



The Division for Early Childhood of the Council for Exceptional Children (DEC)

DEC Comments on the Part C NPRM

Docket ID: ED-2007-OSERS-0131

July 23, 2007

These comments are provided on behalf of the Division for Early Childhood of the Council for Exceptional Children (DEC). DEC is a professional membership organization whose mission is to promote policies and advance evidence-based practices that support families and enhance the optimal development of young children who have or are at risk for developmental delays and disabilities. DEC appreciates this opportunity to provide comments on the draft Part C regulations as published in the Federal register on May 9, 2007.

DEC held a series of three conference calls in May 2007 for DEC members, and other interested individuals to provide an overview of the proposed changes. In addition, DEC conducted a survey of its members on a number of important issues contained in this NPRM. The DEC Board worked together with members to carefully consider these draft regulations and to make recommendations on the entire package.

DEC notes new IDEA language that “the Secretary shall issue regulations under this title only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this title.” (Sec 607(a)). We note that this NPRM includes many additional requirements on state Part C systems at the same time that the President’s budget request for ’08 is recommending a \$13M cut in federal funding for Part C.

The following are DEC’s comments organized by topical areas:

General and Definitions

- DEC appreciates and supports the incorporation of relevant Part B provisions (e.g. monitoring, confidentiality, etc) into the Part C regulations instead of having these incorporated by reference as we requested in our letter to the Department in February 2005. This creates a comprehensive set of federal IDEA requirements for Part C. DEC also appreciates the use of terminology consistent with early intervention in these newly incorporated provisions under Part C.

- DEC requests regulatory language be included for the term “scientifically-based” and the guidance should be aligned with NCLB language as long as

the guidance ensures that single-subject, correlational, and qualitative research are included in the definition along with random assignment experiments.

DEC notes that the *DEC's Recommended Practices* initiative is one which identifies, promotes and supports the use of scientifically valid practices based on a synthesis of best available research evidence integrated with professional and family wisdom and values.

- In addition, DEC recommends regulatory language on “peer-reviewed research” be consistent with the work of the National Research Council (2005).
- DEC has significant concern regarding the proposed change in 303.24 regarding the definition of “multidisciplinary.” Permitting one individual to represent a multidisciplinary perspective is not consistent with recommended practice.
- DEC supports the proposed change in 303.33 (c) to allow the use of the term “case management.”

Evaluation, Assessment and Eligibility

- DEC supports changing the 2 working day referral timeline to “as soon as possible but no longer than 5 working days from identification to referral.” (303.302(a)(2)(i))
- DEC supports retaining the language at current §303.321(b) (2) as included in the proposed language at §303.301(b) (2) that reads “An effective method is developed and implemented to determine which children are in need of early intervention services.” However, DEC strongly disagrees with the addition of the new requirement to have an effective method to determine which “children are not in need of those services.” This language is not included in the statute and would add significant and unnecessary burden to lead agencies.
- DEC supports the NPRM language related to the 45-day timeline that defines Day 1 as the day the parent consents to evaluation. However, DEC recommends that the regulation also require that consent for evaluation be obtained as soon as possible but in no case longer than 15 calendar days after referral. (303.320(e))

