



The Council of Parent Attorneys and Advocates, Inc.
www.copaa.org

IDEA-PART C
**Comments on Notice of Proposed Rule Making
Regarding the 2004 Amendments to the Individuals
with Disabilities Education Act**

ED-2007-OSERS-0131

submitted to
U.S. Department of Education
Office of Special Education and
Rehabilitative Services

July 23, 2007

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The Council of Parent Attorneys and Advocates, Inc.
A national voice for special education rights and advocacy

July 23, 2007

by Federal eRulemaking Portal

Alexa Posny
Director, Office of Special Education Programs
U.S. Department of Education
400 Maryland Avenue SW
Potomac Center Plaza, Room 5126
Washington, DC 20202-2641

Re: IDEA Part C-Comments (NPRM) ED-2007-OSERS-0131

Dear Ms. Posny:

We appreciate the opportunity to submit comments on the Department of Education's proposed regulations under the Individuals with Disabilities Education Act, Part C. The Council of Parent Attorneys and Advocates (COPAA) is a national nonprofit organization of parents, attorneys, and advocates who work to protect the civil rights of children with disabilities and ensure that they receive appropriate educational services. Some members are in private practice; others work for public interest organizations that serve low-income parents and other nonprofit purposes. COPAA members see the successes and failures of the IDEA through thousands of eyes, every day of every week of every year.

The final regulations must be guided by IDEA's and Part C's explicit purposes: preserving the rights of children with disabilities and their families, and enhancing the development of infants and toddlers with disabilities. Early intervention is vital to prevent further developmental harm to children.

COPAA believes that many of the proposed regulations are consistent with the Act and carry out its purposes. But others significantly weaken children's rights. Some appear to contravene § 607(a), which permits only regulations necessary to ensure compliance with IDEA's specific requirements. This is very limited rulemaking authority. Others appear to contravene §607(b), which prohibits regulations that are contrary to the IDEA or the regulations in place in 1983.

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Thank you for considering COPAA's comments. Please feel free to contact us if COPAA may be of additional assistance or provide additional information.

Sincerely,

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COPAA Government Relations Committee Chair

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SUBPART A - GENERAL

§303.13(b)(1)(i) (Assistive technology device) and (b)(1)(ii) (Assistive technology service)

Recommendation: The Department should amend 303.13(1)(i) and 303.16(c) regarding surgically implanted devices such as cochlear implants. The Department should eliminate the exclusion for cochlear implant mapping, and optimization and maintenance of surgical devices, which is not present in IDEA.

Rationale: This exclusion appears to violate Section 607(a) as it is not necessary to enforce compliance with the IDEA's specific requirements. Indeed, it is based on proposed language that was rejected by the Senate and the full Congress in adopting IDEA 2004. Moreover, the Department appears to have ignored the concerns expressed by Senator Judd Gregg, former Chair of the Senate Committee, on this issue. Children with sensory impairments are increasingly being given cochlear implants. Efforts are underway in a number of OSEP funded demonstration projects to collect data that identifies variables that impact the development of language, mobility and social interactions for the children before and after implantation. It is clear that failure to provide these services can hamper the implant's effectiveness and children's ability to learn and develop, as the devices must be regularly optimized over time.

§303.13 (b)(13) Early intervention services transportation

Recommendation: Restore reference to taxi services.

Rationale: The regulations should be clear that taxi service is an appropriate mode of transportation. In many urban and low income areas use of taxi services is integral to the provision of services. Many families do not own cars or have access to reliable public (common carrier) transportation. In addition, the nature of a child's disability may make travel via common carrier difficult or prohibitive. Providers must have the ability to identify with the family a mode of transportation based upon their individual needs, including the use of taxi services.

§303.13 Early intervention services

Recommendation 1: Modify (4) (iii) to include *Language and* Communication development.

Rationale: These terms have different definitions and implications, and therefore should be clarified. An individual may demonstrate the ability to communicate using verbal or alternative

communication; but have an expressive or receptive language disorder, making it difficult to follow directions or speak in complex sentences.

Recommendation 2: Modify (4) (iv) to Social *and* emotional development;

Rationale: Emotional development refers to the ability to manage and understand ones emotions; social development refers to the ability to interact effectively with others. Emotional and social skills are together recognized as very important, and often referred to as “Emotional Intelligence.” Current theory suggests that emotional and social skills are better predictors of success and well-being than academic intelligence. (Stern, 2007)¹

Recommendation 3: Modify (b)(11) to include physical, cognitive, communication, social, emotional, and adaptive skills,

Rationale: This would provide clarification to the range of skill areas that must be addressed through early intervention services.

§303.13 Nursing and nutritional services

Recommendation: Retain the regulation in the current regulations defining nursing services and nutritional services.

Rationale: Nursing and nutritional services are essential components of early intervention for many infants and toddlers. If these needs are not addressed the child may not be able to benefit from other early intervention services. As pointed out in the preamble of the regulations, the statutory list was not intended to be exhaustive: “Nursing services or nutrition services could be deemed early intervention services if they are provided by qualified personnel and otherwise meet the definition of early intervention services.” The regulations should retain these provisions because of their importance and to clarify that they are permissible under Part C.

§303.13: Occupational therapy services

Recommendation: Add language stating that occupational therapy means services provided by a qualified occupational therapist.

