



FEDERAL REGISTER

Vol. 76

Wednesday,

No. 188

September 28, 2011

Part II

Department of Education

34 CFR Parts 300 and 303

Early Intervention Program for Infants and Toddlers With Disabilities;
Assistance to States for the Education of Children With Disabilities; Final
Rule and Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Part 303

RIN 1820-AB59

Early Intervention Program for Infants and Toddlers With Disabilities

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

ACTION: Final regulations.

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

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

FOR FURTHER INFORMATION CONTACT:

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Telephone: (202) 245-7605. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay System (FRS) at 1-800-877-8339.

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

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

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

additional public input and conduct further rulemaking in this area.

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

Major Changes in the Regulations

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

Subpart A—General*Definitions*

- The definition of *multidisciplinary* in § 303.24 has been revised with respect to the individualized family service plan (IFSP) Team composition to require the parent and two or more individuals from separate disciplines or professions with one of these individuals being the service coordinator.

- Revised § 303.25(a) and new § 303.321(a)(5) and (a)(6) clarify that in the case of a child who is limited English proficient, *native language* means the language normally used by the parents of the child except that when conducting evaluations and assessments of the child, qualified personnel determine whether it is developmentally appropriate to use the language normally used by the child. Additionally, we have removed the requirement in proposed § 303.25(a)(2) that the native language of the parents be used in all direct contact with the child.

- We have revised the definition of *personally identifiable information* in § 303.29 to cross-reference, with appropriate modifications, the definition of that same term contained in the regulations under the Family Educational Rights and Privacy Act (FERPA) in 34 CFR 99.3, as amended.

- New § 303.32 adds to these regulations a definition of *scientifically*

based research, which cross-references, with appropriate modifications, the definition of the same term contained in section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

Subpart C—State Application and Assurances*Application Requirements*

- Section 303.203(b)(2) clarifies that the State's application must include, as part of coordination of all resources, those methods the State uses to implement the payor of last resort requirements in § 303.511.

- Revised § 303.208(b), regarding public participation policies and procedures, requires lead agencies to hold public hearings, provide at least 30 days' prior notice for the hearings, and provide a public comment period of at least 30 days before adopting any new or revised part C policies or procedures.

- Revised § 303.209(b)(1)(i) (proposed § 303.209(b)(2)(i)) requires that, for toddlers with disabilities who may be eligible for preschool services under part B of the Act, the lead agency notify (consistent with any opt-out policy adopted by the State under § 303.401(e)), not only the local educational agency (LEA) where the toddler resides, but also the State educational agency (SEA), and revise the timeline for the notification to occur not fewer than 90 days before the toddler's third birthday.

- New § 303.209(b)(1)(ii) clarifies that if the lead agency determines a child to be eligible for part C services between 45 and 90 days prior to the toddler's third birthday, the lead agency must notify (consistent with any opt-out policy adopted by the State under § 303.401(e)), not only the LEA where the toddler resides, but also the SEA, as soon as possible after the toddler's eligibility determination.

- New § 303.209(b)(1)(iii) provides that if a child is referred to the lead agency fewer than 45 days before that toddler's third birthday, the lead agency is not required to conduct the initial evaluation, assessment, or IFSP meeting, and if that child may be eligible for preschool services or other services under part B of the Act, the lead agency, with the parental consent required under § 303.414, must refer the toddler to the SEA and appropriate LEA.

- Revised § 303.209(d)(2) clarifies that the transition plan is not a separate document, but is included in the IFSP.

- New § 303.209(e) clarifies that a transition conference under § 303.209(c) or meeting to develop the transition plan under § 303.209(d) must meet the

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

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

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

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

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

General

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

Pre-Referral Procedures

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

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

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

Post-Referral Procedures

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

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

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

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

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

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

Subpart E—Procedural Safeguards

Confidentiality of Personally Identifiable Information and Early Intervention Records

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

- Section 303.405(a), regarding a parent's rights to inspect and review any early intervention records and the timeline the lead agency must follow any time a parent makes such a request, is revised to require that the participating agency must comply with a parent's request without unnecessary

delay and in no case more than 10 days after the parent makes the request to inspect and review records.

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

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

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

Parental Consent and Surrogate Parents

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

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

Dispute Resolution Options

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

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

Subpart F—Use of Funds and Payor of Last Resort

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

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

- Section 303.521(a) is revised to provide that the State's system of payments policies must include the State's definition of ability to pay and indicate when and how the agency makes its determination regarding the parent's ability or inability to pay.
- A new § 303.521(e) is added to address a parent's procedural safeguard rights under a State's system of payments.

Subpart G—State Interagency Coordinating Council

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

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

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

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

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

Analysis of Comments and Changes

Introduction

In response to the invitation in the NPRM, more than 600 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM immediately

follows this introduction. The perspectives of parents, individuals with disabilities, early intervention providers, State and local officials, members of Congress, and others were useful in helping identify where changes to the proposed regulations should be made, and in formulating many of the changes. In light of the comments received, a number of significant changes are reflected in these final regulations.

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

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

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

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

Subpart A—General

Purpose and Applicable Regulations

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

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

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

Changes: None.

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

Comment: One commenter suggested that the list of historically underrepresented populations in § 303.1(d) be revised to include infants and toddlers with disabilities who are

wards of the State and homeless children. Other commenters recommended that we include infants and toddlers in foster care in this list.

