5-30-2007

Minnesota Department of Education

MEMORANDUM

To: Librarian, Legislative Reference Library

From: Kathryn Olson, Rulemaking Coordinator

RE: SONAR in Support of Proposed Rules

Date: April 27, 2007

Pursuant to statutory requirement outlined in Minn. Stat. § 14.131, enclosed please find the agency's SONAR and attached referenced exhibits in support of proposed rule amendments.

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Minnesota Department of Education

STATEMENT OF NEED AND REASONABLENESS

Proposed Amendment to Rules Governing Infant and Toddler Intervention Services and Proposed Special Education Eligibility Criteria for Children Ages Three through Six, Minnesota Rules, 3525.1350 and 3525.1351.

INTRODUCTION

Minnesota provides special education services down to birth for eligible children. The State first formalized its emphasis on special education for the very youngest children – those ages birth through age two – in 1984, when the Departments of Health, Education, and Human Services signed an interagency agreement to promote the development of coordinated interagency service systems for these children. Then in 1987, in order to implement services for children with disabilities ages birth through age two, Minnesota began accepting federal funds under what was then Part H of the Individuals with Disabilities Education Act. Part H was subsequently renamed as Part C and has now been amended by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA).[1] When Minnesota accepted federal funds, it integrated the federal Part H system with the special education system already in place within the State. In 1988, special education and related services were made available to all eligible children in Minnesota, beginning at birth, and finally, in 1994, Minnesota fully implemented the federal system under Part H. Pursuant to its statutory and rule structure, Minnesota offered these Part H-related services to children who (A) who met the criteria of a disability category under Part B of IDEA, which governs services for children ages three to 21; (B) had a condition known to hinder normal development and demonstrated a need for services; and (C) exhibited an overall delay in development. *See* Minn. R. 3525.1350, subp. 2.

This system operated as a seamless system of services from its full adoption in 1994, and yearly reports were submitted to the federal Office of Special Education Services (OSEP) at the U.S. Department of Education. In 2004, however, OSEP informed Minnesota that in order to remain eligible for Part C-related funds, Minnesota must change its eligibility criteria for children ages birth through age two – those children provided for under Part C of IDEA – to align with federal law. Part C of IDEA provides that infants and toddlers are eligible to receive services if they show a developmental delay in at least one area of development, or if they have a medical syndrome or condition that has a high probability of resulting in developmental delay regardless of whether they

[1] The Individuals with Disabilities Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), contains federal mandates, requirements, and funding provisions for special education services. Federal requirements for children ages birth through age two are contained in Part C of IDEA, while requirements for children ages three through 21 are contained in Part B of IDEA. *Minnesota Rule* 3525.1350, which is proposed to be amended in these rulemaking proceedings, establishes state provisions that address eligibility criteria for children ages birth through age six. For that reason, both Parts B and C of IDEA are relevant to the discussion contained in this SONAR.

demonstrated a need for services. Those criteria are less stringent than Minnesota's existing criteria for infants and toddlers.

OSEP reached its conclusion that Minnesota's eligibility criteria are out of compliance after a 2004 OSEP site visit to Minnesota and through discussions between the Minnesota Department of Education and OSEP that have continued since that time. OSEP has informed the Department that the State of Minnesota must bring its Part C eligibility requirements into compliance by June 30, 2007 or risk the loss of its Part C federal funds. In a memorandum to OSEP, Minnesota assured OSEP that it would revise its rules in accordance with OSEP's interpretation of federal requirements. *See* Memorandum from Alice Seagren, Commissioner, Minnesota Department of Education, to Ruth Ryder, Director, OSEP (May 30, 2006).

In order to comply with federal requirements, the Department proposes to revise its existing infant and toddler intervention services rule, Minn. R. 3525.1350, so that services are provided to children ages birth through age two when the child (1) meets the criteria of one of the disability categories under Part B;[2] (2) demonstrates a developmental delay in one or more areas; or (3) has a medically diagnosed syndrome or condition that has a high probability of resulting in a developmental delay.

Under the Department's proposed rule amendment, a larger group of children will be eligible to participate in Minnesota's existing early childhood special education system. These children will receive all of the services that they need, as currently provided for in Minnesota statutes. The expanded eligibility requirements in the Department's proposed rule amendment will bring Minnesota into compliance with federal laws and regulations, and preserve Minnesota's Part C-related federal funding.

In addition to relaxed eligibility criteria for children birth through age two, the proposed rule contains a new Subpart 4, outlining the necessary requirements of an evaluation to determine an infant or toddler's eligibility for intervention services. Some of these evaluation requirements exist in the current rule, but they are buried amongst the eligibility criteria. Others are proposed to be added in order to be more compliant with federal IDEA Part C provisions. The Department also proposes to add a new Subpart 5 to the rule that addresses how to transition a child out of infant and toddler intervention services provided under Part C of IDEA as they approach age two. Including these evaluation and transition requirements in the proposed rule will highlight their importance to providers and evaluators, and will help local entities to be more compliant with state and federal law.

Finally, as a result of addressing these critical infant and toddler eligibility changes, and expanding the scope of Minn. R. 3525.1350 to also address Part C evaluation and transition requirements, the Department proposes to renumber the provisions contained in subpart 3 of the current rule, which establish eligibility criteria for children ages three through six, and move them to a new rule, Minn. R. 3525.1351. It is appropriate to move these eligibility criteria for children ages three through six

[2] This requirement is unchanged from the existing rule. *See* Minn. R. 3525.1350, subp. 2(A).

into a new separate rule, because the content for Rule 3525.1350 has expanded beyond mere criteria to also contain other provisions of the Part C program. Children ages three through age six receive Part B services, not Part C services, so it would be confusing to keep eligibility criteria for these children in a rule that otherwise only applies to infants and toddlers receiving Part C services.

During the process of amending this rule, the Minnesota Department of Education convened an advisory committee which met over a period of several months and advised Department staff about the issues associated with amending this rule. In March 2007, the Department held four informal public meetings around the state, to present a draft of the proposed rules to parents, educators, and other practitioners. All four meetings were well-attended. The Department also published its Request for Comments in the State Register, and received 14 comments from the public. Generally, the comments are supportive of the rule changes. Some comments requested specific changes to the rule language, and the Department has responded to as many of those requests as possible in preparing its final rule language. A few comments expressed concern about costs and resource availability. The Minnesota Legislature has responded to some of those cost concerns by allocating, in its 2006 session, funding for the provision of services to additional children who will be eligible under these proposed rule changes.

ALTERNATIVE FORMAT

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Kathryn Olson at Minnesota Department of Education, 1500 Highway 36 West, Roseville, Minnesota 55113; phone (651) 582-8669; or fax (651) 582-8248. TTY users may call the Department of Education at (651) 582-8201.

STATUTORY AUTHORITY

The Department's statutory authority to adopt the rules is set forth in Minnesota Statutes section 125A.07(a), which provides:

> . . . The commissioner, in consultation with the Departments of Health and Human Services, must adopt permanent rules for instruction and services for children under age five and their families. These rules are binding on state and local education, health, and human services agencies. The commissioner must adopt rules to determine eligibility for special education services.

Under this statute, the Department has the necessary statutory authority to adopt the proposed rules. This rulemaking is an amendment of rules and, in addition, all sources of statutory authority were adopted and effective prior to January 1, 1996, thus Minnesota Statutes, section 14.125, does not apply. *See* Minnesota Laws 1995, chapter 233, article 2, section 58.

REGULATORY ANALYSIS

Minnesota Statutes, section 14.131, sets out seven factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (7) below quote these factors and then give the agency's response.

"(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule"

- The classes of persons affected by this rule include the children who will be newly eligible to receive services and their parents; school districts; and county public health and social services agencies. In addition, the Minnesota Departments of Education, Health, and Human Services will be affected to the extent that they provide field training, technical assistance, and enforcement oversight to local providers.

- Those that will bear the costs of the proposed rule include the state Departments of Education, Health, and Human Services as well as school districts and local county public health and social services agencies. The state Departments will bear the cost of facilitating implementation of the rule, including training, assistance, and oversight. School districts and local county agencies will bear the costs of implementing the rule because they are required to provide services to children in the infant and toddler intervention system, even if it is not totally covered by federal funds or state general education or special education funds.

- Those that will benefit from the proposed rule include primarily the children and parents of children who will now be eligible for infant and toddler intervention services, who are not eligible under the existing rule. For example, an infant or toddler with a delay in one area of development, such as cognitive development or adaptive development, would now be eligible, whereas under Minnesota's current rule, only a child exhibiting an overall or composite delay across the five developmental domains qualifies for services. A child who is shown to have a delay in communication development of -1.50 standard deviations below the mean would be eligible for services even though his or her scores in the other developmental domains (physical, cognitive, social/emotional and adaptive) were within normal limits.

  School districts also will benefit from this rule change, in two ways. Districts are responsible for making adequate yearly progress under the federal No Child Left Behind legislation. These expanded criteria will help districts identify and intervene with an expanded group of infants and toddlers, enabling districts to make greater improvements on the future academic outcomes of those children. Some children who remain in special education services program after age three under Minnesota's existing service system will now be appropriately exited at age three, typically to community-based services. This will

reduce the cost burden, and improve provision of regular and special education services to all children.

Finally, Minnesota society as a whole will benefit from the reduced costs associated with providing special education and related services to these infants and toddlers when they are of school age. A primary purpose of early intervention is to improve academic outcomes for children. A side benefit is that early intervention generally is less costly to provide than are services to older children, and will simultaneously reduce the need for services when the child is older.

"(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues"

- The probable costs to the Minnesota Department of Education are staffing costs associated with the need to have agency staff offer support services to local providers such as ongoing training and technical assistance, guidance, oversight, and enforcement. It is anticipated that current staff time and resources will be reallocated to accommodate these needs.

- The probable costs to the Minnesota Departments of Health and Human Services will be minimal. These agencies will, along with the Department of Education, provide support services such as training and guidance, but these services likely will not result in the need for additional staff or agency resources.

- This rule is not anticipated to have any effect on state revenues.

"(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule"

- There are no less costly methods for achieving the purpose of the proposed rule. Initially, the Department considered a rule that relied on an approach that was described as a "two-door model" as an alternative for achieving the purpose of this rule, as described in detail in analysis point (4), found on page six of this SONAR.

  The two-door model would have required significant new infrastructure within the state agencies as well as within local agencies and between agencies. It would have required new systems for tracking, reimbursement, and enforcement. Those infrastructure and systemic changes certainly would not cost less than, and likely would cost more than, the costs associated with the Department's proposal to expand eligibility for early childhood special education services among children ages birth through age two, and would have placed an additional administrative burden on local agencies.

  It is estimated that only a small number of additional children will be eligible under the proposed eligibility expansion, and those children are not anticipated to need significant levels of services. Current estimates anticipate that the number of additional infants and

toddlers who will receive intervention services will be approximately 312 in fiscal year 2007; 776 in fiscal year 2008; 1255 in fiscal year 2009; 1635 in fiscal year 2010; and 2110 in fiscal year 2111. These estimates are based upon the rates of children served in other states with similar eligibility criteria to those proposed by this rule.

- There are no less intrusive methods for achieving the purpose of this proposed rule. As discussed above, the only other available alternative would require significant additional infrastructure change at the state, local, and interagency levels. The proposed rule does not require infrastructure change, because it instead adds a small number of newly eligible children to the existing system. This approach is consistent with state statute; with Minnesota's required State Performance Plan that was submitted to the federal Office for Special Education Programs; with the Part C State Plan application for federal funds; and with federal regulations and law.

"(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule"

- Initially, the Department of Education considered a revision to the rule that would have kept existing special education services intact. Under this alternative rule proposal, children who are eligible under the current rule would continue to be evaluated and receive early childhood special education, which includes a free appropriate public education (FAPE). Children who are not eligible under Minnesota's current eligibility rules, because they have a delay in only one area of development or a medically diagnosed syndrome or condition that is known to hinder normal development *without* a demonstrated delay in development, would be eligible for early childhood intervention, but not for FAPE. This could informally be referred to as the "two-door model." Under this model, a new system of service delivery, payments, reporting, and enforcement would need to be developed at both the state and local levels in order to support that new system and to comply with the federal requirements under IDEA.

