria under Part C of the Act for an "early interventionist" who is able to provide service coordination services and other Part C services. Consistent with the content of Note 1 following current § 303.23, and as addressed elsewhere in this preamble in the discussion related to proposed § 303.119, the requirements for a service coordination system that includes the qualifications, employment, and assignment of service coordinators is best left to the States to decide. With this clarification Note 1 would be removed.

Proposed § 303.34 (*State*) would remain substantively unchanged from current § 303.24, and would reflect the definition of this term in section 602(32) of the Act.

Proposed § 303.35 (*State educational agency* or *SEA*) would be defined to distinguish it clearly as the State agency that receives funds under Part B of the

Act and that is responsible for administering Part B of the Act (in contrast to the lead agency which may or may not be the SEA and which is responsible for implementing Part C of the Act in the State).

Proposed § 303.36 (*Ward of the State*) would be added to these regulations to reflect the definition in section 602(36) of the Act. Proposed § 303.36(b), regarding an exception to the *ward of the State*, would be added to clarify that a *ward of the State* does not include a foster child who has a foster parent who meets the definition of a *parent* in proposed § 303.27.

Current § 303.20, which provides the definition of *policies*, would be removed because the requirements for State policies are contained in the State application requirements for a grant under Part C of the Act and proposed §§ 303.201 through 303.212.

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

Proposed subpart B would incorporate the Secretary's general authority to make grants to States under section 633 of the Act, the State eligibility provisions under section 634 of the Act, and the requirements for a statewide system under section 635 of the Act. Section 633 of the Act gives the Secretary the authority to make grants to States. In order to be eligible for a grant under this subpart, section 634(1) of the Act requires a State to provide assurances 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. Section 634 of the Act requires a State to provide assurances that its statewide system includes the components listed in section 635 of the Act; section 634 of the Act no longer requires States to submit to the Department policies and procedures that demonstrate each of the components. Other specific State application requirements (policies, procedures, certifications, descriptions, and assurances) in section 637 of the Act would be incorporated into subpart C of these regulations.

#### *General Authority and Eligibility*

Proposed § 303.100 would incorporate the language of section 633 of the Act, providing for the Secretary's authority to make grants to States to maintain and implement a statewide system to provide early intervention services for infants and toddlers with disabilities and their families.

Proposed § 303.101 would identify the conditions that States must meet to

be eligible for a grant under Part C of the Act and would replace current §§ 303.100 and 303.140. Proposed § 303.101(a)(1) would incorporate the language from section 634 of the Act, which requires each State receiving funds under Part C of the Act to assure that the State has adopted a policy that early intervention services are available to all infants and toddlers with disabilities in the State and their families, including Indian infants and toddlers on reservations in the State, and infants and toddlers who are homeless and their families, and infant and toddlers who are wards of the State. Proposed § 303.101(a)(2) would modify current § 303.100(a)(2) and require each State to assure that the State has in effect a statewide system of early intervention services that meets the requirements of section 635 of the Act, including, at a minimum, the components required in proposed §§ 303.111 through 303.126.

The requirement in current § 303.100(b) that States have policies or procedures on file with the Secretary would be removed consistent with section 634 of the Act, which requires that States submit assurances regarding the statewide system requirements under section 635 of the Act. Consistent with this approach, all other provisions in current subpart B that require the policies and procedures to be on file with the Secretary would be removed.

Proposed § 303.101(b) would identify other information and assurances that States would be required to provide to the Secretary, consistent with section 637 of the Act, to demonstrate that the State meets the State application requirements in proposed §§ 303.200 through 303.212.

Current § 303.101, regarding how the Secretary disapproves a State's application, would be substantively included in proposed § 303.230.

Current §§ 303.110 and 303.111, regarding requirements and timelines for public participation and notice of public hearings and opportunity to comment, respectively, would be substantively included in proposed § 303.208.

Current § 303.112, regarding public hearings, would be substantively included in proposed § 303.208(a)(1).

Current § 303.113, regarding the review of public comments by the lead agency prior to adopting the State's application, would be removed because it is not specifically addressed in section 637 of the Act.

Current § 303.120(b) and (c) would be removed because the application requirements under Part C of the Act, including the assurances that meet the

requirements in section 637(b) of the Act, are referenced in proposed § 303.101(b). The assurance requirements in section 637(b) of the Act would be reflected in proposed §§ 303.221 through 303.227.

#### State Conformity With Part C of the Act and Abrogation of State Sovereign Immunity

Proposed § 303.102, consistent with section 608(a)(1) of the Act, would require each State that receives funds under Part C of the Act to ensure that any State rules, regulations, and policies relating to this part conform to the purposes and requirements of the part.

Proposed § 303.103 would incorporate the provisions of section 604 of the Act regarding abrogation of State immunity. Proposed § 303.103(a) would provide that 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. This is the longstanding position of the Department and is consistent with section 604 of the Act and Federal Circuit Courts' decisions interpreting this language. *See, e.g., Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir., 2005), *cert. denied*, 126 S.Ct. 416 (2005); *M.A. ex rel E.S. v State-Operated Sch. Dist.*, 344 F.3d 335 (3rd Cir. 2003); *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816 (8th Cir. 1999); *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997).

Proposed § 303.103(b) would incorporate the requirements of section 604(b) of the Act regarding remedies in a suit against a State for a violation.

Proposed § 303.103(c), which incorporates section 604(c) of the Act, would provide that proposed § 303.103(a) and (b) applies to violations that occur in whole or in part after October 1990.

#### Equipment and Construction

Proposed § 303.104 would incorporate language from section 605 of the Act, relating to the acquisition of equipment, construction or alteration of facilities. This section would provide guidance to lead agencies regarding the use of funds for facility construction impacted by Part C of the Act.

#### Positive Efforts To Employ and Advance Qualified Individuals With Disabilities

We are proposing to add new section § 303.105 to reflect the provisions in section 606 of the Act, which require the Secretary to ensure that each grant recipient under IDEA make positive efforts to employ and advance in employment, qualified individuals with disabilities in programs assisted under IDEA.

#### Minimum Components of a Statewide System

Proposed § 303.110 would be substantively the same as current § 303.160, which refers to the minimum components of a statewide system, and would specifically reference the requirements in proposed §§ 303.111 through 303.126, which align with section 635(a)(1) through (16) of the Act.

Proposed § 303.111 would align with section 635(a)(1) of the Act and would replace current §§ 303.161 and 303.300. Proposed § 303.111 would require the statewide system to include a rigorous definition of *developmental delay* in order to appropriately identify infants and toddlers with disabilities who need early intervention services, consistent with section 635(a)(1) of the Act and proposed §§ 303.10 and 303.203(c).

Proposed § 303.111(a) would generally retain current § 303.300(a)(1) and would require the State to include in its definition of *developmental delay* the evaluation and assessment procedures that would be used to measure an infant's or toddler's development. References to informed clinical opinion as one of the procedures used to measure an infant's or toddler's development in current § 303.300(a)(1) would be moved to proposed § 303.320(b)(2).

Proposed § 303.111(b) would generally retain the requirements of current § 303.300(a)(2) and would require the State to describe the level of developmental delay in functioning or other comparable criteria that could constitute a developmental delay.

Current § 303.300(c) requires States that serve at-risk infants and toddlers to describe the criteria and procedures used to identify those infants and toddlers. Current § 303.300(c) would be removed because proposed § 303.320(b)(2) would clarify that qualified personnel must use their informed clinical opinion to evaluate a child's present level of functioning in each of the developmental areas identified in proposed § 303.21(a)(1) and that informed clinical opinion may be used by qualified personnel to establish a child's eligibility for services under Part C of the Act even when other instruments do not establish eligibility.

The note following current § 303.300(c), regarding the required use of informed clinical opinion to determine an infant's or toddler's eligibility for services, would be moved to proposed § 303.320 regarding evaluation requirements and is addressed in the discussion of subpart D of these regulations.

Proposed § 303.112 would be added to incorporate the language from section 635(a)(2) of the Act and would require each statewide system to have a State policy in effect that ensures that 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 Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State, and infants and toddlers with disabilities and their families who are homeless.

Proposed § 303.113, which would align with section 635(a)(3) of the Act, would replace current § 303.166, and would require each statewide system to ensure a timely, comprehensive, multidisciplinary evaluation of each infant or toddler with a disability in the State, and a family-directed identification of the needs of each infant's or toddler's family to assist appropriately in the development of the infant or toddler. Proposed § 303.113(b) would cross-reference the provisions in proposed § 303.320. These cross-references are necessary because the specific requirements for evaluations would be included in proposed § 303.320.

Proposed § 303.114 would generally retain the provisions in current § 303.167(a) and (b) and would require each statewide system to develop an IFSP for each infant or toddler with a disability in the State, consistent with section 635(a)(4) of the Act. Current § 303.167(c) would be removed because the requirements regarding IFSPs and natural environments would be included in proposed §§ 303.13(a)(8), 303.26, and 303.344(d)(1)(ii).

Proposed § 303.115, regarding a comprehensive child find system, would align with section 635(a)(5) of the Act and would replace current § 303.165. The provisions in current § 303.321 regarding a comprehensive child find system would be incorporated in proposed §§ 303.301 through 303.303, which would be cross-referenced in proposed § 303.115. Proposed § 303.115 would require each statewide system to have a comprehensive child find system that meets the requirements in proposed §§ 303.301 through 303.303; these requirements include that a State's comprehensive child find system be consistent with Part B of the Act and that it ensures rigorous standards to identify infants and toddlers with disabilities for services under Part C of the Act that will reduce the need for future services.

Proposed § 303.116, regarding public awareness, would align with section 635(a)(6) of the Act and would replace current § 303.164. Proposed § 303.116, consistent with section 635(a)(6) of the Act, would set forth the requirements for the statewide system's public awareness program, which would focus on early identification of infants and toddlers with disabilities and provide information to parents of infants and toddlers through primary referral sources.

Proposed § 303.117, regarding the requirements for a central directory, would align with section 635(a)(7) of the Act and would combine the requirements of current §§ 303.162 and 303.301(a). The provisions in current § 303.301(c) requiring the central directory to be up-to-date and accessible to the general public generally would be included in the introductory text of proposed § 303.117. Proposed § 303.117, however, would also clarify that the lead agency must ensure that the central directory is accessible through the lead agency's Web site and other appropriate means as the requirement in current § 303.301(d) that the lead agency arrange for copies of the directory to be available in each geographic region of the State is no longer necessary, as the vast majority of States maintain the directory on their Web sites. Current § 303.301(b), which includes the details of the content of the central directory and current § 303.301(d), which includes the locations and manners of accessibility, would be removed. Most States now maintain this information on their Web site and can easily update it more quickly than is required under current § 303.301.

The note following current § 303.301, which gives examples of appropriate groups that provide assistance to infants and toddlers with disabilities and families, would be removed as unnecessary. Proposed § 303.117 would include language regarding appropriate groups that would provide assistance to infants and toddlers with disabilities and their families, including public and private early intervention services, resources and experts available in the State, and parent support and training and information centers such as those funded under the Act.

Proposed § 303.118, regarding the comprehensive system of personnel development (CSPD), would replace current §§ 303.168 and 303.360 to parallel the requirements and order of section 635(a)(8) of the Act. The introductory paragraph of proposed § 303.118 would combine the provisions in current § 303.360(b)(3) and (4), and would require each statewide system to

include a CSPD that addresses the training of paraprofessionals and primary referral sources with respect to the basic components of early intervention services in the State.

Proposed § 303.118(a) would replace current § 303.360(c)(1), (2), and (4), and would, consistent with section 635(a)(8)(A) of the Act, list the training that now must be included in the CSPD. Proposed § 303.118(a)(1) would retain the language in current § 303.360(c)(1) regarding training on innovative strategies to recruit and retain EIS providers. Proposed § 303.118(a)(2) would retain the language in current § 303.360(c)(2) regarding promoting the preparation of EIS providers who are fully and appropriately qualified. Under current § 303.360(c)(1) and (2), including this training in the CSPD was permissive. Consistent with section 635(a)(8)(A) of the Act, however, the training in proposed § 303.118(a)(1) and (2) would be required to be included in the CSPD.

Proposed § 303.118(a)(3), regarding training personnel to coordinate transition services, would generally retain the language in current § 303.360(c)(4) and would reference a preschool program under Part B of the Act, Head Start, Early Head Start, and an elementary school under Part B of the Act as programs to which children receiving services under Part C of the Act may transition to, consistent with sections 635(a)(8)(A)(iii) and 637(a)(10) of the Act. Consistent with sections 635(a)(8)(A) and (c) and 637(a)(10) of the Act, including this training in the CSPD would now be mandatory.

Proposed § 303.118(b)(1) would retain current § 303.360(c)(3) and would allow (but not specifically require, consistent with section 635(a)(8)(B)(i) of the Act) training for personnel to work in rural and inner-city areas. Proposed § 303.118(b)(2) would replace current § 303.360(b)(4)(ii) and would allow training of personnel in the emotional and social development of infants and toddlers, consistent with section 635(a)(8)(B)(ii) of the Act. Proposed § 303.118(b)(3) would replace current § 303.360(b)(4)(iii) and would clarify that States may train personnel to support families to participate fully in the development and implementation of their child's IFSP.

References in current § 303.360(b)(3) and (c)(2) to training a variety of personnel needed to meet the requirements of the regulations, including the training of service coordinators, would be removed as redundant. Proposed § 303.119(a) requires States to have policies and procedures to ensure that personnel

necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

Current § 303.360(b)(1), regarding consistency with the CSPD under Part B of the Act, would be removed because Part B of the Act was revised to eliminate references to a CSPD. Current § 303.360(b)(2), requiring that preservice and inservice training be conducted on an interdisciplinary basis, to the extent appropriate, would be removed because whether to conduct preservice and inservice training that includes an interdisciplinary methodology or other methodology, is a decision best left to the States because each State determines the qualifications needed for personnel providing services under Part C of the Act.

Proposed § 303.119, regarding personnel standards, would combine current § 303.169 and relevant provisions in current § 303.361 to parallel the requirements of section 635(a)(9) of the Act.

Proposed § 303.119(a) would substantively retain language from current § 303.361(b)(1) to clarify that each system must include policies and procedures relating to the establishment and maintenance of qualification standards to ensure that personnel are appropriately and adequately trained.

Consistent with section 635(a) of the Act and current § 303.361(b)(2), proposed § 303.119(b) would require the establishment and maintenance of qualification standards, to be consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements, and to apply to the profession, discipline, or area in which personnel are providing early intervention services.

Current § 303.361(a), (c), (d), and (e) would be removed, consistent with statutory changes that removed the requirement that State's policies and procedures include the steps for retraining or hiring personnel when the State's personnel standards are not based on the State's requirements for these personnel.

Proposed § 303.119(c), allowing the use of appropriately trained and supervised paraprofessionals and assistants to assist in the provision of early intervention services, would replace and substantively be the same as current § 303.361(f).

Proposed § 303.119(d), which allows a State to adopt a policy to hire the most qualified individuals available who are making satisfactory progress toward completing applicable coursework necessary to meet the State's personnel standards, would be the same as current

§ 303.361(g), except that the requirement that those persons work to complete the necessary course work in three years would be removed because of the removal of this three-year requirement from section 635(a)(9) of the Act.

The note following current § 303.361 would be removed because the first paragraph in the note addresses the requirement that personnel standards be based on the State's highest standard, which was removed from the Act. The second paragraph in the note following current § 303.361, regarding a State's ability to establish standards, would be removed as unnecessary because the licensure and other standards for occupational categories have always been subject to State, not Federal, standards, and States have always had the flexibility to establish standards higher than Federal standards in this area.

Proposed § 303.120, regarding supervision, monitoring, funding, interagency coordination, and other lead agency responsibilities would combine current §§ 303.171, 303.500, and 303.501 to parallel the organization and content of section 635(a)(10) of the Act.

The introductory paragraph in proposed § 303.120 would incorporate the requirement in section 635(a)(10) of the Act and current § 303.500 that each statewide system include a single line of responsibility in a lead agency designated or established by the Governor.

Proposed § 303.120(a)(1) through (a)(2)(iv) would remain substantively unchanged from current § 303.501(a) and (b)(1) through (b)(4), except that proposed § 303.120(a)(2)(iv), regarding the correction of noncompliance identified through monitoring, would add that the correction must be made as soon as possible and in no case later than one year after the lead agency's identification of the noncompliance. We are proposing that the correction be made as soon as possible and in no case later than one year after the lead agency's identification of the noncompliance because, based on our monitoring activities, we have determined that correction of noncompliance does not always occur in a timely manner. Proposed § 303.120(a)(2)(iv) would align with proposed § 303.700(e) to clarify expectations regarding the timely correction of noncompliance. It is important to correct noncompliance in a timely manner to ensure that infants and toddlers with disabilities and their families receive appropriate early intervention services. Correction of noncompliance means that the State

required the EIS program or EIS provider to revise any noncompliant policies, procedures and/or practices and the State has verified through follow-up review of data, other documentation and/or interviews that the noncompliant policies, procedures and/or practices have been revised and the noncompliance has been corrected. We believe that one year is a reasonable amount of time for the State to verify the correction of policies, procedures and/or practices.

Proposed § 303.120(a)(2)(v), regarding the activities related to monitoring agencies, would reference the monitoring and enforcement requirements in proposed §§ 303.700 through 303.707 that the lead agency must meet in implementing the requirements of proposed § 303.120(a)(2)(i) through (iv).

Proposed §§ 303.700 through 303.706 would align with 34 CFR 300.600 through 300.606 of the Part B regulations (71 FR 46800–46802). Proposed § 303.707 would reference the authority under GEPA for monitoring and enforcement, including the imposition of special conditions in 34 CFR § 80.12. Proposed § 303.708 would clarify continued State flexibility to use other available authorities to monitor and enforce the requirements of Part C of the Act.

Proposed § 303.120(b), which would require the lead agency to identify and coordinate all available resources for early intervention services in the State, would incorporate the language in section 635(a)(10)(B) of the Act and would be the same as current § 303.522(a)(1). Proposed § 303.120(c) through (f) would reference requirements in proposed subpart F regarding use of funds and would be added to conform to section 635(a)(10)(C) through (F) of the Act.

Proposed § 303.120(f) would indicate that in addition to formal interagency agreements, there may be other written methods of establishing financial responsibility consistent with proposed § 303.511 because proposed § 303.511(a)(3) would clarify that appropriate written methods may be used for establishing financial responsibility, as 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.

Proposed § 303.121, regarding contracting or otherwise arranging for services, would replace the requirements in current §§ 303.175 and 303.526, consistent with section 635(a)(11) of the Act. Proposed § 303.121 would require each statewide

system to include a policy for contracting or making other arrangements with public or private providers for services. Proposed § 303.121(a) would incorporate the provision in current § 303.526(a) regarding the State policy including a requirement that all early intervention services meet State standards and be consistent with Part C of the Act.

Proposed § 303.121(b) would add a reference to the requirements found in part 80 of the Education Department General Administrative Regulations (EDGAR). This is not a new requirement because current § 303.5 already provides that EDGAR requirements, including part 80, apply to grant recipients under Part C of the Act. Current § 303.526(b) and (c) would be removed as redundant because these requirements are found in EDGAR provisions in 34 CFR part 80, and compliance with 34 CFR part 80 would be required by proposed § 303.121.

The note following current § 303.526, regarding the option to continue using public and private personnel who meet the requirements of Part C of the Act as service providers, would be removed because proposed § 303.12 (the definition of *EIS provider*) would clarify that States may use public or private entities or individuals to provide early intervention services. The content of the note following current § 303.526 would not provide additional information or clarity to proposed § 303.12.

Proposed § 303.122, regarding reimbursement procedures, would incorporate language from section 635(a)(12) of the Act and would remain substantively unchanged from current § 303.528, with cross-references updated.

Proposed § 303.123, which would incorporate language from section 635(a)(13) of the Act, would replace current § 303.170 and would require each statewide system to meet the procedural safeguard requirements in subpart E of these proposed regulations.

Proposed § 303.124, regarding data collection procedures, would incorporate the requirements of section 635(a)(14) of the Act and would adopt by reference the Part C data requirements in sections 616 and 618 of the Act that are reflected in proposed §§ 303.700 through 303.702 and proposed §§ 303.720 through 303.724. Proposed § 303.124 would require States to adopt data systems for reporting the data to the Secretary and would generally include the language in current §§ 303.176 and 303.540.

Consistent with the reporting requirements in sections 616 and 618 of the Act, proposed § 303.124(a) would

include language indicating that the statewide system must compile and report data that are timely and accurate to align with the reporting requirements in §§ 303.700 through 303.702 and 303.720 through 303.724. The references to timely and accurate reporting on State data in proposed § 303.124(a) are necessary for the Department to implement section 616 of the Act. The requirements regarding disproportionality in section 618(d) of the Act do not apply to Part C of the Act because the findings in section 601(c)(12) of the Act make clear that these provisions were enacted to reflect concerns under Part B of the Act, not Part C of the Act.

Proposed § 303.124(b) would require the data collection process to include a description of the sampling methods, if used by the State to collect data in accordance with proposed §§ 303.701(c)(2) and 303.722(b).

Proposed § 303.125, regarding the Council, would incorporate the language in section 635(a)(15) of the Act and current § 303.141 and would require the statewide system to include a Council. This section also would cross-reference subpart G of these proposed regulations, which would contain the specific requirements for the Council.

Proposed § 303.126, regarding the provision of early intervention services in natural environments to the maximum extent appropriate, would align with section 635(a)(16) of the Act and would generally remain substantively unchanged from current §§ 303.12(b) and 303.344(d)(1)(ii).

Proposed § 303.126(b) would add language from section 635(a)(16) of the Act requiring that, when early intervention cannot be achieved satisfactorily in a natural environment, it must be provided in a setting that is most appropriate, as determined by the parent and the IFSP team. Proposed § 303.126 would not change the longstanding requirements regarding the provision of early intervention services in an infant's or toddler's natural environment and would be read in conjunction with proposed § 303.344(d)(1)(ii)(B), which would clarify that any justification for providing an early intervention service in a setting other than the infant's or toddler's natural environment must be based on the child's outcomes identified by the IFSP team in the infant's or toddler's IFSP.

#### *Subpart C—State Application and Assurances*

Proposed subpart C would contain the specific State application content

requirements that are reflected in section 637 of the Act.

Proposed § 303.200(a) would require each application to contain the specific requirements in proposed §§ 303.201 through 303.212, which would incorporate, respectively, the requirements in section 637(a)(1) through (11) of the Act. Proposed § 303.200(b) would require each application to contain assurances that the State has met the requirements under proposed §§ 303.220 through 303.227, which would incorporate, respectively, the assurance requirements in section 637(b)(1) through (7) of the Act.

#### *Application Requirements*

Proposed § 303.201 would require each application to include a designation of the lead agency in the State responsible for the administration of funds. The proposed regulation would be the same as current § 303.142, consistent with section 637(a)(1) of the Act.

Proposed § 303.202 would require each application to include a certification that the arrangements to establish financial responsibility for the provision of services under Part C of the Act among appropriate public agencies under proposed § 303.511 and the lead agency's contracts with EIS providers regarding financial responsibility for the provision of Part C services meet the requirements in proposed §§ 303.500 through 303.521 and are current as of the date of submission of the certification. Proposed § 303.202 would replace current § 303.143, consistent with section 637(a)(2) of the Act. Proposed § 303.202 cross-references proposed §§ 303.500 through 303.521 and requires the arrangements to establish financial responsibility for the provision of Part C services to be current as of the date of the certification, consistent with a change to section 637(a)(2) of the Act.

Proposed § 303.203 would require each application to include: (a) A description of the services to be provided; (b) the State's policies on funding sources (including any system of payments); and (c) the State's rigorous definition of developmental delay, as required under proposed §§ 303.10 and 303.111 and section 637(a)(3)(A) of the Act. These three elements are key variables in State Part C systems and the Department needs this information in the application to understand each State's Part C system and interpret data from each State under sections 616, 618, and 642 of the Act.

Proposed § 303.204, which aligns with section 637(a)(4) of the Act, would

require each State that provides services to at-risk infants and toddlers with disabilities to include the State's definition of at-risk infants and toddlers with disabilities in its State application. This information is necessary to appropriately interpret child find and other data required to be reported by States under sections 616, 618, and 642 of the Act. Proposed § 303.204(b) would require each application to include, consistent with section 637(a)(4) of the Act, a description of the early intervention services to be provided to at-risk infants and toddlers with disabilities if the State elects to serve such children.

Proposed § 303.205(a) would be substantively the same as current § 303.145(a) and would continue to require each application to include a description of the use of funds, presented separately for the lead agency and the Council.

Proposed § 303.205(b) would require lead agencies, other than SEAs, to identify the total amount the lead agency will retain for State administration. Additionally, proposed § 303.205(b) would require those lead agencies, other than SEAs, to include the total number of full time equivalent administrative positions and the total salaries, including benefits, for these positions, rather than position-specific descriptions and detailed itemized salary information as in current § 303.145(b). SEAs are excluded from this requirement because the Department is the cognizant Federal agency for SEAs for purposes of determining the State's restricted indirect cost rate under Parts B and C of IDEA. However for lead agencies that are not SEAs, the Department often does not obtain any other information about the lead agency's administrative expenses. This proposed change to report on aggregated administrative expenses would reduce the burden on States when reporting costs, positions, and salaries for State administration.

Proposed § 303.205(c) would generally be the same as current § 303.145(c) and would require each application to include a description of each major activity and the funds to be spent on each activity, consistent with proposed § 303.501. Proposed § 303.205(d) would generally be the same as current § 303.145(d)(1) and (2)(ii), with updated cross-references, and would require each State application to include a description of any direct services the State expects to provide using Federal Part C funds and the approximate amount of funds to be used for the provision of each direct service.

Proposed § 303.205(e) would be the same as current § 303.145(f) and would require the application to include information on other agencies expected to receive funds under this part. This information is required in the application because of interagency funding provisions and the interagency coordination provisions in sections 635(a)(10)(B) and (F), and 637(a)(3) and (5) of the Act.

Proposed § 303.206 would be added to align with section 637(a)(6) of the Act. Proposed § 303.206 would require each application to include the State's policies and procedures that require 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, consistent with proposed § 303.302. This requirement has applied to State agencies receiving funds under the Child Abuse Prevention and Treatment Act (CAPTA) in 42 U.S.C. 5106a since June 2003. A comparable requirement was added to section 637(a)(6) of the Act for Part C lead agencies, effective July 1, 2005.

Proposed § 303.207, which would align with section 637(a)(7) of the Act, would require that each application include a description of the procedure used to ensure that resources are available for all geographic areas within the State and would be substantively the same as current § 303.147.

Proposed § 303.208 would incorporate language from section 637(a)(8) of the Act and would combine requirements in current §§ 303.110, 303.112, 303.113(b), and 303.146. Proposed § 303.208(a)(1) would generally be the same as current § 303.110 and would require public hearings, adequate notice of hearings, and an opportunity for comment to the general public, including individuals with disabilities and parents of infants and toddlers with disabilities, prior to the State's adoption of any new or revised policy or procedure under Part C of the Act.

