

July 23, 2007

Patricia Guard  
Acting Director  
Office of Special Education Programs  
U.S. Department of Education  
400 Maryland Avenue, SW  
Room 4109  
Potomac Center Plaza  
Washington, DC 20202-2600

Dear Dr. Guard:

On behalf of the members of the National Association of State Directors of Special Education (NASDSE), the nonprofit organization representing the state directors of special education in the states, territories, federal entities and the Freely Associated States, I am pleased to submit these comments in response to the Notice of Proposed Rulemaking (NPRM) that appeared in the Federal Register on May 9, 2007.

NASDSE's members, the state directors of special education, greatly appreciate the thought and effort that OSEP staff has put into the development of the regulations and commend your efforts.

NASDSE's comments are strictly limited to those areas where we believe that the regulations are not clear or where we believe that the regulations either go beyond the federal statute or are inconsistent with the statute.

NASDSE's overarching concern, which we expressed at the time that the Part B regulations were proposed for comment, is that the regulations provide for accountability with flexibility because Part C implementation varies so much from state to state. In general, we believe that the regulations provide this flexibility. NASDSE also appreciates the reorganization of the regulations and their inclusion of statutory language.

Our comments on specific sections of the regulations follow.

### **Subpart A – General**

Restore the language in current 303.4: **This part does not apply to any child with disabilities receiving a free appropriate public education in accordance with 34 CFR Part 300 with funds received under 34 CFR Part 301.** Restoring this language would make it clear that children who transition to preschool special education before their third birthday would follow Section 619 regulations.

303.13(b). In general, NASDSE does not feel that it is necessary to have unduly long lists of examples where the plain meaning indicates that the language is suggestive of, rather than limited to, the specific references limited. However, in this case, we are concerned that the elimination of the reference to nursing services and nutrition services, which was specifically stated in earlier versions of the regulations, might be confusing to some providers. Therefore, we recommend that nursing services and nutrition services continue to be included in the final regulations.

303.13(b)(1). NASDSE supports the proposed definition of assistive technology, which makes it clear that it does not include “a medical device that is surgically implanted, including cochlear implants, or the optimization...or the maintenance or replacement of that device.”

303.13(b). While we recognize that the services listed under this section are not an exhaustive list, we do believe that it is important to explicitly include a reference to “respite care.” Without a specific reference to respite care in the regulations, we are concerned that this type of service may be overlooked. The importance of providing respite care for parents of infants and toddlers with severe disabilities cannot be underestimated. Furthermore, recently enacted federal respite care legislation recognizes the importance of this service. Further, when this new legislation receives an appropriation, there will be federal monies available for this service. Therefore, we propose that a new section be added as 303.13(b)(15) that makes a specific reference to respite care. We propose that the definition be similar to the definition in P.L. 109-442, *The Lifespan Respite Care Act*. ***Lifespan respite programs are defined as “coordinated systems of accessible, community-based respite care services for family caregivers of children or adults with special needs.”***

In the alternative, we suggest that the words “such as respite care” be added to section 303.13(d) as follows:

“Nothing in this section prohibits the identification on the IFSP of another type of service (e.g., **respite care**) as an early intervention service.....”

303.13(b)(12)(iv). We are concerned about the language in this paragraph. As written, without the use of the word “or,” it would seem to suggest that *all* of these services, sign language, cued language and auditory/oral language services, must be provided to each and every child and family. However, the list constitutes a list of individual *approaches* for meeting the needs of children who are deaf or hard of hearing and their families. We therefore suggest adding the word “**or**” as follows: “...as used with respect to infants and toddlers with disabilities who are hearing impaired, includes services to the infant or toddler with a disability and the family to teach sign language, cued language, and/**or** auditory/oral language, ...as well as to provide **as appropriate for the individual child and family**, oral transliteration services, sign language.....”

303.13(c)11. We support the proposed inclusion of both teachers of infants or toddlers with hearing impairments and teachers of the visually impaired under the definition of special educators. We agree that the appropriate terminology to be used is “teachers of the hearing impaired.”

303.24. NASDSE has serious concerns that a single individual could be appropriately qualified in more than one discipline or profession as would be allowed by this proposed section. We therefore recommend that “or one individual who is qualified in more than one discipline or profession” be deleted from this section.