  The two-door model was rejected for a number of reasons. Due to the infrastructure and systemic changes required to implement the second parallel services program, described above at page five, this approach did not present a significant cost savings as compared to the proposed rule amendments.

  Under the proposed rule, more children will have access to intervention services at an early age, which will improve the ability of those children to benefit from primary and secondary school education, and will reduce the need for school districts to provide more costly special education services when those children are older. *See* 20 U.S.C. § 1431(a) (2005). In addition, the Department of Education's proposed rule will better maintain the high quality of Minnesota's special education system, and its goal of providing the best and most seamless special education programs and services to those children and students who need them most.

Finally, the two-door model would have required statutory changes. State statutes require that all children with a disability, as defined by the Commissioner, are eligible for special education services. *See* Minn. Stat. §§ 125A.02, subd. 1, and 125A.27, subd. 8. Thus, under the existing statutory structure, those infants and toddlers who will qualify under the expanded eligibility criteria are children with disabilities. The Department determined that support for a change in the definition of who is a child with a disability may not exist among legislators, local providers, parents, advocates, and the general public. For that reason, along with the significant costs and infrastructure changes associated with the two-door model, it was determined not to be a viable option.

"(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals"

- The probable cost of complying with the proposed rule is anticipated to be approximately $1,940,000 in fiscal year 2008; $3,137,500 in fiscal year 2009; $4,087,500 in fiscal year 2010; and $5,275,000 in fiscal year 2011. The current budget forecast includes funding for the projected cost increase, and it is anticipated that this funding will be provided by the Minnesota Legislature in the 2007 session.

- It is difficult to determine at this time where within the State the newly eligible children reside, so estimating the costs borne by individual school districts and county agencies is not feasible. However, the Department has estimated that the average yearly cost per newly eligible child is $2,500. Because the funding monies are directed towards the individual children, money that supports services for each individual child will follow the child to the local school district. In turn, districts have the option of contracting with the county to provide necessary services.

"(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals"

- If these proposed rule amendments are not adopted, the consequence will be loss of federal Part C funding. This will cost the State of Minnesota approximately seven million dollars in funding[3] for services and infrastructure, including child find services to help identify children who may need or qualify for infant and toddler intervention services; coordination services provided for families; interagency infrastructure; and respite services for families of children who receive infant and toddler intervention services. In addition, families of children who would be newly eligible under these proposed rules face lost opportunity costs if they do not receive the infant and toddler early intervention services to which they

[3] This information comes from the Grants for Infants and Families Program (Part C) - FY 2007 Estimated Allocation Table, sent to States via email on March, 11, 2007.

are entitled under federal law. Continuing higher costs to schools, local social service agencies, and families for services to address needs or delays that could have been prevented by infant and toddler intervention services are an additional consequence of the lost opportunity for infant and toddler intervention services.

- The costs associated with loss of funding will be borne by local school districts and social service agencies. Indirectly, families of children who are currently eligible for services may bear some consequence as local agencies shift funding and infrastructure. Families of children who would be newly eligible for services under the proposed rule amendments would bear lost opportunity costs if they do not receive the infant and toddler early intervention services to which they are entitled under federal law. They may also need to locate, secure, and pay for alternative ways of providing these intervention services to their children.

"(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference"

- The proposed rule amendment will bring Minnesota's rules into compliance with existing federal regulations, as they are interpreted by the OSEP.

PERFORMANCE-BASED RULES

Minnesota Statutes, sections 14.002 and 14.131, require that the SONAR describe how the agency, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the agency's regulator objectives and maximum flexibility for the regulated party and the agency in meeting those goals.

The proposed amendment to the rule establishing eligibility for infant and toddler intervention services is performance-based because it sets forth only a limited number of requirements, all of which are mandated by the federal IDEA 2004 provisions. However, even those requirements are flexible, in that providers can demonstrate their ability to comply with the requirements in various ways. The rule offers potential providers additional flexibility in how they provide services to eligible children and families through their local system of services.

ADDITIONAL NOTICE

Minnesota law (Minnesota Statutes, sections 14.131 and 14.23) requires that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed amendments to the rules. The Department submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it on April 26, 2007, by Administrative Law Judge Barbara Neilson.

In addition to mailing the proposed rules and the dual notice to all persons who have registered to be on the Department's rulemaking mailing list under Minnesota Statutes, section 14.14,

subdivision 1a, the Additional Notice Plan calls for notifying the following groups:

- Education organizations;
- Advocates/Attorneys;
- Minnesota superintendents, via the department's weekly superintendents mailing;
- Minnesota directors of special education, via the department's special education directors listserv;
- Early childhood special education coordinators;
- IEIC chairs;
- Local county public health and social service administrators;
- Governor's Interagency Coordinating Council (ICC) members;
- Advocacy organizations;
- Early childhood family education coordinators;
- Head Start representatives;
- Early Childhood Special Education Higher Education Consortium;
- Medical community, including NICU directors, children's rehabilitation hospitals, Minnesota Chapter of the Academy of Pediatrics; and
- Other interested parties.

In addition to notifying the above groups, the Department will post the proposed rules, the Notice of Hearing, and the SONAR on the Department's rulemaking website.

Finally, the Department will notify the Minnesota Legislature per Minnesota Statutes, section 14.116 and Minnesota Statutes, sections 121A.15, subdivision 12(2)(b) and 135A.14, subdivision 7(d). This will include sending the proposed rules, SONAR, and Notice of Hearing to the chairs and ranking minority members of the legislative policy and budget committees with jurisdiction over the subject matter.

CONSULT WITH FINANCE ON LOCAL GOVERNMENT IMPACT

As required by Minnesota Statutes, section 14.131, the Department has consulted with the Commissioner of Finance. We did this by sending the Commissioner of Finance copies of the documents sent to the Governor's Office for review and approval by the Governor's Office prior to the Department publishing the Notice of Intent to Adopt. We sent copies of the Governor's Office Proposed Rule and SONAR Form; approved proposed rules; and SONAR on April 20, 2007. The Department of Finance had no comments.

COST OF COMPLYING FOR SMALL BUSINESS OR CITY

As required by Minnesota Statutes, section 14.127, the Department has considered whether the cost of complying with the proposed rules in the first year after the rules take effect will exceed $25,000 for any small business or small city. The Department has determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed $25,000 for any small business or small city.

The Department has made this determination because the amended rule affects school districts and county public health and human services agencies, but does not impact small businesses or small cities. Infant and toddler intervention programs are funded with a combination of federal, state, and local monies. They are operated, according to state and federal statute, by school districts and county agencies.

LIST OF WITNESSES

If these rules go to a public hearing, the Department anticipates having the following witnesses testify in support of the need for and reasonableness of the rules:

1. Alice Seagren, Commissioner, Minnesota Department of Education, will provide opening testimony.
2. Marty Smith, Part C Coordinator, Minnesota Department of Education, will testify about Part C of IDEA and federal requirements related to infant and toddler intervention services.
2. The Commissioner of the Department of Health, or the Commissioner's designee, will testify about interagency involvement in early intervention services at both the state and local levels.
3. The Commissioner of the Department of Human Services, or the Commissioner's designee, will testify about diagnosed conditions that have a high probability of resulting in developmental delay.

RULE-BY-RULE ANALYSIS

Under federal laws, children ages birth to 21 are served under two coexisting but separate programs. The federal Part B program establishes requirements for special education services for children ages three through age 21, and the federal Part C program establishes requirements for early intervention services for children ages birth through age two. Part B's eligibility requirements are more stringent than those under the federal Part C program for infants and toddlers, where early intervention for a broader group of children is emphasized.

Originally, Minnesota designed its special education system to be a "seamless" system from birth through age 21. As envisioned under this system, once a child entered the system at any age, the child would always be eligible for the full range of special education services, for as long as the child remained eligible. Minnesota's approach potentially provides more services to the infants and toddlers it serves than are required to satisfy the federal Part C program, because Minnesota's infants and toddlers are eligible to receive the full range of services available under the federal Part B program. To support Minnesota's seamless approach to special education service, the existing Minn. R. 3525.1350 establishes infant and toddler eligibility criteria for early childhood special education services that interpret the federal Part C program requirements more stringently, because Minnesota's criteria for these youngest children was designed to be similar to the criteria for older children who are served under Part B.

This system had functioned since 1994. Recently, however, OSEP determined that the Minnesota system excludes a small number of children who would meet Part C eligibility requirements, but do not meet Part B eligibility requirements. Those excluded children have a developmental delay in at least one area of development, or have a medically diagnosed syndrome or condition that has a high probability of resulting in developmental delay, regardless of whether the child has demonstrated a need for services. Minnesota's rule structure currently provides early intervention services to children who have an *overall* developmental delay and to children with a medically diagnosed syndrome or condition that hinders normal development, *only if* those children demonstrate a need for special education services.

This proposed amendment to Minn. R. 3525.1350 expands the existing eligibility criteria. Children who meet the existing eligibility criteria because they have a disability as defined under Minnesota Part B Rules will continue to be eligible, as will children who previously met eligibility requirements because they had demonstrated an overall developmental delay or because they had a medical condition or syndrome with a high probability of resulting in developmental delay and had demonstrated a delay. In addition, the eligibility criteria are expanded to include children from birth through age two who meet federal Part C requirements because they have a developmental delay in at least one area of development, or because they have a medically diagnosed syndrome or condition that has a high probability of resulting in developmental delay, regardless of whether the child has demonstrated a need for services. Once these children meet the new eligibility criteria, they will be eligible for early childhood special education services under Minnesota's existing special education system as defined in Minnesota statutes, and will receive whatever services are needed.

In addition to expanding the eligibility to meet the requirements of OSEP, the proposed rule amendment also addresses evaluation requirements and transition from the infant and toddler Part C program, which ends at age three, either to Part B-related services if a child is eligible or to appropriate community programs for children who are not eligible to receive services under the Part B programs. Finally, developmental delay criteria for children ages three through six, which currently are addressed in Minn. R. 3525.1350, subd. 3, are moved to a new Minn. R. 3525.1351. All of these rule changes will be discussed below.

3525.1350 INFANT AND TODDLER INTERVENTION SERVICES

Subpart 1. ~~Definition.~~ Services required. ~~Early childhood special education~~ Infant and toddler intervention services under United States Code, title 20, chapter 33, sections 1431 et seq., and Code of Federal Regulations, title 34, part 303, must be available to ~~pupils~~ children from birth ~~to seven~~ through two years of age who ~~have a substantial delay or disorder in development or have an identifiable sensory, physical, mental, or social/emotional condition or impairment known to hinder normal development and need special education~~ meet the criteria described in subpart 2.

Subpart 1 establishes that services are required for infants and toddlers who meet the eligibility requirements of this rule. The core purpose of the proposed Subpart 1 remains unchanged from the existing subpart 1. However, changes have been made to Subpart 1 that will improve its clarity.

The header for Subpart 1, "Services required" replaces the existing header "Definition." This change was made because Subpart 1 does not contain a definition, but rather establishes that services must be available to children who meet the criteria contained in Minn. R. 3525.1350.

In Subpart 1 and throughout the revised rule, the term "early childhood services" has been changed to "infant and toddler intervention services" whenever it refers to services provided in conjunction with United States Code, title 20, chapter 33, sections 1431 et seq., and Code of Federal Regulations, title 34, part 303 (commonly referred to as Part C). This change was made to reduce confusion and distinguish Part C-related services and eligibility criteria from those under federal Part B provisions for children ages three to five or until kindergarten entrance. It also better emphasizes the Part C program's role as an intervention system whose purpose is to intervene early, to enhance development and minimize the potential for developmental delay among infants and toddlers, and to reduce educational costs by minimizing the need for special education services once children reach school age. *See* 20 U.S.C. § 1431(a) (2005).