Proposed § 303.208(b) would clarify that policies, procedures, and methods that are subject to the public participation requirements in proposed § 303.208 and are required to be submitted to the Secretary under subparts B and C of these proposed regulations must be approved by the Secretary prior to implementation.

The remaining specific requirements in current §§ 303.111 through 303.113 would be eliminated because States are required to comply with the public participation requirements of proposed § 303.208(a) and GEPA and obtain

approval by the Secretary for specific application requirements that are subject to the public participation requirements in proposed § 303.208. These requirements provide sufficient opportunities for public comment.

Proposed § 303.209, regarding the transition of children from services under Part C of the Act to preschool and other programs, would incorporate language from section 637(a)(9) of the Act, and would be similar to current § 303.148. The note following current § 303.148, regarding matters that should be considered in developing policies and procedures to ensure a smooth transition of children from one program to the other, would be removed because it is covered by proposed § 303.209 and section 637(a)(9) of the Act, which identify the specific early childhood transition requirements.

Proposed § 303.209(a)(1) would require each State application to include a description of the policies and procedures the State will use to ensure a smooth transition for toddlers with disabilities leaving the early intervention program to attend preschool, school, or other appropriate services, or exit the program, and their families. Proposed § 303.209(a)(1) would add language to ensure a smooth transition from the early intervention program to preschool, school, or other appropriate services for toddlers receiving services as a result of the State's election to make available early intervention services to children with disabilities ages three and older in accordance with proposed § 303.211.

Proposed § 303.209(a)(2) would add language requiring States to describe how they would meet each of the requirements related to toddlers transitioning from services under Part C of the Act to preschool and other programs in proposed § 303.209(b) through (d).

Proposed § 303.209(a)(3)(i) would revise the language in current § 303.148(c) to require all States (not just those in which the SEA is not the lead agency) to establish an interagency or intra-agency agreement between the programs under Part C and Part B of the Act.

Proposed § 303.209(a)(3)(ii) would clarify that the agreement must contain provisions for how the lead agency and the SEA will meet the requirements of Part C of the Act in proposed § 303.209(b) through (d), regarding LEA notification and transition conferences and plans. In addition, the agreement must contain provisions for how the lead agency and the SEA will meet the requirements in proposed § 303.344(h), regarding IFSP content and transition

steps and services, and the following Part B regulations: 34 CFR 300.124 (Transition of children from the Part C program to preschool programs) (71 FR 46766), 34 CFR 300.321(f) (Initial IEP Team meeting for child under Part C) (71 FR 46788), and 34 CFR 300.323(b) (IEP or IFSP for children aged three through five) (71 FR 46789).

Proposed § 303.209(a)(3)(ii) would also require a State to have an interagency agreement to ensure a seamless transition between services under Part C of the Act to services under Part B of the Act.

Proposed § 303.209(a)(4) would require that the State application must include any policy adopted by the State under proposed § 303.401(e).

Proposed § 303.209(b)(1) would include the requirement in current § 303.148(a) that each application include a description of how families will be included in the transition plan.

Proposed § 303.209(b)(2) would be similar to current § 303.148(b)(1) but would clarify, consistent with section 637(a)(9)(A)(ii)(II) of the Act, the timeline applicable to transition requirements. Proposed § 303.209(b)(2)(i) would require that each State include in its application a description of how the lead agency will notify, at least nine months before the toddler's third birthday, the LEA for the area in which the toddler resides—or, if appropriate, the SEA—that the toddler on his or her third birthday will reach the age of eligibility for preschool or school services under Part B of the Act.

Proposed § 303.209(b)(2)(ii) would also clarify that, if a toddler is referred for early intervention services under Part C of the Act within the nine-month period before the toddler's third birthday, the lead agency, as soon as possible after determining the child's eligibility, will notify the LEA for the area in which the toddler resides—or, if appropriate, the SEA—that the toddler on his or her third birthday will reach the age of eligibility for preschool or school services under Part B of the Act. Proposed § 303.209(b)(3) would clarify that if a State adopts a policy under proposed § 303.401(e), the lead agency's notification obligations under proposed § 303.209(b)(2)(i) and (ii) must be consistent with the policy. Proposed § 303.401(e) are discussed in subpart E of this preamble.

Proposed § 303.209(c) would retain the requirement in current § 303.148(b)(2)(i) that the State lead agency convene, with the approval of the family, a conference among the lead agency, the family, and the LEA to discuss any services under Part B of the

Act that the toddler with a disability may receive.

Proposed § 303.209(c)(1), similar to current § 303.148(b)(2)(i) would require that, for a toddler with a disability who is potentially eligible under Part B of the Act, the transition conference is to be convened not fewer than 90 days before the toddler's third birthday. Current § 303.148(b)(2)(i) allows the conference, at the discretion of the parties, to be held up to six months before the child is eligible for preschool services. Proposed § 303.209(c)(1) would change this time period to not more than nine months before the toddler's third birthday, consistent with changes in section 637(a)(9) of the Act.

Proposed § 303.209(c)(2) would substantively be the same as current § 303.148(b)(2)(ii) and would require the lead agency, for the toddler with a disability who may not be eligible for services under Part B of the Act, to make reasonable efforts to convene a conference with the lead agency, the family, and providers of other appropriate services to discuss services the toddler may receive.

Proposed § 303.209(d)(1) would substantively include the provisions in current § 303.148(b)(3) and would require a review of the toddler with a disability's program options for the period from the toddler's third birthday through the remainder of the school year.

Proposed § 303.209(d)(2) would require the lead agency to establish a transition plan, as in current § 303.148(b)(4). Proposed § 303.209(d)(2) would also clarify that the transition plan be established in the IFSP not fewer than 90 days (and at the discretion of all parties, not more than nine months) before the toddler's third birthday to align with the LEA notification and transition conference timelines.

Proposed § 303.209(d)(3) would add a requirement that the transition plan include steps for the toddler with a disability and his or her family to exit from the program, consistent with section 637(a)(9) of the Act, and also specify that the transition plan must include any transition services needed, consistent with section 636(a)(3) of the Act.

Proposed § 303.210 would be added to require each application to describe State efforts to promote collaboration among Early Head Start programs, early education and child care programs, and early intervention services, consistent with section 637(a)(10) of the Act and would also reference Head Start in the list of early education programs.

Proposed § 303.211 would incorporate the language in section 635(c) of the Act providing States 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. Proposed § 303.211(a)(1) would allow a State to elect to include in its Part C application, a State policy developed jointly by the lead agency and the SEA, to make early intervention services available to certain children with disabilities. If a State elects to include such a policy, children who are eligible for services under section 619 of the Act, and who were previously receiving early intervention services under Part C of the Act, would continue to receive early intervention services, if their parents choose to continue those services.

Proposed § 303.211(a)(2) would clarify that States may choose to serve a subset of children between age three and the age at which the children enter, or are eligible to enter, kindergarten or elementary school. This provision would take into consideration States that have preschool programs for many or all children starting at age four, and would give those States the flexibility to provide early intervention services until the beginning of the school year following the child's third, fourth or fifth birthday. Although proposed § 303.211(a)(2) would allow States to serve a subset of children between age three and the age at which children enter, or are eligible to enter, kindergarten or elementary school, the option would not extend to serving only a specific disability group.

Proposed § 303.211(b)(1) would require States that choose to provide early intervention services to children under this proposed section to ensure, consistent with section 635(c)(2)(A)(i) and (ii) of the Act, that the parents of children with disabilities served under this option would be provided with an annual notice that includes: 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 at which 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. Proposed § 303.211(b)(2) would incorporate the requirement in section 635(c)(2)(B) of

the Act that early intervention services provided to children with disabilities under this proposed section include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills.

Proposed § 303.211(b)(3) would incorporate section 635(c)(2)(C) of the Act and would require the statewide system to ensure that the State policy would not affect the right of any child to receive FAPE under Part B of the Act instead of early intervention services under Part C of the Act.

Proposed § 303.211(b)(4) would require, consistent with section 635(c)(2)(D) of the Act, that all early intervention services outlined in the child's IFSP be continued while any eligibility determination is being made for services under proposed § 303.211, and clarify that this provision is subject to the pendency provision in proposed § 303.430(e).

Proposed § 303.211(b)(5) would incorporate the requirement in section 635(c)(2)(E) of the Act that the State obtain informed consent from the parents of any child to receive early intervention services, where practicable, before the child reaches three years of age.

Proposed § 303.211(b)(6) would provide, consistent with section 635(c)(2)(F) of the Act, that the transition timeline requirements in proposed § 303.209(c)(1) and (d)(2) regarding the transition conference and plan do not apply with respect to a child who is receiving early intervention services under proposed § 303.211 until not fewer than 90 days—and, at the discretion of the parties to the conference, not more than nine months—before the time the child is expected to no longer receive early intervention services. The transition conference and plan would occur between the time that the child is three years old and the time the child enters, or is eligible to enter, kindergarten, depending on how long the State made those services available under proposed § 303.211.

Proposed § 303.211(b)(7) would require 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, consistent with section 635(c)(2)(G) of the Act. Proposed § 303.211(b)(7) would clarify that such referral is dependent upon parental consent. Parental consent would be required to balance the need to protect the safety needs of the parent

seeking shelter because of family violence, as defined in section 320 of the Family Violence Prevention and Services Act, 42 U.S.C. 10401 *et seq.*, with the child find mandate under Part C of the Act.

Proposed § 303.211(c) would incorporate language from section 635(c)(3) of the Act and would require each State that provides early intervention services to children ages three and older to report to the Secretary the number and percentage of children who are eligible for services under section 619 of the Act, but whose parents choose to continue early intervention services for their child. Consistent with section 635(c)(4) of the Act, proposed § 303.211(d) would require States that choose to provide early intervention services to children ages three and older to describe the funds that will be used to ensure that this option is available to eligible children and families who provide consent. The description must include the Federal, State, or local funds that will be used and the fees, if any, to be charged to families with public or private insurance under a State's system of payments adopted under section 632(4)(B) of the Act and proposed §§ 303.520 and 303.521.

Proposed § 303.211(e)(1) would incorporate the language in section 635(c)(5)(A) of the Act that provides that when a statewide system includes a policy to provide early intervention services to a child with a disability who is eligible for services under section 619 of the Act, it is not required to provide the child FAPE under Part B of the Act for the period of time during which the child is receiving early intervention services.

Proposed § 303.211(e)(2) would incorporate the language in section 635(c)(5)(B) of the Act that clarifies that a provider of early intervention services is not required to provide a child receiving early intervention services with FAPE.

Proposed § 303.212, which requires each application to include any other information and assurances that the Secretary may reasonably require, would be added to incorporate the provisions in section 637(a)(11) of the Act. This regulation would provide for the Secretary to require the States to submit other reasonable information and assurances in the State's application for funds under Part C of the Act, and would be enforced as any other requirement in this part in order for a State to receive a grant under section 633 of the Act.

#### Assurances

The assurances in proposed §§ 303.221 through 303.227 would follow the order of the assurance requirements in section 637(b) of the Act.

Proposed § 303.220 would specify that each State application must include the assurances required in proposed §§ 303.221 through 303.227, which would reflect the requirements in section 637(b)(1) through (7) of the Act.

Proposed § 303.221, regarding the expenditure of funds, would reflect section 637(b)(1) of the Act and would retain the substance of current § 303.127, with cross-references updated.

Proposed § 303.222, requiring the State to comply with the payor of last resort requirements in subpart F of these proposed regulations, would replace current § 303.126. Current § 303.126(a) and (b), which reference the requirements on non-substitution of funds and non-reduction of other benefits, would now be incorporated into proposed § 303.510.

Proposed § 303.223, regarding control of funds and property, is generally the same as and would replace current § 303.122 and incorporate the statutory provision in section 637(b)(3) of the Act. Proposed § 303.224, regarding reports and records, would substantively include the language in current § 303.121.

Proposed § 303.225, regarding the prohibition against commingling and supplanting, would combine current §§ 303.123 and 303.124 and the requirements in section 637(b)(5) of the Act. Proposed § 303.225(a) would replace current § 303.123 to require that a State ensure that funds under Part C of the Act are not commingled with State funds, and would add the definition of commingle from the note following current § 303.123. The remainder of the current note, regarding a clear audit trail for each source, would be removed because it is redundant of requirements under the Single Audit Act (31 U.S.C. 7501 *et seq.*), which applies to Part C of the Act.

Proposed § 303.225(b)(1) would substantively include the language in current § 303.124(a) and (b). Proposed § 303.225(b)(1)(i) would require that Federal funds be used to supplement, and, in no case, supplant State and local funds. Proposed § 303.225(b)(1)(ii) would require that the total amount of State and local funds budgeted for expenditures in the current fiscal year for early intervention services for infants and toddlers with disabilities and their families must be at least equal

to the total amount of State and local funds actually expended in the most recent preceding fiscal year for those services.

Proposed § 303.225(b)(2)(i) through (iv) would incorporate the language in 34 CFR 300.204(a) through (d) of the Part B regulations (71 FR 46780), regarding exceptions to maintenance of effort; and would allow a Part C lead agency's maintenance of effort to be temporarily reduced in an individual year due to: a decrease in the number of infants and toddlers who are eligible to receive early intervention services; the termination of costly expenditures for long-term purchases, such as the acquisition of equipment and cost of construction of facilities; the departure of personnel either voluntarily or for just cause; and the termination of the obligation to make early intervention services available to an exceptionally costly IFSP program for a particular infant or toddler with a disability. Proposed § 303.225(c) would incorporate the indirect cost requirements under Part C of the Act and under 34 CFR part 76.

Proposed § 303.226, which requires certain fiscal control and fund accounting procedures, would replace and substantively include the language in current § 303.125. Proposed § 303.227, which requires policies and practices to ensure that traditionally underserved groups are meaningfully involved in the planning and implementation of the requirements under Part C of the Act, would include the language in current § 303.128, except that children with disabilities who are wards of the State would be added to the list of traditionally underserved groups, consistent with section 637(b)(7) of the Act.

#### Subsequent Applications and Modifications, Eligibility Determinations, and Standard of Disapproval

Proposed § 303.228 would incorporate the language in section 637(d), (e), and (f) of the Act and is substantively the same as current § 303.100(b), (c), and (d). Proposed § 303.229 would add a provision that the Secretary notify the State if the Secretary determines a State is eligible to receive a grant under section 637 of the Act. Proposed § 303.230 regarding the standard for disapproval of an application, would replace current § 303.101, and would provide, consistent with section 637(c) of the Act, that the Secretary does not disapprove an application under this part unless the Secretary determines, through the notice and opportunity for hearing procedures in proposed

§§ 303.231 through 303.236, that an application fails to comply with the requirements of this part.

#### Department Procedures

Proposed §§ 303.231 through 303.236 would set forth the specific notice and hearing procedures that would apply before the Secretary determines a State is not eligible to receive a grant under this part. These proposed regulations would incorporate the language in 34 CFR 300.179 through 300.184 of the Part B regulations (71 FR 46776–46778). We propose to adopt these regulations in order to encourage greater consistency between Part B and Part C program operations.

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

Proposed subpart D would incorporate the requirements from section 636 of the Act regarding evaluations and assessments and IFSPs. Proposed subpart D of these proposed regulations would also incorporate the comprehensive child find system requirements because they overlap with evaluation requirements and because the new statutory child find requirements are contained in sections 612, 631, 632, 634, 635, 637 and 641 of the Act, which do not readily relate to a corresponding subpart in these proposed regulations.

Public awareness, child find, referral and screening procedures would be in proposed §§ 303.300 through 303.303. Evaluation and assessment requirements would be combined in proposed § 303.320 to incorporate the relevant provisions in section 636(a)(1) and (2) of the Act.

IFSP provisions would be primarily unchanged in proposed §§ 303.340 through 303.345. Section 636(e) of the Act, regarding parental consent for IFSPs, would not be addressed in subpart D of these proposed regulations. It would instead be included with other parental consent provisions in proposed § 303.420, to align with section 639 of the Act regarding procedural safeguards.

#### Identification—Public Awareness, Child Find, and Referral

Proposed § 303.300(a) and (b), regarding a public awareness program, would incorporate language from current § 303.320 that requires a public awareness program that provides for information to be prepared and disseminated to primary referral sources to inform parents of infants and toddlers about the child find system, central directory, and the availability of preschool services under section 619 of

the Act. Proposed § 303.300(a) would also cross-reference proposed § 303.116, which would require a statewide system to have a public awareness program consistent with the provisions in proposed § 303.300. Consistent with section 635(a)(6) of the Act, proposed § 303.300(a)(1)(ii) would add a specific reference to parents of premature infants, or infants with other physical risk factors associated with learning or developmental complications.

Proposed § 303.300(a)(2) would add a requirement that the statewide system have procedures for assisting primary referral sources to disseminate information to parents of infants and toddlers with disabilities, consistent with section 635(a)(6) of the Act. This proposed provision would replace current § 303.321(d)(2)(iii), which was removed, consistent with section 635(a)(6) of the Act. Proposed § 303.300(a)(2) would cross-reference proposed § 303.302(c) which defines the term *primary referral sources* for the purposes of subpart C. Notes 1 and 2 following current § 303.320, which include the components for an effective public awareness program, would be removed, as they do not reflect regulatory requirements and are therefore not necessary.

Proposed § 303.301, regarding a comprehensive child find system, would incorporate the requirements from current § 303.321 and would also emphasize the applicability of the child find system for the specific subpopulations referred to in many sections of the Act. Proposed § 303.301(a)(1) and (2) would incorporate language from section 635(a)(5) of the Act, which requires a system for making referrals to service providers that includes timelines and provides for participation by primary referral sources. Proposed § 303.301(a)(3) would incorporate statutory language from section 635(a)(5) of the Act that requires rigorous standards for appropriately identifying infants and toddlers with disabilities for early intervention services under Part C of the Act that would reduce the need for future services. Proposed § 303.301(a)(4) would require the comprehensive child find system to meet the requirements in paragraphs (b) and (c) of this section and proposed § 303.302, regarding referral procedures, and proposed § 303.303, regarding screening procedures.

Proposed § 303.301(b) would address the scope of child find by identifying specific subpopulations of children that were added in the 2004 amendments to Part C of the Act. Current § 303.321(a)(2)

would be removed as redundant with proposed § 303.301(b) and (c), regarding the lead agency's responsibilities for administering the child find system under Part C of the Act, and proposed § 303.604(a)(3), regarding the Council's advisory role.

Proposed § 303.301(b) would incorporate current § 303.321(a)(2), which identifies the lead agency as the agency responsible for implementing a comprehensive child find system. Proposed § 303.301(b)(1)(i) and (ii) would add references to children who are residing on a reservation located in a State, homeless, in foster care, and wards of the State to incorporate sections 612(a)(3)(A), 634(1) and 635(a)(2) of the Act and to align with the child find provisions in 34 CFR 300.111 of the Part B regulations (71 FR 46764). Proposed § 303.301(b)(1) would cross-reference the provisions in proposed § 303.731(e)(1) to ensure coordination by lead agencies with tribes, tribal organization, and consortia located in the State to ensure the timely identification of Indian infants and toddlers with disabilities.

Proposed § 303.301(b)(2) would replace current § 303.321(b)(2) and would clarify that child find includes methods for determining which children are in need of early intervention services and which children are not in need of those services.

Proposed § 303.301(c) would incorporate the requirements of current § 303.321(c) and would add language requiring child find coordination with the following programs and agencies, to align with sections 634(1), 635(c)(2)(G), and 637(a)(6) and (10) of the Act: early education programs in the State, including Head Start and Early Head Start programs under section 645A of the Head Start Act; child protection programs including the foster care program and the State agency responsible for administering the Child Abuse Prevention and Treatment Act (CAPTA); child care programs in the State; and the programs that provide services under the Family Violence Prevention and Services Act for States electing to make available early intervention services to children with disabilities, in accordance with section 635(c) of the Act and proposed § 303.211.

Proposed § 303.302, regarding referral procedures, would require that the referral of a child under proposed § 303.302(a)(2)(i) be as soon as possible after the child has been identified. This is a change from the requirement in current § 303.321(d)(2)(ii), which requires the referral to occur within two

working days. The 2004 Amendments require lead agencies to conduct child find for additional subpopulations, which has substantially increased the number of referrals, making the two-day period impractical. A change in referral timeline is needed because we have found that the two-day referral is often not practical when some primary referral sources of these additional subpopulations are working with the lead agency and reviewing all information available about the child in order to determine whether the child may be suspected of having a disability and may need referral for evaluation under Part C of the Act. In addition, the Department has limited ability to enforce such a timeline given that primary referral sources include private physicians and other individuals and entities that are not EIS providers. Recognizing the importance of referring and identifying children potentially eligible for early intervention services as soon as possible, we are seeking comment on the proposed change in proposed § 303.302(a)(2)(i), specifically, regarding whether a different timeframe or approach is more appropriate.

Proposed § 303.302(b), regarding referral of specific at-risk children, would incorporate language from section 637(a)(6) of the Act, which requires States to have policies and procedures for the referral of early intervention services under Part C of the Act for an infant or toddler 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.

Proposed § 303.302(b)(1) would require the referral of a child under the age of three who is involved in a substantiated case of child abuse or neglect. This provision is consistent with 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 involved in a substantiated case of abuse or neglect. In coordinating with the U.S. Department of Health and Human Services, which administers CAPTA, the Department has confirmed that neither Part C of the Act nor CAPTA requires the referral of a child other than the child who is the subject of a proceeding resulting in substantiation. Therefore, proposed § 303.302(b)(1) would not require a sibling to be referred or screened unless that sibling is a child under the age of three who has been the subject of a substantiation proceeding.

Proposed § 303.302(c) would incorporate the definition of “primary referral sources” in current § 303.321(d)(3), but would add to the definition: schools, clinics, public agencies and staff in the child welfare system including child protective service and foster care, homeless family shelters, and domestic violence shelters and agencies for States electing to make services under Part C of the Act available to children after the age of three in accordance with section 635(c)(2)(G) of the Act and proposed § 303.211. This would implement the intent of Congress, as expressed in note 290 of the Conf. Rpt., to ensure that the comprehensive child find system “includes a broad range of referral sources such as homeless family shelters, clinics and other health service related offices, public schools and officials and staff in the child welfare system.” The timelines for public agencies to act on referrals in current § 303.321(e) would be replaced by those in proposed § 303.320(e). The Note following current § 303.321 would be removed as it does not reflect a regulatory requirement and is therefore not necessary.

Proposed § 303.303 would clarify the responsibilities of the lead agency regarding when screening may be used once a child is referred for early intervention services under Part C of the Act. These screening provisions would be added because we have determined them to be necessary. Although section 639(a)(4) of the Act has always referenced “screening,” the new child find provisions in the Act require lead agencies and primary referral sources to determine how best to efficiently identify, from the increased number of potential referrals, those children experiencing developmental delays or potentially eligible for early intervention services under Part C of the Act. Many States have already adopted screening procedures to accomplish this.

Proposed § 303.303(a)(1) would expressly permit States to have procedures for the screening of a child, when appropriate, to determine if the child is suspected of having a disability, and would clarify that if the State lead agency elects to adopt screening procedures to determine if a child is suspected of having a disability, those screening procedures must meet the requirements of proposed § 303.303. States would not be required to adopt screening procedures, but if States adopt such procedures, those procedures would have to meet the requirements in proposed § 303.303.

Proposed § 303.303(a)(2) would clarify that, if the screening indicates that the child is suspected of having a disability, the lead agency must conduct an evaluation under proposed § 303.320 to determine the eligibility of the child. This provision would be added because, if the lead agency were to conduct a screening that indicated the child is suspected of having a disability, such screening results would provide the lead agency with information that the infant or toddler may be experiencing developmental delays. If the lead agency believes, based on the screening and other available information, that a child is not suspected of having a disability, then proposed § 303.303(a)(3), consistent with current § 303.403, would require the lead agency to provide the parent with notice under proposed § 303.421 that it is declining to conduct an evaluation. The notice requirement in proposed § 303.303(a)(3) would be added because it is the Department’s experience that many States were not aware of the need to provide notice under these circumstances.

Proposed § 303.303(a)(4) would require the lead agency to conduct an evaluation if a parent requests an evaluation after the lead agency determines a child is not suspected of having a disability after completing a screening. These proposed regulations provide this clarification because most States that have adopted screening procedures after the June 2003 CAPTA amendments and the IDEA 2004 amendments have found that permitting the parent to request an evaluation is necessary to ensure appropriate identification of eligible children. In addition, 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. Further, research in the early childhood community demonstrates that parents are often in the best position to observe and know their infant’s or toddler’s developmental status.

Proposed § 303.303(b)(1) would define screening procedures as activities that are carried out by a public agency, EIS provider, or designated primary referral source (except for parents) to identify infants and toddlers suspected of having a disability and in need of early intervention services at the earliest possible age. Proposed § 303.303(b)(2) would clarify that the screening procedures include the administration of appropriate instruments by qualified personnel that can assist in making the identification described in proposed § 303.303(a)(1).

Proposed § 303.303(c) would clarify that for every child who is referred to the Part C program or receives a screening, the lead agency is not required to provide an evaluation and assessment of a child, unless the child is suspected of having a disability or the parent requests an evaluation under proposed § 303.303(a)(4). This clarification is consistent with note 303 of the Conf. Rpt., which provides that every child who is referred for early intervention services under Part C of the Act, or who is screened is not required to receive an evaluation unless the child is suspected of having a disability and is not required to receive early intervention services under Part C of the Act unless that child is eligible.

The Department notes that screening has long been part of States' child find and public awareness systems under Part C of the Act. The proposed regulations on screening would not apply to screenings conducted: (1) prior to a child's referral for services under Part C of the Act; (2) when a child's eligibility has already been determined; or (3) to siblings of children in substantiated cases of abuse or neglect.

As part of the child find and public awareness systems, primary referral sources and other community agencies often conduct routine agency screenings of infants and toddlers and other children. The proposed Part C regulations would not apply to screenings that are routinely conducted by primary referral sources and are not used by the lead agency to determine whether a child is suspected of having a disability.

In addition, children already determined to be eligible (such as a child with a diagnosed condition who has medical records that the lead agency can use to establish eligibility) would not need to be screened, because the purpose of screening is to determine whether a child is suspected of having a disability.

Finally, neither Part C of the Act nor CAPTA requires the referral or screening of siblings of a child, other than the child who is the subject of the proceeding resulting in substantiated abuse or neglect or who is identified as affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure, unless that sibling is under the age of three and has also been the subject of a substantiation proceeding. However, under Part C of the Act, States may establish broader policies to permit or require the referral or screening of these siblings.