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

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

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

Changes: None.

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

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

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

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

Changes: None.

Applicable Regulations (§ 303.3)

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

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

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

Finally, the references to “the records” in the following regulations have been replaced with “early intervention records”: § 303.7(b), regarding the definition of consent; § 303.310(c)(1), regarding the documentation of exceptional circumstances that may delay the

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

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

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

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

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

is receiving FAPE under part B of the Act.

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

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

At-Risk Infant or Toddler (§ 303.5)

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

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

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

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

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

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

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

Changes: None.

Comment: None.

Discussion: As proposed, the definition of *at-risk infant or toddler* provided that, at the State's discretion, an at-risk infant or toddler may include an infant or toddler who is at risk of experiencing developmental delay because of biological and environmental factors, including those listed in the proposed definition. We have determined that this language should be clarified to provide that the term *at-risk infant or toddler* may include an infant or toddler who is at risk of experiencing developmental delays due to biological

or environmental factors. We have made this change to clarify that States are not required to ensure that an at-risk infant or toddler is at risk due to meeting both types of factors.

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

Child (§ 303.6)

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

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

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

Changes: None.

Developmental Delay (§ 303.10)

Comment: A few commenters suggested amending the definition of *developmental delay*. One commenter recommended that the definition be revised to specifically reference infants and toddlers with mild disabilities. Another commenter recommended that the regulations clarify that any definition of developmental delay that

the State adopts in response to public comments should not exclude from eligibility children who are eligible under the State's pre-existing definition of developmental delay.

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

Changes: None.

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

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

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

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

Changes: None.

Early Intervention Service Provider
(§ 303.12)

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

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

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

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

Changes: None.

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

Comment: One commenter recommended changing the defined term *early intervention services* to “early intervention” so that readers would not confuse early intervention services under part C of the Act with the

early intervening services described in 34 CFR 300.226 of the part B regulations.

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

Changes: None.

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

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

Changes: None.

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

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

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

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

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

Changes: None.

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

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

Changes: None.

Comment: None.

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

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

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

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

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

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

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

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

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

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

Changes: None.

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

Comment: One commenter supported our proposal to remove nutrition services and nursing services from the types of early intervention services

identified in § 303.13(b) (current § 303.12(d)(6) through (d)(7)), stating that these services are medical in nature and not consistent with the definition of early intervention as a developmental program.

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

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

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

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

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

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

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

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

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

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

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

Another commenter requested that the Department explicitly state in the regulations or in a memorandum or policy letter issued to part C lead agencies that hearing aids and

appropriate related audiological services may be considered, under certain circumstances, an appropriate early intervention service and an assistive technology device.

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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

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

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

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

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

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

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

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

Changes: None.

Comment: One commenter recommended that the definition of *assistive technology device* include the phrase “all related and necessary components of the system” to make clear that the individual components needed to develop a customized device (e.g., ear mold for an FM system or a light pointer for an augmentative and

alternative communication device) would be considered an assistive technology device and, therefore, a covered early intervention service under part C of the Act. The commenter also recommended adding the phrase “specially fit” to the definition of *assistive technology device*.

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

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

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

Changes: None.

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

Discussion: The language referenced by the commenter in § 303.13(b)(1)(ii)(E) is substantively unchanged from language in current § 303.12(d)(1)(v). We do not agree that providing training to a family of an infant or toddler with a disability who is receiving an assistive technology service will always be appropriate. For example, if training already has been provided to a family about an assistive technology device and the family is familiar with its use, the IFSP Team may determine that it is

not necessary to train family members again. As part of the family-directed assessment under § 303.321, the IFSP Team (which includes the parent) determines whether training is necessary. The family assessment identifies the resources, priorities, and concerns and the supports and services necessary to enhance a family’s capacity to meet the developmental needs of the infant or toddler with a disability, including whether training of family members regarding assistive technology services is appropriate or necessary.

Changes: None.

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

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

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

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

Changes: None.

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

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

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

Changes: None.

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

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

Changes: None.

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

Discussion: Adding references to "family training and home visits" throughout the regulations is not necessary because § 303.13(b)(3) makes clear that family training, counseling, and home visits are an early intervention service that may be provided under part C of the Act. However, the determination of whether these particular services are provided to

a family is made by the IFSP Team in accordance with the provisions in §§ 303.340 through 303.346. Accordingly, adding references to family training and home visits or other specific early intervention services in other sections of the regulations would not be appropriate.

Changes: None.

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

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

Changes: None.

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

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

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

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

Discussion: Specifying that occupational therapy must be provided by a qualified occupational therapist, as required in the part B regulations, is not necessary because occupational therapists are identified in § 303.13(c)(4) as a type of qualified personnel who provide the early intervention services listed in § 303.13(b). Additionally, § 303.119(c) provides that paraprofessionals and assistants who are appropriately trained and supervised in

accordance with State law, regulation, or written policy, may assist in the provision of early intervention services under part C of the Act. Repeating this language from §§ 303.13(c) and 303.119(c) in new § 303.13(b)(8) is not necessary.

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

Changes: None.

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

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

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

Changes: None.

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

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

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

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

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

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

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

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

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

Comment: One commenter suggested that the description of sign language and cued language services, which is now in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)), was confusing

because of the use of the word "and" between "cued language" and "auditory/oral language services." The commenter recommended that this phrase be changed to "cued language or auditory/oral language services" because the word "and" implied that either all services in the list must be provided or none of the services can be provided.