The proposed language adds a reference to United States Code, title 20, chapter 33, sections 1431 et seq., and Code of Federal Regulations, title 34, part 303 (commonly referred to as Part C), in order to better establish the connection between Minnesota's rule and federal regulatory requirements.

The proposed language also removes the reference to children up to age seven, replacing that language with "birth through two years of age." Minnesota Rule 3525.1350 now only contains eligibility criteria for children from birth through two years of age. The eligibility criteria for children ages three through six – current subpart 3 – will move to a new rule 3525.1351.

Finally, the proposed language removes discussion about eligibility criteria from Subpart 1, replacing it with the phrase "who meet the criteria described in subpart 2." The eligibility criteria have changed significantly, and as a result are much more streamlined. There is no need to provide a summary of the criteria in Subpart 1, because that could result in conflict and confusion about how to interpret and apply the eligibility criteria. Under the proposed rule language, the eligibility requirements are stated only once.

> **Subp. 2. Criteria for birth through two years of age.** The IFSP team shall determine that a child from birth through the age of two years and 11 months is eligible for ~~early childhood special education~~ infant and toddler intervention services if:

The purpose of Subpart 2 remains unchanged. It establishes eligibility criteria for children from birth through two years of age. As pointed out in the discussion of Subpart 1, using the new term "infant and toddler intervention services" is proposed to reduce confusion with early childhood special education provided to preschool children, and to better capture the purpose of Part C program services The only other proposed language change in this portion of Subpart 2 is the addition of the term "IFSP" to the phrase "the IFSP team," which more accurately describes the team that must make the eligibility determination, as mandated by federal regulation.

A. the child meets the criteria of one of the disability categories in United States Code, title 20, chapter 33, sections 1400 et seq., as defined in Minnesota rule; or

Just as in the existing rule, the proposed Subpart A provides that a child who meets the criteria of a known disability category defined in Minnesota Rules, Chapter 3525, is eligible for infant and toddler intervention services. The proposed amendment clarifies for providers and others that the disability categories are those contained in Minnesota rule, giving them a reference for those criteria.

B. the child meets one of the criteria for developmental delay in subitem (1) ~~and~~ or the criteria in subitems (2) ~~and (3)~~:

~~(1) the child:~~

~~(a) has a medically diagnosed syndrome or condition that is known to hinder normal development, for example, cerebral palsy, chromosome abnormalities, fetal alcohol syndrome, maternal drug use, neural tube defects, neural muscular disorders, cytomegalovirus, grades III and IV intracranial hemorrhage, and bronchopulmonary dysplasia (BPD);~~

~~(b) has a delay in overall development demonstrated by a composite score of 1.5 standard deviations or more below the mean on an evaluation using at least one technically adequate, norm-referenced instrument that has been individually administered by an appropriately trained professional; or~~

~~(c) is less than 18 months of age and has a delay in motor development demonstrated by a composite score of 2.0 standard deviations or more below the mean on an evaluation using technically adequate, norm-referenced instruments. These instruments must be individually administered by an appropriately trained professional;~~

~~(2) the child's need for instruction and services is supported by at least one documented, systematic observation in the child's daily routine setting by an appropriate professional. If observation in the daily routine setting is not possible, the alternative setting must be justified;~~

~~(3) corroboration of the developmental evaluation or the medical diagnosis with a developmental history and at least one other evaluation procedure that is conducted on a different day than the medical or norm-referenced evaluation. Other procedures may include parent report, language sample, criterion-referenced instruments, or developmental checklists.~~

The existing criteria for developmental delay in Subpart B are stricken. These current criteria require that in order to be eligible, infants and toddlers must demonstrate that they (1) have a medical condition or syndrome known to hinder normal development, *and* demonstrate a need for services; (2) have an *overall* developmental delay, *and* demonstrate a need for services; or (3) for infants 18 months of age and younger, have a physical delay, *and* demonstrate a need for services.

These eligibility provisions have been determined by OSEP to be in violation of federal Part C eligibility requirements. First, in order to be eligible for federal Part C services as provided in federal law and regulation, any infant or toddler need only show a developmental delay in any one of five developmental areas – rather than an overall developmental delay as required in Minnesota's current rule language. Second, if the infant or toddler has a diagnosed physical or

mental medical condition which has a high probability of resulting in developmental delay, the child is eligible for services under federal Part C language and does not need to demonstrate a need for those services. *See* 34 C.F.R. § 303.16(a) (2002).

Furthermore, OSEP has informed the Minnesota Department of Education that it must bring its eligibility rules into compliance with federal provisions by June 30, 2007. *See* Memorandum from Rhonda Spence, OSEP-MSIP State Part C Contact for Minnesota, to Barbara O'Sullivan (May 25, 2006); Letter from Troy R. Justesen, Acting Director, Office of Special Education Programs, United States Department of Education, to Alice Seagren, Commissioner, Minnesota Department of Education (March 20, 2006).

Therefore, the language in Subparts 2(B)(1)(a)-(c) and Subpart 2(B)(2) must be replaced because it is in conflict with federal requirements. In addition, the language in subpart 2B3) that requires corroboration of the evaluation or diagnosis is stricken in order to bring Minnesota rule into alignment with federal Part C laws and regulations, which do not require corroboration.

Existing Subpart 2(B)(1)-(2) is replaced by the following proposed new language:

> 1. the child has a diagnosed physical or mental condition or disorder that has a high probability of resulting in developmental delay, regardless of whether the child has a demonstrated need or delay; or
>
> 2. the child is experiencing a developmental delay that is demonstrated by a score of 1.5 standard deviations or more below the mean, as measured by the appropriate diagnostic measures and procedures, in one or more of the following areas:
>
> (1) Cognitive development;
> (2) Physical development, including vision and hearing;
> (3) Communication development;
> (4) Social or emotional development; and
> (5) Adaptive development.

Pursuant to this proposed language, children are eligible due to developmental delay in one of two ways. Under proposed Subpart 2(B)(1), they are eligible if they have a diagnosed physical or mental condition or disorder that has a high probability of resulting in delay. The proposed amendment changes the existing rule's language from "known to hinder normal development" to "has a high probability of resulting in developmental delay." This language is more closely aligned with the language used in federal regulations and IDEA on this subject. *See* 20 U.S.C. § 1432(5)(A)(ii) (2005) and 34 C.F.R. § 303.16(a)(2) (2002). During the comment period, when an informal initial draft of the proposed rules was made available to the public, the Department received comments and questions regarding what conditions or disorders would qualify under the new rule language. The Department believes that training during the initial period after the rule goes into effect will help local providers feel more comfortable with the new rule language, and will help them understand that these eligibility criteria remains substantially similar to the current eligibility criteria.

In response to feedback from its interagency partners, the Departments of Health and Human

Services, the Department added the term "or disorder" to the proposed rule provision that a child must have a "diagnosed physical or mental condition *or disorder*" in order to be eligible under this provision. Both interagency partners made it clear that local referral services use this language, so its inclusion here is important in order to be consistent with appropriate practice in the field. The Department agrees, and so has included this term in the proposed rule language.

The proposed language includes the phrase "regardless of whether the child has a demonstrated need or delay" in order to emphasize for local intervention services providers that a child with a qualifying condition or disorder need not *have* an existing developmental delay in order to be eligible for services. A child need only have a condition or disorder that is *likely to result in* developmental delay and, if that is the case, the child is eligible under Part C provisions. This language was added in response to comments received in informal meetings about the initial draft rules. The comments sought greater clarity that, unlike the existing eligibility rules, a demonstrated need is no longer necessary in order for a child to be eligible under these proposed rules. The Department agrees that a strong emphasis on that subject is important in order to help local providers better apply the new eligibility criteria contained in this rule, and so has included this phrase in its proposed rule.

The proposed language also removes from the current rule the examples of conditions that are known to hinder normal development. The sample list of physical or mental conditions was included to demonstrate for local providers the types of syndromes and conditions that would satisfy this requirement. Inclusion of this brief set of examples in the existing rule has caused confusion and misinterpretation that the examples were an exhaustive list of qualifying conditions and syndromes. Therefore, this list has been removed from the rule.

The Department does not believe that its proposed rule is confusing or overly general. Within the medical, developmental delay research, and intervention services communities, there is agreement about the disorders and conditions that have a high probability of resulting in delay. These conditions and disorders are widely known. However, because the existing rule has been viewed as exhaustive by some local agencies, the Department wishes to underscore to the local provider and referral communities the breadth of conditions and disorders intended to be included in this rule. For that reason only, the Minnesota Department of Education is working with the Departments of Health and Human Services, along with representatives of the Disability Subcommittee of the Minnesota Chapter of the American Academy of Pediatrics and the Governor's Interagency Coordinating Committee (ICC), to develop an online resource that will list conditions and disorders having a high probability of causing developmental delay, and the developmental sequellae of each. The list of conditions will be compiled based on agency and medical recommendations, and will be founded in significant medical and educational/ developmental research. It will be illustrative, rather than exhaustive, and the online resource will also include a contact person whom local providers can contact to discuss the eligibility of a child with a condition or disorder not included on the list. Local providers will receive training about how to access and use this online resource. The online resource will be available as soon as the new rule goes into effect.

Under proposed Subpart 2(B)(2), a new provision, infants and toddlers are eligible if they have a delay in development in at least one of five areas: cognitive development; physical development, including vision and hearing; communication development; social or emotional development; or adaptive development. This is a significant change from the existing rule because the existing rule required an overall developmental delay across all developmental domains. This change is necessary in order to bring Minnesota's rule into compliance with federal laws and regulations, which provide that children are eligible if they have a developmental delay in one or more of the listed areas. *See* 20 U.S.C. § 1432(5)(A) (2005) and 34 C.F.R. § 303.16(a) (2002). The change has been explicitly required by the federal Office of Special Education Programs in order for Minnesota to continue to receive Part C funding. *See* Letter to Commissioner Seagren, from Office of Special Education Programs (November 14, 2005).

During the comment period and at informal meetings on the proposed rules, the Department received several comments specifically supporting this developmental delay eligibility criteria language. Commenters expressed that they see children who would qualify under these expanded eligibility criteria but do not qualify under the existing eligibility criteria when they are older. The children demonstrate significant delays as they age, according to these comments. The expanded eligibility criteria will help local providers offer services to such children at a younger age, in order to help prevent more significant delay when the children reach school age.

The Department also received one comment that children with a delay in a single area are merely "at risk," and therefore not eligible for services. However, this comment is in direct conflict with Part C of IDEA, which spells out clearly that these children are eligible for services and are not considered merely "at risk." *See* 20 U.S.C. § 1432(5)(A) (2005) and 34 C.F.R. § 303.16(a) (2002). Minnesota cannot choose to determine that these children are only at risk, and therefore not eligible for services under Part C. However, Minnesota does have the flexibility, within the federal requirements, to determine the degree of developmental delay that makes a child eligible for Part C services. Minnesota could choose to require a demonstrated delay of 1.5 or 2.0 standard deviations below the mean, or a combination of the two.[4] Minnesota has long employed a requirement that the child must show a developmental delay of 1.5 standard deviations below the mean in order to be eligible for services under Part C. The Department believes that this standard, which is allowable under federal requirements, remains a reasonable one. Furthermore, it has received no comments, either written or during informal rule presentations, to indicate that practitioners in the field wish to see this standard changed. Therefore, the Department proposes to retain its degree of delay criteria of 1.5 standard deviations below the mean, as provided for in the existing rule.

Subpart 2 does not contain any language referencing an evaluation, as did the rule it replaces. Rather, Subpart 2(B)(2) requires that the level of developmental delay be "measured by appropriate diagnostic measures and procedures." This language parallels language found in federal requirements. *See* 34 C.F.R. § 303.322(c)(1) (2002). In addition, a new Subpart 4 has been

[4] For example, Minnesota could decide to employ eligibility criteria under which a child would need to demonstrate a delay of 2.0 standard deviations below the mean in one developmental area, or 1.5 standard deviations below the mean in two developmental areas.

created to specifically address the subject of evaluation. By placing evaluations in their own Subpart, important content about what types of evaluations are required and how they must be conducted does not get overwhelmed in language about eligibility criteria.