Evaluation and Assessment of the Child and Family and Assessment of Service Needs

Proposed § 303.320 would combine the requirements from current §§ 303.300(b), 303.322, and 303.323 and section 636(a)(1) and (2) of the Act. Proposed § 303.320(a)(1) would require the lead agency to ensure that a timely, comprehensive, and multidisciplinary evaluation and an assessment are performed for each child under three who is referred for an evaluation and is suspected of having a disability. Proposed § 303.320(a)(2)(i) would clarify that an evaluation is the method used to review the assessments of the child and the family to determine a child's initial and continuing eligibility consistent with the definition of *infant or toddler with a disability* in proposed § 303.21. Proposed § 303.320(a)(2)(ii) would clarify that in conducting an evaluation, no single procedure may be used as the sole criterion for determining the child's eligibility for Part C services. Proposed § 303.320(a)(2)(iii) would clarify that the use of a child's medical and other records may be used to establish eligibility (without conducting an assessment of the child and the family) if those records contain information, required under proposed § 303.320, regarding the child's level of functioning in the developmental areas identified in proposed § 303.21(a)(1). The nondiscriminatory procedures in current § 303.323 would be incorporated into proposed § 303.320(a)(3).

Proposed § 303.320(b)(1) would incorporate the procedures for the assessment of a child found in current §§ 303.322(b)(2), 303.322(c)(2), and 303.323(c). Proposed § 303.320(b)(1) would clarify that an assessment of a child means reviewing the child's pertinent records that relate to the child's current health status and medical history and conducting personal observation and assessment of the child to identify the child's unique strengths and needs and present level of developmental functioning. This clarification is necessary because States have not consistently required that the assessment of a child's need for early intervention services be based on personal observation and assessment of the child by qualified personnel. Proposed § 303.320(b)(1) and (2) would clarify that the assessment of the child's unique strengths and needs includes an identification of the child's level of functioning in each of the following developmental areas: Cognitive development; physical development, including vision and hearing;

communication development; social or emotional development; and adaptive development based on objective criteria, which include informed clinical opinion.

Proposed § 303.320(b)(2) would expressly require that the lead agency allow qualified personnel to use their informed clinical opinion to assess a child's present level of functioning in each of the developmental areas identified in proposed § 303.21(a)(1) and to establish a child's eligibility, even when other instruments fail to establish eligibility. This is consistent with the Department's monitoring experience, which has indicated confusion in States that do not expressly allow the use of informed clinical opinion as a separate basis to establish eligibility. This is necessary because instruments may not adequately capture the extent of the developmental delay. Thus, informed clinical opinion may be used to establish a child's eligibility under this part even when other instruments do not establish eligibility. However, under proposed § 303.320(b)(2), informed clinical opinion cannot be used to negate eligibility established through the use of other appropriate assessment instruments.

As provided in the note following current § 303.300, the use of informed clinical opinion in establishing eligibility for early intervention services under Part C of the Act is especially important when standardized instruments are unavailable, unreliable or inappropriate for use in measuring developmental delay (as they often are for children under the age of three) or for evaluating a diagnosed condition such as autism spectrum disorder or pervasive developmental delay. Although the language of the note would be removed by these proposed regulations, the use of informed clinical opinion in establishing eligibility continues to be necessary and would therefore be included in proposed § 303.320(b)(2) as previously discussed.

With respect to the procedures for the assessment of a family, proposed § 303.320(c) would combine the requirements of section 636(a)(2) of the Act and current §§ 303.322(b)(2)(ii) and 303.322(d), and would require that family information be assessed not just through the use of an assessment tool, but through a voluntary personal interview with the family. In addition to the parent, the family assessment can include other family members for the purposes of identifying the child's needs. This proposed language would permit States to avoid unnecessary, time-consuming, and costly evaluations,

if existing records contain reliable information, and establish eligibility for services under Part C of the Act.

Proposed § 303.320(d) would clarify, consistent with section 636(a)(1) of the Act and current § 303.322(c)(3)(iii), that the assessment of service needs must identify the early intervention services needed to meet the unique strengths and needs of each infant or toddler with a disability. The service needs of the family under current § 303.322(d) and sections 635(a)(3) and 636(a)(2) and (d)(2) of the Act have been longstanding requirements, which have clarified that family assessments must be family directed and designed to determine the resources, priorities and concerns of the family and the identification of supports and services to meet the developmental needs of the child. Under proposed § 303.320(d), the assessment of the service needs of each infant or toddler with a disability and that child's family must include a review of the evaluation (including the assessment of the child and family) and available pertinent records and conducting personal observation and assessment of the infant or toddler with a disability in order to identify the early intervention services appropriate to meet the child's unique needs in each of the five developmental areas identified in proposed § 303.320(b)(1).

Current §§ 303.321(a) and 303.321(e)(1) and (2), require that a child's evaluation, assessment, and initial IFSP meeting occur within 45 days from the date the public agency receives the referral. The Department believes this imposes an unnecessary burden on Part C agencies. Because the public agency cannot initiate these actions without parental consent, a refusal or late consent may drastically reduce the time available for the agency to perform evaluations and prepare for the IFSP meeting. Proposed § 303.320(e)(1) would retain the 45-day timeline requirement, but the timeline would start with the date the public agency obtained parental consent for the evaluation, not the date the public agency receives the referral.

This change in how the 45-day timeline is calculated may result in some delays in the evaluation process, since the public agency may be less motivated to obtain timely consent. However, there are situations in which the lead agency is unable to obtain the requisite consent in a timely manner because the parents do not respond. In those cases, the delays in obtaining parental consent affect the State's ability to conduct evaluations, assessments, and the initial IFSP meetings within the 45-day period; potentially increase costs

due to the need to pay overtime to staff; and make the State vulnerable to due process complaints based on its not complying with the 45-day timeline requirement.

The Department believes the change in starting date for the 45 days to when parental consent is obtained would provide a more realistic start time for conducting evaluations, assessments and the initial IFSP meeting and improve the ability of States to manage the development of IFSPs. This proposed change also would eliminate the possibility that States will be penalized for a lack of timeliness in due process complaints in which parents were responsible for delays because they did not provide timely consent or did not respond. The timeline change reflected in proposed § 303.320(e) is consistent with section 636(c) of the Act, which requires that the IFSP be developed within a reasonable time after the assessment is completed.

The Department is seeking comment on whether the proposed change to the starting date for evaluation, assessment, and initial IFSP in proposed § 303.320(e) is reasonable and necessary. Another option to consider is for the starting date to remain the same with an increase in the length of time to complete evaluations, assessments, and holding the initial IFSP meeting.

#### Individualized Family Service Plans (IFSPs)

The definition of IFSP in current § 303.340 would be incorporated into the definition of IFSP in proposed § 303.20. Proposed § 303.340 would cross-reference the definition in proposed § 303.20 and would require that the IFSP for an infant or toddler with a disability meet the requirements in proposed §§ 303.342 through 303.345.

Proposed § 303.342(a) through (d), regarding procedures for IFSP development, review, and evaluation would be substantively unchanged from current § 303.342(a) through (d), with the cross-references updated. Proposed § 303.342(e) would be substantively unchanged from current § 303.342(e), except that the substantive requirements regarding a parent's ability to consent or decline consent at any time would be addressed in proposed § 303.420. The note following current § 303.342 would be removed as it does not reflect a regulatory requirement and is therefore not necessary.

Proposed § 303.343, regarding IFSP team meetings and periodic reviews, would be substantively unchanged from current § 303.343 except that the title of the section would be changed. IFSP

participants would be referred to as the "IFSP team" to align with the reference to a "multidisciplinary team" in section 636(a)(3) of the Act. Proposed § 303.343(a)(1)(iv) would remove, as unnecessary, language defining which service coordinators must participate in the initial and annual IFSP meetings. The change would be made to alleviate burden on the State to have additional people at the IFSP meeting. In most States, the service coordinator at the time of the IFSP meeting is the service coordinator who is most knowledgeable about the child and family and this service coordinator generally attends the IFSP meeting.

Proposed § 303.344(a), regarding content of an IFSP, would be substantively unchanged from current § 303.344(a), except that proposed § 303.344(a) would clarify that the IFSP content regarding present levels of functioning in each developmental area must be based on the child's evaluation and assessment under proposed § 303.320, to align with section 636(d)(1) of the Act, which requires that the child's present levels of development be based on objective criteria. Accordingly, current § 303.344(a)(2), which refers to professionally acceptable objective criteria, would be removed. Proposed § 303.320 would require that objective criteria be used to determine the infant or toddler's present levels of functioning in the developmental areas identified.

Proposed § 303.344(b) would be substantively unchanged from current § 303.344(b). Proposed § 303.344(c) would incorporate language from section 636(d)(3) of the Act, which requires the IFSP to contain a statement of the "measurable results or outcomes expected to be achieved for the infant or toddler and the family, including pre-literacy and language skills, as developmentally appropriate for the child." Because the term "measurable" modifies both "results" and "outcomes," proposed § 303.344(c) would clarify that the IFSP must contain measurable results or measurable outcomes. In addition to being required by the statute, including pre-literacy and language skills as examples of measurable results or measurable outcomes is consistent with the current practices of most States for including on the IFSP, communication or social and emotional developmental goals. These goals would meet the requisite pre-literacy and language skills that are developmentally appropriate for infants and toddlers with disabilities.

Proposed § 303.344(d)(1) would incorporate language from section 636(d)(4) of the Act, which requires that

specific early intervention services contained in the IFSP be based on peer-reviewed research, to the extent practicable. This requirement is not intended to impose any additional recordkeeping or IFSP content burden but rather to ensure that each early intervention service is based on the child's developmental needs and reflects current standards of research-based practices.

Proposed § 303.344(d)(1)(i) would be consistent with section 636(d)(4) and (6) of the Act, and would require the IFSP to contain a statement of the frequency, intensity, length, duration, and method of delivery of services.

Proposed § 303.344(d)(1)(ii)(A), concerning natural environments, would be amended to align with sections 635(a)(16)(A) and 636(d)(5) of the Act. Proposed § 303.344(d)(1)(ii)(B), regarding the determination of the appropriate setting for providing early intervention services, would align with section 635(a)(16)(B) of the Act.

Proposed § 303.344(d)(1)(ii)(B) would specify that if a particular early intervention service cannot be provided satisfactorily in a natural environment, a justification that describes the setting in which the service will be provided and an explanation that supports the decision as to how the setting will assist the infant or toddler achieve the IFSP outcomes is required on the IFSP. This incorporates a longstanding Department policy that a justification for not providing early intervention services in a natural environment should be based on the child's IFSP outcomes. Note 295a of the Conf. Rpt. states "that there may be instances when a child's Individualized Family Service Plan cannot be implemented satisfactorily in the natural environment. The Conferees intend that in these instances, the child's parents and other members of the individualized family service plan team will together make this determination and then identify the most appropriate setting in which early intervention services can be provided."

In addition, proposed § 303.344(d)(2) would define the terms *frequency and intensity, method, length, and duration* for purposes of proposed § 303.344(d)(1)(i). Proposed § 303.303(d)(2)(i) regarding the definition of *frequency and intensity* would be substantively the same as current § 303.344(d)(2)(i) except that proposed § 303.344(d)(2)(iii) would include a definition of *length*, consistent with section 636(d)(6) of the Act. Proposed § 303.303(d)(2)(ii), regarding the definition of *method*, would incorporate current § 303.344(d)(2)(ii). Proposed § 303.344(d)(2)(iv), regarding

the definition of *duration*, would clarify that 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).

Proposed § 303.344(d)(3), regarding the definition of *location*, would incorporate the language in current § 303.344(d)(3).

Proposed § 303.344(d)(4) would add a new requirement 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 to align with sections 632(5)(B)(ii) and 635(c) of the Act, and 34 CFR 300.323(b) of the Part B regulations (71 FR 46789), regarding the allowable use of IFSPs under section 619 of the Act.

Proposed § 303.344(e) would remove 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. Current § 303.344(e)(1)(ii) would be removed, as it is overly burdensome to require IFSP teams, including service coordinators, to identify funding for services not required under Part C of the Act, because service coordinators may have limited knowledge about funding for services that are provided by other programs. In addition, proposed § 303.344(e) would incorporate current § 303.344(e)(i) regarding the requirement that other services needed or received by the child or family also be identified on the IFSP. Identifying these other services ensures that the IFSP identifies all of the services available to the child and family, and would avoid duplicative services and enhance coordination among the various agencies and organizations that are providing or may provide such services, and would ensure that Part C funds are not being used to pay for duplicate services. As indicated in Note 3 following current § 303.344, while listing the non-required services in the IFSP does not mean that those services must be provided, their identification is helpful to the child's family, the service coordinator, and EIS providers because the IFSP provides a comprehensive picture of the child's total service needs (including medical and health services), as well as early intervention services (including transition services).

Current § 303.344(e)(2) would be removed as unnecessary. The substance of current § 303.344(e)(2) would be included in proposed § 303.16(c)(3), in the definition of *health services*. Proposed § 303.344(f) would be

substantively unchanged from current § 303.344(f) and would require the IFSP team to include on the IFSP, the projected date for initiation of each service, which date must be as soon as possible after the IFSP meeting, and the anticipated duration of each service.

Current § 303.344(g)(1) and (3) would be retained in proposed § 303.344(g). Proposed § 303.344(g)(1) is intended to provide guidance to the State in the identification of the service coordinator on the IFSP. Current § 303.344(g)(2) would be removed, to align proposed § 303.344(g) with section 636(d)(7) of the Act, and to reduce the burden on States. Although the service coordinator must serve as the single point of contact under current § 303.23 and proposed § 303.33(a)(3), there is not a requirement that the service coordinator be the same individual throughout the child's participation in the Part C system. Current § 303.344(g)(3) would be renumbered as proposed § 303.344(g)(2).

Proposed § 303.344(h)(1), regarding the IFSP identifying the programs to which children may transition from services under Part C of the Act, would be substantively unchanged, except that subsections (ii) and (iii) would be added to expressly identify the following additional programs: (1) elementary school or preschool services (for children participating under proposed § 303.211); and (2) early education, Head Start and Early Head Start or child care programs to incorporate the coordination provisions in section 637(a)(10) of the Act.

Proposed § 303.344(h)(2)(iv) would incorporate the provisions in section 636(a)(3) of the Act to add a reference to transition services and would remain substantively unchanged from current § 303.344(h). The remainder of current § 303.344(h) would be amended and renumbered consistent with section 636 of the Act. The notes following current § 303.344 would be removed, as they do not reflect regulatory requirements, but are explanatory or provide examples, and are therefore not necessary, except for Note 3, which would be incorporated into proposed § 303.344(e).

Proposed § 303.345 would be substantively unchanged from current § 303.345, with cross-references updated. The first part of the note after current § 303.345 regarding the purpose of interim IFSPs would be removed as unnecessary because it provides only one example of when interim IFSPs may be used, namely when a child's eligibility under Part C of the Act is clear (i.e. due to a diagnosed condition such as cerebral palsy). However, interim IFSPs are available whenever an immediate need for an early

intervention service is identified for an infant or toddler with a disability and the other conditions of proposed § 303.345 are met, regardless of how a child is eligible under Part C of the Act. In addition, the second part of this note, regarding the applicability of the 45-day timeline, would be removed, because proposed § 303.345(c) would continue to apply the 45-day timeline for the timely completion of evaluations and assessments, even when an interim IFSP is used.

Proposed § 303.346 would retain current § 303.346, regarding the responsibility and accountability of agencies and persons who have a direct role in the provision of early intervention services. Personnel training and standards in current §§ 303.360 and 303.361 would be moved to subpart B of the proposed regulations in §§ 303.118 and 303.119 to align with section 635 of the Act. The note following current § 303.361, regarding State flexibility to identify specific occupation categories, would be removed as unnecessary, because proposed §§ 303.118 and 303.119 would adequately clarify that State personnel standards would continue to be determined by States.

#### *Subpart E—Procedural Safeguards*

Proposed subpart E would incorporate the procedural safeguard provisions from sections 615 and 639 of the Act.

#### *General*

Proposed § 303.400(a) would substantially retain the language in current § 303.400(a), but would identify the major components of procedural safeguard requirements in proposed subpart E, including: confidentiality; parental consent and notice; surrogate parents; mediation; dispute resolution options; and due process hearing procedures under sections 639 and 615 of the Act. Proposed § 303.400(b) would be substantially the same as current § 303.400(b), and would indicate that the lead agency is responsible for ensuring the effective implementation of the safeguards by each EIS provider in the State that is involved in the provision of early intervention services.

The confidentiality provisions in proposed §§ 303.401 through 303.417, would implement sections 617(c) and 639(a)(2) and (4) of the Act and would primarily incorporate the language of the confidentiality protections under 34 CFR 300.610 through 300.627 of the Part B regulations (71 FR 46802–46804), and the Family Educational Rights and Privacy Act (FERPA) in 20 U.S.C. 1232g and its implementing regulations in 34 CFR part 99.

The parental consent, notice, and surrogate parent provisions in proposed §§ 303.420 through 303.422, would implement section 639(a)(3), (5), (6), and (7) of the Act, regarding parental consent, parental notice, and surrogate parent provisions and would replace current §§ 303.403 through 303.406.

The dispute resolution options in proposed §§ 303.430 through 303.439, would implement section 639(a)(1) and (8), and 639(b) of the Act. To make these regulations a freestanding document, the due process hearing procedures for resolving individual child complaints in proposed §§ 303.440 through 303.449 would include language from section 615(b)(6) and (7), (c)(2), (e)(2)(F), (f), (h), (i), (l), and (o) of the Act.

#### *Confidentiality*

Proposed § 303.401 would combine current §§ 303.402 and 303.460 to clarify when the confidentiality provisions in Part C of the Act apply, to mandate very limited disclosure between specific agencies for purposes of child find activities, to make other changes to conform to the Act, and to allow a lead agency to establish procedures that would inform parents of a potential referral and provide an opportunity to object prior to the disclosure. The note following current § 303.460 regarding the confidentiality requirements and the provisions of FERPA, would be removed because the substance of the applicable language is included in proposed §§ 303.401 and 303.402.

Proposed § 303.401(b) would remain substantively unchanged from current § 303.402, except that, instead of referencing the confidentiality provisions from Part B of the Act, proposed § 303.401(b) references proposed §§ 303.402 through 303.417, which would include the language of these requirements as modified to apply to lead agencies and EIS providers under Part C of the Act. Proposed § 303.401(b)(1) would clarify that the Part C confidentiality provisions are consistent with, but broader than, the provisions under FERPA.

Proposed § 303.401(c) would clarify that the Part C confidentiality provisions apply, when the child is referred for early intervention services under Part C of the Act and continue to apply until the time when the lead agency, public agency or EIS provider is no longer required to maintain or maintains such information under applicable Federal and State laws. The proposed provisions would clarify that as long as the lead agency, public agency or EIS provider is required to maintain, or maintains such records

under Part C of the Act, the confidentiality provisions would apply to ensure appropriate privacy of Part C early intervention records.

Proposed § 303.401(d) would be added to incorporate the child find requirements from sections 612(a), 635(a)(6), and 637(a)(9) of the Act and require the very limited disclosure of personally-identifiable information during child find activities. This provision incorporates existing Department policy.

Proposed § 303.401(e) would permit States to adopt a policy to require any public agency or EIS provider, prior to the limited disclosure, to inform the parent of the intended disclosure required under proposed §§ 303.401(d) and 303.209(b)(2), and would allow the parent an opportunity to object to the disclosure in writing. Permitting States to adopt this policy would balance the privacy interests of parents of children receiving services under Part C of the Act, with the lead agency's and SEA's responsibilities to identify children potentially eligible for services under IDEA. Consistent with proposed § 303.209, if the State adopted such an "opt-out" policy, that policy must be on file with the Secretary as part of the State's application under Part C of the Act.

#### *Additional Confidentiality Requirements*

Proposed §§ 303.402 through 303.417 would be added in order to create freestanding regulations that can be easily used by parents, lead and public agencies, and EIS providers and that would include the confidentiality requirements from 34 CFR 300.610 through 300.627 of the Part B regulations (71 FR 46802–46804) that apply to Part C of the Act under current §§ 303.402 and 303.460. These confidentiality requirements would be amended, where appropriate, to apply to Part C lead agencies and EIS providers to ensure confidentiality of Part C records but would not be substantively changed from the corresponding provisions in the Part B regulations. For example, proposed § 303.405(a), regarding access rights, requires the agency to comply with a request no more than 20 days after a request has been made, whereas the corresponding requirement in 34 CFR 300.613(a) of the Part B regulations (71 FR 46803) requires a response no more than 45 days after the request. The variance in the timelines is to accommodate the 30-day timeline for due process hearings under Part C of the Act, as opposed to the 45-day timeline in Part B of the Act.

In addition, proposed § 303.414(d) would codify an express exception to the general parental consent requirement for release of personally identifiable information in early intervention records to reflect the role of Protection and Advocacy (P&A) systems under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act). Under the DD Act, which is administered by the Department of Health and Human Services, a P&A system may need access to early intervention records in specific circumstances.

Proposed § 303.414(d)(1) would cross-reference the requirement in section 143(a)(2)(I)(iii)(III) of the DD Act, that authorizes P&A systems under the DD Act to obtain access to contact information (including the name, address and telephone number) of the parent or legal guardian or representative of an infant or toddler with a disability in cases where they have probable cause to believe that such a child is an individual with a developmental disability who has been subject to abuse or neglect. 42 U.S.C. 15043(a)(2)(I)(iii). Proposed § 303.414(d)(1) would enable the lead agency or participating agency to disclose to the P&A system this contact information that would otherwise be considered personally identifiable information under Part C of the Act when the P&A system expressly requests this information under section 143(a)(2)(I)(iii) of the DD Act.

Proposed § 303.414(d)(2) would expressly also permit the lead agency or participating agency to disclose personally identifiable information in early intervention records in order to provide the P&A system access to the early intervention record of an infant or toddler with a disability when the P&A system requests access under either section 143(a)(2)(I)(iii) or section 143(a)(2)(J) of the DD Act. Under section 143(a)(2)(I)(iii) of the DD Act, the P&A system is authorized to have access where the P&A system has probable cause to believe that an individual with a developmental disability has been subject to abuse or neglect, it has contacted the parents to offer assistance, and the parents have refused to act. Under Section 143(a)(2)(J)(ii) of the DD Act, the P&A system is authorized to have immediate access to the early intervention records of an infant or toddler with a disability who is an individual with a developmental disability without that child's parental consent in a case where a P&A system has probable cause to believe that the health and safety of that individual are in serious and immediate jeopardy.

#### Parental Consent and Notice

Proposed § 303.420(a) and (b), regarding parental consent and notice, would be substantively unchanged from current § 303.404 and would add "and ability to decline service" in the heading to better align the regulation with section 639(a)(3) of the Act. Proposed § 303.420(a) would specifically indicate that the lead agency must ensure that parental consent is obtained before an evaluation and assessment of a child would be conducted under proposed § 303.320, before the provision of early intervention services, prior to the use of the parent's public or private insurance under proposed § 303.520, and prior to the exchange of personally identifiable information consistent with proposed § 303.401.

The term "initial" in current § 303.404(a)(1) would not be included in proposed § 303.420(a)(1) in order to clarify, consistent with Part B in section 614(c)(3) of the Act and the practice in the vast majority of Part C State early intervention programs, that parental consent is required not only for the initial evaluation but also for reevaluation of a child under Part C of the Act. Because the Part C parental consent provisions in section 639(a)(3) of the Act are broader (and more appropriate for the parents of infants and toddlers with disabilities) than the consent provisions under Part B in section 614(c) of the Act, the exceptions to requiring the public agency to obtain parental consent in section 614(c)(3) of the Act and 34 CFR 300.300(c) of the Part B regulations (71 FR 46784) do not apply to Part C of the Act.

Proposed § 303.420(b) would be unchanged from current § 303.404(b) regarding the lead agency's responsibilities if the parent does not provide consent.

Proposed § 303.420(c) would be added to include the language of Note 2 following current § 303.404 to clarify that a lead agency may, but is not required to, use the due process hearing procedures to challenge the parent's refusal to consent to an evaluation and assessment of the child. The term "initial" in Note 2 would not be incorporated into proposed § 303.420(c) because the lead agency may, but is not required to, use due process hearing procedures to override parental refusal to provide consent for any evaluation, not just the initial evaluation. The substance of Note 1, regarding parental consent, following current § 303.404 would be included where applicable in proposed § 303.420; and the substance of Note 1, regarding personally

identifiable information, would be included in proposed § 303.401(c).

Proposed § 303.420(d) would incorporate the requirements in section 639(a)(3) of the Act and current § 303.405, and clarify the parent's right to accept or decline any early intervention service at any time.

Proposed § 303.421, regarding prior written notice, would be substantively unchanged from current § 303.403 and would incorporate section 639(a)(6) and (7) of the Act. Proposed § 303.421(c) would be substantively unchanged from current § 303.403(c) except that the provisions in current § 303.403(c)(3) would be moved to the definition of *native language* in proposed § 303.25.

#### Surrogate Parents

Proposed § 303.422, regarding surrogate parents, would be substantively unchanged from current § 303.406, except proposed §§ 303.422(b)(2), 303.422(c)(2)(i) and 303.422(e), would contain new language. Additionally, we used the statutory word "locate" in proposed § 303.422(a)(2), rather than the term "discover the whereabouts" used in current § 303.406(a)(2). "Locate" as used in proposed § 303.422(a)(2), regarding a lead agency's efforts to locate the child's parent, means that a lead agency makes reasonable efforts to discover the whereabouts of a parent, as defined in proposed § 303.27, before assigning a surrogate parent.

Proposed § 303.422(b)(2) would clarify that in implementing the provisions for determining when a surrogate parent is needed and assigning one for an infant or toddler who is a ward of the State or placed in foster care, the lead agency must consult with the public agency to which care of the infant or toddler has been assigned. This provision would be added due to the potential increase in the number of infant or toddler referrals under CAPTA and from child protective service agencies, recognizing that lead agencies may not have current updated data on families. However, this consulting requirement is not intended to be a burden, and consultation can occur by telephone, e-mail, or other means established by the lead agency and consistent with the interagency confidentiality requirements.

Proposed § 303.422(c)(2)(i) would incorporate the language from section 639(a)(5) of the Act, and would prohibit the assignment of a surrogate parent who is an employee of the lead agency or any other public agency or EIS provider that provides early intervention or other services to the child or any family member of the child.

Current § 303.406(d)(1) would be removed because it would be redundant with proposed § 303.422(c)(2)(i). Proposed § 303.422(e) would be substantively unchanged from current § 303.406(e), and would clarify that the surrogate parent has the same rights as a parent for all purposes under this part.

#### Dispute Resolution Options

Proposed § 303.430(a) would require each State system to make available dispute resolution options under Part C of the Act that would include mediation, due process hearing procedures, and State complaint procedures in current §§ 303.419, 303.420 through 303.425, and 303.510 through 512, respectively.

Proposed § 303.430(b) would clarify that each lead agency must make mediation available as required in proposed § 303.431, and would incorporate language from sections 615(e) and 639(a)(8) of the Act and current § 303.419.