Rationale: This will ensure that the occupational therapy infants and toddlers receive is consistent with state licensure and practice act requirements that ensure quality and consistency of professional services. The modification is also consistent with the definition of occupational therapy in Part B of IDEA, thus aligning both parts. Young children should not receive occupational therapy services from unqualified providers simply because of their age.

¹ <http://www.aboutourkids.org/aboutour/articles/socialemotional.html>

§303.24 Multidisciplinary

Recommendation: Strike the definition of “multidisciplinary” as follows:

Multidisciplinary, with respect to evaluation and assessment of a child, an IFSP team or IFSP development under Subpart D of this part, means the involvement of two or more individuals from separate disciplines or professions ~~or one individual who is qualified in more than one discipline or profession.~~

Rationale: One individual cannot represent “multidisciplinary” involvement. Early Childhood Education is long recognized as a multidisciplinary field that embraces the challenges of complexity and diversity through multiple perspectives. Multidisciplinary practice allows for a coordinated approach; expedites and enhances the IFSP team knowledge; and increases the potential to provide new insights and solutions and achieve favorable outcomes at a critical stage of development. There is no evidence or basis for allowing one person to satisfy the requirement for a multidisciplinary approach.

§303.323 Native language

Recommendation: Retain the existing rule that evaluations be in the family’s native language or mode of communication unless clearly not feasible. Recommend the following addition: “or if the language of an infant or newborn is wholly irrelevant for the evaluation being conducted.”

Rationale: The proposed regulation would require evaluation in the native language “as appropriate.” This is too vague and gives agencies too much discretion. Many evaluations depend on communication with the family or child, such as a speech-language evaluation, occupational or physical therapy evaluation where the child has to follow instructions. The same is true of evaluations of social and cognitive skills and of potential emotional disabilities. In an official report compiled by the National Center for Education Statistics it was found that the number of school age children (ages 5-17) who spoke a language other than English at home has increased from 3.8 million to 10.6 million. The report also found that 90% of non-US citizens spoke a language other than English. 64% of naturalized US citizens spoke a language other than English, while only 16% of US-born citizens spoke a language other than English at home. Finally, 30% of the poor spoke a language other than English at home while only 14% of the non-poor do so.² It is also important to preserve the right to an evaluation in the mode of communication used by the family (e.g., deaf parents who use sign language or parent or child who uses a communications device). In Part C, the family plays a very important role and services are designed to also assist the family. Moreover, in almost all situations, the “clearly not feasible” language provides enough flexibility for agencies that, after having made all reasonable efforts, are unable to find a native language speaker. Agencies should be required to make such reasonable efforts.

COPAA recognizes that there some situations where the native language of the child may be wholly irrelevant. For example, a physical therapy evaluation of a newborn or infant may not

² <http://nces.ed.gov/programs/coe/2007/section1/indicator06.asp>

require communication with the child in the native language, and such newborns should get needed services. On the other hand, there must always be informed consent by the parents and such consent must be obtained in the native language. This makes it likely that the agency will need to provide a native language speaker anyway. Thus, the proposed regulation needs to be tightened to permit such an evaluation when language is wholly irrelevant, but not the overbroad language in the current regulation.

§303.26 Natural environments

Recommendation: Modify the definition of “natural environments” as follows:

Natural environments means settings **in which** ~~that are natural or normal for~~ an infant or toddler without a disability **typically spends time**, ~~may include~~ **including** the home **and community settings in which children without disabilities participate**; and must be consistent with the provisions of section 303.126.

Rationale: The concept of natural environments is important to help families facilitate the development of their child with disabilities in the context of each child’s family’s unique needs; including in activities within the community where children without disabilities would typically be found. Evidence to support the use of natural learning environment practices is plentiful (Bruder & Dunst, 1999; Dunst, Hamby, Trivette, Raab, & Bruder, 2000; Dunst, Herter, Shields, 2000; Hart & Risley, 1995; McLean & Cripe, 1997; Shelden & Rush, 2001; Trivette, Dunst & Hamby, 2004; etc.) and continues to emerge.³ The concept of natural environment should not be limited to the child’s home. Without the above suggested clarification, Part C regulations may be subject to misinterpretation. The statute is quite clear: "to the maximum extent appropriate, [early intervention services] are provided in natural environments, including the home, and community settings in which children without disabilities participate" (§632(4)(G)). The regulations need to be equally clear to assure access to appropriate setting and to maximize opportunity for the child and the entire family. Of course, if the home is the natural environment for the child, then the services should be provided in the home. The parent should not be forced to take the child to a center to receive services.

SUBPART B - STATE ELIGIBILITY FOR A GRANT AND REQUIREMENTS FOR A STATEWIDE SYSTEM

§303.105 Positive efforts to employ and advance qualified individuals with disabilities

Recommendation: Maintain and strengthen this requirement to include the requirement for a State plan that includes specific benchmarks.

Rationale: This recommendation is in keeping with the stated purpose of IDEA to prepare students with disabilities for post-secondary and employment outcomes and economic self-

³ NLE [Natural Learning Environment] Practices Defined
<http://www.coachinginearlychildhood.org/nlepracticesdefined.php>

sufficiency. Plans and benchmarks are necessary to document the efforts that are made.