303.25(a)(1). NASDSE is extremely concerned about this proposed language that would require that all direct contact with the child be in the child’s native language used in the home or learning environment. This requirement places a tremendous burden on providers in those communities where numerous languages other than English are

spoken in the home. In some communities, more than 100 languages other than English are spoken by residents. It would be impossible to find providers proficient in all of those languages nor would it be plausible to locate translators in all instances when services are being provided. Furthermore, if the provider is unable to locate service providers who speak the child's native language, what is the alternative under the proposed language? Would the provider not provide the service at all or should the provider provide the service in another language? The proposed regulation is silent on this. This provision as drafted is unworkable. NASDSE recommends that 303.25(a)(2) be deleted.

303.26. NASDSE is concerned that this section does not sufficiently recognize the reality of today's world when many young children are in some type of out-of-home care while their parent(s) are at work. We therefore recommend that this section be expanded as follows:

Natural environments means settings that are natural or normal for an infant or toddler without a disability **and may include the home or community-based setting such as Early Head Start, child care programs or home day care settings** consistent with.....

303.27(b)(2). We recommend that the last sentence in this section be written as follows: "...except that an EIS provider or public **or private** agency that provides early intervention or other services...." Private agencies providing services should not have the option to serve *in loco parentis* for the same reasons that the proposed regulation would prohibit public agencies from taking on this role.

303.33. NASDSE supports the comment in the *Preamble* to the regulations that states that 303.33 "would not require service coordinators to be responsible for identifying funding sources for those services not covered under Part C..."

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

303.111. NASDSE urges that the final regulation make it clear that it is up to the states to develop a "rigorous" definition of development delay.

303.112. NASDSE is concerned about a conflict between this section and 303.334. The proposed language in this section requires lead agencies to have a policy ensuring that "appropriate early intervention services are based on scientifically based research...". However, in 303.334, the proposed regulation requires all IFSPs to contain "a statement of the specific early intervention services based on peer-reviewed research..." These two terms are not synonymous. Clarity in resolving this inherent conflict would be helpful.

303.119(b). NASDSE supports the proposed language and is opposed to any suggestions that this language be expanded to include any other requirements.

303.124(b). NASDSE is opposed to the inclusion of the wording, "including a description of the State's sampling methods, if sampling is used..." There is no reference to sampling in the statute. Rather, the description of sampling methodology is required by the Annual Performance Report (APR), which should be sufficient. Given all of the changes made to the APR indicators since their inauguration, we do not feel that it is appropriate to include language specific to reporting on the indicators in the regulations.

303.126(b). NASDSE believes that the language as drafted is redundant. The parent is considered to be part of the IFSP team and therefore, it should not be necessary to state “as determined by the parent *and* (emphasis added) the IFSP team...” We believe that it is more accurate to state “as determined by the IFSP team, **which includes the parent(s)...**”

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

303.209(a)(3)(i)(B). NASDSE does not support the proposed language in this section that would require an interagency agreement where the lead agency is the state education agency (SEA). We believe that it is unnecessary to require an SEA to have an agreement with itself and that it would impose an unnecessary paperwork burden.

303.211(e). NASDSE appreciates that this section provides a good description of this new policy option.

NASDSE does not support the deletion of current 303.4. This provision allows states to follow Part B and not Part C regulations for children who transition to preschool special education before their third birthday. This regulation is consistent with IDEA 619(a)(2) and (h), long-standing provisions in the law. This provision is a necessary and 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.

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

303.301(c). We recommend that the State Children’s Health Insurance Program (SCHIP), Title XXI of the Social Security Act and the Early Hearing Detection and Intervention program be added to the list of programs with which Part C lead agencies should coordinate child find activities. Because these programs see very young children, they are both in a good position to identify children and families who would benefit from Part C services. Because of their importance in providing health care to very young children, it would be helpful to mention them in the list of agencies with which lead agencies should coordinate.

303.302. NASDSE strongly supports the proposed change in timelines that eliminates the two-day requirement for referrals to child find. The proposed changes acknowledge that Part C Lead Agencies have no control over the referring entity.

303.302(b)(1). NASDSE recommends that language contained in the Preamble pertaining to Section 303.302(b)(1) be added to the regulation. This language clarifies that required referral provisions under CAPTA are for the child who is “the subject of a proceeding resulting in substantiation” and that the provisions do not include any siblings of the child unless they also have been the subject of a substantiation proceeding.

303.303(4). NASDSE has concerns about the proposed language in this subsection that that if the “parent of the child requests an evaluation, then child must be evaluated under §303.320.” Under Part B of the law, if the parent disagrees with a decision regarding a referral for evaluation, the parent is entitled to appeal that decision. We believe that the language in Part C should be consistent with Part B in this instance. If a child is screened under this section and under paragraph (3) of this section, “the lead agency

believes that the child is not suspected of having a disability, the lead agency must ensure that notice is provided to the parent under §303.421.” We support this notice language. However, we do not believe that that the lead agency has an obligation to evaluate each and every child brought to its attention. We further believe that the due process procedure to designed to address these differences of opinion and that some deference should be given to the opinion of the experts who conduct the screenings.