Proposed § 303.430(c) would be aligned with the Part B administrative complaint procedures in 34 CFR 300.151 through 300.153 of the Part B regulations (71 FR 46770–46771) and would continue to require, as set forth in current § 303.510, that each lead agency adopt written State complaint procedures that meet the requirements in proposed §§ 303.432 through 303.434 to resolve any complaints filed by any party regarding any violation of this part.

Proposed § 303.430(d) would continue to allow lead agencies the option of using the Part C due process hearing procedures under proposed §§ 303.435 through 303.439, or the Part B due process hearing procedures under proposed §§ 303.440 through 303.449 (with the option of adopting either a 30-day or 45-day timeline).

Proposed § 303.430(e)(1) and (2) would incorporate the pendency language in section 639(b) of the Act and current § 303.425 regarding the services that must be provided during the pendency of a due process complaint. Proposed § 303.430(e)(1) would further clarify that the child must continue to receive those early intervention services that are identified on the IFSP to which the parent has provided consent and in the settings identified on the IFSP, unless the lead agency and parent otherwise agree.

Proposed § 303.430(e)(3)(i) would clarify that if a child turns three and the child's eligibility under Part B of the Act has not yet been determined in a State that has adopted the option to provide Part C services beyond age three, then the lead agency must continue to

provide Part C services to that child under proposed § 303.211(b)(4). Proposed § 303.430(e)(3)(ii) would clarify that once a child turns three and has been determined ineligible for services under Part B of the Act and proposed § 303.211, Part C pendency does not apply and the lead agency is not required to provide Part C services to that child during the pendency of any due process hearing procedure challenging the determination of ineligibility.

#### Mediation

Proposed § 303.431, regarding mediation, would remain substantively unchanged from the current § 303.419 but would include several mediation provisions based on revisions in section 615(e) of the Act, which applies to Part C through section 639(a)(8) of the Act. 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, as indicated in proposed § 303.431(a). Proposed § 303.431(b) would include the requirements in current § 303.419(b).

Additionally, proposed § 303.431(b)(5) and (b)(6) would incorporate the requirements in sections 615(e) and 639(a)(8) of the Act and require that if mediation results in resolution of a complaint, the parties must execute a legally binding agreement that describes the resolution of the matter and states that discussions that occurred during mediation shall be confidential and not used as evidence in any subsequent due process hearing or civil proceeding. The proposed regulation would require that the agreement be signed by the parent and a lead agency representative who has authority to bind the agency, and state that the agreement would be enforceable in any State court of competent jurisdiction or in a district court of the United States.

Proposed § 303.431(c) would provide requirements for the impartiality of the mediator consistent with sections 615(e)(2) and 639(a)(8) of the Act. Proposed § 303.431(d), regarding a meeting to encourage mediation, would incorporate the language in current § 303.419(c). Current § 303.419(b)(6), regarding the requirement that parties sign a confidentiality pledge, would be removed to align with section 615(e) of the Act.

#### State Complaint Procedures

Proposed § 303.432, regarding the requirement for the lead agency to adopt written State complaint procedures, would be substantively unchanged from current § 303.510 except that the provision in current § 303.510(a)(1)(ii), regarding the option for a local public agency to resolve a complaint, would be removed. This provision would be removed because, under Part C of the Act, (unlike Part B of the Act) virtually all States utilize only the lead agency for the resolution of complaints. In addition, because relatively few State complaints are filed under Part C of the Act eliminating this option would not create any additional burden for States. During Federal fiscal year 2004 the average number of State complaints filed under Part C of the Act was less than 2.0 per State.

Proposed § 303.433, regarding the requirements for minimum State complaint procedures, would remain substantively unchanged from current § 303.512.

Proposed § 303.433(a)(3) would clarify that a lead agency's State complaint procedures must provide the lead agency, public agency, or EIS provider with an opportunity to respond to a complaint filed under proposed § 303.430(c), including, at a minimum, 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 proposed § 303.430(b). Proposed § 303.433(b)(1)(ii) regarding time extensions for filing a State complaint, would clarify that it would be permissible to extend the 60-day timeline if 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 agree to engage in mediation, consistent with proposed § 303.433(a)(3)(ii). Proposed § 303.433(c)(3) would incorporate the provisions in current § 303.512(c)(3).

Proposed § 303.434, regarding filing a complaint, would remain substantively unchanged from current § 303.511 except proposed § 303.434(b)(3) and (4) would require a parent filing a State complaint to provide the lead agency, public agency, or EIS provider with information about the child who is the subject of the complaint, which may allow the lead agency, public agency, or EIS provider to attempt to resolve the complaint at the earliest opportunity. In addition, proposed § 303.434(c) would amend the language in current § 303.511(b) to require that the complaint must allege that a violation

occurred not more than one year prior to the date the complaint is received, and would remove references to longer periods for continuing violations to ensure expedited resolution for public agencies and children.

Proposed § 303.434(d) would require that the party filing a complaint 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. This provision would ensure that the public agency or EIS provider involved has knowledge of the issues, and an opportunity to resolve them directly with the complaining party.

States That Choose To Adopt the Part C Due Process Hearing Procedures Under Section 639 of the Act

Proposed §§ 303.435 through 303.439, regarding due process hearing procedures under Part C of the Act, would remain substantively unchanged from current §§ 303.420 through 303.425, except that the references to “impartial procedures” would be replaced with “due process hearing” to distinguish these procedures from the State administrative complaint procedures in proposed §§ 303.432 through 303.434 and in proposed § 303.430(c). Note 1 following current § 303.420, regarding the adoption of Part C impartial procedures for resolving individual child complaints, would be removed because it is substantively incorporated into proposed §§ 303.435 through 303.439. Also, the complaint procedures in Note 1 following current § 303.420 would be substantively incorporated into proposed §§ 303.432 through 303.434. Note 2 following current § 303.420, indicating that the administrative procedures developed by a State should be designed to result in speedy resolution of complaints, because an infant’s or toddler’s development is so rapid that undue delay could be potentially harmful, would not be included in these proposed regulations because the process for the resolution of due process hearing procedures, including timelines, is addressed in proposed §§ 303.435 through 303.449.

Proposed § 303.435, regarding appointment of an impartial due process hearing officer, would remain substantively unchanged from the current § 303.421.

Proposed § 303.436, regarding parental rights in due process hearing procedures, would remain substantively unchanged from the current § 303.422.

Proposed § 303.437, regarding convenience of hearings and timelines,

would remain substantively unchanged from the current § 303.423.

Proposed § 303.438, regarding civil actions, would remain substantively unchanged from current § 303.424.

States That Choose To Adopt the Part B Due Process Hearing Procedures Under Section 615 of the Act

Proposed §§ 303.440 through 303.448 would incorporate the due process hearing procedures for resolving individual child complaints under section 615 of the Act and 34 CFR 300.507, 300.508, and 300.510 through 300.516 of the Part B regulations (71 FR 46793–46796), and proposed § 303.449 would align with section 615(e)(2)(F) of the Act. These regulations are included to make these proposed Part C regulations a freestanding document to assist families, EIS providers, and lead agencies in accessing the provisions of the Part B due process hearing procedures under section 615 of the Act, which a Part C lead agency may choose to adopt under proposed § 303.430(d).

The note following current § 303.423 would not be included in the proposed regulations because the procedures for resolving Part B due process complaints under section 615 of the Act would be substantively included in proposed §§ 303.440 through 303.449, except that the portion of the note regarding the State being encouraged (but not required) to accelerate the timeline for the due process hearing because the needs of children in the birth-through-two age range change rapidly, would be removed because the process for the resolution of impartial individual child complaints, including timelines, is addressed in proposed §§ 303.440 through 303.449.

Proposed § 303.440(a) would reflect the change in 34 CFR 300.507(a) of the Part B regulations (71 FR 46793), regarding initiating a due process hearing on matters regarding the identification, evaluation, or placement of a child, or the provision of appropriate early intervention services, to specify that a party could “file a due process complaint,” as opposed to “initiate,” a hearing on these matters.

Proposed § 303.440(a)(2) would reflect the requirement in section 615(b)(6)(B) of the Act concerning the time period for filing a request for a due process hearing after the alleged violation has occurred. Proposed § 303.440(b), consistent with the revision to 34 CFR 300.507(b) of the Part B regulations (71 FR 46793), would include information regarding the responsibility of the lead agency, under certain circumstances, to provide information about available free

or low-cost legal or other relevant services to parents.

Proposed § 303.440(c) would clarify that the lead agency may adopt a 30- or a 45-day timeline, subject to proposed § 303.447(a), for the resolution of due process complaints and must specify in its written policies and procedures under proposed § 303.123 and in its prior written notice under proposed § 303.421, the specific timeline that it has adopted.

Proposed § 303.441 would substantively include language from 34 CFR 300.508 of the Part B regulations (71 FR 46793–46794) regarding due process complaints. Additionally, proposed § 303.441(a), (b), and (c) would incorporate new language from section 615(b)(7) of the Act. Proposed § 303.441 would include language concerning the obligation to provide a due process complaint to the other party, the required content of the complaint notice, and the requirement that a due process hearing may not be held until the party, or the attorney representing the party, files the due process complaint. These changes should help clarify that the complaint and complaint notice would be the same document, which should aid in smooth implementation of these new provisions.

Proposed § 303.441(a)(2) would require the party requesting the hearing to forward a copy of the due process complaint to the lead agency to align with section 615(b)(7)(A)(i) of the Act. Proposed § 303.441(b) would address the contents of the due process complaint and would align with section 615(b)(7)(A)(ii) of the Act. Proposed § 303.441(c), regarding the notice required before a hearing on a due process complaint, would include language from section 615(b)(7)(B) of the Act. Proposed § 303.441(d) and (e) would incorporate the new language from section 615(c)(2) of the Act concerning due process complaint sufficiency and response to a due process complaint. Proposed § 303.441(e) would address the lead agency’s or EIS provider’s responsibility to send a parent a response to the due process complaint if the lead agency had not sent a prior written notice to the parent regarding the subject matter contained in the parent’s due process complaint. Proposed § 303.441(e)(1) would outline what information must be contained in the response.

Proposed § 303.442 would substantively include language from 34 CFR 300.510 of the Part B regulations (71 FR 46794) regarding the resolution process. Additionally, proposed § 303.442(a)(4) would be added to

include the substance of note 212 of the Conf. Rpt. that the parent and the lead agency must determine the relevant members of the IFSP team to attend the resolution meeting. Proposed § 303.442(b)(2) would clarify that the regulatory timeline for issuing a final due process hearing decision begins at the end of the 30-day resolution period that starts when the due process complaint is received. This provision is based on the language in section 615(f)(1)(B)(ii) of the Act stating that the applicable timelines for a due process hearing commence at the end of this 30-day period. Proposed § 303.442(b)(3) would provide, however, that the resolution process and due process hearing would be delayed until the resolution meeting is held if a parent filing a due process complaint fails to participate in the resolution meeting. Proposed § 303.442(b)(3) is based on H. Rep. No. 108–77, p. 114 that provides: “[If] the parent and the State or lead agency mutually agree that the meeting does not need to occur, the resolution session meeting does not need to take place. However, unless such an agreement is reached, the failure of the party bringing the complaint to participate in the meeting will delay the timeline for convening a due process hearing until the meeting is held.”

Proposed § 303.442(c) would incorporate the requirement from section 615(f)(1)(B) of the Act, regarding the conducting of resolution meetings, unless waived by joint agreement of the parties prior to the opportunity for an impartial due process hearing. Proposed § 303.442(d) includes language from section 615(f)(1)(B)(iii) of the Act regarding the contents of a legally binding written settlement agreement. Proposed § 303.442(e) includes language from section 615(f)(1)(B)(iv) of the Act regarding the ability of a party who executed a settlement agreement to void the agreement within three business days.

Proposed § 303.443 would substantively include language from 34 CFR 300.511 of the Part B regulations (71 FR 46794–46795) regarding impartial due process hearings. Additionally, proposed § 303.443(a) and (b) would incorporate the language from section 615(f)(1)(A) of the Act regarding impartial due process hearings. Proposed § 303.443(b) would include the language from section 615(f)(1)(A) of the Act, and would indicate that the lead agency directly responsible for the early intervention services of the infant or toddler, as determined under State statute, be responsible for conducting the due process hearing. Proposed § 303.443(c)(1) would include the

language regarding qualifications of hearing officers from section 615(f)(3)(A) of the Act. Proposed § 303.443(c) would incorporate the regulatory language in 34 CFR 300.511(c) of the Part B regulations (71 FR 46795) regarding the non-employee status of the hearing officer and the requirement for the public agency to keep a list of hearing officers and their qualifications. Proposed § 303.443(d), (e), and (f) would include the requirements in section 615(f)(3)(B), (C), and (D) of the Act concerning the subject matter of the due process hearings, timelines for requesting hearings and exceptions to the timelines, respectively.

Proposed § 303.444(a), (b), and (c) would incorporate the due process hearing rights addressed in section 615(f)(2) and (h) of the Act and in 34 CFR 300.512 of the Part B regulations (71 FR 46795). In addition, proposed § 303.444(a)(4) and (5) would include the language from section 615(h)(3) and (4) of the Act indicating that parents would have a right to obtain copies of a written, or, at the option of the parents, electronic, verbatim record of the hearing and copies of findings of fact and decisions, and public agencies would remain responsible for ensuring that these rights are effectively implemented. The language in 34 CFR 300.512(c)(3) of the Part B regulations (71 FR 46795) concerning providing the record of the hearing and decision at no cost to the parents is included in proposed § 303.444(c)(3).

Proposed § 303.445 would substantively include language from 34 CFR 300.513 of the Part B regulations (71 FR 46795) regarding hearing decisions. Proposed § 303.445(a) would include the language in section 615(f)(3)(E) of the Act concerning the nature of hearing officer decisions, including the requirement that decisions be made on substantive grounds, and the standards for when procedural violations can be found to deny appropriate identification, evaluation, placement, or provision of early intervention services, and would clarify that a hearing officer can order an EIS provider to comply with procedural requirements.

Proposed § 303.445(b) would incorporate the construction clause from section 615(f)(3)(F) of the Act. In addition, proposed § 303.445(b) would clarify language in note 225 of the Conf. Rpt., which indicates that the statutory reference to a complaint was intended to address a State-level administrative appeal process, if available in that State.

Proposed § 303.445(c) would incorporate the requirement from

section 615(o) of the Act that nothing prevents a parent from filing a separate due process complaint on an issue separate from the due process complaint that has already been filed. However, note 220 of the Conf. Rpt. states that: “the Conferees intend to encourage the consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint.”

Proposed § 303.445(d) would include the language from section 615(h)(4)(A) of the Act concerning the availability of hearing decisions to the public. This is also consistent with the requirements of section 617(b) of the Act relating to the confidentiality of data.

Proposed § 303.446, on finality of decision, appeal, and impartial review, and proposed § 303.447, regarding timelines and convenience of hearings and reviews, would substantively include 34 CFR 300.514 and 300.515, respectively, of the Part B regulations (71 FR 46795–46796), with cross-references updated to include the proposed regulations under Part C of the Act.

Proposed § 303.447(a) also would be revised to start the 45-day timeline from the expiration of the 30-day period for resolution under proposed § 303.442, rather than from the date when the agency receives a due process complaint. This change is based on revised language in section 615(f)(1)(B)(ii) of the Act providing that the timelines for a due process hearing commence at the expiration of the resolution period.

Proposed § 303.448(a) through (e), regarding civil actions, incorporates the language from section 615(i)(2), (i)(3)(A), and (l) of the Act and would substantively include language in 34 CFR 300.516 of the Part B regulations (71 FR 46796). Additionally, the requirement in section 615(i)(2)(B) of the Act is included in proposed § 303.448(b), which provides for a time limit of 90 days from the date of the final State administrative decision to file a civil action, or if the State has an explicit time limitation for bringing a civil action under Part C of the Act, in the time allowed by that State law. Proposed § 303.449 would include language from section 615(e)(2)(F) and (f)(1)(B) of the Act regarding the State's use of other mechanisms to enforce mediation.

#### *Subpart F—Use of Funds and Payor of Last Resort*

Proposed subpart F would incorporate provisions in sections 632, 635, 638, and 640 of the Act regarding use of Part

C funds, payor of last resort provisions, and system of payments requirements.

#### General

Proposed § 303.500 would require each statewide system to have written policies and procedures that meet the fiscal and interagency requirements set forth in the system of payments, interagency, use of funds, confidentiality, and payor of last resort provisions in sections 632(4)(B), 635(a)(10), 635(a)(12), 638, 639(a)(2), and 640 of the Act. Proposed § 303.500 would clarify that a State's written policies and procedures must include the identification and coordination of funding resources for, and the provision of, early intervention services under Part C of the Act within the State and would incorporate the requirements in current §§ 303.173 and 303.174 and in sections 634, 635 and 640 of the Act.

#### Use of Funds

Proposed § 303.501, regarding permissive use of funds by the lead agency would incorporate the provisions in section 638 of the Act and the provisions in current §§ 303.3 and 303.560, modified to reflect statutory changes. The major substantive change from the current regulations is in proposed § 303.501(d). Proposed § 303.501(d) would incorporate the language from section 638(4) of the Act regarding the permissive use of Part C funds to make early intervention services available to children ages three and older consistent with proposed § 303.211.

#### Payor of Last Resort

Proposed § 303.510, regarding payor of last resort requirements, reflects the provisions in section 640(a) and (c) of the Act, and would remain substantially unchanged from the provisions in current § 303.527. Proposed § 303.510(b), regarding interim payments when reimbursement is delayed, would be substantively the same as the language in current § 303.527(b)(2)(i) through (iii) and (b)(3).

Proposed § 303.511, regarding establishing financial responsibility for and methods of ensuring services, would combine many of the provisions in current §§ 303.520 through 303.528 with modifications to reflect the statutory provisions in section 640(b) of the Act. Section 640(b) of the Act provides that a State may meet certain fiscal and interagency coordination requirements regarding provision of services under Part C of the Act by using one of three methods: (1) State law or regulations, (2) interagency or intra-agency agreements that identify the

responsibilities of each agency, or (3) other appropriate written methods (once approved by the Secretary). Proposed § 303.511(a)(1) through (3) would identify these three options.

Proposed § 303.511(b) would require, consistent with section 640(b)(1)(A) of the Act and current § 303.523, that each method define the financial responsibility of each agency for paying for early intervention services or other functions authorized under Part C of the Act, including child find and evaluations and assessments, consistent with State law and the requirements of Part C of the Act.

Proposed § 303.511(c)(1) would require, consistent with section 640(b)(1)(A)(ii) of the Act and current §§ 303.523(c) and 303.528, that 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 proposed procedures would require a mechanism for resolution of intra-agency 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.

Proposed § 303.511(c)(2) would clarify that the method must 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 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.

Proposed § 303.511(c)(3) would incorporate the Note following current § 303.523 regarding interagency dispute resolution to require that 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 proposed § 303.511 was inappropriately made, the Governor, Governor's designee or lead agency must reassign the responsibility to the appropriate agency; and the lead agency must make arrangements for reimbursement of any expenditures incurred by the agency originally assigned responsibility.

Proposed § 303.511(d), regarding the delivery of services in a timely manner, would incorporate these requirements from current § 303.525 and require that the methods adopted by the State under

proposed § 303.511 must include a mechanism to ensure that no services that a child is entitled to receive under Part C of the Act are delayed or denied because of disputes between agencies regarding financial or other responsibilities; and must be consistent with the written funding policies adopted by the State under proposed § 303.511.

Proposed § 303.511(e) would require that 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, all public agencies and early intervention service providers involved in the State's early intervention service programs.

#### Use of Insurance, Benefits, Systems of Payment, and Fees

Proposed § 303.520, regarding policies related to use of insurance for payment for services, and proposed § 303.521, regarding a system of payments and fees, would incorporate certain requirements in current §§ 303.520 and 303.521.

#### Public Insurance and Benefits and Private Insurance

Proposed § 303.520(a) and (b), regarding policies related to use of public insurance or benefits and private insurance for payment for services, would clarify when public insurance or benefits and private insurance may be used to pay for services pursuant to sections 632(4)(B), 635(a)(10), and 640 of the Act.

Proposed § 303.520(a)(1)(i), consistent with sections 632(4)(B) and 639(a)(2) of the Act, would allow a State to access a parent's public insurance or benefits when the parent is already enrolled if the parent provides consent to disclose personally identifiable information in accordance with proposed § 303.414.

Proposed § 303.520(a)(1)(ii) would clarify that a lead agency may use public insurance or benefits, without first obtaining parental consent under proposed §§ 303.7, 303.414, and 303.420(a)(3), for children in foster care when these children are eligible under the State's Medicaid plan. This provision was added because the Act places significant emphasis on finding children in foster care, and it is important to clarify for lead agencies the circumstances under which they may access public insurance or benefits for these children. Moreover, the provisions in existing laws deem virtually all children receiving foster care assistance under section 472 of the Social Security Act to be automatically eligible for

Medicaid under Title XIX of the Social Security Act.

Proposed § 303.520(a)(1)(iii) would clarify that a State may access a parent's public insurance or benefits program when the parent is not already enrolled in a public insurance or benefits program if the parent provides consent under proposed §§ 303.7, 303.414, and 303.420(a)(3), to enroll in such a program. This provision would be added to clarify existing confidentiality requirements. This provision also is necessary to ensure parents are aware of the opportunity to enroll, and provide informed consent prior to enrollment, in a public insurance or benefits program because enrollment in a public insurance or benefits program can potentially have significant negative impact on an individual's insurability, credit rating, immigration status, and status under other Federal assistance programs.

Proposed § 303.520(a)(2) would clarify that, if a State requires parents to pay the costs incurred as a result of participating in a public insurance or benefits program (such as co-payments, premiums or deductibles or the required use of private insurance as the primary insurance), these costs must be identified in the State's policies regarding its system of payments under proposed § 303.521.

Proposed § 303.520(a)(3) would clarify that when obtaining parental consent under proposed § 303.520(a), the lead agency must provide parents with a copy of the State's system of payments policies that identify potential costs that the parent may incur while enrolled in a public insurance or benefits program and to ensure that the consent is informed. Proposed § 303.520(a)(3) is being added to ensure that parents would be informed of those costs as part of consenting to the use of public insurance or benefits to pay for early intervention services.

Proposed § 303.520(b)(1)(i) would permit States to use private insurance to pay for early intervention services if the State obtains parental consent as defined in proposed § 303.7 and in accordance with proposed §§ 303.414 and 303.420(a)(3) prior to accessing the parent's private insurance.

Proposed § 303.520(b)(1)(ii) would require that any types of costs (including co-payments, premiums or deductibles) that may be charged to the parent as a result of using the parent's private insurance be identified in the State's system of payments policies under proposed § 303.521. Proposed § 303.520(b)(1)(iii) would require that a copy of this policy be provided to parents when obtaining consent.

Proposed § 303.520(b)(1)(iv) would incorporate requirements in current § 303.520(b)(3) that, if a parent or family is determined unable to pay under the State's definition of inability to pay that is required in proposed § 303.521(a)(3) and does not provide consent under proposed § 303.520(b)(1)(i), the lack of consent may not be used to delay or deny any Part C services to the child or family.

Proposed § 303.520(b)(2) would provide a specific exception to the parental consent requirements in proposed § 303.520(b)(1) for those States that have adopted specific statutes requiring private insurance companies and other entities to provide coverage for Part C early intervention services. This exception would only apply if the State statute ensures that—(1) lifetime coverage caps for the infant or toddler with a disability and parents are not triggered by the use of health insurance benefits to pay for Part C early intervention services; (2) the health insurance coverage of the infant or toddler with a disability and his or her family may not be discontinued due to the use of the health insurance to pay for Part C services; and (3) health insurance premiums and costs for the infant or toddler with a disability or his or her family may not be increased solely due to use of the health insurance to pay for Part C services.

Proposed § 303.520(b)(3) would clarify that if a State has enacted a State statute regarding private health insurance coverage that meets the requirements in proposed § 303.520(b)(2) for early intervention services under Part C of the Act that ensures that the use of private health insurance to pay for Part C services, the State may reestablish, for nonsupplanting purposes, in the next Federal fiscal year following the effective date of the statute, a new baseline of State and local expenditures under proposed § 303.225(b). This provision would be added to ensure that States that enacted protective statutes as part of the State's system of payments to ensure funding for Part C services would be able to factor in the change in funding sources for nonsupplanting purposes under Part C of the Act.

Proposed § 303.520(c)(1) and (2), regarding the treatment of public and private insurance proceeds and reimbursements from public benefits under 34 CFR 80.25, would remain substantively unchanged from current § 303.520(d). However, given the Federal interest in ensuring the use of overall Federal funds (including Part C and Medicaid funds) to increase the availability of services to children with

disabilities, the Department seeks comment on whether funds from public benefits (such as Medicaid reimbursements) should continue to be excluded from treatment as program income under 34 CFR 80.25. Specifically, the Department invites comment on the potential estimated cost to States in characterizing these funds as program income (and the concomitant requirement that such funds be used for Part C purposes) as well as the potential estimated benefits to the Federal program and children served under Part C.

Proposed § 303.520(c)(3) would add that if the State spends funds from a State public insurance or benefits program or the State portion of a Federal public benefits program (such as the State portion of Medicaid costs) for services under this part, those funds may, but are not required to, be considered State or local funds under proposed § 303.225(b). This proposed provision would also add however that, if a State has elected to include such funds for purposes of nonsupplanting provisions in proposed § 303.225(b), it must continue to aggregate such amounts for all future years. Proposed § 303.520(c)(4) would add that if the State spends funds from private insurance for services under this part, those funds are considered neither State nor local funds for nonsupplanting purposes under proposed § 303.225.

Proposed § 303.520(d)(1) and (2) would clarify that funds received from a parent or family under a State's system of payments are "program income" under 34 CFR 80.25, would not need to be deducted from the total allowable costs charged under Part C of the Act, and must be used for the State's Part C early intervention services program, consistent with 34 CFR 80.25(g)(1) and (2). Proposed § 303.520(d)(3) would clarify that these funds would not be considered either State or local funds for non-supplanting purposes under proposed § 303.225(b).

#### System of Payments and Fees

Proposed § 303.521(a), regarding a State's system of payments and fees, would incorporate language from current § 303.521(a) regarding a schedule of sliding fees and would further require States to identify in their system of payments policies: (1) Any cost participation fees (such as co-pays or deductible amounts) required to be paid under Federal, State, local or private insurance or benefits programs for which the infant or toddler with a disability or family is enrolled, that meet the requirements of proposed §§ 303.520 and 303.521; and (2) which

functions or services will be subject to the system of payments, including any fees charged to the family as a result of using the family's public or private insurance.

Proposed § 303.521(a)(3) would require a State to include in its system of payments policies the State's definition of inability to pay (including its definition of income and family expenses). Proposed § 303.521(a)(4) would be substantively unchanged from current § 303.520(b)(3) except that proposed § 303.521(a)(4)(iii) would require States to assure that families will not be charged more than the actual cost of the services and 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.