§ 303.11 State definition of developmental delay

Recommendation: Establish standardized criteria for states to meet in establishing a rigorous definition of developmental delay. Such criteria should take into consideration disability diagnosis, risk factors including family poverty, and other issues that have been shown to lead to disability or delay.

Rationale: Currently, 8 states have set definitions so narrowly that every eligible child must have a delay of 50 percent. This standard should be unacceptable. Other states definitions include 25 percent delays, or some level of standard below the mean. There exists a significant variation in eligibility exists across the country. Infants and toddlers are not eligible under some State definitions. As a result, children who could benefit from services may go unserved until they are school-aged. There is grave concern that this situation continues to lead to under-identifying infants and toddlers with disabilities and their families who could clearly benefit from services during this critical developmental stage of life. The Department should establish standard criteria to ensure that all children who can benefit from early intervention services are eligible, and ensure that those criteria are appropriate so that children with disabilities are identified and provided services.

§303.111 Availability of early intervention services

Recommendation: Modify to add that early intervention services are both available **and accessible** to all infants and toddlers with disabilities and their families.

Rationale: A policy that states that services are available to all eligible children is insufficient. States must demonstrate that eligible families can actually access such services. In many rural areas, in practical terms, services are not available to individuals who have no means of transportation. Such services might be available in a larger city, several hours away.

§303.117 Central directory

Recommendation 1 and Rationale Favor retaining existing 303.117(b) which requires a physical form to be available. It is not sufficient to provide information in electronic form via the website alone as this may preclude access by families. Many families, particularly those with low incomes, do not have home computers or easy access to the internet. It is imperative that all families be able to obtain needed information about early intervention services, including being able to access it in printed hard-copy form.

Recommendation 2: Require the directory to be updated annually.

Rationale: In those states that established “vendor” systems through which hundreds, if not thousands of independent contractors provide early intervention services to families, the central directory must be formally updated at least annually. Moreover, states can use the directory to

evaluate the availability of early intervention services in all areas in which potentially eligible families live.

§ 303.126 Early intervention services in natural environments

Recommendation and Rationale: Clarify that that services may be provided in a combination of a natural environment and another setting, such as a center-based program, if such an arrangement is necessary to help the child and family meet the IFSP goals.

These recommendations seek to clarify that the ultimate goal of an early intervention service is to help a child attain a specific outcome or result. Moreover, the recommendation seeks to further clarify that that placement is not an "either-or" decision as to natural environment or center based environment, but it can be both.

SUBPART C – REFERRAL, PUBLIC PARTICIPATION, TRANSITION, COORDINATION AND STATE OPTIONS

§303.208(a)(2) Public participation policies and procedures

Recommendation and Rationale: Modify 303.208(a)(2) to maintain the requirement to requirement for 30 days notice before hearings are held. This provision is found in current regulation §303.110(a)(3). “Adequate notice” is open to misinterpretation that could cause undue delay. In addition, parents need 30 days to ensure that they can meaningfully participate in the hearings.

§ 303.211 State option to make services under this part available to children ages three and older

Recommendation and Rationale: Modify 303.211(b)(1)(ii)(B) as follows. (B) Clarify that parents should have sufficient information to understand the differences between the procedural safeguards provided pursuant to this section and the procedural safeguards under Part B of the Act; in order to make an informed decision regarding whether to keep their child under Part C instead of moving to Part B of IDEA. This is necessary because if parents do not understand that there is no requirement to provide a child under Part C FAPE, they will not understand what they are giving up.

SUBPART D - CHILD FIND, EVALUATIONS AND ASSESSMENTS, AND INDIVIDUALIZED FAMILY SERVICE PLANS

§ 303.301 Comprehensive Child Find System

Recommendation: Add the State Children's Health Insurance Program under Title XXI of the Social Security Act and the Early Hearing Detection and Intervention (EHDI) systems to the list of programs with which Part C should coordinate child find activities.

Rationale: Many children with disabilities participate in SCHIP programs and most states now have early hearing detection programs that can identify hearing impairments in infants. One of the biggest challenges these programs are facing is ensuring that deaf and hard of hearing children are enrolled in early intervention programs. EHDI and early intervention systems should collaborate more effectively in order to serve children and families better.

§ 303.300 Public awareness program

Recommendation and Rationale: Retain the existing Note 2 outlining a requirement for broad public awareness programs about Early Intervention, including the popular media. Not all parents regularly see physicians, including includes parents with limited or no health insurance. The ability to receive information should not depend on whether parents are able to regularly see a pediatrician. *Start Healthy Stay Healthy* reports that there are approximately 11.4 million children who are uninsured in the U.S.; 40% are covered under the Medicaid program, leaving 60% without any health insurance at all. Other families may not see a physician regularly or may be dependent on physicians who lack information to properly identify a disability. Lack of outreach would leave these families unaware of programs and services available; resulting in unserved children who would be eligible for and benefit from early intervention. Mass outreach via popular media would also ensure equitable dissemination of information, and not limit information to families of children born premature or have clearly identified disabilities. Some disabilities, e.g., autism are not diagnosed until 18-24 months.