Furthermore, the proposed language (requiring that the child must be evaluated if this parent requests) is inconsistent with paragraph (3) which stipulates that “notice must be given.” What is the purpose of the notice under these circumstances? Under paragraph (3), the parent is to be given notice that that the child is not suspected of having a disability and under proposed paragraph (4), the lead agency is still required to evaluate the child. As written, these two paragraphs are inconsistent.

Finally, we believe that the proposed language is not required by the statute. We strongly urge that paragraph (4) be deleted.

303.320(e)(1). NASDSE strongly supports the proposed change in this provision, which starts the 45-day timeline for evaluation from the time that parent permission to evaluate is obtained.

303.344(d)(ii)(B)(2). NASDSE is concerned about the reference to making decisions about the determination of the appropriate setting for provision of services being dependent on §303.25, which relates to the provision of services in the child’s native language. NASDSE has previously in this document voiced its concerns about §303.25. In light of our concern about the previous section, we do not feel that the reference is appropriate here and urge that it be removed.

### **Subpart E – Procedural Safeguards**

303.414(d). NASDSE is concerned about including language in the regulations regarding disclosure of confidential information to a Protection and Advocacy organization. NASDSE believes that this language is included because of the outcome in a legal proceeding in the State of Connecticut. However, we are concerned that a difference of opinion may still exist in the circuit courts. If this is the case, then it would be inappropriate for the regulations to adhere to one court decision when conflicting decisions may apply in other parts of the country. Furthermore, it is unclear why this would be a requirement under Part C when it is not a requirement under Part B.

303.420(a)(1)(i). NASDSE is concerned about the implication of this language that screening may be used to determine “a child’s eligibility” for services under Part C. We recommend that this paragraph be deleted as a child who is screened for a disability should have a complete evaluation before an IFSP is developed and services are provided.

303.420(a)(4). NASDSE is concerned about the proposed requirement to require parent consent to access public insurance. While we strongly believe that parent consent should be obtained before accessing private insurance, accessing public insurance is a separate issue that should be treated differently. We recognize that this proposed language is consistent with the final Part B regulations. However, the parent consent requirement in Part B has created considerable confusion and has placed an undue

burden on local education agencies who are attempting to ensure funding for needed services for students. Federal funding for the Part C program has stagnated over the past few years, while there is significant pressure on lead agencies to increase their child find activities to appropriately identify infants and toddlers who need services. Furthermore, the new screening requirements required by CAPTA have also increased the need to provide screening and services. Medicaid funds are “a must” to ensure that all children and their families who need services are located, screened, evaluated where appropriate, and have access to appropriate services. Furthermore, Part C is an interagency system that must utilize all available resources. 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.

NASDSE therefore urges that the in paragraph (4) of this section, the words “**Public or**” be deleted from the final regulation.

303.434(c). NASDSE supports the proposed language that limits the filing of a state complaint to events that occurred no more than one year previously. This is consistent with the Part B regulations.

We recommend that language consistent with §300.515(c) of the Part B regulations be added to this Subpart 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 either or both parties. Having the hearing officer grant the extension is a protection against any potential abuse of this provision.

Sections 303.440-303.449. We suggest that it would helpful to clarify that these sections only apply to those states that choose to adopt the Part B due process procedures under §615 of the Act. We suggest that beneath the header, “States That Choose To Adopt the Part B Due Process Procedures Under Section 615 of the Act” that the following language be added: **Sections 303.440 through 303.449 only apply to States that choose to adopt the Part B due process procedures under Section 615 of the Act.**

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

303.520(a)(i). NASDSE does not support the proposed language in this section that would require parent consent before disclosing personally identifiable information in order to access Medicaid. See our comments under 303.420 above.

#### **Subpart H – Federal Administration and Allocation of Funds Monitoring, Technical Assistance, and Enforcement**

303.734(a). NASDSE supports the clarification in this section that 15 percent of the excess of funds over \$460 million appropriated for Part C would be available for the new 3-Kindergarten option.

We thank you for the opportunity to provide comments on these proposed regulations. NASDSE and its members look forward to working with OSEP and other stakeholders on the implementation of the final regulations. Please feel free to contact me should you have any questions regarding NASDSE’s comments.

Sincerely,

Nancy D. Reder, Esq.  
Deputy Executive Director