Thus, when read together, under proposed §§ 303.520(b) and 303.521, a Part C lead agency would continue to be able to require parents either to pay the costs of providing early intervention services or to provide their consent for use of their public insurance or benefits or private insurance. Parents would have the option under proposed § 303.520(a) and (b) to allow the State to use their public insurance or benefits or private insurance or to pay the fees established by the State according to any system of payments established by the State under proposed §§ 303.520 and 303.521.

Proposed § 303.521(a)(5) would specify that a State's system of payments policies must include provisions that failure to provide the requisite income information and documentation may result in a charge of a fee and specify the fee that may be charged to the parent. Proposed § 303.521(a)(6) would clarify that the system of payments policies must include provisions that a lead agency may, but is not required to, use Part C funds or other funds to pay for costs or fees to be paid by a parent under proposed §§ 303.521(a)(1) and 303.520(a)(2) (use of public insurance or benefits) or (b)(1)(ii) (use of private insurance). However, for a parent determined unable to pay under proposed § 303.521(a)(4)(ii), proposed § 303.521(a)(6) would clarify that, consistent with current requirements, the lead agency must use Part C funds or other funds to cover the costs for the Part C services provided to the child of the parent.

Proposed § 303.521(b), regarding functions not subject to fees, would remain unchanged from current § 303.521(b). Proposed § 303.521(c) regarding States with FAPE mandates,

or that use Part B funds to serve infants or toddlers with disabilities under age three, would incorporate the longstanding requirements in current § 303.521(c) that if a State is required by law to provide FAPE to infants or toddlers with a disability under the age of three, those services that constitute FAPE must be provided at no cost and must comport with the requirements of Parts B and C of the Act.

Specific sections of the Act permit States to use Part B funds for infants or toddlers with a disability under Part C of the Act and do not require the provision of FAPE. These are:

- Section 611(e)(2)(C)(i), which allows States to use Part B funds for direct and support services (which can include child find for children with disabilities under Part B of the Act);
- Section 611(e)(1)(D), which allows States to use State administrative set-aside funds under section 611 of the Act for Part C administration if the SEA is the lead agency;
- Section 619(f)(1), which allows States to use Part B section 619 funds for support services (including mediation) for children under three and above five if the services primarily benefit three through five year olds;
- Section 619(f)(6), which allows Part B section 619 funds to be used to provide service coordination or case management for families receiving services under Part C of the Act; and
- Sections 611(e)(7) (regarding the ability to use funds available under Part B of the Act in sections 611(e)(1)(A), 619(f)(5), and 643(e) (regarding funds under Part C of the Act), which provisions allow the use of specific Part B and Part C funds for providing Part C services to children in States that elect to serve children under section 635(c) of the Act and proposed § 303.211.

In addition, section 619(a)(2) of the Act provides that Part B section 619 funds can be used to pay for the provision of special education and related services for two year olds who will turn three during the school year. However, these special education and related services (that constitute FAPE for the two-year old) would be required to be provided at no cost to the family, consistent with the requirements of Part B of the Act.

Proposed § 303.521(d)(1) would clarify that family fees collected under a State's system of payments are considered program income under EDGAR, 34 CFR 80.25. Under this provision, a State would be permitted to add these fees to its Part C grant funds

rather than deducting the program income from the State's Part C grant (which the Department has the discretion to authorize under 34 CFR 80.25). Under this provision, any family fees collected must be used by the State for the purposes of the Part C grant. Proposed § 303.521(d)(2) would clarify that, under EDGAR, family fees collected under a State's system of payments would be considered neither State nor local funds under proposed § 303.225(b).

#### *Subpart G—State Interagency Coordinating Council*

Proposed subpart G would incorporate the provisions of section 641 of the Act, regarding the State Interagency Coordinating Council (Council), which are in current subpart G.

Proposed § 303.600 would retain the provisions in current § 303.600 regarding the establishment of the Council.

Proposed § 303.601(a)(1)(i) and (ii) would retain the requirements in current § 303.601(a)(1)(i) and (ii) regarding parent membership on the Council. Proposed § 303.601(a)(1)(iii) would incorporate the first paragraph in the note following current § 303.600 to require that, to avoid a potential conflict of interest, a parent member may not be an employee of a public or private agency involved in providing early intervention services. The second paragraph in the note following current § 303.600, suggesting that consideration be given to maintaining an appropriate balance between the urban and rural communities of the State, would be removed as duplicative of proposed § 303.600(b).

Proposed § 303.601(a)(2) through (6) regarding the composition of the Council would reflect the statutory provisions in section 641(b)(1)(A) through (F) of the Act and would remain substantively unchanged from current § 303.601(a)(2) through (6). Proposed § 303.601(a)(7) and (11) through (13) would reflect the provisions in section 641(b)(1)(G) and (K) through (M) of the Act, which provide for additional members to be included on the Council. Proposed § 303.601(a)(7) would provide for at least one member to be from the agency responsible for the State Medicaid program in accordance with section 641(b)(1)(G) of the Act. Proposed § 303.601(a)(8) and (9), regarding members from Head Start or Early Head Start and the State agency responsible for child care, would reflect the statutory provisions in section 641(b)(1)(H) and (I) of the Act and would be substantively unchanged from

current § 303.601(a)(8) and (9). Proposed § 303.601(a)(10), regarding the member from the agency responsible for the State regulation of health insurance, would remain essentially the same as current § 303.601(a)(7) except that “State governance” would be replaced with “State regulation” to incorporate the language in section 641(b)(1)(f) of the Act. Proposed § 303.601(a)(11) would provide for at least one member to be from the Office of the Coordination of Education of Homeless Children and Youth, consistent with section 641(b)(1)(K) of the Act. Proposed § 303.601(a)(12) would provide for the Council to include a member from the State child welfare agency responsible for foster care, consistent with section 641(b)(1)(L) of the Act and proposed § 303.601(a)(13) would provide that at least one member be from the agency responsible for children’s mental health, consistent with section 641(b)(1)(M) of the Act.

Proposed § 303.601(b) would be added to clarify that the Governor may appoint one member to represent more than one agency listed under proposed § 303.601(a)(7) through (a)(13). Proposed §§ 303.601(c) and (d) would retain the provisions in current §§ 303.601(b) and 303.604, respectively, and reflect the requirements of section 641(b)(2) and (f) of the Act, respectively. Proposed § 303.601(d) would also incorporate the language in section 641(f) of the Act that no member may cast a vote on any matter that would provide direct financial benefit to the member or otherwise give the appearance of a conflict of interest under State law.

Proposed § 303.602, regarding Council meetings, would revise current § 303.603 to incorporate minor wording changes in section 641(c) of the Act. Proposed § 303.602(a) would revise current § 303.603(a) to be consistent with the language in section 641(c) of the Act, including clarifying that the Council must meet, at a minimum, on a quarterly basis. Proposed § 303.602(b)(3) would remain substantively unchanged from current § 303.603(c) requiring meetings to have interpreters, as needed, and permitting the use of Part C funds for interpreter services at those meetings.

Proposed § 303.602(b)(1), requiring that Council meetings be announced in advance, would substantively be the same as current § 303.603(b)(1). Additionally, proposed § 303.602(b)(2) is substantively unchanged from current § 303.603(b)(2), requiring that, to the extent appropriate, meetings be open and accessible to the general public.

Proposed § 303.603, regarding how the Council may use Part C funds,

would incorporate the provisions of current § 303.602 and the provisions in section 641(d) of the Act. Proposed § 303.603(a) and (b) would retain the provisions in current § 303.602(a)(1) through (5) regarding the use of funds and in current § 303.602(b) regarding the requirement that Council members must serve without compensation from funds available under Part C of the Act, except as provided in proposed § 303.603(a).

Proposed § 303.604 regarding the functions of the Council, would combine and revise current §§ 303.650 through 303.653, consistent with the requirements in section 641(e) of the Act. Proposed § 303.604(a) would retain the provisions in current §§ 303.651 and 303.652 except that proposed § 303.604(a)(3) would remove references to interagency agreements and refer instead to “methods” (which can include interagency agreements) as specified in section 640(b)(3) of the Act. Proposed § 303.604(a)(3) also specifically references the proposed regulatory sections that require interagency coordination and collaboration regarding child find, monitoring, transition, financial responsibility, and provision of early intervention services. Proposed § 303.604(a)(4) would retain the provisions of current § 303.652 regarding the Council’s function to assist the lead agency in the preparation of applications and amendments to those applications.

Proposed § 303.604(b) would include the language from current § 303.653 that the Council must also advise and assist the lead agency regarding transition of toddlers with disabilities to preschool and other appropriate services.

Proposed § 303.604(c)(1), in accordance with section 641(e)(1)(D) of the Act, would retain the provisions in current § 303.654(a) regarding the Council’s responsibility to annually report to the Governor and to the Secretary on the status of early intervention programs operated within the State. Proposed § 303.604(c)(2) would also retain the provision in current § 303.654(b), that each annual report must contain the information required by the Secretary for the year for which the report is made.

Proposed § 303.605(a) would reflect the provisions in current §§ 303.650(b) permitting the Council to advise and assist the lead agency and SEA in the provision of appropriate services for children with disabilities from birth through age five including the transition from services under Part C of the Act to other appropriate services.

Proposed § 303.605(b) would incorporate current language from current § 303.650(c) permitting the Council to 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.

#### *Subpart H—Federal Administration and Allocation of Funds*

Proposed subpart H would incorporate provisions from sections 642 and 643 of the Act. Section 642 of the Act provides that the requirements in section 616 of the Act regarding monitoring and enforcement and the requirements in section 618 of the Act regarding data collection are applicable to Part C of the Act.

The requirements in section 616 of the Act would be reflected in proposed §§ 303.700 through 303.708 and the requirements in section 618 of the Act would be reflected in proposed §§ 303.720 through 303.724. The provisions in section 643 of the Act regarding procedures for allocating grant funds to States would be reflected in proposed §§ 303.730 through 303.734.

#### *Monitoring, Technical Assistance, and Enforcement*

Proposed §§ 303.700 through 303.708 regarding monitoring and enforcement would incorporate the statutory requirements under section 616 of the Act, which apply to Part C of the Act under section 642 of the Act. The proposed regulatory requirements adopt the statutory language with appropriate modifications to include the provisions of Part C of the Act.

Proposed § 303.700(a) would include the new provisions in section 616(a)(1)(C) of the Act, which sets forth the responsibility of States to monitor, enforce, and annually report on the implementation of the Part C program by EIS programs, as defined in proposed § 303.11. In addition, proposed § 303.700(a) would require the lead agency to make determinations annually about the performance of each EIS program using the categories identified in proposed § 303.703. Also, proposed § 303.700(a) would require the State to report annually on the performance of the State under the State’s performance plan as provided in proposed § 303.702.

Proposed § 303.700(b) would reflect the new statutory requirement in section 616(a)(2) of the Act that the primary focus of monitoring is on improving early intervention results and functional

outcomes for infants and toddlers with disabilities.

Proposed § 303.700(c) would reflect new requirements in section 616(a)(3) of the Act that States measure performance in monitoring priority areas using quantifiable indicators and such qualitative indicators as are needed to adequately measure performance. Proposed § 303.700(c) would clarify that these indicators are established by the Secretary in the context of informing States of the requirements under the State's performance plan.

Proposed § 303.700(d) lists the priority areas States must monitor under Part C of the Act. These areas are early intervention services in natural environments and State exercise of general supervision.

Proposed § 303.700(e) would clarify that the State, in exercising its monitoring responsibilities under proposed § 303.700(d), must ensure that when it identifies noncompliance with the requirements of Part C of the Act by EIS programs and EIS providers, the noncompliance is corrected as soon as possible and in no case later than one year after the State's identification. The language in this section would align with the addition of the language in proposed § 303.120(a)(2)(iv).

We propose to add § 303.700(e) because, based on our monitoring activities, we have determined that correction of noncompliance does not always occur in a timely manner. Proposed § 303.700(e) would clarify expectations regarding the timely correction of noncompliance. It is important to correct noncompliance in a timely manner to ensure that infants and toddlers with disabilities and their families receive appropriate early intervention services. Correction of noncompliance means that the State required the EIS program or EIS provider to revise any noncompliant policies, procedures and/or practices and the State has verified through follow-up review of data, other documentation and/or interviews that the noncompliant policies, procedures and/or practices have been revised and the noncompliance has been corrected. We believe that one year is a reasonable amount of time for the LEA to correct noncompliant policies, procedures and/or practices and for the State to verify the correction.

Proposed § 303.701 would reflect new statutory language in section 616(b) of the Act requiring States to have a performance plan that evaluates their efforts to implement the requirements and purposes of Part C of the Act and describes how the State will improve implementation. Under proposed

§ 303.701(a) the plan must establish measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in proposed § 303.700(d). Consistent with the new statutory language, proposed § 303.701(b) would require States to review their performance plans at least once every six years and submit any amendments to the Secretary.

Proposed § 303.701(c)(1) would require, consistent with section 616(b) of the Act, that each State collect valid and reliable information on all the indicators in the performance plan to include in the State's annual report to the Secretary. Proposed § 303.701(c)(2) would clarify that States may use, if the Secretary permits it for a particular indicator, the option to collect data through State monitoring or sampling. Proposed § 303.701(c)(2) would further clarify that, if 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 the State performance plan. The use of monitoring or sampling data, if valid and reliable, can be an effective means of data collection, reducing burden on State lead agencies, while providing meaningful information on the performance of EIS programs. Proposed § 303.702(b)(1)(ii) also would align with 34 CFR 300.602(b)(1)(ii) of the Part B regulations (71 FR 46801).

Proposed § 303.701(c)(3) would also incorporate the statutory requirements from section 616(b)(2)(B)(ii) of the Act regarding data collection and specify that nothing in the Act or the regulations authorizes the development of a nationwide database of personally identifiable information on individuals involved in studies or other data collections.

Proposed § 303.702(a) would reflect the statutory language in section 616(b)(2)(C) of the Act requiring States to use the targets established in their performance plans and the priority areas in proposed § 303.700(d) to analyze the performance of each EIS program in the State. Under proposed § 303.702(b), which would largely incorporate the language in section 616(b)(2)(C) of the Act, States would be required to report annually to the public on the performance of each EIS program in the State on the targets in the State performance plan and make the State performance plan available to the public. Notes 253 through 258 of the Conf. Rpt. explain that the expectation is that the State performance plans, indicators and targets are to be developed with broad stakeholder input

and public dissemination. To ensure that EIS program performance reports are disseminated in a timely manner, proposed § 303.702(b)(1)(i)(A) would require that EIS program performance be reported to the public no later than 60 days following the State's submission of its annual performance report to the Secretary and would prescribe the minimal methods for that public dissemination.

Proposed § 303.702(b)(1)(i)(B) would include the statutory requirements from section 616(b)(2)(C) of the Act that a State make its performance plan publicly available. In addition, to ensure that the State's annual performance reports and the reports on the performance of each EIS program in the State are widely disseminated, proposed § 303.702(b)(1)(i)(B) would require that States make these reports available through public means, including posting the reports on the Web site of the lead agency and distributing them to the media and to EIS programs.

Proposed § 303.702(b)(1)(ii) would add that, if the State, in meeting the requirements of proposed § 303.702(b)(1)(i), collects performance data through State monitoring or sampling, the State must include the most recently available performance data on each EIS program and the date the data were obtained in its report on the performance of EIS programs.

Proposed § 303.702(b)(2) would reflect the language in section 616(b)(2)(C) of the Act requiring each State to report annually to the Secretary on the performance of the State under its performance plan. Under proposed § 303.702(b)(3), however, the State would not be required to report to the public or the Secretary any information on performance that would disclose personally identifiable information about individual children or any data if the available data are insufficient to yield statistically reliable information.

Proposed § 303.703(a) and (b)(1) would reflect new language in section 616(d) of the Act requiring the Secretary to review annually the State's annual performance report and, based on information in the annual performance report, or information obtained through monitoring visits or other public information, determine if the State: (1) meets the requirements and purposes of Part C of the Act, (2) needs assistance in implementing the requirements of Part C of the Act, (3) needs intervention in implementing the requirements of Part C of the Act, or (4) needs substantial intervention in implementing the requirements of Part C of the Act.

Proposed § 303.703(b)(2) would reflect the language from section

616(d)(2)(B) of the Act that provides States with notice and an opportunity for a hearing for determinations under proposed § 303.703(b)(1)(iii) and (b)(1)(iv). Proposed § 303.703(b)(2)(ii) would clarify that the hearing would consist of an opportunity to meet with the Assistant Secretary for the Special Education and Rehabilitative Services to demonstrate why the Department should not make the determination. We propose this provision to meet the hearing requirement because the Department has determined that this type of hearing would provide the appropriate amount of process due a State prior to one of these determinations. Should specific enforcement action subsequently be contemplated, as provided for in section 616(e) of the Act, other hearing procedures may be applicable, as provided for in proposed §§ 303.705, 303.231 through 303.236, and in the General Education Provisions Act as amended, 20 U.S.C. 1221 *et seq.* (GEPA).

Proposed § 303.704, regarding enforcement, would reflect new requirements in section 616(e) of the Act that set forth the various actions the Secretary may take with respect to each State's level of compliance as determined by the Secretary's review of the State's annual performance report under proposed § 303.703. Thus, proposed § 303.704 would identify, consistent with section 616(e) of the Act, the specific enforcement actions that the Secretary may take if the Secretary determines that a State needs assistance, needs intervention, or needs substantial intervention.

For example, if it is determined that a State needs substantial intervention, the Secretary would take one or more of the actions described in proposed § 303.704(c), including recovering funds under section 452 of GEPA, withholding in whole or in part any further payments to the State under Part C of the Act, referring the case to the Office of Inspector General at the Department, or referring the matter for appropriate enforcement action, which may include referral to the Department of Justice.

Under proposed § 303.704(d), the Secretary would be required to report to appropriate congressional committees within 30 days of taking an enforcement action against a State under proposed § 303.704, including in the report a description of the specific action that was taken, and the reasons why it was taken.

Proposed § 303.705(a) would reflect the language in section 616(e)(4)(A) of the Act regarding reasonable notice and the opportunity for a hearing prior to withholding of any Part C funds.

Proposed § 303.705(b) would reflect new language from section 616(e)(4)(B) of the Act that, pending the outcome of any hearing to withhold payments, the Secretary may do one or both of the following: Suspend payments to a recipient or suspend the recipient's authority to obligate funds under Part C of the Act provided that the recipient has been given reasonable notice and an opportunity to show cause why future payments or the authority to obligate Part C funds should not be suspended. Proposed § 303.705(c) regarding the nature of withholding actions would reflect the language in section 616(e)(6) of the Act.

Proposed § 303.706 reflects the language in section 616(e)(7) of the Act. Whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action pursuant to proposed § 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 proposed § 303.704 to the attention of the public within the State, including posting such notice on the Web site of the lead agency and distributing the notice to the media and to the EIS programs.

Consistent with the statutory provisions in section 616(g) of the Act, proposed § 303.707 would provide that nothing in subpart H restricts the Secretary from utilizing any authority under GEPA and EDGAR to monitor and enforce the requirements under Part C of the Act. Proposed § 303.708 would be added to clarify that States have the flexibility to use other mechanisms to bring about compliance, just as section 616(g) of the Act and proposed § 303.707 recognize that the Department needs the flexibility to use the authority in GEPA and EDGAR to monitor and enforce the Act in addition to the enforcement program described in section 616(e) of the Act.

#### Reports—Program Information

Proposed §§ 303.720 through 303.724 regarding data collection by States would incorporate the applicable statutory requirements under section 618 of the Act, which apply to Part C through section 642 of the Act. These statutory requirements were substantively unchanged by the 2004 amendments to the Act except for the requirement that data reported under Part C of the Act be disaggregated by gender and the requirement that States electing under proposed § 303.211 to make early intervention services available to children ages three and older, report data on those children.

Proposed § 303.720(a) would reflect the statutory provisions in section 618(a) of the Act that require each State to report data each year to the Secretary and to the public. Proposed § 303.720(b) would state that the data be submitted in the manner prescribed by the Secretary.

Proposed § 303.721(a) would specify that lead agencies must count the number of infants and toddlers with disabilities receiving early intervention services on any date between October 1 and December 1 of each year and include in this count any children reported to them by tribes, tribal organization, and consortia under proposed § 303.731(e)(1). Current practices require the infant and toddler count to occur on December 1. The proposed provision would broaden the window for States and would be consistent with the Part B regulations in 34 CFR 300.641(a) (71 FR 46804). Proposed § 303.721(a)(1), (2), and (3) would reflect data collection and reporting requirements described in section 618(a) of the Act.

Proposed § 303.721(b) would reflect the statutory provisions in section 635(c)(3) of the Act. These provisions require that if a State adopts the option under section 635(c) of the Act and proposed § 303.211 to make early intervention services available to children ages three through five, the State must report data on the number and percentage of children with disabilities who are eligible to receive services under section 619 of the Act but whose parents choose to continue to receive early intervention services.

Proposed § 303.721(c) would reflect the statutory provisions in section 618(a)(1)(F) and (H) of the Act. This provision would require the State to report 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.

Proposed § 303.722(a) would reflect the new provisions in section 618(b)(1) of the Act requiring each State to report data in a manner that does not result in disclosure of personally identifiable information.

Proposed § 303.722(b) regarding sampling, reflects the language in section 618(b)(2) of the Act.

Proposed § 303.723 regarding certification of the annual report of infants and toddlers served, would require that an authorized official of the lead agency certify the accuracy of the data being submitted. This requirement is to ensure that data submitted to the

Secretary are an accurate representation of the infants and toddlers with disabilities in the State.

Proposed § 303.724, regarding other responsibilities of the lead agency related to the annual report of infants and toddlers served, would provide more detail to the provision in current § 303.540(a)(1)(i) that requires the lead agency to include a process for collecting data from various agencies and service providers. To ensure the collection of accurate data in a timely manner, proposed § 303.724 would provide specific steps and procedures for lead agencies to follow in collecting the data to be reported to the Secretary.

#### Allocation of Funds

Proposed §§ 303.730 through 303.734 would incorporate the provisions in section 643 of the Act regarding allocation of funds under Part C of the Act to States, outlying areas and the Secretary of the Interior. Proposed § 303.730 regarding reservation of funds for the outlying areas would remain substantively unchanged from current § 303.204 except for minor changes to the language in order to conform to section 643(a) of the Act.

Proposed § 303.731 would implement section 643(b)(1) of the Act regarding allocation of funds under Part C of the Act to the Secretary of the Interior. Proposed § 303.731(a) would retain the provisions regarding payment and distribution of funds to tribes and tribal organizations in current §§ 303.180(a), 303.180(b) and 303.203.

Proposed § 303.731(b) would be added to incorporate the provision in section 643(b)(2) of the Act requiring the Secretary of the Interior to distribute amounts to each tribe, tribal organization, or consortium based on the number of infants and toddlers residing on the reservation divided by the total of those children served by all tribes, tribal organizations, or consortia.

Proposed § 303.731(c) would be added to incorporate the provision in section 643(b)(3) of the Act, which clarifies that, in order to receive payment under this section, the tribe, tribal organization, or consortium must submit to the Secretary of the Interior information to determine the amounts to be distributed.

Proposed § 303.731(d) would be added to incorporate section 643(b)(4) of the Act and would state the required and permissible uses of funds under this section.

Proposed § 303.731(e)(1) and (2) would be added to incorporate the provision in section 643(b)(5) of the Act regarding the requirement to submit a biennial report to the Secretary of the

Interior in order to be eligible to receive funds. Proposed § 303.731(e)(1) would require that to be eligible to receive a payment under proposed § 303.731(b), a tribe, tribal organization, or consortium must make a biennial report to the Secretary of the Interior of activities undertaken under proposed § 303.731, 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 would require tribes, tribal organization and consortia to 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.

Proposed § 303.731(e)(2) would require the Secretary of the Interior to provide the Secretary with a summary of that information on a biennial basis, including confirmation that each tribe, tribal organization, or consortium has provided to it the assurance required under proposed § 303.731(e)(1), along with such other information required of the Secretary of the Interior under Part B or C of the Act. In addition proposed § 303.731(e)(2) would clarify, consistent with section 643(b)(5) of the Act, that the Secretary may require any additional information from the Secretary of the Interior.

Proposed § 303.731(e)(3), regarding reports to the Secretary on payments disbursed under this section, would retain the language in current § 303.180(c).

Proposed § 303.731(f) would mirror section 643(b)(6) of the Act, and would clarify that Part C funds may not be used by the Secretary of the Interior for administrative purposes or the provision of technical assistance.

Proposed § 303.732, regarding the allotment and distribution of funds to the States under this part, generally would retain the language in current §§ 303.200 and 303.202 but would also incorporate additional provisions from section 643(c) of the Act, and track the organization of the Act. Proposed § 303.732(a) would be the same as current § 303.200(a). Proposed § 303.732(b) also would retain the minimum allocation provision in current § 303.202, but would revise

current language to clarify that no State may receive less than 0.5 percent of the aggregate amount available under this section or \$500,000, whichever is greater.

Proposed § 303.732(c) would incorporate provisions in section 643(c)(3)(A) and (B) of the Act regarding the ratable reduction of allotments to States. Proposed § 303.732(d) would retain the definitions of *aggregate amount*, *infants and toddlers*, and *State* in current § 303.200(b).

Proposed § 303.733, regarding reallocation of funds if a State elects not to receive its allotment reflects the provisions in section 643(d) of the Act and would retain the provisions in current § 303.201.

Proposed § 303.734 would reflect new statutory provisions from section 643(e) of the Act regarding the allocation of Part C funds for incentive grants for States electing to implement the provisions of section 635(c) of the Act and proposed § 303.211 to make Part C services available to children ages three through five. This clarifies that when the appropriations under Part C of the Act exceed \$460,000,000, fifteen percent of the amount that exceeds \$460,000,000 must be available for allocation under section 643(e) of the Act and proposed § 303.734 for States that elect to serve children under section 635(c) of the Act and proposed § 303.211.

#### Executive Order 12866

##### 1. Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action. The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently. In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs.

We have also determined that this regulatory action would not unduly interfere with State, local, private, and tribal governments in the exercise of their governmental functions.

Following is an analysis of the costs and benefits of the most significant changes in the regulations implementing Part C of the Act governing the Early Intervention Program for Infants and Toddlers with Disabilities. In conducting this analysis, the Department examined the extent to which changes made by these proposed 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 current regulations. Variation in practice from State to State makes it difficult to predict the effect of these changes. However, based on the following analysis, the Secretary has concluded that the changes reflected in the proposed regulations will not impose significant net costs on the States.