§ 303.321 Comprehensive child find system

Recommendation and Rationale: Combine language from the current and proposed regulations to clarify that an effective method is developed and implemented that determines children in need of early intervention services, and of those, which children are actually getting the service. The proposed regulation would eliminate the requirement to determine which children are actually getting served. Because infants' and toddlers' needs change so quickly, it is important that they be promptly served, and if they are not, that this be reported.

§303.302 Referral procedures

Recommendation: Restore the language from existing regulations that provide for referring a child **within 2 working days to the extent practicable** after the child has been identified; and

Rationale: Elimination of any specific time frame dilutes the concept of urgency that should be a key component of referring an infant or toddler who is possibly in need of early intervention services. In the event that the Department adopts a change to this regulation, it must keep the time window as small as possible and ensure that services be provided to the child as soon as possible. Because of the speed at which infants and toddlers can develop, delay--even of a few weeks-- can be harmful. Early intervention requires early action.

§ 303.303 Screening procedures

Recommendation: Proposed 303.303(a)(4) is an appropriate provision and we support its inclusion.

Rationale: Parents must have the remedy of being able to obtain an evaluation for their child even if screening seems to indicate child doesn't have disability. Screenings are very brief and not full evaluations, and it is inappropriate to rely on them to deny all services and evaluation.

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

Recommendation 1: COPAA recommends retaining the existing requirement that IFSP meetings be held within 45 days of the date the referral is received, not the date of parental consent. Furthermore, COPAA recommends adding language that if the initial IFSP meeting is not held within 45 days after receiving the referral; the public agency may request a waiver of this requirement if it can document good faith efforts to obtain parental consent, including a request for consent that was mailed within 5 days of the date of referral. Documentation of good faith effort may include

- (a) detailed records of telephone calls made or attempted and the results of those calls
- (b) copies of correspondence sent to the parents and any responses received;
- (c) detailed records of visits made to the parent's home or place of employment and the results of those visits.

Rationale: As the Department has long recognized, infant and toddler needs change so quickly that time is of the essence. Thus, developing the initial IFSP must happen in a timely manner. Six weeks should be sufficient time to do so. Unfortunately, as the Department recognizes in the preamble, if the 45 days run from date of consent, some agencies may delay obtaining parental consent so as to gain more time to develop an IFSP. Likewise, to ensure that consent is sought in a timely manner, the agency should be required to mail the request for consent within 5 days of the referral date.

Alternative Recommendation 1A: If the final regulations provide that the 45 days run from date of consent, they must also provide that within 5 days of the referral, the agency has sent out the request for consent and telephoned the parent to explain the importance of returning it.

Rationale: This is necessary to prevent agencies from delaying when they seek parental consent in order to delay when the 45-day period begins, a concern the Department recognized in the

preamble. COPAA's experience with Part B is that some school districts do delay seeking formal consent to delay the beginning of the 60-day clock for evaluations.

§ 303.320 (a)(3) Evaluation and assessment

Recommendation and Rationale: We support the language requiring that all evaluations and assessments of the child and family must be conducted by qualified personnel, in a nondiscriminatory manner, in the child's or family's native language or mode of communication (as appropriate), and selected and administered so as not to be racially or culturally discriminatory. To do otherwise is contrary to Congress' intent throughout IDEA, and appears impermissible under § 607(a). As stated above, there are many children who do not speak English, including 64% of naturalized U.S. citizens and 90% of non-citizens. Doing evaluations and assessments is impossible if the child does not understand the language. Evaluations that measure social delays, speech and language, or that require a child to follow instructions will be fatally flawed if a child does not understand the communication. It is also important to preserve the right to an evaluation in the mode of communication used by the family (e.g a parent who is blind may need an assessment form in Braille). Some concerns have been expressed about situations in which agencies cannot locate native language speakers. The current regulations provide sufficient flexibility, as agencies need not do so when it is clearly not feasible. To meet this standard, the Department should require agencies to make all reasonable efforts to locate speakers of the native language or users of the mode of communication, and document those efforts.

§ 303.33 Service coordination services (case management)

Recommendation: Modify 303.33 (b) as following to include the availability of advocacy services.

(5) Informing families of their rights and procedural safeguards, as set forth in Subpart E of this part and related resources **including the of the availability of advocacy services;**

Rationale: When families enter the Early Intervention program they are introduced to a new set of systems, policies, and regulations. Families are recognized as an integral part of the IFSP team. But for many, this is their first introduction to the system and they likely will not have received any training or have developed any understanding of their rights under the law. It is important for families to be aware of and have access to advocacy services to help them understand their rights and procedural safeguards.

§ 303.342 Procedures for IFSP development, review, and evaluation

Recommendation: Retain the requirement in the proposed and current regulations that IFSPs be conducted in the native language of the family or other mode of communication used by the family, unless it is clearly not feasible to do so.

Rationale: Clearly not feasible means the agency must make all reasonable efforts to obtain a native language speaker. The 1999 regulations placed an affirmative duty on public agencies so

that there would be no doubt in that the responsibility to make parental participation meaningful was on the agency. Deleting this provision now suggests that public agencies do not have to make reasonable efforts or at least leaves the definition of what is reasonable up to interpretation of the agency. There should be no question that an interpreter must be present for a deaf parent or a parent whose first language is not English, or whose only language is other than English. Blind parents may need materials in Braille. The “clearly not feasible” standard provides sufficient flexibility for agencies unable to locate a native language speaker after making all reasonable efforts. The Department should require documentation of those efforts. Agencies which fail to find native language speakers after making all reasonable efforts, and documenting them, have established that it is clearly not feasible to do so.