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

Regarding the commenter's concern about the use of the term "and", this use does not mean that all of the services listed must be identified in the IFSP or provided. The definition of *sign language and cued language services* in new § 303.13(b)(12) provides that sign language and cued language services "include" certain services and § 303.18, in turn, defines the term *include* to mean "that the items named are not all of the possible items that are covered, whether like or unlike the ones named." Accordingly, revising the reference to "and" in the definition of *sign language and cued language services* is not necessary.

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

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

Discussion: Transliteration, in new § 303.13(b)(12) (proposed

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

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

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

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

Changes: None.

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

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

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

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

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

Comment: Some commenters requested that the Department clarify the definition of *vision services* in new § 303.13(b)(17)(iii) (proposed § 303.13(b)(14)(iii)). A few commenters noted that the definition focused on older children and did not include the full scope of instruction available to young children and their families. One commenter expressed concern that the definition of *vision services* in new § 303.13(b)(17) (proposed § 303.13(b)(14)) described an outdated medical model that promotes skills training, rather than developmental adjustments that accommodate vision loss. A few commenters recommended that we add to this definition training and services in the following areas: tactile awareness, sensory utilization

and preferences, emergent literacy, precane skills, environmental orientation, environmental adaptations, and modifications and conceptual understanding where visual impairment (including blindness) precludes typical access to early intervention.

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

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

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

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

Changes: We have added the words “that affect early childhood development” after the words “specific visual disorders, delays, and abilities.”

We also have removed the phrase “independent living skills” from proposed § 303.13(b)(14)(iii).

Qualified Personnel (§ 303.13(c))

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

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

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

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

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

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

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

Changes: None.

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

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

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

Changes: None.

Comment: A few commenters requested that, in identifying the types of qualified personnel who provide early intervention services, the reference

to "teachers of children with hearing impairments" be revised to refer to "teachers of deaf and hard of hearing children." Another commenter stated that the appropriate reference to teachers who instruct children who are deaf or hard of hearing is "teachers of the hearing impaired." Commenters who recommended using "teachers of deaf and hard of hearing children" opposed the word "impairment" as outdated, value-laden, and inconsistent with the language in the part B regulations.

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

Changes: None.

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

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

Changes: None.

Other Services (§ 303.13(d))

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

services that may be appropriate for infants and toddlers with disabilities.

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

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

Changes: None.

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

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

Changes: None.

Free Appropriate Public Education (§ 303.15)

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

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

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

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

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

Health Services (§ 303.16)

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

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

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

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

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

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

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

Changes: None.

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

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

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

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

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

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

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

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

Changes: None.

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

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

Changes: None.

Homeless Children (§ 303.17)

Comment: Commenters generally were supportive of the proposed definition of *homeless children* in § 303.17. One commenter supported including the definition of *homeless*

children in the regulations and another appreciated the focus on a traditionally underserved population.

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

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

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

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

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

Individualized Family Service Plan (§ 303.20)

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

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

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

Changes: None.

Infant or Toddler With a Disability (§ 303.21)

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

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

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

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

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

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

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

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

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

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

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

Concerning the request to revise the definition of *infant or toddler with a disability* to include children who are eligible for services under section 619 of the Act and were previously served under part 303, § 303.21(c) already makes clear that the definition of *infant*

or toddler with a disability may include, at a State’s discretion, a child with a disability who is eligible for services under section 619 of the Act and who previously received services under part 303 until the child enters, or is eligible under State law to enter, kindergarten or elementary school.

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

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

Lead Agency (§ 303.22)

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

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

Changes: None.

Local Educational Agency (§ 303.23(c))

Comment: None.

Discussion: The proposed definition of local educational agency included a definition for BIA-funded schools, which referred to an elementary or secondary school funded by the Bureau

of Indian Affairs (BIA). The Bureau of Indian Affairs is now called the Bureau of Indian Education or BIE and we have updated our references in § 303.23(c) accordingly.

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

Multidisciplinary (§ 303.24)

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

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

Some commenters were concerned that multidisciplinary teams are the

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

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

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

proposed definition to indicate that *multidisciplinary* means the involvement of two or more separate disciplines or professions and may include one individual who is qualified in more than one discipline or profession.

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

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

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

Native Language (§ 303.25)

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

Additionally, these commenters indicated that the proposed requirement would be inconsistent with section 602(20) of the Act, regarding the definition of *native language*, and section 607 of the Act, regarding

requirements for prescribing regulations. One commenter expressed concern that proposed § 303.25(a)(2) would prohibit the delivery of services in English in situations where the child is in either a multilingual living or learning environment, even if the parent wanted the services delivered in English, or would prohibit the parent from serving as a translator for the EIS provider.

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

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

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

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

Comment: None.

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

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

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

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

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

Natural Environments (§ 303.26)

Comment: Many commenters suggested changes to the proposed definition of *natural environments* in

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

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

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

The definition of *natural environments* in § 303.26 remains substantively unchanged from current § 303.18 and is consistent with the

language in section 632(4)(G) of the Act, as well as the following statutory sections:

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

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

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

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

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

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

However, § 303.344(d)(1) requires that the identification of the early intervention service needed, as well as the appropriate setting for providing each service to an infant or toddler with a disability, be individualized decisions made by the IFSP Team based on that child's unique needs, family routines, and developmental outcomes. If a determination is made by the IFSP Team that, based on a review of all relevant information regarding the unique needs of the child, the child cannot satisfactorily achieve the identified early intervention outcomes in natural environments, then services

could be provided in another environment (e.g. clinic, hospital, service provider's office). In such cases, a justification must be included in the IFSP, pursuant to § 303.344(d)(1)(ii)(A).