- ❑ DEC recommends that a specific provision be added to §303.320 (e) to allow the lead agency to document family requested delays (e.g. child or family illness, work or family vacation scheduling needs or other family requested considerations) that would interfere with the ability of the lead agency to meet the 45-day timeline.
- ❑ DEC supports the addition of language in §303.303 permitting states to establish policies and procedures to screen children as part of procedures to determine if the child needs to be evaluated. This is consistent with our letter submitted in February 2005, in which we requested the addition of a state option to establish and implement screening policies and procedures.
- ❑ DEC recommends the language at §303.420(a) (1) (ii) below be deleted. The proposed language states “The lead agency must ensure parental consent is obtained before administering screening procedures that are used either to determine:
 - (i) Whether a child is suspected of having a disability; or
 - (ii) A child's eligibility under this part;”
 Screening appropriately can be used as described in (a)(1)(i) to determine the need for evaluation, but screening, by definition, is not appropriate nor are screening instruments valid for use to determine eligibility as stated in (a)(1)(ii).
- ❑ DEC requests that the language in proposed §303.303(a) (2) be modified to read “the parent must be offered an evaluation” instead of the proposed language “the child must be evaluated.”
- ❑ DEC requests modification to the proposed §303.303(a) (3) and (4). DEC notes that the written prior notice in (3) would inform the parent, as it would be required to do so under §303.421, that the parent must initiate a dispute resolution process to overturn the agency’s decision to not evaluate. This prior notice statement would be inconsistent with the proposed language in (4) stating an evaluation must be conducted at parent request even if the child is not suspected of being a child with a disability as per the written prior notice. DEC suggests instead that if the agency decides the child does not need an evaluation, the agency be required to present this decision and the reasons for it to a parent in writing (but not through written prior notice at 303.421). At that point, if the parent requests an evaluation, the agency would be required to offer the evaluation.
- ❑ DEC supports the revised definitions of evaluation and assessment with several reservations. To address these, DEC strongly recommends the following changes:

- DEC has significant concern about the new language at §303.320(a) (1) (iv) and (d) establishing a new component to the evaluation and assessment process. This new process expands the concept contained in the current regulations regarding identification of “service needs” and seems inconsistent with the statutory intent that services be identified at the IFSP meeting to address the child’s needs in the context of the child and families outcomes. This new requirement to perform “an assessment of service needs” prior to the IFSP is not consistent with the statute or with 25 years of practice in Part C across the country;
 - DEC recommends that §303.320(b) (2) be revised to read “... but informed clinical opinion may not negate the results of assessment instruments that did establish a child’s eligibility.” The NPRM language is not clear; and
 - DEC requests the language at 303.320(a)(2)(iii) be clarified that in instances in which medical records and other information are adequate to determine eligibility without assessment, a child must still receive assessment in accordance with 303.320(b) prior to the IFSP meeting.
- ❑ DEC requests that clarification related to whether parents are required to consent to outcome assessment required under the SPP/ APR process be included in §§303.420. The FAQ from OSEP (Sept. 2006 VI.) states families cannot refuse to provide data needed for federal accountability. However, the SPP/ APR process is dependent on pre and post child assessment information that in some states is also used for initial eligibility for Part C and for Part B preschool services.
 - ❑ DEC suggests that the final regulations provide additional clarification on the new language on “rigorous” in the definition of developmental delay.

Services and Providers

- ❑ DEC supports the inclusion in §303.13(c) (11) of teachers of children with hearing impairments (including deafness) and teachers of children with visual impairments (including blindness) to the term special educator.
- ❑ DEC recommends that nutrition and nursing services be retained in §303.13. We note the preamble language that these services still would be required if determined necessary by the IFSP team and are being eliminated because they were never included in the statute. DEC is concerned that if the services are eliminated from the list in federal regulations after being there for over 15 years, the field will misinterpret that deletion.

- ❑ DEC supports the proposed change of language in §303.16(a) from “during the time the child is receiving the other early intervention services” to “during the time that the child is eligible to receive other early intervention services.”
- ❑ DEC does not support the addition of subsection (a)(2) in the proposed revision to the definition of “native language” in 303.25. This language is not contained in section 602(20) of the statutory definition nor is it in the current Part C regulations at 303.401(b). This additional requirement to provide all services to eligible infants and toddlers and their families in the language used by the child in the home or learning environment would place a significant new responsibility on Part C systems resulting in major financial and human resource implications. While DEC certainly supports this as a goal and encourages it as practice whenever possible, it would be virtually impossible to implement this proposed requirement, particularly in communities in which there are often up to 100 different languages spoken by families.