§ 303.342(e) Procedures for IFSP development, review, and evaluation

Recommendation: Retain the requirement in the current regulation that “If the parents do not provide consent with respect to a particular early intervention service or withdraw consent after first providing it, that service may not be provided. “

Rationale: If the parents do not provide consent with respect to a particular early intervention service or withdraw consent after first providing it, that service may not be provided. Retaining this requirement makes clear parents have the right to refuse certain services and still get others. For example, a pediatrician may determine a service is inappropriate or a parent may wish to reject group speech therapy to obtain individual therapy for the child, and parents should have the clear right to refuse or withdraw consent.

§ 303.343 Participants in IFSP meetings and periodic reviews

Recommendation: Modify the proposed regulation as follows to permit parents to request the participation of others in the IFSP review, and clarify that if such personnel are invited, they should fully participate.

Rationale: Each periodic review must provide for the participation of persons in paragraphs (a)(1)(i) through (a)(1)(iv) of this section. If conditions warrant **or if the parents request**, provisions must be made for the participation of other representatives identified in paragraph (a) of this section. It is important to note that this provision is useless if the personnel are under the impression or instructions to refrain from giving their opinion. Consequently, it should be made clear that they should do so. Many of the therapists will have worked with the child directly and will have very useful information.

Recommendation: Retain the right in the current regulation and proposed regulation 303.343(a)(iii) that parents may bring an advocate or person outside the family to IFSP meetings.

Rationale: COPAA commends the Department for its inclusion of the right of parents to bring advocates and supporters outside the family to IFSP meetings; a right to which parents have long held. Advocates can help parents protect their rights and facilitate IFSP meetings that result in providing appropriate services for children. Many have years of experience in disabilities and

development. For many families, IFSP meetings can be intimidating, as they are surrounded by professionals who are experienced in the process.

§ 303.344 Content of an IFSP

Recommendation 1: Modify the language to reflect social and emotional development.

Rationale: As worded, the regulation would permit an IFSP that addressed either social or emotional development. It should be corrected to make clear that both must be addressed, and that agencies don't have discretion to only address one.

Recommendation 2: Change the language in (d), to require that IFSPs include a statement of the specific early intervention services, based on **scientifically based** research, rather than based on "peer reviewed research."

Rationale: As written, the proposed regulation violates § 607(b) because it violates IDEA's explicit terms. IDEA § 635 requires that IFSPs include "appropriate early intervention services based on **scientifically based research**, to the extent practicable"—not services based on peer-reviewed research.

Recommendation 3: Amend the regulation to incorporate consideration of the special factors in 34 C.F.R. 303.342 and Part B as part of the IFSP. Thus, 300.344 would include:

Consideration of special factors:

The IFSP Team shall—

- (i) in the case of a child whose behavior impedes the child's development or ability to learn or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
- (ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IFSP;
- (iii) in the case of a child who is blind or visually impaired, consider the need for instruction in Braille and the use of Braille unless the IFSP Team determines this to be inappropriate;
- (iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and
- (v) consider whether the child needs assistive technology devices and services.

Rationale: The special factors language is as important for infants and toddlers as it is for older children. Toddlers should receive appropriate assistive technology devices; those should not be delayed until the child is older. Likewise, the child's communications needs are very important,

particularly for babies and toddler with speech and language impairments, autism and other disabilities that incorporate communication disorders, and for children who are deaf or hard of hearing. Similarly, where appropriate, the team should consider the need for Braille and early activities related to Braille that enable those infants and toddlers to build a bridge between emergent literacy and formal Braille literacy in later school years. Finally, as toddlers prepare for preschool, ensuring that they have received positive behavioral supports as an early intervention will help alleviate behavioral issues.

SUBPART E - PROCEDURAL SAFEGUARDS

§ 303.405 Access rights

Recommendation and Rationale: Expand access rights to allow parents to receive a copy student records upon request so parents may participate as full and equal IEP team members. The original FERPA language about inspection was written at a time when photocopying was not as wide-spread or cheap as it is today. With photocopying an inexpensive widespread technology, and electronic record copying quite easy, the regulation should affirmatively provide that parents can get copies.

§ 303.414 Consent prior to disclosure or use

Recommendation: COPAA supports the language in 303.414(d). We suggest that the Department include in their regulations clarification that contact information and personally identifiable information should also be disclosed to P&A's when P&A's seek access pursuant to their authority of the Protection and Advocacy of Individuals with Mental Illness (PAIMI Act), specifically 42 U.S.C. § 10805(a)(4); 42 C.F.R. §51.41

Rationale: COPAA believes it is appropriate to include this issue. The U.S. Department of Education has made clear in its regulations that participating agencies may disclose to a Protection and Advocacy Agency (P&A) contact information or personally identifiable information of an infant or toddler when the P&A requests access under their authority of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act). As the Department stated in an amicus brief it filed in *Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Hartford Bd. of Education*, 464 F.3d 229 (2nd Cir. 2006), "FERPA does not bar a P&A from obtaining access to the name of and contact information for a parent, guardian, or other legal representative of a minor student with a disability or mental illness, where the P&A's probable cause determination satisfies the requirements for access to records under the PAIMI Act and the DD Act." The Department further stated in its amicus brief that "[t]o the extent that the statutes are in conflict, the specific access provisions of the PAIMI Act and the DD Act (and 29 U.S.C. § 794e, by incorporation) are properly understood as a limited override of FERPA's generally applicable non-disclosure requirements." The Department's recognition assists in the protection of children at a very vulnerable age. The regulation will eliminate the need for protracted litigation about the issue and instead ensure infants and toddlers' rights are protected.