> **Subp. 3. Criteria for three through six years of age.** The team shall determine that a child from the age of three years through the age of six years ~~and 11 months~~ is eligible for ~~early childhood~~ special education when:

Please note that the Department proposes to move this Subpart to a newly created rule, Minn. R. 3525.1351. This proposal is addressed in the Renumbering Instruction section at page 25 of this SONAR. The Renumbering Instruction would create a new rule, Minn. R. 3525.1351, that specifically addresses criteria for three through six years of age. For discussion about the reasons for proposing this new rule, please refer to the Renumbering Instruction at page 25 of this SONAR.

The introductory language to this subpart remains largely unchanged. The Department proposes to remove the phrase "and 11 months" because it is confusing and unnecessary. Practitioners understand that the usual meaning of the phrase "through the age of six years" means through and including the age of six. The Department also proposes to remove the phrase "early childhood" because these children will receive special education services under the Part B program. Minnesota statutes and rules related to Part B programs do not contain any separate definition for "early childhood special education."

During the comment period for this proposed rule, a commenter suggested that the Department align its Part C developmental delay eligibility criteria language (discussed above at Subpart 2) and its Part B developmental delay eligibility criteria. The Department agreed that it would be less confusing to providers if these criteria were aligned wherever federal requirements allow for alignment. Thus, throughout the proposed Subpart 3 language, wherever the Department could align this language with that found in Subpart 2, it has done so. However, complete alignment was not possible because federal requirements for developmental delay criteria in the two age groups, birth through age two and ages three through six, do differ in some ways.

> A. the child meets the criteria of one of the categorical disabilities; or

Subitem A also remains unchanged from the existing rule language. The categorical disabilities are outlined elsewhere in Chapter 3525, but it is important to reference them here in order to ensure that all practitioners are aware that children ages three through six can qualify for special education services either because of developmental delay or because they meet the criteria of one of the categorical disabilities.

> B. the child meets one of the criteria for developmental delay in subitem (1) and the criteria in ~~subitems~~ subitem (2) ~~and (3)~~. Local school districts have the option of implementing these criteria for developmental delay. If a district chooses to implement these criteria, it may not modify them.

The language in Subitem B remains unchanged from the existing rule language, except to remove a reference to Subitem (3). Subitems (2) and (3) have been reorganized and consolidated in order to improve their clarity and make them easier to follow.

> (1) The child:
>
> (a) has a ~~medically~~ diagnosed ~~syndrome or condition that is known to hinder normal development including cerebral palsy, chromosome abnormalities, fetal alcohol syndrome, maternal drug use, neural tube defects, neural muscular disorders, cytomegalovirus, grades III and IV intracranial hemorrhage, and bronchopulmonary dysplasia (BPD)~~ physical or mental condition or disorder that has a high probability or resulting in developmental delay; or

The proposed language change in Subitem (1)(a), replacing "medically diagnosed syndrome or condition that is known to hinder normal development" with "diagnosed physical or mental condition or disorder that has a high probability of resulting in developmental delay," will bring this rule provision into alignment with federal law, and with the proposed language in Subpart 2(B), relating to infants and toddlers.

The Department also proposes to remove the examples of conditions that are known to hinder normal development from Subitem (1)(a), just as it proposes to do in Subpart 2(B), discussed above at pages 14-15. Please also refer to that discussion for more information about the reasons for removing this language from the proposed rule.

> (b) has a delay in each of two or more of the areas of cognitive development; physical development, including vision and hearing; communication development; social or emotional development; and adaptive development, that is verified by an evaluation using one or more technically adequate, norm-referenced instruments. ~~Subtests of instruments are not acceptable.~~ The instruments must be individually administered by appropriately trained professionals and the scores must be at least 1.5 standard deviations below the mean in each area~~;~~ .

The Department proposes to list directly in its rule the five areas of development that are referenced in federal law, as it did in Subpart 2(B)(2) related to criteria for children ages birth through age two, rather than simply refer indirectly to delay in "areas of development." Including the five areas directly in the rule will serve as an easy reference for educators and evaluators who are working with children, so that they need not refer to another rule or law in order to confirm the eligible areas of developmental delay. In addition, by listing the developmental categories here, the Department helps to ensure compliance with federal law, because there is no chance that local evaluators will not be aware of the eligible areas of development.

The proposed language includes the phrase "one or more" to further describe the term "technically adequate, norm-referenced instruments." This inclusion is intended to promote appropriate evaluation practices that align with the entirety of Minnesota Rules, Chapter 3525, and with IDEA. Current practice around the state indicates that many practitioners believe they must use multiple norm-referenced instruments in order to be in compliance with the current rule. This practice is based on past interpretation of the plural "instruments" used in the existing rule – as opposed to

"instrument" or "at least one instrument." Regulations implementing IDEA, at 34 C.F.R. § 300.304(b)(1) (2006), direct evaluators to "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child" that may assist in determining whether the child is a child with a disability. IDEA does not specify that evaluators and IEP teams must use multiple norm-referenced instruments to evaluate a child's eligibility, but rather a variety of different tools and strategies, beyond just norm-referenced instruments, that will give them a complete picture of the child's development. Therefore, the phrase "one or more" is added to the rule to clarify that evaluators must use at least one norm-referenced instrument, but are not required to use more than one such instrument if that is not otherwise called for by the circumstances of the evaluation.

The existing rule language also directs that "[s]ubtests of instruments are not acceptable." The Department proposes to remove this language from Subpart 3(B)(1)(b). This requirement was included in the rule at a time when evaluation instruments were not as reliable as they are today. Evaluation instruments have improved greatly since this rule was originally promulgated, and are considered technically adequate. Norm-referenced evaluation instruments generally are a set of tasks presented systematically to a child, following standardized procedures. The child's performance on these tasks is compared to the performance of an instrument's norming sample, thus providing a measure of the extent to which a child's performance is like that expected by children of a similar age. Children whose scores are significantly discrepant from the norms demonstrate potential giftedness or delayed development. Only tools that are deemed reliable, valid, and sensitive are published for use. Scale scores or domain scores are included in these evaluation instruments, and are specifically designed by the test developers to be used independently for educational decision making purposes. Like the overall evaluation instrument, scale and domain assessments – and therefore, the scores resulting from those assessments – have improved greatly and are now considered technically reliable. A review of information from technical manuals of recently published developmental evaluation instruments references the synthesis of developmental milestones, sound practice in normative sampling, and reliable statistical analysis for each scale or domain included in each instrument's design.

In the past, the rule provision that made subtests of instruments unacceptable has been interpreted by local evaluation teams to mean that scale or domain scores may not be used in educational decision making. Instead, these local teams use only a composite score. Federal law directs evaluators to assure that instruments "are used for the purposes for which the assessments or measures are valid and reliable." *See* 34 C.F.R. § 300.304 (c)(1)(iii) (2006). To use a composite score that combines performance across domains to address a single domain is inconsistent with this federal regulation. Instead, a technically sound domain or scale score would be the appropriate instrument to use, but interpretation of the confusing current rule language prevents many local evaluators from doing just that.

By removing this language, practitioners in the field will no longer feel compelled by the confusing rule language to avoid using scale scores or domain scores. This will improve application of the rule, because eligibility determinations will be more accurate and complete. For those reasons, the proposed language is necessary and reasonable.

(2) the child's need for special education is supported by:

(a) at least one documented, systematic observation in the child's daily routine setting by an appropriate professional~~.~~ or, if observation in the daily routine setting is not possible, the alternative setting must be justified;

~~(3) corroboration of the developmental evaluation or the medical diagnosis with~~ (b) a developmental history; and

(c) at least one other evaluation procedure in each area of identified delay that is conducted on a different day than the medical or norm-referenced evaluation~~.~~ ;

~~Other procedures~~ which may ~~be used here~~ include ~~parent report, language sample,~~ criterion-referenced instruments, language samples, or ~~developmental checklists~~ curriculum-based measures.

This language is substantially similar to the existing language found in Subpart 3(B)(2)-(3). The proposed rule has consolidated and clarified that existing language, because its organization was confusing. The existing rule language requires one observation to support the need for special education, and corroboration of the evaluation or medical diagnosis with a developmental history and at least one other evaluation procedure. However, since all of that information is used to demonstrate that the evaluation accurately reflects the child's need for special education services, the proposed rule combines all three requirements into a single step.

Furthermore, IDEA does speak to not determining a child's eligibility on the basis of a single procedure, so requiring additional procedures aligns with that concept.[5] By specifying the components of a good evaluation, Minnesota ensures that children who are determined eligible are truly children with disabilities, rather than just children who do not test well but are otherwise highly functional. For all of those reasons, the Department believes that its evaluation standards for children ages three through six are both necessary and reasonable.

Subp. 4. Evaluation. The evaluation used to determine whether a child is eligible for infant and toddler intervention services must be based on informed clinical opinion; must be multidisciplinary in nature, involving two or more disciplines or professions; and must be conducted by personnel trained to utilize appropriate methods and procedures. The evaluation must include:

A. a review of the child's current records related to health status and medical history;

B. an evaluation of the child's levels of cognitive, physical, communication, social or emotional, and adaptive developmental functioning;

C. an assessment of the unique needs of the child in terms of each of those developmental areas.; and

D. at least one documented, systematic observation in the child's daily routine setting by an appropriate professional or, if observation in the daily setting is not possible, the alternative setting must be justified.

[5] In fact, IDEA implementing regulations state that evaluation "means the *procedures* used . . . to determine a child's initial and continuing eligibility." 34. C.F.R. § 300.322(b)(1) (2002).

Subpart 4 is newly added in the proposed rule amendment. The current Minn. R. 3525.1350 references the need for an evaluation in Subpart 2, specifically Subpart 2 (B)(1)(b) and (c), in order to demonstrate delay. As a means of providing clarity, the proposed rule creates a separate Subpart in which to address the evaluation, and covers the evaluation requirements in greater depth. Placing the evaluation for eligibility in a separate Subpart emphasizes the need for a thorough evaluation of potentially eligible infants and toddlers. It highlights the key components of an evaluation, including the allowance for an informed clinical opinion, and the role of qualified personnel. The inclusion of evaluation in Minnesota's rule also better aligns the rule with federal regulations. *See* 20 U.S.C. § 1435(a)(3) (2005); 34 C.F.R. § 303.322 (2002).

The language used in Subpart 4 parallels the language used in federal regulation in order to emphasize to Minnesota school districts and local social services and public health agencies the need for a thorough evaluation that includes all of the relevant components. By using this language, and creating a separate Subpart, the Department intends to make clear for practitioners the standards for eligibility evaluations, including the need for a thorough evaluation that goes beyond the use of tests and protocols. The Department also believes that a full definition of the elements of a complete eligibility evaluation will serve to increase consistency of eligibility determinations around the state.

An evaluation based on informed clinical opinion conducted by personnel trained to utilize appropriate methods and procedures is a necessary and reasonable requirement for eligibility determinations, because standardized tests and protocols are not always applicable to or appropriate for evaluating infants and toddlers. In some cases, protocols have not been standardized on the relevant population, and in other situations, standardized tests and protocols are simply unable to accurately assess whether a young child has a particular condition or syndrome. In addition, federal regulations, as well as OSEP's interpretation of those regulations, specifically require that eligibility evaluation procedures include the use of informed clinical opinion and that they be conducted by trained personnel. *See* 34 C.F.R. § 303.322(c) (2002). Appropriate methods and procedures, such as tests and other measurements, certainly may and should be used to determine a child's eligibility for infant and toddler intervention services but, particularly in situations where tests and protocols may not be applicable, informed clinical opinion must be available as an independent basis for determining a child's eligibility. *See* Letter to Barnett, from Office of Special Education Programs (May 17, 2001).