IFSPs

- ❑ DEC recommends that current language at §303.343(a)(iv) be retained to allow states the continued flexibility to have the service coordinator be either the person who has been working with the family since the initial referral for the person who will be designated to be the service coordinator responsible for implementing the IFSP.
- ❑ DEC requests clarification on IFSP language related to preschoolers with IFSPs. We note that the language at §303.344(d)(4) seems to apply to any preschooler that has an IFSP. However, this does not seem consistent with Part B §300.323 (b) that allows the use of IFSPs for preschoolers under certain circumstances. Further, this is not consistent with language included in the IEP content language under §300.320 that does not require educational components for preschool IEPs.
- ❑ DEC disagrees with the addition of “length” and “duration” into the content of the IFSP at §303.344(d)(1)(i) as these terms are not included in the statute.

Natural Environment

- ❑ DEC does not support the term “if applicable” in §303.344(d)(1)(ii) as it implies that a justification may not always be required. The statute is clear that a justification is required if a service is to be provided in a setting other than a natural environment.

- ❑ The language at 303.344(d)(1)(ii)(B)(2) appears to be a typo and probably should be 303.26 not 303.25.
- ❑ DEC supports the following definition of “natural environment.” - “Natural environments means settings in which an infant or toddler without a disability typically spends time, including the home and inclusive community settings in which children without disabilities participate; and must be consistent with the provisions of 303.126.”
- ❑ DEC recommends that language in §303.126 (b) that states “... only when early intervention services cannot be *provided* satisfactorily in a natural environment” be replaced with the statutory language in Sec 635(a) (16) (b) “... only when early intervention cannot be achieved satisfactorily for the infant or toddler in a natural environment.” DEC also recommends that the clarification contained in the congressional report regarding “the decision would be made by the parents and other members of the IFSP team” be incorporated into the final regulations.

Transition

- ❑ DEC supports the proposed transition language requiring a referral to the LEA 9 months before the child’s third birthday.
- ❑ DEC does not support the language in proposed §303.209(a) (3) (i) (B) that would require an intra-agency agreement if the Lead Agency is the SEA. It is unnecessary and is a burden for education lead agencies to have to agree with themselves. This new requirement would present an unnecessary paperwork burden.
- ❑ DEC opposes the deletion of 303.4. This provision allows states to follow Part B and not Part C regulations with children who transition to preschool special education before their third birthday. This regulation is consistent with IDEA section 619(a)(2) and(h), long-standing provisions in the statute. This provision is necessary as an important component of many state transition systems as part of ensuring a seamless transition for children and families from Part C to preschool special education.
- ❑ DEC does not support the change in language throughout §303.209 related to transition from “age of eligibility for preschool” to “the child’s third birthday.” Many states have transition policies and procedures that are consistent with the statute and regulations and that allow flexibility to meet community, child and family needs. Changing to “third birthday” will

disrupt many existing options for seamless transitions that have been carefully crafted by states and local communities.

- DEC supports the inclusion of the state lead agency option to provide written prior notice to parents allowing them to decline referral to the local school system as their child approaches age three. This is consistent with the long standing OSEP position as contained in policy letters on this matter.
- DEC recommends that a construction clause be added at 303.209(e) stating that nothing will hold Part C responsible for ensuring required timeline for the transition conference is met if referral to Part C occurs less than 45 days prior to the date the transition conference is due.

Birth to Kindergarten Option

- DEC has significant concerns regarding the lack of funding to support the new state option to serve children under Part C up to kindergarten age with parent consent. It is unlikely that any state will allow this option for parents of preschoolers without federal funding to support its implementation.
- DEC supports the clarification that 15 percent of the excess of funds over \$460 million would be available for the new three to kindergarten option as included in 303.734.
- DEC generally supports the provision in 303.211 (a)(2) and 303.501 (d) that allows states to serve a subset of children under the birth-to-kindergarten option but there are major issues that remain to be clarified. However, state allocations for this should be consistent with the age range a state includes in the option.