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

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

Parent (§ 303.27)

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

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

Changes: None.

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

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

Changes: None.

Comment: One commenter recommended that the Department clarify the definition of *parent* to provide that foster parents, absent custody or other legal right, do not have the right to consent to or deny early intervention services. Another commenter requested clarification concerning the role of the foster parent when the biological parent is available, as well as when the whereabouts of the

biological parent are unknown or when the biological parent is incarcerated. The commenter also requested guidance on how assertively the State should seek out the biological parent to obtain consent.

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

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

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

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

to determine in light of State law and policy.

Changes: None.

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

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

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

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

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

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

Changes: None.

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

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

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

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

Discussion: The length of a judicial appointment of a parent for the purposes of part C of the Act is at the discretion of the judge issuing the appointment, is subject to State law, and is often decided on a case-by-case basis. State law or the judge issuing the appointment would determine whether an appointment is temporary or

permanent and the length of any appointment. Therefore, we have not revised the definition as requested.

Changes: None.

Comment: None.

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

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

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

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

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

child from acting as the parent for that child.

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

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

Changes: None.

Parent Training and Information Center (§ 303.28)

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

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

Changes: None.

Personally Identifiable Information (§ 303.29)

Comment: Some commenters requested clarification of the

confidentiality provisions. One commenter requested that the information protected under the part C confidentiality provisions align with the information that is protected under FERPA.

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

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

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

Public Agency (§ 303.30)

Comment: None.

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

providing early intervention services to infants and toddlers with disabilities under this part and their families is an *EIS provider* under § 303.12.

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

Qualified Personnel (§ 303.31)

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

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

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

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

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

Scientifically Based Research (§ 303.32)

Comment: None.

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

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

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

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

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

parents of infants and toddlers with disabilities in obtaining access to needed early intervention services and other services identified in the IFSP. Additionally, for clarity, we have provided examples of activities that the service coordinator may engage in when assisting parents in obtaining access to needed early intervention services and other services identified in the IFSP.

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

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

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

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

Changes: None.

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

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

Comment: One commenter recommended that proposed § 303.33(a)(2), which provides that a service coordinator or case manager

must assist parents of infants and toddlers with disabilities to coordinate early intervention services and other services identified in the IFSP that are needed or are being provided to the infant or toddler with a disability, be revised to state that a service coordinator or case manager must coordinate early intervention and other services identified in the IFSP for "other family members" in addition to "parents."

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

Changes: None.

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

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

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

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

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

Changes: None.

Comment: None.

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

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

Comment: None.

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

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

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

Comment: None.

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

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

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

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

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

Changes: None.

State Definition of Developmental Delay (§ 303.111)

Comment: Some commenters strongly supported the flexibility afforded States through the regulatory language in § 303.111, regarding a State's definition of *developmental delay*. Other commenters requested that the Department define the term "rigorous"

in § 303.111. One commenter requested that the regulations clarify that a "rigorous" definition of *developmental delay* does not necessarily mean that States must change their definitions to make them more rigorous than they were before the enactment of the 2004 amendments to the Act. The same commenter expressed concern that any definition of *developmental delay* under § 303.111 would exclude certain children who are eligible under the State's existing definition of *developmental delay*.

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

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

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

We decline to replace the phrase "infants and toddlers," as used in § 303.111, with the term "child," as one commenter requested, because this change is unnecessary. The definition of

"infant or toddler with a disability" in § 303.21(c) includes any child to whom the State elects to offer part C services under section 635(c) of the Act and § 303.211.

Changes: None.

Availability of Early Intervention Services (§ 303.112)

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

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

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

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

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

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

Changes: None.

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

Discussion: Section 303.112 reflects the language of, and requirements in, section 635(a)(2) of the Act that each part C statewide system must have in effect a State policy that ensures that appropriate early intervention services, based on scientifically based research, to the extent practicable, are available to all infants and toddlers with disabilities and their families, including Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State, and infants and toddlers with disabilities who are homeless children and their families. Children living in rural areas are a historically underrepresented population and as stated in § 303.1(d), one of the purposes of this program is to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of rural children. Additionally, under § 303.227(a), States

must ensure that policies and practices have been adopted to ensure that traditionally underserved groups, including minority, low-income, homeless, and rural families and children with disabilities who are wards of the State, are meaningfully involved in the planning and implementation of all the requirements of this part. Given these requirements, we expect that accessibility issues, such as transportation, that may be specific to these groups will be addressed by the lead agency.

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

Changes: None.

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

Discussion: Section 303.112 of these regulations reflects the requirement in section 635(a)(2) of the Act that a State’s system include a policy that ensures that early intervention services are available to all infants and toddlers with disabilities and their families, including Indian children with disabilities and their families residing on a reservation geographically located in the State and homeless children with disabilities and their families. We define the word *including* in § 303.18 of subpart A of these regulations to mean that the items named are not all the possible items that are covered, whether like or unlike the ones named. The use of the term “including” in § 303.112 is meant to

make clear that the list of groups (*i.e.*, Indian children and homeless children) is not exhaustive. We also note that provisions regarding the identification of infants and toddlers with disabilities who have experienced or have been exposed to abuse, neglect, or family violence (and other subpopulations that were specifically added in the 2004 Amendments to the Act) are reflected in § 303.302(c) of these regulations, which address the scope and coordination of the State’s child find system. Thus, revising § 303.112 to specifically identify additional subgroups of infants and toddlers with disabilities and their families is not necessary.