An evaluation that includes a review of the child's current records related to health status and medical history is necessary and reasonable, because it ensures that the evaluator has all of the relevant current information about a child's health and medical situation, including any existing documentation about a diagnosed physical or mental condition that has a high probability of resulting in developmental delay. This component is specifically required by federal regulation. *See* 34 C.F.R. § 303.322(c)(3)(i) (2002).

An assessment of the child's levels of cognitive, physical, communication, social or emotional, and adaptive developmental functioning is necessary and reasonable because a child may have delays in areas not immediately suspected. Part C services must be individually designed to meet

the unique needs of the child, and if a complete evaluation is not performed, the child may not receive necessary services. Therefore, it is important to complete a thorough, comprehensive assessment prior to developing an IFSP. As with other aspects of the eligibility evaluation, this component is specifically required by federal regulation. *See* 34 C.F.R. § 303.322(c)(3)(ii) (2002).

Similarly, an assessment of the unique needs of the child in terms of each of those developmental areas is required by federal regulation. *See* 20 U.S.C. § 1436(a)(1) (2005); 34 C.F.R. § 303.322(c)(3)(iii) (2002). Including it in Minnesota rule is also necessary and reasonable, because the rule is often the primary legal resource for practitioners in the field; inclusion of this requirement in the rule will ensure that all evaluators remember to consider this critical aspect of evaluating infants and toddlers.

The current rule already includes language that requires the evaluation to be supported by at least one documented, systematic observation in the child's daily routine setting by an appropriate professional. Originally, the Department had proposed to remove this language, which exists in the current rule, from the proposed rule language. However, during informal presentations of these rules to practitioners, the Department received feedback that this requirement is important, particularly for young children, because an infant's or toddler's developmental status is best observed in the daily routine setting. Furthermore, there is an emphasis in the federal Part C program on addressing "[t]he resources, priorities, and concerns of the family and the supports and services necessary to enhance the family's capacity to meet the developmental needs of their infant or toddler with a disability." 20 U.S.C. § 1436(a)(2) (2005); s*ee also* 34 C.F.R. § 303.322(b)(2)(ii) (2002). Given that mandate, the Department agrees that it is important to require at least one observation of the child in his or her daily routine setting. Therefore, the Department proposes to leave it in the amended rule.

The Department also received a few comments suggesting that "parent report" be included here as another procedure that may be used to support the evaluation. Parent report is included in the existing rule, but the Department does not believe it is necessary or appropriate to include it in the evaluation language, because parent participation and reporting is an integral part of the collaborative process under Part C provisions. For example, parent reporting is one of the initial referral sources that identify a child as potentially being eligible for Part C services. 34 C.F.R. § 303.321(d)(3)(iii) (2002). Parents also are members of the IFSP team, and are participants at all initial and periodic team meetings. *See* 20 U.S.C. §§ 1436(a)(3) and (b) (2005); 34 C.F.R. § 303.343 (2002). By contrast, the federal law that addresses evaluations and assessments does not reference "parent report" as one of the elements that must be included in an evaluation. *See* 34 C.F.R. § 303.322 (2002). For those reasons, the Department believes it is reasonable not to include "parent report" as one of the required elements of an evaluation to determine eligibility.

> **Subp. 5. Transition.** The infant and toddler intervention service coordinator must facilitate transition from infant and toddler intervention services prior to the child's third birthday. The transition plan must include steps to be taken to determine and document eligibility for early childhood special education, and steps to support the transition of the child to early childhood special education under United States Code, title 20, chapter 33, sections 1411 et seq., and Code of Federal Regulations, title 34, part 300, or to other community-based services that may be available.

A. For a child who may be eligible for early childhood special education services under United States Code, title 20, chapter 33, sections 1411 et seq., and Code of Federal Regulations, title 34, part 300, the service coordinator must, with the approval of the family of the child, convene a conference between the family, the local educational agency and community-based service providers not less than 90 days (and at the discretion of all such parties, not more than 9 months) before the child is eligible for the preschool services to discuss services that the child may receive under United States Code, title 20, chapter 33, sections 1411 et seq., and Code of Federal Regulations, title 34, part 300.

B. For a child who may not be eligible for early childhood special education services under United States Code, title 20, chapter 33, sections 1411 et seq., and Code of Federal Regulations, title 34, part 300, the infant and toddler intervention service coordinator must, with the approval of the family, take reasonable steps, to convene a conference between the family, the lead agency, and community-based service providers to discuss appropriate services that the child may receive after exiting infant and toddler intervention services.

Pursuant to the proposed changes contained in this rule amendment, as the children served under Minnesota's Part C programs approach their third birthdays, their eligibility under Part B, section 619 of IDEA, will need to be determined. Some children, mainly those served under the expanded criteria, will not qualify for Part B-related services and will exit the system. Those meeting the three-to-five-year-old criteria will continue in early childhood special education under Part B programs. All children will need to transition from early intervention services to early childhood special education services and/or to appropriate community-based services.

Transition from Part C services to Part B services always has been required by federal law, but because Minnesota's existing eligibility criteria are identical for both Part C and Section 619 under Part B, Minnesota providers have not needed to handle some aspects of transition; all children receive services from the local school district, and go on to receive services from the local school district after their third birthdays. So, though transition services *are* provided in Minnesota, they have tended to occur when a child moves to a new provider or setting rather than as the child approaches her third birthday. Once the infant and toddler eligibility criteria are expanded under this proposed rule amendment, transition will need to occur at age three for all children. To address this significant change, and to make it clear that transition services are both important and required by federal law, the Department determined that the most effective and reasonable approach would be to insert into the rule a new subpart that specifically outlines and establishes transition requirements.

Including transition requirements in the rules will help local school districts and local social services and public health agencies better serve infants and toddlers under the new eligibility rules, by giving them a transition framework. Transition is addressed in state statute, but it is not fully or independently addressed; in fact, it is contained in the service coordinator's responsibilities, rather than in its own section. *See* Minn. Stat. § 125A.33(a)(7). Furthermore, some federal requirements are contained in § 125A.33(a)(7), but many others have not been included there. So, in order to better inform local providers of their transition obligations, it was necessary to include a transition Subpart in this rule.

All of the provisions of this proposed transition Subpart are required under the federal Part C program. The service coordinator must facilitate transition from infant and toddler intervention services prior to the child's third birthday. *See* Letter from Troy R. Justesen, Acting Director, Office of Special Education Programs, United States Department of Education, to Alice Seagren, Commissioner, Minnesota Department of Education (March 20, 2006), and attached Table A, Indicator 8 Required Action. Minn. Stat. § 125A.33(a)(7) also assigns this responsibility to the service coordinator. Federal law requires that transition occur before the child's third birthday. *See* 20 U.S.C. § 1437(9)(a) (2005); 34 C.F.R. § 303.148 (2002), IDEA sec. 636(d), 637(a). Federal law also requires that the IFSP contain a transition plan, and that the early intervention services providers work to include families in the transition process. *See* C.F.R. § 303.344(h) (2002); see also 20 U.S.C. §§ 1436(b) and (d)(8) (2005).

In response to a suggestion from its interagency partners, the Departments of Health and Human Services, the Department of Education has made one valuable addition to the proposed rule language that otherwise derives from federal law. Where local agencies are required to convene a conference, that conference must be between the family, the local education agency or lead agency, and – in addition – "community-based service providers." For young children, particularly those who will not receive Part B services after exiting from the Part C program, community-based service providers often offer significant opportunities to receive support and intervention services. By including these providers in the exit conference, they will be better able to respond to the needs of families and children when they are no longer receiving Part C services.

During the comment period, the Department has received numerous comments and questions about transition, which in and of itself indicates to the Department that local providers have not been aware of all their transition requirements to date, even though those requirements are outlined in federal law and, to some extent, Minnesota statute. These comments and questions have underscored the need for a Subpart in this rule that fully outlines transition requirements for children exiting Part C services. In addition, to help answer those questions, the Department and its interagency partners, Health and Human Services, will begin providing significant training opportunities and technical assistance to local providers throughout the State as soon as this proposed rule goes into effect. This training and technical assistance effort is designed to support proper implementation, statewide, of the existing federal requirement.

Some questions have focused on the issue of eligibility standard for Part B services upon transition from Part C services. The Department is aware that this may cause some confusion among local services agencies and evaluators. However, because the eligibility standard is associated with Part B, rather than Part C, it is better addressed in Part B decision making and rule development. The Department is in the process of determining the best way to approach these concerns, and will develop a proposal to address them in Part B rulemaking.

The rule also is reasonable because it limits transition-related requirements to those that are required by federal law. School districts and local social services and public health agencies have flexibility to create transition steps or plans and infrastructure that work for their local communities. However, transition is a required element of the federal Part C program, and all

children should go through transition by their third birthday. To ensure that local providers are aware of this and that they are in fact performing transition services, it needs to be included in the State's rule.

> A. For a child who may be eligible for early childhood special education services under United States Code, title 20, chapter 33, sections 1411 et seq., and Code of Federal Regulations, title 34, part 300, the service coordinator must, with the approval of the family of the child, convene a conference between the family, the local educational agency and community-based service providers to discuss services that the child may receive under United States Code, title 20, chapter 33, sections 1411 et seq., and Code of Federal Regulations, title 34, part 300. The conference must be held not less than 90 days, and, at the discretion of all such parties, not more than nine months, before the child is eligible for the preschool services.

Federal regulations require that the service coordinator obtain family consent for a conference with the school district before the child becomes eligible for preschool services under Part B of IDEA, in order to discuss possible Part B services. *See* 20 U.S.C. § 1437(9)(a)(ii) (2005); 34 C.F.R. § 148 (2002). Often a child's service setting may change at age 3 even if they are still eligible for early childhood special education, so transition planning and services are still important even if the child will continue into the Part B programs.

It is reasonable and necessary to include this provision in the rule to ensure that all local providers are aware of the scope of their transition obligations, particularly when the framework of federal Part C program services is undergoing change in Minnesota.

> B. For a child who may not be eligible for early childhood special education services under United States Code, title 20, chapter 33, sections 1411 et seq., and Code of Federal Regulations, title 34, part 300, the infant and toddler intervention service coordinator must, with the approval of the family, take reasonable steps, to convene a conference between the family, the lead agency, and community-based service providers to discuss appropriate services that the child may receive after exiting infant and toddler intervention services.

For children who may not be eligible for Part B early childhood special education services, a conference with the family, the lead agency, and community-based service providers is essential. These children will likely transition out of the special education services program area entirely. They may become eligible for community-based services, but their families may require help finding those services. A conference to discuss these issues, and to make the available community support networks aware of the family and its needs, will help everyone better manage the transition process. Furthermore, as stated in the discussion above, transition services are required by federal law, so it is important to include this provision in Minnesota's amended rule.

> **RENUMBERING INSTRUCTION.** In Minnesota Rules, the revisor of statutes must renumber Minnesota Rules, part 3525.1350, subpart 3, as Minnesota rules, part 3525.1351, and make necessary cross-reference changes.

Subpart 3 is renumbered and moved in its entirety to a newly created Minn. R. 3525.1351. Minn. R. 3525.1350 no longer merely addresses eligibility criteria; instead, it addresses eligibility criteria for children ages birth through age two; conduct of evaluations for children ages birth through age

two; and transition from Part C programs and services to Part B-related services or to community services. Addressing criteria for children older than age three no longer makes sense in this rule because this rule is now specifically designed to address children ages birth through age two. Furthermore, children ages three through six receive services under Part B, so it would be confusing to include them in a rule that otherwise addresses only Part B program requirements. In addition, moving eligibility criteria for children ages three through six years of age to a new, standalone rule will improve the ability of local services agencies and school districts to adapt to the changes in eligibility and transition for children from birth through age two.