Current Regulation § 303.420

Recommendation: Retain Note 2 from current regulation § 303.420 that “It is important that the administrative procedures developed by a State be designed to result in speedy resolution of complaints. An infant’s or toddler’s development is so rapid that undue delay could be potentially harmful.”

Rationale: An infant’s or toddler’s development is so rapid that undue delay could be potentially harmful. According to The National Scientific Council on the Developing Child, there has been “an explosion” of recent research demonstrating that early experience literally shapes brain architecture. Brain architecture and developing abilities are built “from the bottom up,” with simple circuits and skills providing the scaffolding for more advanced circuits and skills. . The 2007 NEILS report reinforces these findings.⁴

§ 303.430 (e)(3)(ii) Status of a child during the pendency of a due process complaint

Recommendation: Remove and restore the right of children who are transitioning from Part C to Part B services to maintain stay-put during the pendency of due process.

Rationale: IDEA §615(j) requires this result. The proposed regulation appears to contravene 607(a) and 607(b). The statute is clear that only permissible exception to the stay-put provision is a disciplinary change in placement under § 615(k).As the Third Circuit held in *Pardini v. Allegheny Intermediate Unit*, a child in early intervention has right to a "smooth transition." Continuing services while disagreements are worked out preserves the child’s ability to continue to learn, progress, and improve.

§303.435 Appointment of an impartial due process hearing officer

Recommendation: Add language from 300.511 to specify that the hearing officer must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

Rationale: These provisions were added to IDEA Part B to ensure that hearing decisions were made by officials who were knowledgeable about the law and standard legal practice. Parents of infants and toddlers are entitled to this same basic protection that they would have if their children were a few years older. COPAA respectfully submits that hearing officers not familiar with the laws or legal practice should not be deciding the rights of infants and toddlers or the responsibilities of agencies.

⁴ *Early Intervention for Infants and Toddlers with Disabilities and Their Families; Participants, Services, and Outcomes* (2007) Final Report of the National Early Intervention Longitudinal Study (NEILS). SRI International http://www.sri.com/neils/pdfs/NEILS_Report_02_07_Final2.pdf

§303.436. Parental rights in due process hearings

Recommendation 1 and Rationale: Add a requirement that parents may make the hearing public and may receive the hearing record and findings and decision at no cost to the parent. Parents have this right under Part B and § 300.512. They should not be denied it under Part C, even if the hearing is not conducted in accord with Part B. Hearing records are expensive and most parents are not in a position to pay for them. The age of the child should not determine the parents' right to these materials. Parents cannot receive proper due process and engage in the process fully (including appeals if necessary) unless they receive a copy of the hearing and a copy of the findings of fact and decision. That right should not be based on the ability to pay for them.

Recommendation 2 and Rationale: Retain the note in the current regulations, 300.423, providing that while states adopting Part B hearing mechanisms may have 45 days to conduct a hearing, they are encouraged to accelerate this to 30 days. As the current regulations recognize, "Because the needs of children in the birth-through- two-age range change so rapidly, quick resolution of complaints is important."

§ 303.441 Due process complaint

Recommendation 1: In 303.441(d), specify that hearing officers should allow parties to amend due process complaint notices unless doing so would prejudice the other party.

Rationale: Parents will not know and understand IDEA's hearing procedural rules in detail. They should be able to amend complaints when necessary, rather than having to start the entire process from the beginning with a new complaint, if their complaint is deemed insufficient. The prejudice standard is clear and appropriate. In the alternative, the standard applied to complaints in federal court should be used. Since 1937, Federal Rule of Civil Procedure 15(a) has required that leave to amend be "freely given when justice so requires."

Recommendation 2 and Rationale: Incorporate into 303.441(d)(4) the Part B regulation commentary that states that if a motion for insufficiency is granted and parents must amend the complaint "[t]here is no need to hold more than one resolution meeting, impose additional procedural rules, or otherwise adjust the resolution timeline." 71 Fed. Reg. 46698. Part C regulations should affirmatively include this requirement. Repeated 30 day resolution periods deny a child access to justice and FAPE, and the longer a hearing is delayed, the longer an infant or toddler must go without needed services. Because infants' and toddlers' needs change so quickly, this is appropriate. As the Department believed this was appropriate for older children, it likewise is appropriate for younger ones.

§ 303.442 Resolution process

Recommendation 1 and Rationale: Strike the section which mandates a 30-day resolution period. IDEA 2004 contains a resolution session for Part B, but Congress did not include one for Part C. There is no statutory basis for this regulation and it should be removed. To do otherwise is to contravene §607(b) and §607(a), as such a requirement is not necessary to ensure

compliance with IDEA's specific requirements. Had Congress intended a 30-day resolution period for Part C hearings, it would have required one. If the Department does not remove it, COPAA offers the following comments.