Changes: None.

Evaluation, Assessment, and Nondiscriminatory Procedures (§ 303.113)

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

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

Changes: None.

Individualized Family Service Plans (IFSPs) (§ 303.114)

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

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

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

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

Comprehensive Child Find System
(§ 303.115)

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

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

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

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

Changes: None.

Central Directory (§ 303.117)

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

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

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

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

In response to commenters’ concerns about the ability of individuals with disabilities to access the central directory, accessibility to the central directory requires not only the ability of the general public to obtain a copy of the directory, but also the ability to access the contents in the directory. Lead agencies must comply with the requirements in the ADA, which apply to public entities (*i.e.*, State and local governments), and the requirements in Section 504, which apply to recipients of Federal financial assistance. Both of

these statutes and their implementing regulations generally require that communications with individuals with disabilities be as effective as communications with individuals without disabilities, and that appropriate auxiliary aids and services be made available where necessary to afford a qualified individual with a disability an equal opportunity to participate in, and enjoy the benefits of, any program or activity conducted by a lead agency that receives a grant under part C of the Act. Further clarification in § 303.117 is not necessary because the lead agency is already responsible in § 303.117 for ensuring that the central directory is accessible and is also subject to the requirements of these other Federal laws.

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

Changes: None.

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

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

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

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

Changes: None.

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

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

Discussion: The requirements for a CSPD in § 303.118 incorporate the requirements in section 635(a)(8) of the Act. With respect to the request that a State's CSPD specifically require training that is targeted to address the early intervention service needs of infants and toddlers with disabilities who are homeless or who have been exposed to or experienced violence or trauma, we do not believe that it is appropriate for the Department to require that a State's CSPD mandate particular types of training or training targeted to specific populations. Each State is in the best position to evaluate the training needs of personnel providing early intervention services in that State and to design the CSPD to meet those needs. Similarly, it is the Department's position that it is not necessary to list in the regulations occupational therapy or other specific fields in which training must be provided, particularly given that § 303.13(a)(7) requires that qualified

personnel provide all early intervention services, including occupational therapy. Moreover, § 303.119(a), which requires that a State's system include policies and procedures relating to the establishment and maintenance of qualification standards to ensure that personnel are appropriately and adequately prepared and trained, is sufficiently broad to ensure that each State will address, as appropriate, the needs of its specific subpopulations and identify any providers or personnel that may need more specific training.

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

Changes: None.

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

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

Changes: None.

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

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

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

Comment: None.

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

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

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

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

Personnel Standards (§ 303.119)

Comment: Some commenters disagreed with our proposal to remove the provision in current § 303.361(a)(2), which requires State education personnel standards to meet the highest requirement for a profession or discipline. The commenters asserted that the removal of this provision, while perhaps deemed necessary to alleviate an immediate personnel shortage crisis and serve children who are currently eligible, could undermine the quality of early intervention programs. The commenters expressed concern that not requiring State education personnel standards to meet the highest requirement for a profession or discipline will promote a two-tiered system in which infants and toddlers with disabilities served in natural settings receive services provided by personnel who are less qualified than personnel providing services in other settings, such as hospitals and private

clinics. One commenter recommended that the Department revise this section to require lead agencies to ensure that early intervention services providers who deliver services in their discipline or profession have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.

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

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

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

Changes: None.

Qualification Standards (§ 303.119(b))

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

State statutes that govern the practices of specific professions).

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

Changes: None.

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

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

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

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

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

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

Changes: None.

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

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

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

State" and "geographic area where there is a shortage," as used, in this section are best left to the State to define.

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

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

Changes: None.

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

Comment: None.

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

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

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

to reach compliance within one year of identification."

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

Changes: None.

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

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

Changes: None.

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

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

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

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

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

Changes: None.

Data Collection (§ 303.124)

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

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

Changes: None.

State Interagency Coordinating Council (§ 303.125)

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

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

Changes: None.

Early Intervention Services in Natural Environments (§ 303.126)

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

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

ensure that early intervention service settings, to the maximum extent appropriate, are provided in natural environments.

Changes: None.

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

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

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

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

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

Changes: None.

Subpart C—State Application and Assurances

General

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

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

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

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

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

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

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

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

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

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

Changes: None.

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

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

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

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

definition of infant or toddler with a disability under § 303.21(b).

Changes: None.

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

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

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

Changes: None.

Availability of Resources (§ 303.207)

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

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

Changes: None.