As discussed above, the proposed language in Minn. R. 3525.1351 is similar to the language stricken from Minn. R. 3525.1350, subp. 3. It was moved to a new, standalone rule in order to better delineate eligibility, evaluations, and transition for children ages birth through age two – which continue to be addressed in Minn. R. 3525.1350 – and eligibility for children ages three through six. Beginning at age three, children who receive special education services are provided for under federal Part B programs. The children addressed in Minn. R. 3525.1350 receive services under federal Part C programs. Therefore, creating a new rule for eligibility criteria that apply only to children ages three up to age seven will improve the rules' clarity and application.

LIST OF EXHIBITS

In support of the need for and reasonableness of the proposed rules, the Department anticipates that it will enter the following exhibits into the hearing record:

1. Memorandum from Rhonda Spence, OSEP-MSIP State Part C Contact for Minnesota, to Barbara O'Sullivan (May 25, 2006)

2. Letter from Troy R. Justesen, Acting Director, Office of Special Education Programs, United States Department of Education, to Alice Seagren, Commissioner, Minnesota Department of Education (March 20, 2006), including attached Table A, Indicator 8

3. Letter to Commissioner Seagren, from Office of Special Education Programs (November 14, 2005).

4. Letter to Barnett, from Office of Special Education Programs (May 17, 2001).

5. Memorandum from Alice Seagren, Commissioner, Minnesota Department of Education, to Ruth Ryder, Director, OSEP (May 30, 2006)

CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

April 30, 2007

Chas Anderson
Deputy Commissioner

MEMORANDUM

U.S. DEPARTMENT OF EDUCATION
WASHINGTON, DC 20202-2640

TO: Barbara O'Sullivan, Minnesota Department of Education

THROUGH: Larry Ringer, Associate Division Director

FROM: Rhonda Spence, OSEP-MSIP State Part C Contact for Minnesota

SUBJECT: Specific Part C Assurance for Federal Fiscal Year (FFY) 2006

DATE: May 25, 2006

Your e-mail correspondence to me today indicated that there is one major issue that needs additional action in order to make Minnesota's Part C Federal fiscal year (FFY) 2006 Application substantially approvable under, and consistent with, the requirements of Part C under the Individuals with Disabilities Education Act (IDEA) and applicable regulations. Specifically, OSEP's November 14, 2005 letter indicated that the Minnesota Department of Education (MDE) must revise:

(1) Section 3525.1350 of its regulations and MDE's monitoring checklist 3.5 to specifically state that an infant or toddler is eligible for Part C services if she or he has a developmental delay in one or more of the following areas: (1) cognitive development; (2) physical development, including vision and hearing; (3) communication development; (4) social or emotional development; and (5) adaptive development; and

(2) Section 3525.1350, subpart 2(b)(1) and (2) of its regulations to make clear that a child who has a developmental delay is eligible for Part C services, without the need for an additional determination that the child needs early intervention services.

MDE provided earlier today to OSEP a copy of its March 9, 2006 memorandum to early intervention providers that clarifies, as indicated in OSEP's November 14, 2005 letter, that in Minnesota, an infant or toddler who has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay is eligible to receive Part C services, and that the State does not, in addition, require evidence that the child has a developmental delay.

Therefore, in order to receive its FFY 2006 Part C grant awards, the State will need to provide a written assurance to OSEP that: (1) the State will complete all of those additional actions, as specified in OSEP's November 14, 2005 memorandum regarding revisions to MDE's regulations at Section 3525.1350 and MDE's monitoring checklist 3.5, on or before June 30, 2007; and (2) the State will ensure compliance in the interim.

Attached is assurance language that the State may use to meet this requirement. Please submit the necessary assurance, dated and with the signature of an official who has authority to ensure compliance with the assurance, as soon possible. Please feel free to contact me or Larry Ringer, if you have any questions or concerns.

Attachment

cc: Ruth Ryder

The Minnesota Department of Education (MDE) hereby assures that it shall:

(1) Make all changes necessary to the State's regulation at MDE Section 3525.1350 and to monitoring checklist 3.5 as specified in OSEP's May 26, 2006 Memorandum and November 14, 2005 letter to revise MDE Section 3525.1350 to be consistent with the Part C requirements at 20 U.S.C 1432(5)(A) and 34 CFR §§303.16(a) and 303.322(b)(1) and (c)(3)(ii), and submit the revised regulation, policies, procedures, and monitoring checklist 3.5 to OSEP by June 30, 2007;

(2) Throughout the period of the State's grant award for fiscal year 2006 under Part C of IDEA, the State will ensure that all providers in the State will comply with all requirements of Parts A and C of IDEA, including 20 U.S.C. 1432(4)(B) and §303.520(b)(3)(ii), (including, if necessary, sending a memorandum to all agencies and providers that are part of the State's Part C early intervention system to inform them of changes that impact on the provision of early intervention services in the State with respect to the above-identified Part C requirements); and

(3) Ensure that the State-wide system of early intervention required by Part C of IDEA at 20 U.S.C. 1431-1444 and regulations in 34 CFR Part 303 will be in effect throughout the FFY 2006 grant period.

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Honorable Alice Seagren
Commissioner
Minnesota Department of Education
1500 Highway 36 West
Roseville, Minnesota 55113-4266

MAR 20 2006

Dear Commissioner Seagren:

Thank you for your timely submission of Minnesota's State Performance Plan (SPP) for review under Part C of the Individuals with Disabilities Education Act (IDEA). Section 616(b) of the Act requires States to submit, within one year after the date of enactment of the reauthorized IDEA, an SPP that evaluates the State's efforts to implement the requirements and purposes of IDEA and describes how the State will improve implementation. We appreciate the State's efforts in preparing the SPP under a short timeline and in the face of many other competing priorities. In the SPPs, due by December 2, 2005, States were to include: (1) baseline data that reflect the State's efforts to implement Part C of the IDEA; (2) measurable and rigorous targets for the next six years for each of the indicators established by the Secretary in the priority areas under section 616(a) of the IDEA; and (3) activities the State will undertake to improve implementation of Part C.

The Office of Special Education Programs (OSEP) is pleased to inform you that your State's SPP under Part C meets the requirements of section 616(b) to include measurable and rigorous targets and improvement activities. The State must make its SPP available through public means, including posting on the State lead agency's website, distribution to the media, and distribution through public agencies. (Section 616(b)(2)(C)(ii)(I))

Under section 616(b)(2)(C)(ii)(II) of the Act, the State must annually report to OSEP on its performance under the SPP. The State's first Annual Performance Report (APR) on its progress in meeting its targets is due to OSEP by February 1, 2007. Attached to this letter you will find Table A that addresses issues identified during our review of the SPP that – while not requiring disapproval of your plan – will affect our annual determination of State performance and compliance based on data presented in the State's APR. As a result, your State needs to provide additional information as part of its February 2007 APR submission. Table B includes OSEP's analysis of your submission related to previously-identified noncompliance or other issues included in our October 18, 2005 letter that responded to your State's Federal fiscal year (FFY) 2003 APR, that also may require additional reporting. As noted on the enclosed Table B, the State must submit with its FFY 2006 Part C grant application, its revised eligibility criteria to be consistent with section 632(5) of IDEA and 34 CFR §§303.16(a) and 303.300.

In addition to reporting to OSEP, the State must report annually to the public on the performance of each early intervention service (EIS) program located in the State on the targets in the State's performance plan. (Section 616(b)(2)(C)(ii)(I)) The requirement for public reporting on EIS program performance is a critical provision related to ensuring accountability and focusing on improved results for infants and toddlers with disabilities. OSEP will be providing technical assistance regarding the reporting on EIS program performance at the National Accountability Conference, September 18 and 19, 2006 in Denver and through periodic technical assistance conference calls.

We hope that your State found the August 5, 2005 guidance on submission of the SPPs and the technical assistance that we provided through the August 11-12, 2005 Summer Institute, periodic conference calls, and the SPP Resources website helpful in this endeavor. If you have any feedback on our past technical assistance efforts or the needs of States for guidance, we would be happy to hear from you as we work to develop further mechanisms to support State improvement activities.

Thank you for your continued work to improve results for infants and toddlers with disabilities and their families. We encourage you to work closely with your State Contact as you proceed in implementing improvement activities and developing your APR. If you have any questions regarding the SPP or the APR, please contact Rhonda Spence at 202-245-7382.

Sincerely,

Troy R. Justesen
Acting Director
Office of Special Education Programs

Enclosures
Table A
Table B

cc: Jan Rubenstein
Part C Coordinator

Minnesota Part C

Table A - Issues Identified in the State Performance Plan

SPP Indicator	Issue	Required Action
Indicator 1: Percent of infants and toddlers with IFSPs who receive the early intervention services on their IFSPs in a timely manner. (20 USC 1416(a)(3)(A) and 1442)	1. The State's timely standard is "not more than 30 calendar days following the initial IFSP team meeting." The Part C regulations at 34 CFR §§303.342(e) and 303.344(f)(1) require that the lead agency provide the early intervention services that are consented to by the parent as soon as possible after the IFSP meeting. OSEP assumes that the IFSP meeting date is when a parent consents to the provision of early intervention services under 34 CFR §303.404(a)(2). 2. In addition, the State's standard suggests that the State's baseline data may only measure the timeliness of early intervention services for children with initial IFSPs and not all children with IFSPs. OSEP assumes the data reported meets the State's 30-day standard for all eligible children with IFSPs.	1. The State must confirm in the FFY 2005 APR, due February 1, 2007, that the IFSP meeting date is when a parent consents to the provision of early intervention services under 34 CFR §303.404(a)(2). 2. The State must confirm in Indicator 1 of the FFY 2005 APR due February 1, 2007 data on the timeliness of early intervention services on the IFSP for **all** eligible children with IFSPs, and not just those with initial IFSPs.

SPP Indicator	Issue	Required Action
Indicator 8: Percent of all children exiting Part C who received timely transition planning to support the child's transition to preschool and other appropriate community services by their third birthday including: A. Individualized family service plans (IFSPs) with transition steps and services; B. Notification to LEA, if child potentially eligible for Part B; and C. Transition conference, if child potentially eligible for Part B. (20 USC 1416(a)(3)(B) and 1442)	**8A:** On page 36 of the SPP the State reported that: (1) 78 Part C records were reviewed as part of the established cyclical monitoring process; and (2) among those files, there were no findings of non-compliance regarding documentation of transition steps on the IFSP. The State further reported, however, that it did not have data on the proportion of the reviewed Part C files that were for toddlers preparing for transition to Part B. **8C:** In response to Indicator 8C, the State indicated that, "Transition services on IFSPs are the result of an IFSP team meeting held for the purposes of reviewing child progress and planning transition activities. In Minnesota the meeting held to plan transition does not involve an additional agency as the LEA is the primary provider of services under Part C and Part B. Because no citations were issued for failure to appropriately document transition services on the IFSP it is reasonable to assume that transition conferences were held to develop transition plans. Similarly, no citations were issued during the reporting period for failure to convene the IFSP team to review child progress in a timely manner." It is unclear whether the State is monitoring to ensure that the transition conference is held as required under 34 CFR §303.148(b)(2)(i) to explain to parents the availability of Part B services under section 619. Although the LEA is both the Part C early intervention services (EIS) program and the LEA under Part B, the Part C requirement is not that the LEA attend the conference (as it is under Part B at 34 CFR §300.132) but rather that the transition conference is held at least ninety days (and at the discretion of all parties nine months) prior to the child's third birthday and the parent is informed of transition options.	**8A:** To the extent that the State uses sampling of child records as part of its monitoring data to respond to Indicator 8A in the APR, due February 1, 2007, the State must, as part of its response to that indicator, describe how it ensured that the child records were representative of children exiting from Part C, regardless of whether such children are transitioning to Part B. **8C:** The State must include, in the FFY 2005 APR, due February 1, 2007, data from FFY 2005 (July 1, 2005 through June 30, 2006) for Indicator 8C, that demonstrate that a transition conference, as required by 34 CFR §303.148(b)(2)(i), was timely held, and include actual numbers of children for whom the transition conference was timely held. Failure to include these data may affect OSEP's determination in 2007 of the State's status under section 616(d) of the IDEA.
Indicator 13: Percent of mediations held that resulted in mediation agreements. (20 U.S.C. 1416(a)(3)(B) and 1442)	The State included targets (in the range of 80% to 88%) and improvement activities regarding mediation; however, baseline data indicated that the number of mediations requested was fewer than ten. OSEP guidance on developing the SPP indicated that targets and improvement activities were not needed until the total number of mediations requested totaled ten or greater. The consensus among mediation practitioners is that 75-85% is a reasonable rate of mediations that result in agreements and is consistent with national mediation success rate data.	The State may remove the targets and improvement activities related to mediation in the APR, due February 1, 2007, if the number of mediations for FFY 2005 is less than 10. In a reporting period when the number of mediations reaches ten or greater, the State must develop targets and improvement activities, and report them in the corresponding APR.