Recommendation 2: Amend 303.442 to require that the agency make all reasonable efforts to schedule the resolution session at a mutually-agreed upon time and place; that the agency consult parents within 5 days about relevant IFSP team members to attend the resolution session; and that parents may seek the intervention of a hearing officer if the agency fails to do so.

Rationale: The goal of the resolution sessions is to decrease litigation by allowing the parties to negotiate a resolution to the problem. This cannot happen if the correct personnel are not at the meeting. Nor can it happen if the meeting is scheduled at a time or location that parents cannot attend. Affording parents meaningful opportunity to participate in determining the composition of , timing, and location of the session is important to facilitate this goal.

Recommendation 3: Add a new subsection to § 300.510(b) stating that agencies may not abuse or misuse the resolution session, and may not prevent parents from seeking due process who have attended the session.

Rationale: The regulations should affirmatively state that the agency may not use the resolution session for any purpose beyond resolving the complaint. They may not impose additional obligations on parents, use the resolution sessions to intimidate or interrogate parents, use the session as a one- way discovery session or fishing expeditions, use the parent's denial of any offer by the agency as grounds for dismissing the hearing, or raise settlement offers made in resolution sessions at a hearing. COPAA has already received many complaints that school districts have misused resolution sessions, particularly to intimidate parents or as one-sided discovery or fishing expeditions. The American judicial system is based on treating both sides equitably. Under the IDEA, both sides exchange evidence at the same time—five business days before the hearing. *See* IDEA 2004 § 615(f)(2); 34 C.F.R. § 300.508(a)(3) (July 20, 1983 regulations and 1999 regulations). No school district or agency should use the resolution session to subvert this equitable statutory requirement. Moreover, if an agency refuses to go forward with a resolution session, the hearing may not be delayed. Agencies may not prevent a parent from having a due process hearing when the parent has attended the resolution session. There is absolutely no statutory authority for permitting agencies to delay a hearing in this way.

Recommendation 4 and Rationale: change in language in (b) Resolution period as follows:

- (1) *If the lead agency has not resolved the due process complaint to the satisfaction of the ~~parties~~ parent.* This is in accord with IDEA statute Section 615, which states that if the agency has not resolved the complaint to parents' satisfaction, within 30 days, the hearing may proceed. Because this is the statutory language, substituting "parties" as the proposed regulation does violates §607(b).

Recommendation 5: Retain proposed § 303.442(b)(5) permitting parents to seek the intervention of a hearing officer if the agency fails to convene the resolution session or have the appropriate personnel there. Also require the state to appoint hearing officers sufficiently in advance of the hearing so that parents' requests can be heard.

Rationale: The proposed language, like identical language in the Part B regulations, provides necessary relief for parents if agencies fail to convene resolution sessions. Parents must have a remedy if the agency fails to convene a resolution session. COPAA has received complaints of school districts that have failed to convene the meetings. COPAA has also received complaints that some State Education Agencies have not appointed hearing officers before the 30 day resolution period elapses. As a result, parents have difficulty getting their motions heard and seeking the permitted relief. To prevent this from happening with Part C, the Department should require states to appoint hearing officers sufficiently in advance of the hearing to deal with all motions.

Recommendation 6 and Rationale: Proposed § 303.442(e) (4) should require agencies to orally inform parents, through an interpreter if necessary, of the right to void the resolution agreement within 3 business days. This information needs to be printed in boldface or another attention-seeking form on each such agreement. Most parents do not know the intricacies of the IDEA; many are not represented by counsel and do not have advocates. The right to void an agreement within 3 business days of execution is important and parents need to know they may do so. Informing them of this right is consistent with IDEA 2004, requires very little effort on the part of schools, and imposes no real additional costs.

§ 303.444 Hearing rights

Recommendation and Rationale: Retain the language in proposed 303.444 allowing parents to make the hearing public; receive the record and findings and decision at no cost to the parent; and to have the child present. As the Department recognizes, these are important parental rights. A parent's decision to open a hearing to the public promotes greater accountability. As with Part B hearings, parents going to Part C hearings should receive the record and other materials at no cost. Due process requires that parents have access to these materials to prepare appeals and this should not depend on the ability to pay for them.

§ 303.445 Hearing decisions

Recommendation 1: Delete entirely the language in 303.445, restricting the bases on which hearing officers may make their decisions.

Rationale: IDEA 2004, §615(f)(1)(E) explicitly limits Part B hearing officers to making decisions only on the basis of a substantive denial of a Free Appropriate Public Education, unless procedural claims meet certain substantive standards. These were substantive changes imposed by Congress, not procedural ones. Congress limited these restrictions to Part B. It did not extend them to Part C. The Department may not simply copy them and apply them to Part C. To do so violates §607(a) which permits only regulations necessary to ensure compliance with IDEA's specific requirements. Section 607(a) is unique. Because of § 607(a), the Department's rulemaking authority is restricted much more than in writing regulations under other statutes.