Public Participation Policies and Procedures (§ 303.208)

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

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

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

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

We have restructured this section in response to comments requesting

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

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

Restructuring § 303.208 in this manner addresses requests by commenters to retain language from current §§ 303.110(a)(1) and (a)(3). Specifically, § 303.208(a) ensures that the public has at least 30 days to comment on a State’s part C application before the State submits the application to the Department. Additionally, we agree with commenters that specifying a minimum timeline for notice of public hearings is preferable to simply requiring that States provide “adequate notice” of the hearings. It is the Department’s position that 30 days prior notice is the minimum notice needed to ensure meaningful public participation at public hearings. For this reason, in § 303.208(b)(2), we have added the requirement from current § 303.110(a) that States must provide notice of public hearings at least 30 days prior to the hearing. Regarding the comments opposing the public participation requirements in § 303.208, we appreciate the concern about the potential burden these requirements place on States and lead agencies; however, we strongly believe that the benefits of public input outweigh any potential burden because States have flexibility under part C of the Act in

many areas (e.g., developing their definition of developmental delay, serving at-risk infants and toddlers, serving children beyond age three, using part B or C due process procedures, and system of payments), and the part C policies and procedures in these and other areas affect the fundamental rights of infants and toddlers with disabilities and their families. For this reason, it is critical that the public have an opportunity to weigh in on a State’s policies and procedures, regardless of whether they are new or revised or if they involve direct part C services.

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

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

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

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

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

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

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

Changes: None.

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

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

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

We have retained in § 303.101(c) the long-standing Departmental policy of requiring a State to obtain approval of

policies and procedures that must be submitted to the Secretary prior to implementation. The purpose of the Secretary’s review is to ensure that State policies and procedures are consistent with the Act, thereby ensuring that the rights of infants and toddlers with disabilities and their families are protected and the responsibilities of lead agencies, EIS providers, and parents are explicitly defined.

Changes: None.

Transition to Preschool and Other Programs (§ 303.209)

Application Requirements (§ 303.209(a))

Comment: None.

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

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

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

§ 303.211(b)(6)(ii) the substance of proposed § 303.209(b)(2)(i) and (b)(2)(ii) regarding transition from services under § 303.211.

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

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

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

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

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

Changes: None.

Comment: None.

Discussion: Based on further review of § 303.209(a)(3)(ii), we have determined that additional clarification is needed with regard to the required transition-related content of the interagency and intra-agency agreements under § 303.209(a)(3)(i). To clarify that these agreements must address how the lead agency and the SEA will meet the confidentiality requirements in § 303.401(d) and (e), we have added specific references to those provisions in § 303.209(a)(3)(ii). Additionally, we have specified that the agreements required pursuant to § 303.209(a)(3)(i) must address how the agency and the

SEA will meet, for all children transitioning from part C services to part B services, the requirements in 34 CFR 300.101(b)—that is, how the lead agency and the SEA will ensure that FAPE is made available to each eligible child residing in the State no later than the child's third birthday.

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

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

Comment: None.

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

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

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

Discussion: Establishing a timeline within which a lead agency must notify the appropriate LEA that a child is about to transition from part C services and may be eligible for services under part B of the Act is challenging. The timeline must allow sufficient time for both the lead agency to fulfill its transition responsibilities under sections 636(a)(3) and (d)(8) and 637(a)(9) of the Act and the SEA and

LEA to meet their respective child find and early childhood transition responsibilities under sections 612(a)(3), 612(a)(9), 612(a)(10)(A)(ii), and 614(d)(2)(B) of the Act and 34 CFR 300.124.

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

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

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

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

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

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

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

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

for preschool services under part B of the Act.

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

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

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

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

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

Second, limiting LEA notification to cover only toddlers potentially eligible for preschool services under part B of the Act is critical to ensuring that the SEA and LEA where the toddler resides have adequate time to meet their respective child find and early childhood transition responsibilities under sections 612(a)(3), 612(a)(9), 612(a)(10)(A)(ii), and 614(d)(2)(B) of part B of the Act, and in particular to

develop and implement an IEP by the child's third birthday as required by section 612(a)(9) of the Act and 34 CFR 300.124(b). These provisions require that children who participate in the early intervention programs under part C of the Act and children who will participate in the preschool services under part B of the Act experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(9) of the Act.

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

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

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

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

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

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

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

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

have been carefully crafted by States and local communities to ensure seamless transitions from the part C program to the part B program.

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

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

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

Concerning commenters' requests not to use the child's "third birthday" in calculating timelines for LEA notification, the third birthday is significant under part C of the Act because eligibility for services for the toddler with a disability ends once that toddler turns three, with two exceptions. A lead agency may provide services to a child who has turned three years old if a State elects either to (a) offer services under the option to make

part C services available beyond age three pursuant to § 303.211 and the parent consents to services under that section, or (b) provide services to a child who is eligible under part B of the Act from that child's third birthday to the beginning of the following school year under section 638(3) of the Act and § 303.501(c)(1), provided that those services constitute FAPE for that child. In both circumstances, the child, upon turning age three, must be eligible as a child with a disability under section 619 of the Act. With the exception of these two circumstances, part C services end at the child's third birthday; therefore, the Department's position is that the use of the phrase "third birthday" with regard to the LEA notification provision is appropriate.

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

Conference To Discuss Services (§ 303.209(c))

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

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

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

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

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

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

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

Discussion: Once a toddler with a disability who received services under part C of the Act turns three and is eligible for part B preschool services under section 619 of the Act, that toddler may receive services that are provided as either: (1) Part C services by the lead agency under § 303.211 (if the State has elected to offer early intervention services to children after age three, and the toddler's parent consents to receipt of services under this option), or (2) services that constitute FAPE either under section 619 of the Act (if the IEP Team determines such services are needed) or under section 638(3) of the Act (if the lead agency elects to offer such services). A State may provide services

under sections 619, 635(c) or 638(3) of the Act regardless of whether the child turns age three during the summer months. However, if the child with a disability receives services under section 619 of the Act, any summer services (*i.e.*, extended school year (ESY) services pursuant to 34 CFR 300.106 of the part B regulations) must be provided, through an appropriate IEP, if the child's IEP Team determines that those ESY services are necessary for FAPE to be provided to that child.