Procedural Safeguards

- DEC supports the consent requirement for screening §303.420 (a)(1); evaluation (a)(2); provision of services (a)(3); use of private insurance at (a)(4); and exchange of personally identifiable information at (a)(5);
- DEC recommends that language consistent with Part B at §300.515(c) be included in Part C to allow extensions in a due process hearing to be granted at the request of either party. There are legitimate circumstances under which an extension may be necessary on the part of both parties. Having the hearing officer grant the extension or not is a protection against any potential abuse of this provision.
- DEC supports the inclusion of the state lead agency option to provide written prior notice to parents allowing them to decline referral to the local school

system as their child approaches age three. This option is included in a number of places in the NPRM including §303.401(e), and §303.209(b) (3). This option is consistent with policy in many states and is long standing OSEP policy as contained in OSEP letters on this matter.

- DEC disagrees with the pendency language at §303.430(e) (3) (i). The language at (i) is based on §303.211(b) (4) that is based on statutory language. This statutory language is not related to dispute situations or pendency but is related to the provision of services in the birth to kindergarten option.

In addition, DEC recommends that (ii) be reworded as follows “Once a child turns three and has been determined ineligible for services under Part B or eligible for services under Part B, the provisions of paragraph (e) (1) of this section do not apply and the lead agency is not required to provide Part C services to that child during the pendency of any due process complaint under Part B.”

- DEC does not support the proposed language at §303.434(d). This requirement may serve as a disincentive to parents to file a state complaint and is an additional burden to a parent that is not necessary. State lead agencies have a variety of ways that the substance of a state complaint is made available to the entity against whom the complaint is filed. This should remain a state matter.

State ICC

- DEC supports the addition of §303.601(a) (1) (iii) excluding parents who are employees of agencies providing early intervention services from serving as parents on the state ICC.

Finance

- DEC does not support the proposed requirement in 303.420 (a) (4) requiring parent consent in order to access public insurance and the requirement in 303.520 (a) (i) requiring parent consent to disclose personally identifiable information in order to access Medicaid reimbursement. Part C, as designed by Congress, is an interagency system that must utilize all available resources to support the needs of the eligible child and family. Federal Part C funds were designed to be the “glue money” to be used in the event federal, state and local funds are not available to pay for a service. Statutory and regulatory language related to “payor of last resort” requires that all resources, including public insurance, be utilized prior to the use of Part C funds. DEC does not consider this change to be consistent with statutory language.

- ❑ DEC does not support the proposed language in §303.520 (b) (2) to exempt the parental consent requirement in cases where there is state legislation. DEC is concerned that this exemption will lead to potential litigation and misuse of the family's insurance. Not all insurance policies are subject to state statute. The percentage of policies that are exempt varies from state to state with some states reporting the percentage as high as 80%. It is unrealistic to expect that local programs or service coordinators will have the knowledge to differentiate ERISA vs. Non-ERISA on a case by case basis.
- ❑ In order to prevent potential litigation, DEC encourages the Department to add language in §303.520 (b) (ii) and (iii) that would require that the state's system of payment policies to include information on the family's procedural safeguards.
- ❑ DEC does not support the language in §303.520(a)(1)(i) that requires families to give consent to disclose personally identifiable information to utilize the family's public benefits. DEC believes that by virtue of the family's voluntary enrollment in the public benefit, their personally identifiable information is already known.
- ❑ DEC supports the language in §303.520 (b)(1)(i) that requires a family to provide consent before the release of personally identifiable information to private insurance for billing purposes

Accountability

- ❑ DEC supports the language in §303.120(a) (2) (iv) that requires the correction of non-compliance as soon as possible but no later than one year after identification.

Thank you for the opportunity to comment on the proposed Part C regulations. As you know, there continues to be annual major increases in the numbers of children and families served under Part C. DEC remains committed to the provision of comprehensive quality services for infants and toddler with disabilities and their families. Please contact us if we can be of any assistance as this NPRM package moves forward.

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