*Section 303.211—State Option To Make Part C Services Available to Children Ages Three and Older*

Proposed § 303.211, which would incorporate the provisions of section 635(c) of the Act, would allow States to continue to serve children with disabilities ages 3 through 5 under Part C of the Act if those children previously received services under Part C of the Act and would otherwise be eligible for services under section 619 of the Act. Making these services available under Part C of the Act would be a State option, and if the State chooses not to serve children with disabilities ages 3 through 5 under Part C of the Act or to discontinue offering this option, it would still be required to make services to these children available through existing Part B programs.

If a State elects to exercise the option to serve 3 through 5 year olds under Part C of the Act, the lead agency would be responsible for the costs of providing the direct Part C services to children whose families elect to continue services under Part C. In addition, we believe that 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 3 through 5 year olds may be different from children ages birth through 2 and would need to include an educational component. 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.

Educational agencies responsible for providing services under Part B of the Act would serve fewer children ages 3 through 5 if the State elects to provide services under Part C to children ages 3 through 5, and families elect to continue services under Part C of the Act. A reduction in the number of children to be served under Part B of the Act would result in both administrative and direct service cost savings for the educational agencies responsible for serving these children. However, the State would still

be required to maintain its Section 619 preschool system to serve children with disabilities who are 3 through 5 years old. The Part C extension only applies to children who are already receiving services under Part C of the Act and wish to continue, not to children newly entering the system. In addition, parents can choose between Part C or B services.

We have very little information on the number of States that may choose to exercise the voluntary Part C option and the additional costs of implementing this option for States that elect to do so. We are requesting comments from the public on these costs and will address this issue in the final regulations. Specifically, we are interested in information related to the following: Initial costs related to establishing or enhancing the infrastructure in the Part C lead agencies necessary to serve children ages 3 through 5; differences in the costs of providing the services required by IDEA to children with disabilities ages 3 through 5 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 2; the extent to which States may choose to exercise the option of serving children with disabilities ages 3 through 5 under Part C of the Act; and possible sources of funding for providing Part C services to these children.

*Sections 303.300 Through 303.303—Public Awareness, Comprehensive Child Find System, Referrals, and Screening*

Proposed §§ 303.300 through 303.303 would combine the child find and public awareness requirements from section 635(a)(5) and (a)(6) of the Act and incorporate 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. Proposed § 303.301 would require 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. The proposed regulations would require the State to have referral procedures to be used by specified primary referral sources and would require such procedures to provide for the referral of certain children covered by CAPTA. This change is consistent with the CAPTA provision that became effective in June 2003, which requires that States receiving CAPTA funds adopt policies

providing for the referral to the Part C program of children under the age of 3 who are involved in a substantiated case of child abuse or neglect.

The proposed regulations would also add a requirement for a public awareness program about the availability of early intervention services and specifically require the dissemination of such information to 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 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 added relating to children covered by CAPTA and those who are homeless, in foster care, or wards of the State.

In addition, proposed § 303.303 would allow the lead agency to use 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. Proposed § 303.303 also would allow State lead agencies to determine how primary referral sources would work with the lead agencies to administer screenings.

*Sections 303.320(e)(1) and 303.342(a)—Timelines*

Current §§ 303.321(e)(2), 303.322(e)(1), and 303.342(a) require that a child's evaluation, assessment, and initial IFSP meeting occur within 45 days from the date the public agency receives the referral. Proposed § 303.320(e)(1) would retain the 45-day timeline requirement, but the timeline would not begin until the public agency has obtained parental consent for the evaluation, thereby increasing the amount of time available to the agency for completing these actions.

Allowing the agency additional time to complete a child's evaluation, assessment, and initial IFSP meeting could reduce costs associated with trying to meet the 45-day deadline, such as paying overtime to staff, while improving the ability of States to manage the workflow of their service coordinators. In addition, lack of compliance with the 45-day timeline in

current §§ 303.321(e)(2), 303.322(e)(1), and 303.342(a) resulted in nine States having either special conditions or compliance agreements attached to their Part C grants during fiscal year 2006. To the extent that any of the findings of noncompliance with the 45-day timeline requirement involved cases where the parents did not provide consent or provide consent in a timely manner, the change would assist States to avoid future findings of noncompliance with the IDEA. This change could also reduce the number of complaints related to missed deadlines; however, any savings associated with the resolution of due process complaints are likely to be negligible since there are few requests for due process hearings filed under Part C—only 22 in fiscal year 2003 and 186 in fiscal year 2004<sup>1</sup> and a missed deadline is not likely to be the sole or primary basis for a complaint.

Since the 45-day deadline would no longer encompass the period between the referral and obtaining parental consent for the initial evaluation, the agencies could take more time in contacting parents for their consent to evaluate the child, particularly in cases where the parents are not aware of the initial referral, and, thereby, delay the evaluation process. While undue delays could be harmful to the child, we have no basis for assuming that agencies will take more time than is needed to contact the parents for consent, based on our experience under the Part B regulations. In most cases, parents will be aware of the referral and will readily provide their consent if they want the child to be evaluated.

*Section 303.344(e)—Content of the IFSP*

The current regulations in § 303.344(e) require service coordinators to identify on the IFSP 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. Proposed § 303.344(e)(2) would retain the requirements for service coordinators to identify on the IFSP medical and other services that the child needs, but are not required by Part C of the Act, and the steps that will be taken to secure those services through public or private sources. However, service coordinators would no longer be required to identify and coordinate 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, including the service coordinator, 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 service coordinators have limited knowledge about, and ability to coordinate funding for, these services.

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 that it could take several hours or more to identify and coordinate 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 and coordinating funding for services not required by IDEA and describing it in the IFSP. Based on an analysis of salaries for early intervention service coordinators employed by public and private agencies and organizations for 7 States<sup>1</sup> and Bureau of Labor Statistics data for fringe benefits costs for health care and social assistance personnel,<sup>2</sup> we estimate average compensation for service coordinators to be approximately \$22 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 2 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 313,100 children under Part C of the Act in fiscal year 2007. Based on these estimates, we expect savings of approximately \$14 million from this change.

<sup>1</sup> Estimate based on an analysis of average salaries for early intervention service coordinators using information from State job postings and an analysis of average early intervention specialist salaries conducted by the PayScale Corporation that looked at median salaries for early interventionists employed by non-profit organizations, school districts, private companies, State and local governments, and colleges and universities.

<sup>2</sup> Table 4, State and local government, by occupational and industry group, last modified March 29, 2007, <http://www.bls.gov/news.release/eeec.t04.htm>.

*Section 303.520(a)—Policies Related to Use of Public Insurance and Benefits for Payment for Services*

This proposed section would clarify when a State may access funds from a parent's public insurance or public benefits program. Under proposed § 303.520(a), States would be able to access public insurance or benefits to pay for Part C services—(1) If the parent or child is already enrolled in a public insurance or benefits program and the parent provides consent as defined under proposed § 303.7 and provided for under proposed § 303.414; (2) if the child is in foster care and automatically eligible under the State's Medicaid plan; or (3) if the parent agrees to enroll in a public insurance or benefits program and consents to allow the State to use the public insurance or benefit. Proposed § 303.414 would require consent prior to disclosure of personally identifiable information, which consent requirement is reflected in current §§ 303.402 and 303.460.

The National Early Intervention Longitudinal Study (NEILS) indicates that approximately 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 State Children's Health Insurance Program (SCHIP) (<http://www.sri.com/neils>). In addition, the FY 2002 Part C IDEA Annual Performance Reports (APRs) required to be submitted by States to the Department on March 31, 2004 indicated that Federal Medicaid funds represent an average of 23.7 percent of the State's overall Part C early intervention program budget for the 27 States for which Medicaid dollars were reported on a disaggregated basis. Given this information, we believe that it is important for the regulations to be clear about when and how States may access a parent's public insurance or benefits.

The current regulations do not specify the circumstances under which a State may access a parent's public insurance or benefits to obtain reimbursement for Part C services. Some States automatically access reimbursements from public insurance or benefit programs if the parents are enrolled in these programs. Proposed § 303.520(a)(1)(i) would clarify that States may use a parent's public insurance or benefits, if the parent is already enrolled, but only when the parent provides consent. The Department believes that most parents will provide the requisite consent if requested. There may be some costs to obtaining consent; however, they are likely to be minimal because the

requests are likely to be made during the already existing intake process, at which time the parents could be asked to sign any consent forms needed by the State. There would also be some loss of revenue to States if parents enrolled in public insurance or benefit programs refuse to provide consent. In this regard, the Department believes that any increased cost to States that may result from this requirement is outweighed by the benefits of protecting the privacy and autonomy of the family and minimizing the potential negative impact on a family's credit rating, immigration status, insurability, and status under other programs.

Proposed § 303.520(a)(1)(ii) would provide that a State may use the public benefits available to a child served under Part C if the child is in foster care and eligible to participate in the public insurance or benefits program. Children in foster care may be automatically eligible for Medicaid under the State's Medicaid plan and section 472 of the Social Security Act. This proposed provision, which would clarify that States would not need to obtain parental consent prior to accessing the public insurance or benefits available to these children, would facilitate State access to public insurance or benefits for these children and would eliminate some costs associated with obtaining consent for the release of personally identifiable information.

Proposed § 303.520(a)(1)(iii) covers circumstances where the parent is not currently enrolled in a public insurance or benefits program. The proposed provision would provide that the State would be required to obtain parent consent to enroll, and, therefore, would not be able to require a parent to enroll in a public insurance or benefits program as a requirement of receiving services. We expect this clarification to have a very limited effect because very few States require eligible families to apply for public insurance or benefits in order to receive Part C services. Data from a survey of the States conducted by the IDEA Infants and Toddlers Coordinators Association (ITCA) indicate that only two of the 21 States that responded reported that they require families to apply for existing third party resources such as Medicaid, SCHIP, and the Children's Special Health Care Needs program. (<http://www.ideainfanttoddler.org>). A review of applications submitted by States indicates that fewer than 5 States currently have systems of payments on file with the Department that have express policies requiring parents to enroll in public insurance or benefits as a condition of receiving services under

Part C of the Act and/or permit the Part C lead agency to expressly access a parent's public insurance or benefits without parental consent.

Moreover, we believe that most parents will agree to enroll voluntarily since it is generally to the family's advantage to obtain health insurance for all family members.

To the extent that there may be an increased cost to States that currently require parents to enroll in public insurance or benefits programs due to a potential loss of revenue, this potential cost is outweighed by the benefits of protecting the privacy and autonomy of the family (including minimizing any potential negative impact that use of public insurance or benefits may have on the family). Enrollment in public insurance or benefits programs may negatively affect a parent's immigration status and ability to borrow, or have other legal and financial repercussions. A parent's decision to enroll in public insurance or benefit programs also may be affected by religious concerns, the perceived stigma of public insurance or benefits, and considerations related to family finances.

Since we do not have data on the number or percentage of eligible families participating in the Part C program that refuse to enroll in public insurance or benefits programs or the participation rates in States that require eligible families to enroll in public insurance or benefits programs, we invite commenters to provide this information. We request that commenters identify any relevant research or evidence, if available.

#### *Section 303.520(b)—Policies Related to Use of Private Insurance for Payment for Services*

Under proposed § 303.520(b), the State would not be able to access a parent's private insurance to pay for Part C services unless the parent provides informed consent to do so. Proposed § 303.520(b)(2) would provide that the parental consent requirement does not apply if the State has enacted a statute regarding private health insurance coverage for early intervention services under Part C of the Act that provides specific protections. These protections must include ensuring that the use of health insurance to pay for Part C services cannot: (1) Count towards the lifetime coverage caps for the child or family, (2) negatively impact 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 child's or family's premiums. We are aware of a

few States that have enacted such statutes. These few States are the only States that use private insurance such that it accounts for ten percent or more of their State's Part C budgets. By adopting specific State statutes that provide parental protections to the parent, these States would be exempt from the proposed parent consent requirements.

Under current regulations, Part C services must be provided free of charge unless the State has established a system of payments. In addition, under current §§ 303.402 and 303.460, the lead agency must obtain consent prior to disclosing personally identifiable information. Because the proposed regulations would not represent a significant change from current requirements relating to consent, the proposed changes should not result in increased costs for a State. In addition, we expect the proposed provision in § 303.520(b)(2) to have a limited effect because private insurance funds represent a very limited proportion of States' Part C budgets. Twenty-six States reported in either their fiscal year 2001 or 2002 Part C APRs that they receive funding from private insurance or family fees. For 21 of the 26 jurisdictions reporting income from private insurance or family fees, which could be paid, with parental consent, by private insurance, the average percentage of the State's overall Part C budget that represented funds from private insurance or family fees was 4.9 percent.

Any loss of revenue to States from not being able to access private insurance without the consent of the parents would be offset by the major consequences that use of private insurance might have for families, including jeopardizing eligibility for private insurance policies and lifetime caps on benefits or causing increases in premiums or discontinuation of insurance. In addition, the proposed regulations provide flexibility to both States and parents. States have the flexibility either to establish a system of payments under proposed § 303.521 to recoup the costs of providing early intervention services or to obtain parental consent for use of private insurance. Parents have the option to allow the State to use their private insurance or to pay the fees established by the State according to a system of payments established under § 303.521.

*Section 303.521(c)—States With FAPE Mandates or That Use Part B Funds To Provide Services to Infants and Toddlers With Disabilities*

This proposed provision would incorporate longstanding policy and requirements under Part B of the Act that, if a State is required under State law to provide FAPE for, or uses Part B funds under section 611 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, but has a law extending FAPE down to birth for a particular 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 the proposed change clarifies existing requirements and practice, this change is not expected to result in any change in costs for State agencies or families.

## 2. Clarity of the Regulations

Executive Order 12866 and the Presidential Memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a number heading; for example, § 303.209 Transition.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make these proposed regulations easier to understand to the person listed in the **ADDRESSES** section of the preamble.

## Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. These proposed regulations would govern only States in their implementation of the Part C early intervention program and States are not considered small entities under the Regulatory Flexibility Act of 1980, as amended. In addition, because Part C does not authorize subgrants no small entities would be directly affected by these proposed regulations. The small entities that would be indirectly affected are local entities that enter into contracts with the State to provide Part C early intervention services. However, the proposed regulations would not have a significant economic impact on these small entities because the proposed regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The proposed regulations would impose minimal requirements, concerning the potential referral of additional children to the Part C program as well as the issue of use of insurance and systems of payments to ensure the proper expenditure of program funds.

## Paperwork Reduction Act of 1995

These proposed regulations contain information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). A description of these five information collections 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.

The proposed regulations include five information collection requirements associated with the following provisions: Proposed §§ 303.21(c)(2), 303.100 through 303.126, 303.200 through 303.227, 303.300, 303.320(e)(2), 303.342(e), 303.431 through 303.449, 303.520(a)(3) and 303.520(b)(1)(iii), 303.701 and 303.702 and 303.720 through 303.724. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of these sections to OMB for its review. The Department recognizes that information collection requests requiring aggregate data on race and ethnicity do not reflect the 1997 OMB Standards for Data on Race and Ethnicity. The Department anticipates

providing guidance to implement those standards in forthcoming collections.

Interested persons are requested to send comments regarding the information collections to the Department of Education within 60 days after publication of these proposed regulations. This comment period does not affect the deadline for public comments associated with these proposed regulations.

Collection of Information: IDEA Part C State Performance Plan (SPP) and Annual Performance Report (APR), (Information Collection 1820–0578) for proposed §§ 303.124 and 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.

Under 44 CFR 1320.11, we requested that OMB review information collection 1820–0578. The 60-day **Federal Register** notice was published on August 10, 2006, the 30-day **Federal Register** notice was published on October 18, 2006, and the information collection was approved by OMB on December 12, 2006, with the understanding that the Department would submit this collection for OMB review in conjunction with this NPRM.

Annual reporting and recordkeeping burden for this collection of information is estimated to be 150 hours annually for each of 56 respondents. The total annual burden to States for this information collection is estimated to be 8,400 hours. Of the total 150 hours, it is estimated that 80 hours will be spent planning the report, 40 hours will be spent writing the report, and 30 hours will be spent typing and compiling the report. 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 2 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) §§ 303.100 through 303.126 and §§ 303.200 through 303.227. Under proposed § 303.101

States would be required to submit a statement that they have submitted the new and/or revised State policies, procedures, methods, and descriptions that meet all requirements found under Part C of the Act. Information Collection 1820-0550 has been revised to reflect these proposed regulations.

Under 44 CFR 1320.11, we requested that OMB review Information Collection 1820-0550. The 60-day **Federal Register** notice was published on August 10, 2006, the 30-day **Federal Register** notice was published on October 18, 2006, and the information collection was approved by OMB on December 12, 2006, with the understanding that the Department would submit this collection for OMB review in conjunction with this NPRM.

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 for 56 respondents. Thus, the annual total burden estimate for this information collection is 560 hours.

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; Report on Infants and Toddlers Exiting Part C (Information Collection 1820-0557) was approved by OMB on November 21, 2006 for proposed §§ 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 101 hours per State agency or 5,656 hours total.

Collection of Information: (Information Collection 1820-0678) Report of Dispute Resolution Under Part C of the Individuals with Disabilities Education Act Complaints, Mediations, and Due Process Hearings was approved by OMB on November 22, 2006 for proposed §§ 303.431 through 303.449. Under the Act the Secretary obtains data on the dispute resolution processes described in section 615 of the Act. Each State must report the number of

due process complaints, number of hearings conducted and the number of mediations held and the number of settlement agreements reached through such mediations. This collection will replace Attachment 1 of the Part C Annual Performance Report (OMB number 1820-0578) beginning with the data collection for the FFY 2005 (2005-2006) period. 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: (Information Collection 1820-NEW) State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements under Part C. Proposed §§ 303.21(c)(2), 303.211(b)(1), 303.224(b), 303.300, 303.320(e)(2), 303.430, 303.431(b)(2)(i), 303.432 through 303.434, 303.440(b), 303.342(e), 303.443(c)(3), 303.520(a)(3) and (b)(1)(iii), and 303.724(c) and (e). 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. For the purpose of clarity and efficiency, we have combined these separate collections of information into one collection that reflects all the recordkeeping, reporting, and disclosure activities that must be completed by the State or EIS provider, which do not require reporting to the Department.

Each State lead agency must develop a public awareness program. State lead agencies are also required to keep records to verify the proper disbursement of funds. States must develop procedures to document circumstances when it is impossible to complete the evaluation and assessment of an infant or toddler with a disability within the 45-day timeline.

State lead agencies must also maintain documentation to verify the accuracy of their child count data. The proposed regulations also require the State lead agency to obtain certification from each EIS provider regarding the accuracy of the EIS provider's child count.

Each State lead agency must have on file a list of mediators and the State complaint procedures. If the State lead agency adopts Part B due process hearing procedures, then the public agencies must have on file a list of hearing officers and low-cost legal services information.

Annual reporting and recordkeeping burden for this collection of information is estimated to be approximately 112 hours for 56 respondents (State lead agencies) for a total of 6,272 hours.

With respect to EIS providers, the proposed regulations require that EIS providers make the following disclosures to parents:

1. Written notification of their rights and responsibilities in determining whether their child will continue to receive services under Part C of the Act or participate in preschool programs under section 619 of the Act.

2. If a State decides to make EI services available to children ages three and older, annual notice that contains a description of the rights of parents to elect to receive services under § 303.211 or services under Part B of the Act and an explanation of the differences between these services.

3. A copy of the system of payments policies that identify potential costs that parents may incur while enrolled in a public insurance program or private insurance program.

The proposed regulations also require that EIS providers obtain informed consent from parents prior to the provision of EI services.

Annual reporting and recordkeeping burden for this collection of information is estimated to be approximately 17,392 hours. This burden was calculated by multiplying the number of children (298,150) served by the estimated amount of time to carry out these activities (3 to 4 minutes).

Consistent with the discussion above, the following chart describes the sections of the proposed regulations involving information collections, the information being collected, and the collections the Department will submit to the Office of Management and Budget for approval and public comment under the Paperwork Reduction Act.

Regulatory section	Collection information	Collection
<b>Third Party Disclosure</b>		
§ 303.21(c)(2) .....	Requires that parents receive a written notification of their rights and responsibilities in determining whether their child will continue to receive services under Part C or participate in preschool programs under section 619 of the Act.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.211(b)(1) .....	Requires that if a State adopts this policy, parents are provided an annual notice that contains a description of the rights of parents to elect to receive services pursuant to § 303.211 or under Part B and an explanation of the differences between services provided under § 303.211 and under Part B.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.300 .....	Requires the lead agency to develop a public awareness program.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.520(a)(3) and § 303.520(b)(1)(iii) .....	Requires the State to provide parents with a copy of the State’s system of payments policies that identify potential costs that the parent may incur while enrolled in a public insurance program or private insurance program.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
<b>Recordkeeping Requirements</b>		
§ 303.224(b) .....	Requires the State to keep records and afford access as the Secretary may find necessary to ensure compliance, correctness and verification of reports, and proper disbursement of funds.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.320(e)(2) .....	Requires the State to develop procedures to document circumstances when it is impossible to complete the evaluation and assessment within the 45-day timeline.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.724(e) .....	Requires the lead agency to maintain documentation to enable the State and the Secretary to audit the accuracy of the child count data.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
<b>Other Information Collection Requirements</b>		
§ 303.342(e) .....	Requires that informed consent be obtained from the parents prior to the provision of EI services, as described in the IFSP.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.724(c) .....	Requires the lead agency to obtain certification from each EIS provider that is unduplicated and accurate regarding their count of children served.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.430 .....	Requires the State to develop written procedures for the timely administrative resolution of complaints.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.431(b)(2)(i) .....	Requires the State to maintain a list of qualified mediators.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§§ 303.432 through 303.434 .....	Requires the State to develop procedures for resolving complaints, including the minimum State complaint procedures and the procedures for filing a complaint.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.440(b) .....	Requires the lead agency to inform parents of any free or low-cost legal and other relevant services available.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.443(c)(3) .....	Requires the State to maintain a list of hearing officers.	Information collection 1820–NEW “State and EIS Recordkeeping, Reporting, and Third Party Disclosure Requirements.”
§ 303.124 .....	Requires the State to develop a statewide system for compiling and reporting timely and accurate data.	Information collection 1820–0557 “Report on Infants and Toddlers Exiting Part C.”
§§ 303.720 through 303.724 .....	Requires the State to annually report to the Secretary and the public on the information required by section 618 of the Act. Requires the annual reporting of children served, protection of identifiable data and certification of the report.	Information collection 1820–0557 “Report on Infants and Toddlers Exiting Part C.”

Regulatory section	Collection information	Collection
§§ 303.100 through 303.126 .....	Eligibility requirements for a grant and requirements for a statewide system for implementing Part C.	Information collection 1820–0550 “Annual State Application under Part C of the IDEA.”
§ 303.200 through 303.227 .....	Requirements for each State application and required assurances.	Information collection 1820–0550 “Annual State Application under Part C of the IDEA.”
§ 303.124 .....	Requirements for a statewide system that includes a system for compiling and reporting timely and accurate data.	Information collection 1820–0578 “IDEA Part C State Performance Plan (SPP) and Annual Performance Report (APR).”
§ 303.701 .....	Requirements for data collection to report annually to the Secretary on the indicators established by the Secretary for the State Performance Plan.	Information collection 1820–0578 “IDEA Part C State Performance Plan (SPP) and Annual Performance Report (APR).”
§ 303.702 .....	Requirements to report annually to the public on the performance of each EIS program in the State on the targets in the State’s performance plan; and the requirements to make the State’s performance plan, annual performance report and reports on the performance of each EIS program available through public means.	Information collection 1820–0578 “IDEA Part C State Performance Plan (SPP) and Annual Performance Report (APR).”
§§ 303.431 through 303.449 .....	Requires the State to annually report to the Secretary and the public on information required by section 618 of the Act. Requires the annual reporting of the number of due process complaints, the number of hearings conducted, and the number of mediations held, and the number of settlement agreements reached through such mediations.	Information collection 1820–0678 “Report of Dispute Resolution under Part C of the Individuals with Disabilities Education Act.”

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for U.S. Department of Education. Send these comments by e-mail to [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or by fax to (202) 395–6974. Commenters need only submit comments via one submission medium. You may also send a copy of these comments to the Department contact named in the ADDRESSES section of this preamble.

We consider your comments on these proposed collections of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60

days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

Requests for copies of the submission for OMB review may be accessed from <http://edicsweb.ed.gov> by selecting the “Browse Pending Collections” link. When you access the information collection, click on “Download Attachments” to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Request may also be electronically mailed to the Internet address [OCIO-RIMG@ed.gov](mailto:OCIO-RIMG@ed.gov) or faxed to (202) 245–6621.

If you want to comment on the information collection requirements, please send your comments to Alexa Posny, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, room 4109, Washington, DC 20202–2641.

#### Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives 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.

This document provides early notification of the Department’s specific plans and actions for this program.

#### Assessment of Educational Impact

The Secretary particularly requests 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.

#### Electronic Access to this Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) at the following site: <http://www.ed.gov/news/fedregister>.

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 1–800–293–4922; 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)

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 303 AND THE CORRESPONDING SECTION IN THIS NPRM<sup>3</sup>

A. Current regulatory section number	B. Corresponding section in NPRM
<b>Subpart A—General</b>	
303.1 Purpose of the early intervention program for infants and toddlers with disabilities ..... 303.2 Eligible recipients of an award ..... 303.3 Activities that may be supported under this part ..... 303.4 Limitation on eligible children ..... 303.5 Applicable regulations ..... Definitions: Note ..... 303.6 Act ..... 303.7 Children ..... 303.8 Council ..... 303.9 Days ..... 303.10 Developmental delay ..... 303.11 Early intervention program ..... 303.12 Early intervention services ..... Note to 303.12 ..... 303.13 Health services ..... Note to 303.13 ..... 303.14 IFSP ..... 303.15 Include; including ..... 303.16 Infants and toddlers with disabilities ..... Note 1 to 303.16 ..... Note 2 to 303.16 ..... 303.17 Multidisciplinary ..... 303.18 Natural environments ..... 303.19 Parent ..... 303.20 Policies ..... 303.21 Public agency ..... 303.22 Qualified ..... 303.23 Service coordination (case management) ..... Note 1 to 303.23 ..... Note 2 to 303.23 ..... 303.24 State ..... 303.25 EDGAR definitions that apply .....	303.1. 303.2. 03.501(a)–(e). Removed. 303.3.  Removed. 303.4. 303.6. 303.8. 303.9. 303.10. 303.11. 303.13. 303.13(d). 303.16. Removed. 303.20. 303.18. 303.21. 303.21(a)(2). 303.5. 303.24. 303.26. 303.27. Removed. 303.30. 303.31. 303.33. Removed. 303.33(c). 303.34. 303.3.
<b>Subpart B—Eligibility and Requirements for a Statewide System</b>	
General Requirements: 303.100 Conditions of assistance ..... 303.101 How the Secretary disapproves a State’s application or statement of assurances ..... Public Participation: 303.110 General requirements and timelines for public participation ..... 303.111 Notice of public hearings and opportunity to comment ..... 303.112 Public hearings ..... 303.113 Reviewing public comments received ..... Statement of Assurances: 303.120 General ..... 303.121 Reports and records ..... 303.122 Control of funds and property ..... 303.123 Prohibition against commingling ..... 303.124 Prohibition against supplanting ..... 303.125 Fiscal control ..... 303.126 Payor of last resort ..... 303.127 Assurance regarding expenditure of funds ..... 303.128 Traditionally underserved groups ..... General Requirements for a State Application: 303.140 General ..... 303.141 Information about the Council ..... 303.142 Designation of lead agency ..... 303.143 Designation regarding financial responsibility ..... 303.144 Assurance regarding use of funds ..... 303.145 Description of use of funds ..... 303.146 Information about public participation ..... 303.147 Services to all geographic areas ..... 303.148 Transition to preschool programs ..... Note 1 to 303.148 ..... Components of a Statewide System—Application Requirements: 303.160 Minimum components of a statewide system ..... 303.161 State definition of developmental delay .....	303.100, 303.101, 303.228. 303.230.  303.208. 303.208(a). 303.208(a). 303.208.  303.220. 303.224. 303.223. 303.225(a). 303.225(b). 303.226. 303.222. 303.221. 303.227.  303.101 and 303.203(a). 303.125. 303.201. 303.202. 303.221. 303.205. 303.208. 303.207. 303.209. 303.209.  303.110. 303.111.