Changes: None.

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

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

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

Changes: None.

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

Discussion: The phrase "as appropriate" is included in section

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

Changes: None.

Comment: None.

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

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

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

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

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

Changes: None.

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

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

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

eligible for preschool services under part B of the Act.

Changes: None.

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

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

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

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

Comment: A few commenters sought guidance on how the transition

requirements in § 303.209 apply, including how to implement the transition timeline requirements in §§ 303.209(c)(1) and 303.209(d)(2) for children served under § 303.211.

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

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

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

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

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

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

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

Changes: None.

Comment: None.

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

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

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

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

Discussion: Section 303.211 reflects the language from section 635(c) of the Act, which provides States with the option to make early intervention services available to children beginning at three years of age until the children enter, or are eligible under State law to enter, kindergarten or elementary school. If a State elects to offer this option, children who are eligible for services under part B of the Act and who previously received early intervention services under part C of the

Act would continue to receive early intervention services if their parents choose to continue the services under this option. The Department has no authority to eliminate this provision because it is statutory.

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

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

Changes: None.

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

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

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

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

Changes: None.

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

Discussion: Section 303.211, consistent with section 635(c) of the Act, allows each State to develop and implement a policy under which parents of children who are receiving early intervention services and who are eligible to receive services under section 619 of the Act can choose for these children to continue receiving early intervention services under part C of the Act. Section 635(c) of the Act expressly identifies (and limits) the age range through which these services may be provided; that is, early intervention services could be available to these children until they enter, or are eligible under State law to enter, kindergarten. Section 303.211(a)(2) is specifically

intended to provide flexibility to a State that chooses to allow for the continuation of early intervention services pursuant to § 303.211 to provide services under the option to one of three subsets of eligible children within this age range (*i.e.*, eligible children from age three until the beginning of the school year following the child's third birthday, eligible children from age three until the beginning of the school year following the child's fourth birthday and eligible children from age three until the beginning of the school year following the child's fifth birthday).

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

Requirements (§ 303.211(b))

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

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

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

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

Regarding what information must be included in the annual notice, States choosing to offer early intervention services under § 303.211 must provide parents of these children with disabilities with an annual notice that includes, among other things, an

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

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

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

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

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

Changes: None.

FAPE (§ 303.211(b)(3))

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

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

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

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

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

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

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

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

Discussion: We agree with commenters who noted that the requirement in proposed § 303.430(e)(3) applies only to States that elect to offer services under § 303.211 and is not a

pendency provision and, thus, we have moved the substance of proposed § 303.430(e)(3) to § 303.211(b)(4). For clarification, we have added that it is the lead agency that must continue to provide all early intervention services identified in the toddler with a disability’s IFSP under § 303.344 (and consented to by the parent under § 303.342(e)) beyond age three until that toddler’s initial eligibility under part B of the Act is determined under 34 CFR 300.306.

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

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

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

The parent must consent to an evaluation to determine eligibility under section 619 of the Act. Once a parent consents to the initial evaluation under part B of the Act, the LEA must conduct the evaluation under 34 CFR 300.301(b) of the part B regulations within 60 days or a State-determined timeline. Additionally, under section 612(a)(9) of the Act and 34 CFR 300.124(b) of the

part B regulations, the SEA and LEA must ensure that an IEP has been developed and is being implemented by age three for a toddler with a disability who transitions from part C of the Act to part B of the Act regardless of whether the State has established a timeline different from the 60-day evaluation timeline in 34 CFR 300.301(c)(1) of the part B regulations.

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

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

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

Informed Consent (§ 303.211(b)(5))

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

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

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

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

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

Changes: We have modified § 303.211(b)(5) by separating the

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

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

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

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

As noted earlier under new § 303.209(f) of this *Analysis of Comments and Changes* section of the preamble, we have clarified in new § 303.211(b)(6) that the transition requirements concerning SEA and LEA notification, transition conference, and transition plan in §§ 303.209(b)(1)(i) and (b)(1)(ii), (c)(1), and (d), respectively, apply to toddlers with disabilities under the age of three in a State that elects to offer services under § 303.211. We have

clarified these requirements because ensuring a seamless transition for children receiving services under § 303.211 is important and the lead agency and LEA must coordinate transition planning (including part B eligibility determination and timely IEP development) for toddlers who may continue to receive part C services under § 303.211.

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

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

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

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

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

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

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

violence and who is a sibling of a child already receiving early intervention services under the option described in § 303.211.

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

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

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

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

the jurisdiction of a child protective services agency.

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

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

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

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

Changes: None.

Rules of Construction (§ 303.211(e))

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

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

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

§ 303.209 do not apply to these children. For this reason, we decline to make the change requested by the commenter.

Changes: None.

Additional Information and Assurances (§ 303.212)

Comment: None.

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

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

Reports and Records (§ 303.224)

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

Discussion: This section tracks the language from section 637(b)(4) of the Act, which requires States both to ensure that reports are in the form and

contain the information that the Secretary may require to carry out the functions under part C of the Act and to keep such reports and afford such access to the reports as the Secretary may find necessary to ensure the correctness and verification of those reports and proper disbursement of Federal funds under part C of the Act. The purpose of this section is for the Secretary to have access to the proper records to ensure compliance with the part C requirements. The requirements in this section do not reflect any new requirements or an additional burden on States.