Moreover, this is also a 607(b) violation. Rules of decision, like this, which set the standard by which hearing officers will determine whether a parents' rights have been violated, are substantive, not procedural. They are thus different from regulations listing required elements of a due process complaint or setting timelines. Moreover, Part C places significant focus on the

family and parents. IDEA 2004, Part C, in §636 provides for a “family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the infant or toddler.” It likewise mandates that the IFSP include a statement of the major outcomes to be achieved and the early intervention services to be provided *for “the infant or toddler and the family.”* Given the significant role that the family plays in the IFSP process under §636, the proposed regulation is impermissible and contrary to the scheme laid out in the statute.

§ 303.448 Civil action

Recommendation 1: The regulation should state that the courts have jurisdiction of actions brought under section 615 and 639 of the Act.

Rationale: IDEA 2004, Part C, § 639(a) states that any party aggrieved by the findings and decision regarding a Part C complaint may bring a civil action in a state court or a district court without regard to the amount in controversy. The regulation must be changed to refer to this statutory right. If the intent of the proposed regulation is to deny parents the right to pursue claims in court when a state has not adopted Part B procedures for Part C hearings, this is contrary to the IDEA and a §607(b) violation. The statute is clear: parents may sue in federal court when aggrieved by a decision on a Part C administrative complaint, and it is a §607(b) violation if the regulation is not brought into accord with the statute.

SUBPART F – USE OF FUNDS AND PAYOR OF LAST RESORT

§ 303.510 (c) Non-reduction of benefits

Recommendation: Add a reference to the State Children’s Health Insurance Program (SCHIP) under Title XXI of the Social Security Act. Nothing in this part may be construed to permit a State to reduce medical or other assistance available or to alter eligibility under Title V of the Social Security Act 42 U.S.C. 701 et seq., (SSA) (relating to maternal and child health) ~~or~~ Title XIX of the SSA, 42 U.S.C. 1396 (relating to Medicaid), **or Title XXI of the SSA (relating to the State Children’s Health Insurance Program)** within the State.

Rationale: SCHIP is another federal program that provides medical assistance to children who may receive early intervention programs. According to a national survey conducted in 2006 by the organization Covering Kids and Families, 8 million children in the U.S. go uninsured. However, thanks in large part to the State Children’s Health Insurance Program (SCHIP) the number of uninsured children has gone down by 2 million since 1997.⁵ SCHIP was created in 1997 and since then has managed to significantly decrease the number of children uninsured under Medicaid.

⁵<http://coveringkidsandfamilies.org/press/factsheets/2006UninsuredFactsheet.pdforg/shsh/>

§ 303.520(a)(1)(i) Policies related to use of insurance or public benefits for payment for services

Recommendation and Rationale: Retain 303.520(a)(1)(i) as written, requiring parental consent to access public and private benefits. It is important for parents to give consent and it is likely that most parents will do so. But there are situations in which agency's accessing the child's public benefits for Part C services would mean that the child would not receive other needed services under those benefits, such as durable medical equipment or services needed at home. Parents need to know what services the Part C program will use from the child's public benefits allocation and how that may affect future services.

§ 303.520(b)(1)(i) Use of private insurance

Recommendation 1 and Rationale: Clarify by note or regulation that families need to be informed of the fact that when a child has both Medicaid and private insurance, Medicaid rules require the family to exhaust the private insurance benefit before Medicaid benefits can be accessed. This could be done through the policies regarding the system of payments under section §303.521.

Recommendation 2 and Rationale: Amend proposed regulation §303.520(b)(1) to retain the language that protects parents from having their private insurance accessed without their consent. Delete the introductory phrase, "*Except as provided in paragraph (b)(2) of this section.*" Also delete (b)(2) in its entirety, which would eliminate the consent requirement if the state adopts legislation providing that if the state access the parent's private insurance, the payments for Part C would not count toward lifetime caps, negatively affect the availability of health insurance, or increase the family's premiums.

Rationale: The public system should not be permitted to access parents' private benefit without their consent regardless of state legislation. Most families are covered by insurance plans governed by the Employee Retirement Income Security Act of 1974. ERISA applies to all private section employee benefit plans. ERISA Section 514 preempts all state laws that "relate to any employee benefit plan." States may only regulate plans provided by state or local governments or sold in the individual market, which make up a very small proportion of the plans. Thus, even if a state adopts the legislation in proposed (b)(2), it would not protect parents whose insurance is from a plan governed by ERISA. Those plans would be immune from the state law and could freely diminish parents rights, including counting the Part C benefits toward lifetime cap; limiting their availability of insurance, and increasing their premiums. Proposed (b)(2) is intended to create protection for parents. However, even if states adopt the legislation envisions, most parents would have no protection. ERISA's preemption provision means that insurance plans can freely deny parents all of these protections. So, in essence, the provision simply becomes an unintended loophole. If the state adopts legislation that does not protect them, they still lose the protection of the consent provision. This is certainly not what the Department intended and likely is a §607(b) violation.

SUBPART H – MONITORING AND ENFORCEMENT

§303.120(a)(2)(iv) Correction of noncompliance identified through monitoring

Recommendation: Support the language requiring that the correction must be made as soon as possible and in no case later than one year after the lead agency's identification of the noncompliance.

Rationale: Correction of noncompliance does not always occur in a timely manner. Proposed Sec. 303.120(a)(2)(iv) would align with proposed Sec. 303.700(e) to clarify expectations regarding the timely correction of noncompliance. This is important to ensure that infants and toddlers with disabilities and their families receive appropriate early intervention services as quickly as possible due to rapid development.