Minnesota Part C

Table B -- Previously Identified Issues

Issue	State Submission	OSEP Analysis	Required Action
Indicator 1 **34 CFR §§303.340(c), 303.342(e) and 303.344(f)(1).** The State's FFY 2003 APR did not include the required data and analysis regarding whether all individualized family service plans (IFSPs) included all services necessary to meet the identified needs of the child and family and whether all early intervention services on IFSPs were timely provided. In its October 18, 2005 response to the State's FFY 2003 APR, OSEP required the State to submit, as part of its response to Indicator 1 in the SPP, baseline data on the percent of infants and toddlers with IFSPs who received the early intervention services on their IFSPs in a timely manner.	On page 2 of the SPP, the State reported that baseline data from 2004-2005 indicated that 90.4% of eligible infants and toddlers and their families received Part C services on their IFSPs in a timely manner.	The State reported a 90.4% level of compliance for Indicator 1 in the SPP, specifically the requirements at 34 CFR §§303.340(c), 303.342(e) and 303.344(f)(1). While this level of compliance is below 100% and requires improvement activities to achieve full compliance, OSEP recognizes the effort made by the State in working toward compliance with these requirements.	OSEP looks forward to reviewing data in the APR, due February 1, 2007, that demonstrate full compliance with these requirements.
Indicators 5 and 6 **34 CFR §§303.16(a) and 303.300** OSEP's March 9, 2005 verification letter included a finding that the State was not implementing eligibility criteria for Part C services that were consistent with Part C (with IDEA section 632(5) and 34 CFR §§303.16(a) and 303.300) or the State's approved Part C application. In its November 14, 2005 letter, OSEP informed the State that it was important that the State submit to OSEP its revised eligibility provisions (final after applicable public comments) as soon as possible, but no later than June 1, 2006.	Although the eligibility provisions, as described on pages 19-20 and 27-28 of the SPP are not consistent with Part C, the State confirmed, in its letter to OSEP of January 20, 2006, that it will make the required revisions to its eligibility criteria, and set forth the timeline for making those revisions.	The State's January 20, 2006 letter set forth a plan to make the State's eligibility provisions consistent with Part C.	As part of its FFY 2006 Part C grant application and not later than June 1, 2006, the State must submit its revised eligibility criteria to OSEP that are consistent with IDEA section 632(5) and 34 CFR §§303.16(a) and 303.300.

Issue	State Submission	OSEP Analysis	Required Action
Indicator 7 **34 CFR §§303.321(e)(2), 303.322(e)(1), and 303.342(a)** The State's FFY 2003 APR did not include the required data and analysis regarding the extent to which public agencies convened initial IFSP meetings within 45 days of a child's referral to Part C. In its October 18, 2005 response to the State's FFY 2003 APR, OSEP required the State to submit, as part of its response to Indicator 7 in the SPP, baseline data and analysis as to whether the evaluation, assessment and initial IFSP meeting were conducted within 45 days from referral.	On page 33 of the SPP, the State reported that baseline data from 2004-2005 indicated that 75.9% of evaluations, assessments and initial IFSP meetings were conducted within the 45-day timeline.	The State reported a 75.9% level of compliance for Indicator 7, specifically the requirements at 34 CFR §§303.321(e)(2), 303.322(e)(1), and 303.342(a)).	The State must ensure that noncompliance is corrected within one year of its identification, and include data in the APR, due February 1, 2007, that demonstrate compliance with these requirements. The State should review and, if necessary revise, its improvement strategies included in the SPP to ensure they will enable the State to include data in the APR, that demonstrate full compliance with these requirements. Failure to demonstrate compliance at that time may affect OSEP's determination of the State's status under section 616(d) of the IDEA.
Indicator 9 **34 CFR §303.501(b)** The State's FFY 2003 APR included data and information raising concerns about whether the timely correction of State-identified noncompliance was occurring. In its October 18, 2005 response to the APR, OSEP required the State to submit, as part of its response to Indicator 9 in the SPP, data reflecting timely correction (and implementation of corrective action plans (CAPs)). OSEP further specified that if the State could not provide such data or the data indicated noncompliance, the State must provide a plan to ensure compliance with this requirement within one year of OSEP's acceptance of the plan.	On page 42 of the SPP, the State reported that baseline data from 2004-2005 indicated that, in SPP priority areas (Indicator 9A): (1) a total of 186 Part C files were reviewed through the Minnesota Department of Education's (MDE's) traditional monitoring between July 1, 2003 and June 30, 2004; (2) seven instances of noncompliance were identified; and (3) MDE did not verify the correction of the noncompliance in any of these instances for a baseline of 0%. Regarding areas not included in the SPP priorities (Indicator 9B): (1) two instances of noncompliance were identified through Part C files reviewed during 2003-2004; and (3) MDE did not verify the correction of the noncompliance in either of these instances for a baseline of 0%. Regarding Indicator 9C: (1) a total of 33 instances of noncompliance were identified through alternate means, including complaints and the locally-driven planning/monitoring process, and (2) MDE verified the correction of the noncompliance within one year in 100% of these instances.	The State reported 0% compliance for Indicators 9A and 9B, specifically the requirement to ensure the timely correction of noncompliance at 34 CFR §303.501(b).	The State must ensure that noncompliance is corrected within one year of its identification and include data in the APR, due February 1, 2007, that demonstrate compliance with this requirement. The State should review and, if necessary revise, its improvement strategies included in the SPP to ensure they will enable the State to include data in the APR, that demonstrate full compliance with this requirement. Failure to demonstrate compliance at that time may affect OSEP's determination of the State's status under section 616(d) of the IDEA.

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Honorable Alice Seagren
Commissioner
Minnesota Department of Education
1500 Highway 36 West
Roseville, MN 55113

NOV 14 2005

Dear Commissioner Seagren:

Thank you for the opportunity to speak with you on September 19, 2005, regarding Minnesota's criteria and procedures for determining whether infants and toddlers are eligible to receive early intervention services under Part C of the Individuals with Disabilities Education Act. I believe that our conversation was very productive, and resulted in our agreement on the actions that the State would take to ensure that those criteria and procedures are consistent with the requirements of Part C. I am confident that the Minnesota Department of Education (MDE) and the Office of Special Education Programs (OSEP) can work together in the future to address issues of mutual concern and to help ensure positive outcomes for the State's children with disabilities. This letter confirms OSEP's understanding of the actions that MDE has agreed to take.

MDE will revise section 3525.1350 of the State regulations and MDE's monitoring checklist 3.5 to specifically state that an infant or toddler is eligible for Part C services if she or he has a developmental delay in one or more of the following areas: (1) cognitive development; (2) physical development, including vision and hearing; (3) communication development; (4) social or emotional development; and (5) adaptive development.

MDE will also revise section 3525.1350, subpart 2(b)(1) and (2) of its regulations to make clear that a child who has a developmental delay is eligible for Part C services, without the need for an additional determination that the child needs early intervention services. In addition, MDE will revise its Part C application to make clear that an infant or toddler who has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay is eligible to receive Part C services, and that the State does not, in addition, require evidence that the child has a developmental delay. It is important that the State submit to OSEP its revised provisions (finalized after applicable public comment), as soon as possible, but no later than June 30, 2006.

If we can be of further assistance regarding the issues addressed in this letter, please contact me, Larry Ringer (202-245-7496) or Rhonda Spence (202-245-7382). Please feel free to contact me if you wish to discuss this further.

I look forward to working with you in the future.

Thank you.

Sincerely,

Troy R. Justesen
Acting Director
Office of Special Education Programs

Potomac Center Plaza South

550 12th Street, SW, Washington, DC 20004

Fax: (202) 245 - 7614

Office of Special Education and Rehabilitative Services
Office of Special Education Programs
Monitoring and State Improvement Planning Division

Date: 11-14-05

To: Alice Seagren

Phone: _____ *Fax:* _____

From: Rhonda Spence

Phone: 202-245-7382 *Fax:* _____

Pages: 2 *(including cover sheet)*

Comments:

IDEAs that Work

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

MAY 17 2001

Deborah Barnett, Director
Office of Special Education
Department of Education and Cultural Affairs
700 Governors Drive
Pierre, South Dakota 57501-2291

Joanne Wounded Head
South Dakota Interagency
Coordinating Council
Department of Education and Cultural Affairs
Office of Special Education
700 Governors Drive
Pierre, South Dakota 57501-2291

Dear Ms. Barnett and Ms. Wounded Head:

This is in response to your letter, dated February 4, 2000, regarding South Dakota's Federal monitoring report. We apologize for the delay. This letter supercedes any previous communications to you on this issue. In your letter, you ask for clarification on the following four items:

1) Under General Supervision, suggestions for improved results (top of page 5 of the report) it states, "The State may want to consider procedures to ensure adequately trained staff to provide appropriate services for infants, toddlers and their families, such as, mandating requirements for early intervention service providers, providing incentives and including requirements for certification in its Comprehensive System of Personnel Development." South Dakota currently requires an early childhood special education endorsement which includes fifteen semester hours in seven competency areas. Please further explain the specific areas where you believe certification, incentives, or further regulation is recommended. We would appreciate information on any [S]tates that could be consulted as a model.

Response

The State is not required to address this particular item, as it is a suggestion for improvement, not a finding of noncompliance. However, this suggestion is provided based on findings in Sections III and V of the Report in the areas of early intervention services, family supports and services, and transition. Many of the findings are related to a need for staff training. It is further stated in

determining eligibility for Part C. If a child is not eligible according to the scores from an evaluation protocol, the child would not be eligible for the early intervention program even if the evaluator believed the child was in need of services." Early intervention staff determining eligibility told OSEP that a child must be eligible according to the criteria of a test protocol, and if the child did not demonstrate eligibility on the test, evaluators told OSEP the child would not be eligible based on their clinical opinion. The evaluation protocol is the sole determiner of eligibility in South Dakota according to the evaluators and, as they further stated, they did not use informed clinical opinion in the determination of eligibility.

Informed clinical opinion is one of the separate criteria identified in the regulations as being required to be used in an evaluation to determine eligibility, as well as the use of other procedures as stated in §303.300. The note following this regulation discusses the concern that tests and protocols may not always be applicable. Many tests and protocols were not standardized on the population of premature babies, and may not be appropriate to determine levels of development and eligibility for these children. Therefore, other procedures, including informed clinical opinion, are essential in determining eligibility for such a child. Another example of a sub-population for whom standardized tests and protocols are insufficient diagnostic criteria is the identification of young children with autism. Many children with autism pass a standardized instrument at age two to three; however, unless evaluators used their informed clinical opinion along with a standardized test, many of these children would not be identified until more severe developmental problems were identifiable.

While the Part C regulations do not expand on the definition of informed clinical opinion, DECA may want to contact NEC*TAS to obtain technical assistance on this topic. NEC*TAS maintains a file of definitions and procedures other States have developed for the use of informed clinical opinion in determination of eligibility for early intervention services. Several States have also submitted to NEC*TAS procedures for the use of informed clinical opinion by appropriately qualified personnel in their states.