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 303 AND THE  
CORRESPONDING SECTION IN THIS NPRM<sup>3</sup>—Continued

A. Current regulatory section number	B. Corresponding section in NPRM
303.162 Central directory .....	303.117.
303.164 Public awareness program .....	303.116.
303.165 Comprehensive child find system .....	303.115.
303.166 Evaluation, assessment, and nondiscriminatory procedures .....	303.113.
303.167 Individualized family service plans .....	303.114.
303.168 Comprehensive system of personnel development (CSPD) .....	303.118.
303.169 Personnel standards .....	303.119.
303.170 Procedural safeguards .....	303.123.
303.171 Supervision and monitoring of programs .....	303.120.
303.172 Lead agency procedures for resolving complaints .....	303.430(c).
303.173 Policies and procedures related to financial matters .....	303.511.
303.174 Interagency agreements; resolution of individual and disputes .....	303.120(e) and (f) 303.511.
303.175 Policy for contracting or otherwise arranging for services .....	303.121.
303.176 Data collection .....	303.124.
Participation by the Secretary of the Interior:	
303.180 Payments to the Secretary of the Interior for Indian tribes and tribal organizations .....	303.731.
<b>Subpart C—Procedures for Making Grants to States</b>	
303.200 Formula for State allocations .....	303.732.
303.201 Distribution of allotments from non-participating States .....	303.733.
303.202 Minimum grant that a State may receive .....	303.732(b).
303.203 Payments to the Secretary of the Interior .....	303.731.
303.204 Payments to the jurisdictions .....	303.730.
Program and Service Components of a Statewide System of Early Intervention Services:	
303.300 State eligibility criteria and procedures .....	303.111, 303.203(c), 303.204, 303.205(c), and 303.320(b)(1).
Note to 303.300 .....	303.320(b)(2).
303.301(a), (c) and Note to 303.301 .....	Removed.
303.301(b), (d) Central Directory .....	303.117.
Identification and Evaluation:	
303.320 Public awareness program .....	303.116, 303.300.
303.321 Comprehensive child find system .....	303.301, 303.302.
303.322 Evaluation and assessment .....	303.320.
303.323 Nondiscriminatory procedures .....	303.320(a)(3).
Individualized Family Service Plans (IFSPs):	
303.340 General .....	303.340.
303.342 Procedures for IFSP development, review, and evaluation .....	303.342.
303.343 Participants in IFSP meetings and periodic reviews .....	303.343.
303.344 Content of IFSP .....	303.344.
303.345 Provision of services before evaluation and assessment are completed .....	303.345.
303.346 Responsibility and accountability .....	303.346.
Personnel Training and Standards:	
303.360 Comprehensive system of personnel development .....	303.118.
303.361 Personnel standards .....	303.119.
<b>Subpart E—Procedural Safeguards</b>	
General:	
303.400 General responsibility of lead agency for procedural safeguards .....	303.400.
303.401 Definitions of consent, native language, and personally identifiable information .....	303.24, 303.25, 303.29, 303.401, 303.420, and 303.421.
303.402 Opportunity to examine records .....	303.401.
303.403 Prior notice; native language .....	303.421.
303.404 Parent consent .....	303.420.
Note 1 to 303.404 .....	303.401.
Note 2 to 303.404 .....	303.420(c).
303.405 Parent right to decline service .....	303.420(d).
303.406 Surrogate parents .....	303.422.
Mediation and Due Process Hearing Procedures for Parents and Children:	
303.419 Mediation .....	303.430(b); 303.431.
303.420 Due process hearing procedures .....	303.430(d) and 303.435–303.449.
Note 1 to 303.420 .....	303.435–303.439.
Note 2 to 303.420 .....	303.435–303.439.
303.421 Appointment of an impartial person .....	303.435.
303.422 Parent rights in administrative proceedings .....	303.436.
303.423 Convenience of proceedings; timelines .....	303.437.
303.424 Civil action .....	303.438.
303.425 Status of a child during proceedings .....	303.430(e).
Confidentiality:	

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 303 AND THE CORRESPONDING SECTION IN THIS NPRM<sup>3</sup>—Continued

A. Current regulatory section number	B. Corresponding section in NPRM
303.460 Confidentiality of information .....	303.401–303.417.
<b>Subpart F—State Administration</b>	
General:	
303.500 Lead agency establishment or designation .....	303.201.
303.501 Supervision and monitoring of programs .....	303.120.
Lead Agency Procedures for Resolving Complaints:	
303.510 Adopting complaint procedures .....	303.432.
303.511 An organization or individual may file a complaint .....	303.434(a).
303.512 Minimum State complaint procedures .....	303.433.
Policies and Procedures Related to Financial Matters:	
303.520 Policies related to payment for services .....	303.511.
303.521 Fees .....	303.521.
303.522 Identification and coordination of resources .....	303.511.
303.523 Interagency agreements .....	303.120(f) and 303.511.
303.524 Resolution of disputes .....	303.120(e) and 303.511.
303.525 Delivery of services in a timely manner .....	303.511(d).
303.526 Policy for contracting or otherwise arranging for services .....	303.121.
303.527 Payor of last resort .....	303.510.
303.528 Reimbursement procedures .....	303.122, 303.510(b).
Reporting Requirements:	
303.540 Data collection .....	303.124.
Use of funds for State Administration:	
303.560 Use of funds by the Lead Agency .....	303.501.
<b>Subpart G—State Interagency Coordination Council</b>	
General:	
303.600 Establishment of Council .....	303.600.
Note to 303.600 (Paragraph 1) .....	303.601(a)(1)(iii).
Note to 303.600 (Paragraph 2) .....	Removed.
303.601 Composition .....	303.601.
303.602 Use of funds by the Council .....	303.603.
303.603 Meetings .....	303.602.
303.604 Conflict of interest .....	303.601(d).
Functions of the Council:	
303.650 General .....	303.605.
303.651 Advising and assisting the lead agency in its administrative duties .....	303.604(a).
303.652 Applications .....	303.604(a).
303.653 Transitional services .....	303.604(a).
303.654 Annual report to the Secretary .....	303.604(c).

<sup>3</sup> See explanation at the end of this table.

*Explanation of Table:* The purpose of this table is to help readers find where a given section number in the current regulations (column A of Table) is located in this NPRM, as shown under column B. In general, the table *does not* include any new requirements added by Pub. L. 108–446, or any proposed new regulations that would be added. In the Table, if a specific section of the current regulations would be removed by the NPRM (e.g., “Early intervention program” under current § 303.11), it would be shown as “Removed” under column B.

**List of Subjects in 34 CFR Part 303**

Education of individuals with disabilities, Grant programs—education, Infants and toddlers, Reporting and recordkeeping requirements.

Dated: April 27, 2007.

**Margaret Spellings,**

*Secretary of Education.*

For the reasons discussed in this preamble, the Secretary proposes to amend Title 34 of the Code of Federal Regulations by revising part 303 as follows:

**PART 303—EARLY INTERVENTION PROGRAM FOR INFANTS AND TODDLERS WITH DISABILITIES**

**Subpart A—General**

**Purpose and Applicable Regulations**

Sec.

- 303.1 Purpose of the early intervention program for infants and toddlers with disabilities.
- 303.2 Eligible recipients of an award.
- 303.3 Applicable regulations.

**Definitions Used in This Part**

- 303.4 Act.
- 303.5 At-risk infant or toddler.
- 303.6 Child.
- 303.7 Consent.
- 303.8 Council.
- 303.9 Day.
- 303.10 Developmental delay.
- 303.11 Early intervention service program.
- 303.12 Early intervention service provider.
- 303.13 Early intervention services.
- 303.14 Elementary school.
- 303.15 Free appropriate public education.
- 303.16 Health services.
- 303.17 Homeless children.
- 303.18 Include; including.
- 303.19 Indian; Indian tribe.
- 303.20 Individualized family service plan.
- 303.21 Infant or toddler with a disability.
- 303.22 Lead agency.
- 303.23 Local educational agency.
- 303.24 Multidisciplinary.
- 303.25 Native language.
- 303.26 Natural environments.

- 303.27 Parent.
- 303.28 Parent training and information center.
- 303.29 Personally identifiable.
- 303.30 Public agency.
- 303.31 Qualified personnel.
- 303.32 Secretary.
- 303.33 Service coordination services (case management).
- 303.34 State.
- 303.35 State educational agency.
- 303.36 Ward of the State.

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

##### **General Authority and Eligibility**

- 303.100 General authority.
- 303.101 State eligibility—requirements for a grant under this part.

##### **State Conformity with Part C of the Act and Abrogation of State Sovereign Immunity**

- 303.102 State conformity with Part C of the Act.
- 303.103 Abrogation of State sovereign immunity.

##### **Equipment and Construction**

- 303.104 Acquisition of equipment and construction or alteration of facilities.

##### **Positive Efforts To Employ and Advance Qualified Individuals with Disabilities**

- 303.105 Positive efforts to employ and advance qualified individuals with disabilities.

##### **Minimum Components of a Statewide System**

- 303.110 Minimum components of a statewide system.
- 303.111 State definition of developmental delay.
- 303.112 Availability of early intervention services.
- 303.113 Evaluation, assessment, and nondiscriminatory procedures.
- 303.114 Individualized family service plans (IFSPs).
- 303.115 Comprehensive child find system.
- 303.116 Public awareness program.
- 303.117 Central directory.
- 303.118 Comprehensive system of personnel development (CSPD).
- 303.119 Personnel standards.
- 303.120 Lead agency role in supervision, monitoring, funding, interagency coordination, and other responsibilities.
- 303.121 Policy for contracting or otherwise arranging for services.
- 303.122 Reimbursement procedures.
- 303.123 Procedural safeguards.
- 303.124 Data collection.
- 303.125 State interagency coordinating council.
- 303.126 Early intervention services in natural environments.

#### **Subpart C—State Application and Assurances**

##### **General**

- 303.200 State application and assurances.

##### **Application Requirements**

- 303.201 Designation of lead agency.

- 303.202 Certification regarding financial responsibility.
- 303.203 Statewide system and description of services.
- 303.204 Application's definition of at-risk infants and toddlers and description of services.
- 303.205 Description of use of funds.
- 303.206 Referral policies for specific children.
- 303.207 Availability of resources.
- 303.208 Public participation policies and procedures.
- 303.209 Transition to preschool and other programs.
- 303.210 Coordination with Head Start and Early Head Start, early education, and child care programs.
- 303.211 State option to make services under this part available to children ages three and older.
- 303.212 Additional information and assurances.

##### **Assurances**

- 303.220 Assurances satisfactory to the Secretary.
- 303.221 Expenditure of funds.
- 303.222 Payor of last resort.
- 303.223 Control of funds and property.
- 303.224 Reports and records.
- 303.225 Prohibition against commingling and supplanting; indirect costs.
- 303.226 Fiscal control.
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**Authority:** 20 U.S.C. 1431 through 1445, 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), 1435(b))

###### § 303.2 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.

(Authority: 20 U.S.C. 1401(31), 1434)

###### § 303.3 Applicable regulations.

(a) The following regulations apply to this part:

(1) The regulations in this part 303; and

(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 State educational agency means the lead agency under this part.

(Authority: 20 U.S.C. 1221e-3)

#### 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 and environmental factors that can be identified such as low birth weight, respiratory distress as a newborn, lack of oxygen, brain hemorrhage, infection, nutritional deprivation, and a history of abuse or neglect, being directly affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure.

(Authority: 20 U.S.C. 1432(1) 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, or other mode of communication;

(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 describes that activity and lists the records (if any) that will be released and to whom; and

(c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.

(2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not apply to an action that has 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 team's 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 of the individualized family service plan (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 as requested by the family, the needs of the family to assist appropriately in the infant's or toddler's development, as identified by the individualized family service plan 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 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

(9) Are provided in conformity with an individualized family service plan 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 devices and services* 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 cochlear implants, or the optimization (*e.g.*, mapping) or the 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* includes—

(i) Identification of children with auditory impairment, 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 need for 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) *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.

(7) *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.

(8) *Psychological services* includes—

- (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.

(9) *Service coordination services* has the meaning given the term in § 303.33.

- (10) *Social work services* includes—
  - (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.

(11) *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 individualized family service plan 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.

(12) *Speech-language pathology services* includes—

- (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 communicative or language disorders and delays in development of communication skills;
- (iii) Provision of services for the habilitation, rehabilitation, or prevention of communicative or language disorders and delays in development of communication skills; and
- (iv) Provision of sign language, cued language, and auditory/oral language services, which, as used with respect to infants and toddlers with disabilities who are hearing impaired, includes services to the infant or toddler with a disability and the family to teach sign language, cued language, and auditory/oral language, as well as to provide oral transliteration services, sign language, and cued language interpreting services.

(13) *Transportation and related costs* includes the cost of travel (e.g., mileage, or travel by common carrier or other means) and other costs (e.g., tolls and parking expenses) that are necessary to enable an infant or toddler with a disability and the child's family to receive early intervention services.

(14) *Vision services* means—

- (i) Evaluation and assessment of visual functioning, including the diagnosis and appraisal of specific visual disorders, delays, and abilities;
- (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, independent living skills 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 dietitians.
- (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 on 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* 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* means services necessary to enable a child to benefit from the other early intervention services under this part during the time that the child is eligible to receive other 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 cochlear implants.

(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 on 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.

(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 under the age of three years 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; 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 § 303.320;

(b) Includes the content specified in § 303.344;

(c) Is implemented as soon as possible once parental consent to early intervention services on 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; severe sensory impairments; inborn errors of metabolism; disorders reflecting disturbance of the development of the nervous system; congenital infections; and disorders secondary to exposure to toxic substances, including fetal alcohol syndrome.

(b) *Infant or toddler with a disability* also 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* also 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 serving the child must include—

(1) An educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills; and

(2) A written notification to parents 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 free appropriate public education on a regional basis; and

(iii) Provides special education and related services to children with disabilities within the State.

(c) *BIA funded schools.* The term includes an elementary school or

secondary school funded by the Bureau of Indian Affairs, and not subject to the jurisdiction of any SEA other than the Bureau of Indian Affairs, 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*, with respect to evaluation and assessment of a child, an IFSP team, or IFSP development under subpart D of this part, means 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.

(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, means the following:

(1) The language or mode of communication normally used by that individual, or, in the case of a child, the language or mode of communication normally used by the parents of the child, except as provided in paragraph (a)(2) of this section.

(2) In all direct contact with a child (including evaluation of the child), the language or mode of communication normally used by the child in the home or learning environment.

(b) For an individual with deafness or blindness, or for an individual with no written language, the term *native 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 normal for an infant or toddler without a disability, may include the home, and must be consistent with the provisions of § 303.126.

(Authority: 20 U.S.C. 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 health, educational or early intervention services 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 health, 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 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.

(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.

*Personally identifiable* means information that contains—

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child or child's family;

(c) A personal identifier, such as the child's or parent's social security number or student number; or

(d) A list of personal characteristics or other information that would make the child's or parent's identity easily traceable.

(Authority: 20 U.S.C. 1415, 1439)

### § 303.30 Public agency.

*Public agency* includes the lead agency and any other agency or political

subdivision of the State that is responsible for providing early intervention services to infants and toddlers with disabilities under this part and their families.

(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 area in which the individuals are providing early intervention services.

(Authority: 20 U.S.C. 1432(4))

**§ 303.32 Secretary.**

*Secretary* means the Secretary of Education.

(Authority: 20 U.S.C. 1401(28))

**§ 303.33 Service coordination services (case management).**

(a) *Service coordination services* means 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 rights, procedural safeguards, and services that are authorized to be provided under Part C of the Act, including—

- (1) Coordinating all services required under this part across agency lines;
- (2) Assisting parents of infants and toddlers with disabilities in gaining access to and coordinating the provision of the early intervention services and coordinating 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; and
- (3) Serving as the single point of contact for carrying out the activities described in paragraph (b) of this section.

(b) The term includes—

- (1) Coordinating the performance of evaluations and assessments;
- (2) Facilitating and participating in the development, review, and evaluation of IFSPs;
- (3) Assisting families in identifying available EIS providers;
- (4) Coordinating and monitoring the delivery of services required under this part;
- (5) Informing families of their rights and procedural safeguards, as set forth in subpart E of this part and related resources;
- (6) Coordinating the funding sources for services required under this part; and
- (7) Facilitating the development of a transition plan to preschool, school, or other services, if appropriate.

(c) 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 Medicaid), for purposes of claims in compliance with the requirements of proposed § 303.501 (Payor of last resort).

(Authority: 20 U.S.C. 1432(4), 1435(a)(4), 1436(d)(7))

**§ 303.34 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 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))

**§ 303.35 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))

**§ 303.36 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 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, 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.

(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 the 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 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.

(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 § 303.18(a)(1), the evaluation and assessment procedures, consistent with § 303.320, 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).

(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.

(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 § 303.320.

(Authority: 20 U.S.C. 1435(a)(3))

#### § 303.114 Individualized family service plans (IFSPs).

Each system must include, for each infant or toddler with a disability in the State, an IFSP that meets the requirements of §§ 303.340 through 303.345, including service coordination services in accordance with the IFSP.

(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 §§ 303.301 through 303.303.

(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 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 § 303.300.

(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.

(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, that—

(a) Must include—

(1) Implementing 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 services 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; and

(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.

(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.

(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 receiving assistance under Part C of the Act; and

(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 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, and organizations used by the State to carry out Part C of the Act;

(ii) Enforcing any obligations imposed on those agencies under Part C of the Act and these regulations;

(iii) Providing technical assistance, if necessary, to those agencies, institutions, and organizations;

(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 these regulations 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 service 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.

(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 individual 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.

(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.

(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.

(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 of 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.

(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.

(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 provided satisfactorily in a natural environment.

(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 §§ 303.220 through 303.227.

(Authority: 20 U.S.C. 1437)

**Application Requirements****§ 303.201 Designation of lead agency.**

Each application must include a designation of the lead agency in the State that will be responsible for the administration of funds provided under this part.

(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.

(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 (including any system of payments regarding the use of public insurance or benefits, private insurance, or family costs or fees) as required under subpart F of this part; and

(c) The State's rigorous definition of developmental delay as required under §§ 303.10 and 303.111.

(Authority: 20 U.S.C. 1432(3), 1432(4)(B), 1432(4)(C), 1435(a)(1), 1435(a)(10)(B), 1437(a)(3)(A) and (B), 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.

(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 agencies.* If other 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.

(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 § 303.302(b).

(Authority: 20 U.S.C. 1437(a)(6))

**§ 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.

(Authority: 20 U.S.C. 1437(a)(7))

**§ 303.208 Public participation policies and procedures.**

(a) Each application must include a description of the State's policies and procedures that ensure that—

(1) Before adopting any new or revised policies and procedures needed to comply with Part C of the Act (including any amendments to those policies and procedures), the lead agency holds public hearings, gives adequate notice of the hearings, and provides an opportunity for comment by the general public, including individuals with disabilities and parents of infants and toddlers with disabilities;

(2) Before submitting a State application under this part (including

any policies, procedures, descriptions, methods, certifications and assurances required in subparts B and C of this part), the State—

(i) Complies with the public participation requirements in paragraph (a) of this section; and

(ii) Publishes each proposed application, policy or procedure to—

(A) Ensure circulation throughout the State, at least 60 days before the date on which the application, policy or procedure is submitted to the Secretary; and

(B) Provide an opportunity for public comment for at least 30 days during that 60-day period.

(b) Before implementing any policies, procedures, and methods that are subject to the public participation requirements in this section and required to be submitted to the Secretary under subparts B and C of this part, the State must have approval by the Secretary.

(Authority: 20 U.S.C. 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 toddlers with disabilities and their families—

(i) From receiving early intervention services under this part (including toddlers receiving services under § 303.211) to preschool, school, or other appropriate services; or

(ii) To exit the program.

(2) A description of how the State will meet each of the requirements in paragraphs (b) through (d) 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 include provisions for how the lead agency and the SEA will meet the requirements of § 303.209(b) through (d) and § 303.344(h), and 34 CFR 300.124, 300.321(f) and 300.323(b).

(4) Any policy the lead agency has adopted under § 303.401(e).

(b) *Family involvement and notification of the LEA.* The State lead agency must ensure that—

(1) Each family of a toddler with a disability who is served under this part will be included in the transition plan required under this section and § 303.344(h);

(2)(i) Except as provided in paragraph (b)(3) of this section, at least nine months before the third birthday of the toddler with a disability, the lead agency will notify the LEA for the area in which the toddler resides—or, if appropriate, the SEA—that the toddler on his or her third birthday will reach the age of eligibility for preschool or school services under Part B of the Act, as determined in accordance with State law; or

(ii) Except as provided in paragraph (b)(3) of this section, if the lead agency determines within the nine-month period before the third birthday of a toddler with a disability the initial eligibility of the toddler for early intervention services under Part C of the Act, the lead agency, as soon as possible after determining the child's eligibility, will notify the LEA for the area in which the toddler with a disability resides—or, if appropriate, the SEA—that the toddler on his or her third birthday will reach the age of eligibility for preschool or school services under Part B of the Act, as determined in accordance with State law; and

(3) If the State has adopted, under § 303.401(e), a policy permitting a parent to object to disclosure of personally identifiable information, the notification requirement in paragraphs (b)(2)(i) and (ii) of this section must be consistent with this policy.

(c) *Conference to discuss services.* The State lead agency must ensure the following:

(1) If a toddler with a disability may be eligible for preschool services or other services under Part B of the Act, the lead agency, with the approval of the family of the toddler, will convene a conference among the lead agency, the family, and the LEA not fewer than 90 days—and, at the discretion of all of the parties, not more than nine months—before the toddler's third birthday to discuss any services the toddler may receive under Part B of the Act.

(2) If a toddler with a disability may not be eligible for preschool or other services under Part B of the Act, the lead agency, with the approval of the family of the toddler, will make reasonable efforts to convene a conference among the lead agency, the family, and providers of other appropriate services for this toddler to

discuss appropriate services that the toddler may receive.

(d) *Program options and transition plan.* The State lead agency must ensure that—

(1) It will review 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;

(2) It will establish a transition plan not fewer than 90 days—and, at the discretion of all of the parties, not more than nine months—before the toddler's third birthday; and

(3) The plan will include, consistent with § 303.344(h), as appropriate—

(i) Steps for the toddler with a disability and his or her family to exit from the program; and

(ii) Any transition services needed by that toddler and his or her family.

(Authority: 20 U.S.C. 1437(a)(9))

**§ 303.210 Coordination with Head Start and Early Head Start, early education, and child care programs.**

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.*), early education and child care programs, and services under this part.

(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 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, may choose the continuation of early intervention services under this part for their children ages three and older until the children enter, or are 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 ages three through five inclusive, or to one of the following three subsets of that age range:

(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.

(iii) From age three until the beginning of the school year following the child's fifth birthday.

(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 served pursuant to this section are provided 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 will not affect the right of any child served pursuant to this section 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) Subject to § 303.430(e), all early intervention services outlined in the child's IFSP under § 303.344 will be continued while any eligibility determination is being made for services under this section.

(5) Informed consent must be obtained from the parents of any child to be served under this section, where practicable, before the child reaches three years of age, as to whether the parents intend to choose the continuation of early intervention services pursuant to this section for their child.

(6) The transition timeline requirements under § 303.209(c)(1) and (d)(2) do not apply with respect to a child who is receiving services under this section until not fewer than 90 days—and, at the discretion of all of the parties, not more than nine months—before the time the child is expected to no longer receive services under this section.

(7) In States that adopt the option to make services under this part available to children ages three and older, 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.

(Authority: 20 U.S.C. 1435(c), 1437(a)(11))

#### **§ 303.212 Additional information and assurances.**

Each application must contain other information and assurances as the Secretary may reasonably require.

(Authority: 20 U.S.C. 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 of §§ 303.221 through 303.227.

(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 § 303.501.

(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 §§ 303.501 through 303.521 in subpart F of this part.

(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.

(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.

(Authority: 20 U.S.C. 1437(b)(4))

#### **§ 303.225 Prohibition against commingling and supplanting; indirect costs.**

(a) *Prohibition against commingling.*

(1) The State must ensure that funds made available under this part will not be commingled with State funds.

(2) *Commingle* means depositing or recording funds in a general account without the ability to identify each specific source of funds for any expenditure.

(b) *Requirement to supplement and not supplant State funds.* (1)(i) The State must ensure that Federal funds made available under this part will be used to supplement and increase 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.

(ii) To meet the requirement in paragraph (b)(1)(i) of this section, the total amount of State and local funds budgeted for expenditures in the current fiscal year for early intervention services for infants and toddlers with disabilities 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 infants and toddlers and their families in the most recent preceding fiscal year for which the information is available.

(2) The State may reduce the level of expenditures under Part C of the Act below the level of those expenditures for the preceding fiscal year if the reduction is attributable to any of the following:

(i) A decrease in the number of infants and toddlers who are eligible to receive early intervention services under this part.

(ii) The termination of costly expenditures for long-term purchases, such as the acquisition of equipment and the construction of facilities.

(iii) The voluntary departure, by retirement or otherwise, or departure for just cause, of personnel under Part C of the Act.

(iv) The termination of the obligation of the lead agency, consistent with this part, to make available early intervention services to a particular infant or toddler with a disability that are exceptionally costly, as determined by the lead agency, because the infant or toddler—

(A) Has left the State;

(B) Has reached the age at which the obligation of the lead agency to make available early intervention services has terminated; or

(C) No longer needs early intervention services.

(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 paragraphs (c)(2)(i) and (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.

(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 may be necessary to ensure proper disbursement of, and

accounting for, Federal funds paid under this part.

(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.