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

Changes: None.

Prohibition Against Supplanting; Indirect Costs (§ 303.225)

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

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

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

proposed § 303.225(b) with current § 303.124.

Traditionally Underserved Groups
(§ 303.227)

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

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

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

Changes: None.

Comment: A few commenters requested that § 303.227 require States to identify and address barriers faced by homeless children and other traditionally underserved populations

when attempting to participate in part C programs.

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

Changes: None.

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

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

Discussion: Section 637(c) of the Act provides that the Secretary may not disapprove an application for a part C grant award unless the Secretary determines, after notice and opportunity for a hearing, that the application fails to comply with the requirements under part C of the Act. Both parts B and C of the Act in current § 303.101 (which references 34 CFR 300.581 through 300.586 of the part B regulations in effect prior to October 13, 2006) and 34 CFR 300.179 of the current part B regulations require the Secretary to provide a State with reasonable notice before making a final determination that the State is ineligible to receive a grant

award. Section 303.231(a)(1)(i) incorporates this long-standing reasonable notice requirement and thus provides both the Department and States with the flexibility to address circumstances on a case-by-case basis. Therefore, it is the Department's position that it is not necessary to add a 90-day timeline as requested by the commenter.

Changes: None.

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

General (New § 303.300)

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

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

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

Subpart D follows the general chronological order of the pre-referral, referral, and post-referral components of the part C statewide system.

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

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

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

Comment: A few commenters supported proposed § 303.300(a)(1)(ii), which specifically included parents with premature infants or infants with other physical risk factors associated with learning or developmental complications among those parents to whom information about early intervention services must be disseminated. These commenters requested that we add a requirement that child find activities be conducted

in collaboration with parent advocacy groups or other community agencies that are available to answer questions and provide support to these families as they access services.

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

Changes: None.

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

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

While we have not incorporated the notes as requirements in the regulations, we continue to believe that an effective public awareness system is one that involves an ongoing effort that is in effect throughout a State, including rural areas; provides for the involvement of, and communication with, major organizations throughout a State that have a direct interest in this part, including public agencies at the

State and local level, private providers, professional associations, parent groups, advocate associations, and other organizations; has coverage broad enough to reach the general public, including those who have disabilities; and includes a variety of methods for informing the public about the provisions of this part. Methods for informing the public continue to include the use of printed materials, television, radio, and the Internet, but may also include other appropriate methods in a particular State. For these reasons, we decline to revise new § 303.301 (proposed § 303.300) as requested by the commenter.

Changes: None.

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

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

Changes: None.

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

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

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

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

Concerning the comment that the public awareness requirement should be the responsibility of the part B State or local public agencies, section 635(a)(6) of the Act was revised in 2004 to require that the lead agency prepare and disseminate information about preschool services under section 619 of the Act. SEAs and LEAs have child find responsibilities as defined in sections 612 and 619 under part B of the Act. The requirement in new § 303.301(c) (proposed § 303.300(b)(4)) reflects the lead agency's responsibilities under sections 635(a)(6) and 637(a)(9) of the Act to ensure that information about part B preschool services is available to parents of all toddlers with disabilities

exiting the part C program, not just those toddlers who have been determined by the lead agency to be potentially eligible under part B of the Act.

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

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

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

Comment: None.

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

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

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

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

Changes: None.

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

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

Changes: None.

Comment: None.

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

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

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

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

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

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

Comment: None.

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

Changes: We have added the words “and child welfare” after the words

“child protection” in new § 303.302(c)(1)(ii)(G) (proposed § 303.301(c)(1)(ii)(G)).

Comment: None.

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

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

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

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

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

the CHIP program ensures nonduplication of Federal and State funds and efforts to provide needed health services to eligible children.

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

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

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

Comment: None.

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

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

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

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

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

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

Comment: None.

Discussion: We have made a technical edit to new § 303.303(a)(1) (proposed § 303.302(a)(1)) to clarify that the referral procedures that lead agencies

must provide to primary referral sources are the State's procedures for referring a child under the age of three to the part C program.

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

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

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

Discussion: We agree with the commenters who expressed concern that requiring primary referral sources to refer an identified child to the part C program "as soon as possible" could introduce undue delays into the part C referral process. Although enforcement of the timeline in current § 303.321(d)(2)(ii), which requires primary referral sources to refer a child to the part C system within two working days of the child's identification, has been a challenge for lead agencies, requiring referrals to be made "as soon as possible" may be more difficult to enforce than the two-day timeline. We believe it is appropriate to retain the phrase "as soon as possible" because it conveys a sense of urgency that referrals be made to the part C program in a

timely manner. Therefore, we have retained the "as soon as possible" language and added a maximum timeline to new § 303.303(a)(2)(i) (proposed § 303.302(a)(2)(i)) to require that a child be referred as soon as possible, but in no case more than seven days, after the child has been identified. We realize that in some cases an earlier referral may be reasonable, but establishing a maximum timeline of seven days provides more flexibility to primary referral sources for making referrals than the timeline under current § 303.321(d)(2)(ii). Moreover, the new timeline requires primary referral sources to refer children as soon as possible.

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

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

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

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