3) Under Section III, Part C: Early Intervention Services in Natural Environments #2, Failure to include all needed early intervention services on the IFSP (page 16), the report states, "Early intervention services may include such services as the provision of respite and other family support services." Section 303.12 of IDEA, Part C states that early intervention services means services that "are designed to meet the developmental needs of each child eligible under this part and the needs of the family related to enhancing the child's development." Please provide guidance on how the IFSP team would document that the need for respite care was based on the developmental needs of the child and/or on the needs of the family related to enhancing the child's development including how the team would determine frequency and intensity.

Response

"Failure to include all needed Early Intervention Services on the IFSP," in Section III, B, 2 of the Report includes the IFSP process in identifying and including early intervention services. The determination of early intervention services needed by a child and family is an IFSP team decision based on the multidisciplinary evaluation of each child, and the family-directed

Even though a majority of services may be provided in the home or a child care setting, parents and providers stated that, in general, as stated in the Report, "all of the parents interviewed in the five areas OSEP visited stated that neither the need for transportation nor reimbursement costs were discussed during IFSP meetings." The Report further states, "service coordinators in all five areas visited stated that transportation was not addressed with every family, and in two areas it is not addressed at all. In four of the areas visited service coordinators stated there is a need for transportation, but it is not available, especially on reservations. Provision of services in the home or child care settings could be a concern if the determination of natural environments for each particular family has not been part of an IFSP team discussion or if these two locations are the only two locations considered to be "natural environments."

We hope this response to your questions provides the necessary clarification.

Sincerely,

Patricia J. Guard

Patricia J. Guard
Acting Director
Office of Special Education Programs

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

MAY 17 2001

Deborah Barnett, Director
Office of Special Education
Department of Education and Cultural Affairs
700 Governors Drive
Pierre, South Dakota 57501-2291

Joanne Wounded Head
South Dakota Interagency
Coordinating Council
Department of Education and Cultural Affairs
Office of Special Education
700 Governors Drive
Pierre, South Dakota 57501-2291

Dear Ms. Barnett and Ms. Wounded Head:

This is in response to your letter, dated February 4, 2000, regarding South Dakota's Federal monitoring report. We apologize for the delay. This letter supercedes any previous communications to you on this issue. In your letter, you ask for clarification on the following four items:

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Response

The State is not required to address this particular item, as it is a suggestion for improvement, not a finding of noncompliance. However, this suggestion is provided based on findings in Sections III and V of the Report in the areas of early intervention services, family supports and services, and transition. Many of the findings are related to a need for staff training. It is further stated in

this suggestion (I, B, 1) that "Local administrators, service coordinators and providers in four of the five areas visited by OSEP identified as an area of need, training on: writing IFSPs, developing outcomes and strategies, family centered services, family supports and services, and transition, as well as effective child find strategies." The report further identifies that training sessions were offered, but State administrators reported that local service providers "do not take advantage of training offered," and "providers are not required to attend training activities." As the State has a number of findings that may be resolved with appropriate training for early intervention providers, the State needs to identify appropriate methods to ensure needed changes occur to address noncompliance issues throughout the report, and effective training could be one method. OSEP is not in the position of suggesting specific standards and certification requirements; however, DECA may want to consult NEC*TAS about requirements and standards in other States.

2) Under Child Find/Public Awareness #2 – Failure to use clinical opinion (pages 9 and 10 of the report) 34 CFR §303.323 is cited. This citation addresses nondiscriminatory procedures and that no single procedure is used as the sole criterion for determining a child's eligibility under Part C. The final sentence of this area of non-compliance states, "None of the providers interviewed had ever determined a child eligible using only their clinical judgement when the child was not eligible according to the protocol." South Dakota's policies and procedures state, "Informed clinical opinion is used in determining a child's eligibility. Informed clinical opinion is especially important if there are no standardized measures, or the standardized procedures are not appropriate for a given age or developmental area." South Dakota has always interpreted informed clinical opinion to be a "collection" of all information available, including evaluation and assessment results that each evaluator and team uses to determine the needs of the child and that it is not a "sole procedure" to determine eligibility. Could you please define informed clinical opinion?

Response

Each Statewide system of early intervention services must include the eligibility criteria and procedures, consistent with 34 CFR §303.16, that will be used by the State in carrying out programs under Part C. The State must define developmental delay by describing procedures, including the use of informed clinical opinion, that will be used to measure a child's development. See 34 CFR §303.300. The evaluation and assessment of each child must be conducted by appropriate qualified personnel trained to utilize appropriate methods and procedures and be based on informed clinical opinion. See 34 CFR §§303.322(a), (b)(1) and (c). The State must permit the use of informed clinical opinion as a separate basis in an evaluation to establish the eligibility of a child for early intervention services. While using informed clinical opinion to establish eligibility for Part C services is especially important if there are no standardized measures or if the standardized procedures are not appropriate for a given age or developmental area, it must also be allowed as an independent basis to determine eligibility.

South Dakota's policies and procedures state that, "Informed clinical opinion is used in determining a child's eligibility." However, as stated in OSEP's monitoring report, "... providers and service coordinators told OSEP that informed clinical opinion is not considered in

determining eligibility for Part C. If a child is not eligible according to the scores from an evaluation protocol, the child would not be eligible for the early intervention program even if the evaluator believed the child was in need of services." Early intervention staff determining eligibility told OSEP that a child must be eligible according to the criteria of a test protocol, and if the child did not demonstrate eligibility on the test, evaluators told OSEP the child would not be eligible based on their clinical opinion. The evaluation protocol is the sole determiner of eligibility in South Dakota according to the evaluators and, as they further stated, they did not use informed clinical opinion in the determination of eligibility.

Informed clinical opinion is one of the separate criteria identified in the regulations as being required to be used in an evaluation to determine eligibility, as well as the use of other procedures as stated in §303.300. The note following this regulation discusses the concern that tests and protocols may not always be applicable. Many tests and protocols were not standardized on the population of premature babies, and may not be appropriate to determine levels of development and eligibility for these children. Therefore, other procedures, including informed clinical opinion, are essential in determining eligibility for such a child. Another example of a sub-population for whom standardized tests and protocols are insufficient diagnostic criteria is the identification of young children with autism. Many children with autism pass a standardized instrument at age two to three; however, unless evaluators used their informed clinical opinion along with a standardized test, many of these children would not be identified until more severe developmental problems were identifiable.

While the Part C regulations do not expand on the definition of informed clinical opinion, DECA may want to contact NEC*TAS to obtain technical assistance on this topic. NEC*TAS maintains a file of definitions and procedures other States have developed for the use of informed clinical opinion in determination of eligibility for early intervention services. Several States have also submitted to NEC*TAS procedures for the use of informed clinical opinion by appropriately qualified personnel in their states.

3) Under Section III, Part C: Early Intervention Services in Natural Environments #2, Failure to include all needed early intervention services on the IFSP (page 16), the report states, "Early intervention services may include such services as the provision of respite and other family support services." Section 303.12 of IDEA, Part C states that early intervention services means services that "are designed to meet the developmental needs of each child eligible under this part and the needs of the family related to enhancing the child's development." Please provide guidance on how the IFSP team would document that the need for respite care was based on the developmental needs of the child and/or on the needs of the family related to enhancing the child's development including how the team would determine frequency and intensity.

Response

"Failure to include all needed Early Intervention Services on the IFSP," in Section III, B, 2 of the Report includes the IFSP process in identifying and including early intervention services. The determination of early intervention services needed by a child and family is an IFSP team decision based on the multidisciplinary evaluation of each child, and the family-directed

identification of the needs of each child's family to appropriately assist in the development of the child. The family assessment is not only family-directed, but must be designed to determine 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 child.

For example, the family assessment could show a need that the parents may be unable to assist in the child's early intervention program due to overwhelming family demands, and may be in need of respite services. In another example, the parent may have three children under the age of three, and although services are provided in the home, the parent cannot participate in the early intervention due to demands of the other children. Providing an in-home caretaker for the other two children during provision of services to the eligible child allows the parent to participate in early intervention services, receiving the information and training that can be used to enhance the development of the child. With information from the family assessment, the IFSP team would convene to determine services necessary to meet the needs of the child and the family to enhance the child's development. However, respite is not intended to serve as child-care assistance in ordinary circumstances. States and IFSP team members are expected to continue to exercise judgement in identifying appropriate circumstances under which respite care is truly needed. DECA may want to contact NEC*TAS for further assistance in the area of respite and other family support services.

4) Under Section III. Part C: Early Intervention Services in Natural Environment, #5 Failure to include transportation as an early intervention service (page 19) the report states, "Transportation as a service was found in only two of the 27 IFSPs reviewed by OSEP, and this transportation was not for ongoing early intervention, but for a specialized evaluation event." Earlier in the report South Dakota was commended on [its] effective training program on natural environments and also encouraged to address additional training that the home and child care settings are only two of the multitude of community settings that are natural or normal for children birth to three. These statements and the regulations indicate that the majority of early intervention services are provided in the home or other natural settings. The service providers are traveling to these locations therefore, the parents are not transporting the children to a location to receive the early intervention service. The need for transportation as an early intervention service would be rare. We request clarification as to what change is requested in this area.

Response

"Failure to Include Transportation as an Early Intervention Service" is a noncompliance finding found under Section III, B, 5. Transportation was identified by parents and providers interviewed as a need, and parents stated, "that neither the need for transportation nor reimbursement costs were discussed during IFSP meetings." All of the needs of the family related to obtaining early intervention services should be part of the discussion and decision-making process for development of an IFSP that would enable an eligible child and family to obtain needed services. Information from OSEP's IFSP reviews and interviews with parents, service coordinators and providers indicates that South Dakota will fund transportation for a specialized event, but not ongoing provision of early intervention services, unless the parent knows to request transportation for a service in a non-home location chosen by the IFSP team.

Even though a majority of services may be provided in the home or a child care setting, parents and providers stated that, in general, as stated in the Report, "all of the parents interviewed in the five areas OSEP visited stated that neither the need for transportation nor reimbursement costs were discussed during IFSP meetings." The Report further states, "service coordinators in all five areas visited stated that transportation was not addressed with every family, and in two areas it is not addressed at all. In four of the areas visited service coordinators stated there is a need for transportation, but it is not available, especially on reservations. Provision of services in the home or child care settings could be a concern if the determination of natural environments for each particular family has not been part of an IFSP team discussion or if these two locations are the only two locations considered to be "natural environments."

We hope this response to your questions provides the necessary clarification.

Sincerely,

Patricia J. Guard

Patricia J. Guard
Acting Director
Office of Special Education Programs

Minnesota Department of Education

MEMORANDUM

To: Ruth Ryder, Director
Rhonda Spence, Part C

From: Alice Seagren, Commissioner

Date: May 30, 2006

Re: Assurance for Compliance with Part C requirements

The Minnesota Department of Education (MDE) hereby assures that it shall:

(1) Make all changes necessary to the State's regulation at MDE Section 3525.1350 and to monitoring checklist 3.5 as specified in OSEP's May 26, 2006 Memorandum and November 14, 2005 letter to revise MDE Section 3525.1350 to be consistent with the Part C requirements, at 20 U.S.C 1432(5)(A) and 34 CFR §§303.16(a) and 303.322(b)(1) and (c)(3)(ii), and submit the revised regulation, policies, procedures, and monitoring checklist 3.5 to OSEP by June 30, 2007;

(2) Throughout the period of the State's grant award for fiscal year 2006 under Part C of IDEA, the State will ensure that all providers in the State will comply with all requirements of Parts A and C of IDEA, including 20 U.S.C. 1432(4)(B) and §303.520(b)(3)(ii) , (including, if necessary, sending a memorandum to all agencies and providers that are part of the State's Part C early intervention system to inform them of changes that impact on the provision of early intervention services in the State with respect to the above-identified Part C requirements); and

(3) Ensure that the State-wide system of early intervention required by Part C of IDEA at 20 U.S.C. 1431-1444 and regulations in 34 CFR Part 303 will be in effect throughout the FFY 2006 grant period.