(Authority: 20 U.S.C. 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, or method 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. The provisions of this section apply 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) With reasonable notice; and

(ii) With 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 303.236 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 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 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 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 or 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**

### **Identification—Public Awareness, Child Find, and Referral**

#### **§ 303.300 Public awareness program—information for parents.**

(a) *Preparation and dissemination.* In accordance with § 303.116, each system must include a public awareness program that provides for—

(1)(i) The lead agency's preparation of information on the availability of early intervention services under this part, and other services, as described in paragraph (b) of this section; and

(ii) Dissemination to all primary referral sources (especially hospitals and physicians) of the information to be given to parents of infants and toddlers, including especially parents with premature infants, or infants with other physical risk factors associated with learning or developmental complications; and

(2) Procedures for assisting the primary referral sources described in § 303.302(c) in disseminating the information to parents of infants and toddlers with disabilities.

(b) *Information to be provided.* The information required in 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 for an evaluation or early intervention services;

(3) The central directory; and

(4) For parents with toddlers with disabilities who are nearing transition age (e.g. starting at least nine months prior to the child's third birthday), a description of the availability of services under section 619 of the Act.

(Authority: 20 U.S.C. 1435(a)(6), 1437(a)(9))

#### **§ 303.301 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 § 300.115);

(2) Includes a system for making referrals to public agencies under this part that—

(i) Includes timelines; and

(ii) Provides for participation by the primary referral sources described in § 303.302(c);

(3) Ensures rigorous standards for appropriately identifying infants and toddlers with disabilities for 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 §§ 303.302 and 303.303.

(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 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 organization, and consortia to identify 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

(2) An effective method is developed and implemented to determine which children are in need of early intervention services, and which children are not in need of those 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 conducted 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 under Title V of the Social Security Act (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 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; and

(I) The programs that provide services under the Family Violence Prevention and Services Act (42 U.S.C. 10401 *et seq.*) (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.

(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 various agencies involved in the State's child find system under this part; and

(ii) The State will make use of the resources available through each early intervention service 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) and 1441)

### § 303.302 Referral procedures.

(a) *General.* (1) The child find system described in § 303.301 must include procedures for use by primary referral sources for referring a child to the Part C system for—

(i) Evaluation and assessment, in accordance with § 303.320; and

(ii) As appropriate, the provision of early intervention services, in accordance with §§ 303.342 through 303.345.

(2) The procedures required in paragraph (a)(1) of this section must—

(i) Provide for referring a child as soon as possible after the child has been identified; and

(ii) Include procedures that meet the requirements in paragraphs (b) and (c) of this section.

(b) *Referral of specific at-risk children.* 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 involved in a substantiated case of abuse or neglect; or

(2) Is identified as 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) Day care programs;

(5) LEAs and schools;

(6) Public health facilities;

(7) Other 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 (for States electing to make services available under this part to children after the age of three in accordance with section 635(c)(2)(G) of the Act and § 303.211).

(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)

### § 303.303 Screening procedures.

(a) *General.* (1) The child find system described in § 303.301 may include procedures for the screening of children who have been referred to Part C, when appropriate, to determine whether they are suspected of having a disability under this part. If the State lead agency elects to adopt screening procedures to determine if a child is suspected of having a disability, those procedures must meet the requirements of this section.

(2) If the screening carried out under paragraph (a) of this section or other available information indicates that the child is suspected of having a disability, the child must be evaluated under § 303.320.

(3) If the lead agency believes, 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.

(4) If, under paragraph (a)(3) of this section, the lead agency determines that the child is not suspected of having a disability, but the parent of the child requests an evaluation, the child must be evaluated under § 303.320.

(b) *Definition of screening procedures.* *Screening procedures*—

(1) Means activities under paragraph (a)(1) of this section that are carried out by a public agency, early intervention service provider, or designated primary referral source (except for parents) to identify infants and toddlers suspected of having a disability and in need of early intervention services at the earliest possible age; and

(2) Includes the administration of appropriate instruments by qualified personnel that can assist in making the identification described in paragraph (a)(1) of this section.

(c) *Condition for evaluation or services.* For every child 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 and assessment of the child under § 303.320 unless the child is suspected of having a disability or the parent requests an evaluation under paragraph (a)(4) of this section; or

(2) Provide early intervention services under this part unless a determination is made, after the evaluation and assessment conducted under § 303.320, that the child meets the definition of *infant or toddler with a disability* under § 303.21.

(Authority: 20 U.S.C. 1434(1), 1435(a)(2), 1435(a)(5) and (a)(6), 1435(c)(2)(G), 1437(a)(6), 1439(a)(6))

### Evaluation and Assessment of the Child and Family and Assessment of Service Needs

#### § 303.320 Evaluation and assessment of the child and family and assessment of service needs.

(a) *General.* (1) Each lead agency must ensure, for each child under the age of three who is referred for evaluation or services under this part and suspected of having a disability, the performance of—

(i) A timely, comprehensive, multidisciplinary evaluation of the child;

(ii) An assessment of the child;

(iii) An assessment of the family as described in paragraph (c) of this section, if the parent and family concur; and

(iv) An assessment of service needs, as described in paragraph (d) of this section, if the child is determined to meet the definition of an *infant or toddler with a disability* in § 303.21.

(2)(i) An evaluation is the method used to review the assessments of the child and the family 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.

(ii) In conducting an evaluation, no single procedure may be used as the sole criterion for determining a child's eligibility under this part.

(iii) A child's medical and other records may be used to establish eligibility (without conducting an assessment of the child and the family) if those records contain information required under this section regarding the child's level of functioning in the developmental areas identified in § 303.21(a)(1).

(3) All evaluations and assessments of the child and family must be conducted by qualified personnel, in a nondiscriminatory manner, in the child's or family's native language (as appropriate), and selected and administered so as not to be racially or culturally discriminatory.

(b) *Procedures for assessment of the child*—(1) *Assessment of the child* means reviewing available pertinent records that relate to the child's current health status and medical history and conducting personal observation and assessment of the child in order to identify the child's unique strengths and needs, including an identification of the child's level of functioning in each of the following developmental areas: cognitive development; physical development, including vision and hearing; communication development; social or emotional development; and adaptive development based on objective criteria, which must include informed clinical opinion.

(2) Qualified personnel must use their informed clinical opinion to assess a child's present level of functioning in each of the developmental areas identified in § 303.21(a)(1) and the lead agency must ensure that informed clinical opinion may be used by qualified personnel to establish a child's eligibility under this part even when other instruments do not establish eligibility, but informed clinical opinion may not negate the results of assessment instruments used under paragraph (b)(1) of this section to establish eligibility.

(c) *Procedures for assessment of the family*. *Assessment of the family* means identification of 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, as determined not just through the use of an assessment tool, but through a voluntary personal interview with the family.

(d) *Assessment of service needs*. If the child meets the definition of *infant or toddler with a disability* in § 303.21, an assessment of the service needs of the

infant or toddler with a disability and the child's family must include a review of the evaluation (including the assessment of the child and family) and available pertinent records and conducting personal observation and assessment of the infant or toddler with a disability in order to identify the early intervention services appropriate to meet the child's unique needs in each of the developmental areas identified in paragraph (b)(1) of this section.

(e) *Timelines*. (1)(i) Except as provided in paragraph (e)(2) of this section, the evaluation of the child (including any assessments of the child and family) and assessment of service needs, as well as the initial IFSP meeting, must be completed within 45 days from the date the lead agency obtains parental consent to conduct an evaluation of the child.

(ii) Lead agencies must ensure that parental consent to conduct an evaluation under § 303.420(a) is obtained as soon as possible once a child is referred for evaluation under this part.

(2) The lead agency must develop procedures to ensure that in the event of exceptional circumstances that make it impossible to complete the evaluation (including any assessments of the child and family) and assessment of service needs within 45 days (e.g., if a child is ill) from receiving parental consent, public agencies will—

(i) Document those circumstances; and

(ii) Develop and implement an interim IFSP, to the extent appropriate and consistent with § 303.345.

(Authority: 20 U.S.C. 1435(a)(3), 1435(a)(5), 1436(a)(1)–(2), 1436(c), 1436(d)(1)–(2))

### **Individualized Family Service Plans (IFSPs)**

#### **§ 303.340 Individualized family service plans—general.**

Each lead agency must ensure, for each infant or toddler with a disability, the development, review, and implementation of an individualized family service plan or IFSP that—

(a) Is consistent with the definition of that term in § 303.20; and

(b) Meets the requirements in §§ 303.342 through 303.345 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 who has been evaluated for the first time and determined to be eligible under this

part, a meeting to develop the initial IFSP must be conducted within the 45-day time period in § 303.320(e).

(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 outcomes is being made; and

(ii) Whether modification or revision of the outcomes or services 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 the IFSP for a child and the child's family, and, as appropriate, to revise its provisions. The results of any current evaluations conducted under § 303.320, and other information available from the assessment of service needs must be used in determining what services 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 to families; 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 consent must be obtained prior to the provision of early intervention services described in the IFSP. The early intervention services for which parental consent is obtained must be provided.

(Authority: 20 U.S.C. 1436)

#### **§ 303.343 IFSP team meetings and periodic reviews.**

(a) *Initial and annual IFSP team meetings*. (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 implementation of the IFSP.

(v) A person or persons directly involved in conducting the evaluations and assessments in § 303.320.

(vi) As appropriate, persons who will be providing 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 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. 1436(b))

#### § 303.344 Content of an IFSP.

(a) *Information about the child's status.* The IFSP must include a statement of the child'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 the child's evaluation and assessments conducted under § 303.320.

(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 § 303.320(c).

(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 timeliness used to determine—

(1) The degree to which progress toward achieving the results or outcomes is being made; and

(2) Whether modifications or revisions of the results, outcomes or services 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 services;

(ii)(A) The natural environment setting in which early intervention services will be provided (subject to paragraph (d)(1)(ii)(B) of this section), including, if applicable, a justification of the extent, if any, to which an early intervention service will not be provided in a 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 child 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), 303.25, and 303.126; and

(3) Based on the child's outcomes that are identified by the IFSP team in paragraph (c).

(iii) The location of the 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 service in paragraph (d)(1) of this section, which date must be as soon as possible after the IFSP meetings described in § 303.342; 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 immediately 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 the implementation of 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 to be taken to support the transition of the child, in accordance with § 303.209, to—

(i) Preschool services under Part B of the Act, to the extent that those services are appropriate;

(ii) Elementary school or preschool services (for children participating under § 303.211);

(iii) Early education, Head Start and Early Head Start or child care programs; or

(iv) 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) The transmission of child find information about the child to the LEA or other relevant agency, in accordance with § 303.209(b) and, with parental consent, transmission of additional information to the LEA to ensure continuity of services, including evaluation and assessment information

required in § 303.320 and copies of IFSPs that have been developed and implemented 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(d), 1437(a)(9)–(10), 1440)

**§ 303.345 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 (including the assessment of the child and family) and assessment of service needs in § 303.320, 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 implementation of the interim IFSP and coordination 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 § 303.320(e).

(Authority: 20 U.S.C. 1436(c))

**§ 303.346 Responsibility and accountability.**

Each agency or person 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 agency or person 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.**

Each lead agency must—

(a) Establish or adopt the procedural safeguards that meet the requirements of this subpart, including the provisions on confidentiality, parental consent and notice, surrogate parents, and dispute resolution; and

(b) Ensure the effective implementation of the safeguards by each EIS provider in the State that is

involved in the provision of early intervention services under this part.

(Authority: 20 U.S.C. 1439(a))

**Confidentiality**

**§ 303.401 Confidentiality and opportunity to examine records.**

(a) *General.* Each State must ensure that the parent of a child referred under this part is 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.* Each State must have procedures in effect to ensure that—

(1) EIS providers comply with the Part C confidentiality procedures in §§ 303.402 through 303.417 (which contain confidentiality provisions that are consistent with, but broader than those under, the Family Educational Rights and Privacy Act (FERPA) in 20 U.S.C. 1232g and its regulations in 34 CFR part 99, and include additional Part C requirements); 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 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 lead agency or EIS provider is no longer required to maintain or maintains that information under applicable Federal and State laws.

(d) *Disclosure of information.* (1) Subject to paragraph (e) of this section and § 303.209(b)(3), the lead agency must disclose to the LEA where the child resides or to the SEA, in accordance with § 303.209(b)(2), the

following limited information that would otherwise be determined to be 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 this part and Part B of the Act.

(e) *Option to inform a parent about intended disclosure.* (1) A State lead agency, through its policies and procedures, may require public agencies and EIS providers, prior to making the limited disclosure described in paragraph (d)(1) of this section, to inform the parent of the intended disclosure and allow the parent 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 is not permitted to make such a disclosure under paragraph (d) of this section and § 303.209(b)(2).

(Authority: 20 U.S.C. 1412(a)(9), 1417(c), 1435(a)(5), 1439(a)(6), 1437(a)(9), 1439(a)(2), 1439(a)(4), 1442)

**Additional Confidentiality Requirements**

**§ 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 §§ 303.403 through 303.417.

(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:

(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) *Education records* includes all early intervention records 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, or institution that collects, maintains, or uses personally identifiable information and includes the lead agency and EIS providers.

(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 that is adequate to fully inform parents about the requirements of § 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; and

(c) A description of all of the rights of parents and children regarding this information, including the rights under the Part C confidentiality provisions in §§ 303.401 through 303.417.

(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 education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request 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 20 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the participating agency provide copies of the 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 records.

(c) An agency shall 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 education 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 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 education 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 education 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.**

(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.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

#### **§ 303.410 Amendment of records at parent's request.**

(a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate, misleading, or violates the privacy or other rights of the child 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 decides to refuse 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 a parent with an opportunity for a hearing under § 303.430(d) to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(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, 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, it must inform the parent of the right to place in the 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 records of the child under this section must—

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is 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) 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 participating agency may not disclose personally identifiable information, as defined in § 303.29, to any party except 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 paragraphs (c) and (d) of this section, § 303.401, or the exceptions enumerated in 34 CFR part 99, which are adopted to apply to Part C through this reference.

(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.

(d) The lead agency or participating agency may disclose to a protection and advocacy (P&A) system authorized under section 143 of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act)—

(1) Contact information (including name, address, and telephone number) for the parent or legal guardian or representative of an infant or toddler with a disability when the P&A system requests this information under section 143(a)(2)(I)(iii)(III) of the DD Act when requested by the P&A system; or

(2) Personally identifiable information in the early intervention records of an infant or toddler with a disability in order to provide the P&A system access to the early intervention records when the P&A system requests access under either section 143(a)(2)(I)(iii) or section 143(a)(2)(J) of the DD Act.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442 and 42 U.S.C. 15043(a)(2)(I), 15043(a)(2)(J))

#### § 303.415 Safeguards.

(a) Each participating agency must protect the confidentiality of personally identifiable information at 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 public 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, GEPA, 20 U.S.C. 1230 through 1234i, 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 policies and procedures that the State uses to ensure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met including the sanctions and right to file a State complaint under §§ 303.432 through 303.434 for failure to comply with §§ 303.401 through 303.417.

(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 service.

(a) The lead agency must ensure parental consent is obtained before—

(1) Administering screening procedures that are used either to determine:

(i) Whether a child is suspected of having a disability; or

(ii) A child's eligibility under this part;

(2) An evaluation and assessment of a child is conducted under § 303.320;

(3) Early intervention services are provided to the child under this part;

(4) Public or private insurance is used consistent with § 303.520; and

(5) Exchange of personally identifiable information among agencies consistent with § 303.401.

(b) If the parent does not give consent, the lead agency must make reasonable efforts to ensure that the parent—

(1) Is fully aware of the nature of the evaluation and assessment or the services that would be available; and

(2) Understands that the child will not be able to receive the evaluation and assessment or services unless consent is given.

(c)(1) Subject to paragraph (c)(2) of this section, the lead agency may, but is not required to, use the due process hearing procedures under this part to challenge the parent's refusal to consent to an evaluation and assessment of the child for early intervention services.

(2) The lead agency may not use the procedures described in paragraph (c)(1) of this section to challenge the parent's refusal to consent to the provision of an early intervention service or the use of insurance.

(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 given to the parents of a child a reasonable time before the lead agency or an EIS provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of the child, 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 the 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 shall 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 parents. 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 with whom care of the child has been assigned.

(c) *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 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.

(d) *Non-employee requirement; compensation.* A person who is otherwise qualified to be a surrogate parent under paragraph (c) 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.

(e) *Surrogate parent responsibilities.* The surrogate parent has the same rights as a parent for all purposes under this part.

(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 of § 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.* In addition to adopting the procedures in paragraphs (b) and (c) of this section, the 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.

(3)(i) Except as provided in paragraph (e)(3)(ii) of this section, if a child turns three and the child's eligibility under § 303.211 has not yet been determined, then the child must continue to receive Part C services under § 303.211(b)(4).

(ii) Once a child turns three and has been determined ineligible for services under Part B and § 303.211, the provisions of paragraph (e)(1) of this section do not apply and the lead agency is not required to provide Part C services to that child during the pendency of any due process complaint proceeding challenging the determination of ineligibility.

(Authority: 20 U.S.C. 1415(e), 1415(f)(1)(A), 1415(f)(3)(A)–(D), 1439(a)(8), 1439(b))

### 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.

(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 hearing on the parent's due process complaint, 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 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 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.

(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 of § 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 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, a 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 action appropriate to address the needs of the infant or toddler with a disability and the infant's or toddler's family who is the subject of the complaint; and

(2) Appropriate future provision of services for all infants and toddlers with disabilities and their families.

(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 the 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 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 or EIS provider's failure to implement a due process hearing decision must be resolved by the lead agency.

(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 or of this part;

(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.

(Authority: 20 U.S.C. 1439(a)(1))

#### States That Choose To Adopt the Part C Due Process 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; and

(5) Obtain written findings of fact and decisions.

(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.

(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 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 under Part C of the Act, or the provision of early intervention services to the infant or toddler with a disability and his or her family).

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency 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.

(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 of 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 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 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 proposed or refused action.

(2) A response by the lead agency under paragraph (e)(1) of this section shall not be construed to 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 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 paragraph (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 (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 a 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 paragraph (a)(1) and (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 State, 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 public 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.

(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 be given the right to—

(1) Have the child who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents.

(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 must make a determination, based on substantive grounds, of whether the child was appropriately identified, placed, or evaluated, 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.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive appropriate identification, evaluation, placement, or provision of early intervention services for the child and that child's family 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 parents' 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 shall be construed to preclude 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 shall be construed to affect the right of a parent to file an appeal of the due process hearing decision with the lead agency

under § 303.446(b), if a lead agency level appeal is available.

(c) *Separate due process complaint.* Nothing in §§ 303.440 through 303.449 shall be construed to preclude 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) If the hearing required by § 303.443 is conducted by a public agency other than the lead agency, any party aggrieved by the findings and decision in the hearing may 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 shall have 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 and payor of last resort.**

Each Statewide system must include written policies and procedures that meet the requirements of the—

(a) Use of funds provisions in § 303.501; and

(b) 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).

(Authority: 20 U.S.C. 1432(4)(B), 1435(a)(10), 1435(a)(12), 1438, 1439(a)(2), 1440)

**Use of Funds**

**§ 303.501 Permissive use of funds by the lead agency.**

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 on 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), 1438)

#### Payor of Last Resort

##### § 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), child find functions described in §§ 303.115 through 303.117 and §§ 303.300 through 303.303, and evaluations and assessments in § 303.320), 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 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), within the State.

(Authority: 20 U.S.C. 1440(a), 1440(c))

##### § 303.511 Establishing financial responsibility for, and methods of, ensuring services.

(a) *General.* Each State must ensure that it has in place methods for establishing financial responsibility (consistent with the methods adopted under Part B of the Act, where appropriate) and providing early intervention services under this part. The methods must meet the requirements of this subpart, and be set forth in—

(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.

(b) *Financial responsibility.* Each method must define the financial responsibility of each agency for paying for early intervention services or other functions authorized under this part including child find and evaluations and assessments (consistent with State law and the requirements of this part).

(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 intra-agency 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 responsibility to the appropriate agency; and

(ii) The lead agency must make arrangements for reimbursement of any expenditures incurred by the agency originally assigned 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.

(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, all public agencies and early

intervention service providers involved in the State's early intervention service programs.

(Authority: 20 U.S.C. 1435(a)(10), 1440(b))

### Use of Insurance, Benefits, Systems of Payments, and Fees

#### § 303.520 Policies related to use of insurance or public benefits for payment for services.

(a) *Public insurance and benefits.* (1) The State may use the public insurance or benefits program of a parent or infant or toddler with a disability under this part (consistent with the program requirements of the public insurance or benefits program), if—

(i) The parent or the infant or toddler with a disability is already enrolled or participating in a public insurance or benefits program, provided that the parent provides consent as defined in § 303.7 to disclose personally identifiable information if required under § 303.414;

(ii) The parent has not provided consent under §§ 303.7, 303.414, or 303.420(a)(3), but the infant or toddler with a disability is in foster care and eligible to participate in the public insurance or benefits program; or

(iii) The parent is not enrolled in a public insurance or benefits program but agrees to enroll and provides consent to enroll in a public insurance or benefits program in accordance with §§ 303.7, 303.414, and 303.420(a)(3).

(2) If the State requires a parent to pay any types of costs that the parent may incur as a result of participating in a public insurance or benefits program (such as co-payments, premiums or deductibles or the required use of private insurance as the primary insurance), those types of costs must be identified in the State's policies regarding its system of payments under § 303.521; otherwise, the State will not be allowed to charge those costs to the parent.

(3) In obtaining parental consent required under this section, the lead agency must provide a copy of the State's system of payments policies that identify potential costs that the parent may incur while enrolled in a public insurance or benefits program (such as co-payments, premiums or deductibles or the required use of private insurance as the primary insurance by the public insurance or public benefits program).

(b) *Private insurance.* (1)(i) Except as provided in paragraph (b)(2) of this section, the State may use the private insurance of a parent to pay for services under this part only if the parent provides consent to do so in accordance

with §§ 303.7, 303.414, and 303.420(a)(3).

(ii) If the State requires a parent to pay any types of costs that the parent may incur as a result of the State's use of private insurance to pay for early intervention services, those types of costs (such as deductibles or co-payments) must be identified in the State's system of payments policies under § 303.521; otherwise, the State will not be allowed to charge those costs to the parent.

(iii) In obtaining parental consent required under this section, the lead agency must provide a copy of the State's system of payments policies that identify the potential types of costs that the parent may incur while enrolled in a private insurance program (such as co-payments, premiums or deductibles).

(iv) If a parent or family 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)(i) of this section, the lack of consent may not be used to delay or deny any services under this part to a child or the family.

(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 ensures that the use of private health insurance to pay for Part C services cannot—

(i) Count towards the lifetime coverage caps for the infant or toddler with a disability and parents under their health insurance;

(ii) Negatively affect the availability of health insurance to the infant or toddler with a disability and family, and health insurance coverage may not be discontinued due to the use of the health insurance to pay for services under Part C of the Act; or

(iii) Be the basis for increasing the health insurance premiums of the infant or toddler with a disability or the child's family.

(3) If a State has enacted a State statute that meets the requirements in paragraph (b)(2) of this section regarding private health insurance coverage to pay for early intervention services under Part C of the Act, the State may reestablish in the next Federal fiscal year following the effective date of the statute, a new baseline of State and local expenditures under § 303.225(b).

(c) *Proceeds or funds from public insurance or benefits or from private insurance.* (1) Proceeds or funds from public insurance or public 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 a State public insurance or benefits program or the State portion of a Federal public benefits program (such as the State portion of Medicaid costs) for services under this part, those funds may be considered State or local funds under § 303.225(b); however, if a State elects to include such funds for purposes of nonsupplanting provisions in § 303.225(b), it must continue to aggregate such amounts for all future years.

(4) 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.

(d) *Funds received under a State's system of payments.* Funds received by the State from a parent or family under the State's system of payments established under § 303.521 are considered program income under 34 CFR 80.25. These funds—

(1) Do not need to be 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)(2))

#### § 303.521 System of payments and fees.

(a) *General.* 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-pays or deductible amounts) 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 family is enrolled, that meets the requirements of §§ 303.520 and 303.521. The State's system of payments policies must be in writing and specify which functions or services, if any, will be subject to a system of payments (including any fees charged to the family as a result of using the family's public 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 inability to pay (including its definition of income and family expenses); and

(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 including any costs to the family under this section and § 303.520(a)(2) and (b)(1)(ii); and

(iii) Families will not be charged any more than the actual cost of the Part C service, and 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 allow but do not require the lead agency to use Part C or other funds to pay for any costs or fees to be paid by a parent under paragraph (a)(1) of this section, or § 303.520(a)(2) or (b)(1)(ii). However, for a parent determined unable to pay under § 303.521(a)(4)(ii), the lead agency must use Part C or other funds to cover the costs for the parent.

(b) *Functions not subject to fees.* The following are required functions that must be carried out at public expense by a State, 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 including the functions related to evaluation and assessment in § 303.13(b).

(3) Service coordination services, as defined in §§ 303.13(b)(9) 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 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 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).

(Authority: 20 U.S.C. 1432(4)(B), 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.

(iii) A parent member may not be an employee of a public or private agency involved in providing early intervention services.

(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 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 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 Affairs (BIA) or, where there is no school operated or funded by the BIA, 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. 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—

(1) To conduct hearings and forums;

(2) To 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) To 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) To hire staff; and

(5) To 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 303.301, 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.

(Authority: 20 U.S.C. 1441(e)(2))

### Subpart H—Federal Administration and Allocation of Funds Monitoring, Technical Assistance, 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 (a)(2) (conditions on the lead agency's funding of EIS programs), (b)(2)(i) (corrective action or improvement plan) and (b)(2)(iv) (withholding of funds, in whole or in part by the lead agency), and (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.

(Authority: 20 U.S.C. 1416(a), 1442)

**§ 303.701 State performance plans and data collection.**

(a) *General.* Each State must have in place the performance plan that meets the requirements described in section 616 of the Act, is approved by the Secretary, includes an evaluation of the State's efforts to implement the requirements and purposes of Part C of the Act and a description of how the State will improve implementation, and includes measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in § 303.700(d).

(b) 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 the 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.

(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 no later than 60 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.

(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) 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 (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 require 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, instructional strategies, and methods of instruction 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, 20 U.S.C. 1234f (GEPA), 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 at 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 under Part C of the Act to specified State agencies or 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) and § 303.704 of the Act 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.

(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 organization, 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 2, 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 and 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.

(Authority: 20 U.S.C. 1418(a)(1)(F) 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.

(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.

(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—

(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 reports 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.

(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 after the Secretary determines the amount of payments to be made to the jurisdictions under § 303.730(a).

(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 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 Affairs, 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 include 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 any 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) *General.* 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) *Additional funds.* 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 and to the outlying areas under § 303.730;

(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 § 303.33) 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, 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) 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)

[FR Doc. 07-2140 Filed 5-4-07; 8:45 am]

BILLING CODE 4000-01-P