

**DEPARTMENT OF EDUCATION****34 CFR Parts 300, 301 and 304**

RIN 1820-AB57

**Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities; and Service Obligations Under Special Education—Personnel Development To Improve Services and Results for Children With Disabilities**

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Secretary proposes to amend the regulations governing the Assistance to States for Education of Children with Disabilities Program, the Preschool Grants for Children With Disabilities Program, and Service Obligations under Special Education Personnel Development to Improve Services and Results for Children with Disabilities. These amendments are needed to implement recently enacted changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004.

**DATES:** To be considered, comments must be received at one of the addresses provided in the **ADDRESSES** section no later than 5 p.m. Washington, DC Time on September 6, 2005. Comments received after this time will not be considered.

We will hold public meetings about this NPRM. The dates and times of the meetings and the cities in which the meetings will take place are in *Public Meetings* under *Invitation to Comment* elsewhere in this preamble.

**ADDRESSES:** Address all comments about these proposed regulations to Troy R. Justesen, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, room 5126, Washington, DC 20202-2641. If you prefer to send your comments through the Internet, you may address them to us at the U.S. Government Web site: [www.regulations.gov](http://www.regulations.gov) or you may send your Internet comments to us at the following address: [IDEAComments@ed.gov](mailto:IDEAComments@ed.gov).

You must include the term IDEA—Part B in the subject line of your electronic message. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies.

If you want to comment on the information collection requirements, you must send your comments to the

Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. You may also send a copy of those comments to the U.S. Department of Education (Department) representative named in this section.

All first-class and Priority mail sent to the Department is put through an irradiation process, which can result in lengthy delays in mail delivery. Please keep this in mind when sending your comments and please consider using commercial delivery services or e-mail in order to ensure timely delivery of your comments.

**FOR FURTHER INFORMATION CONTACT:** Troy R. Justesen. Telephone: (202) 245-7468.

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

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:****Invitation To Comment**

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should provide to reduce the potential costs or increase potential benefits while preserving the effective and efficient administration of these programs.

During and after the comment period, you may inspect all public comments about these proposed regulations in room 5126, Potomac Center Plaza, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader, or

print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Public Meetings**

The dates and cities where the meetings about this NPRM will take place are listed below. Each meeting will take place from 1 to 4 p.m. and from 5 to 7 p.m.

Friday, June 17, 2005 in Nashville, TN;

Wednesday, June 22, 2005 in Sacramento, CA;

Friday, June 24, 2005 in Las Vegas, NV;

Monday, June 27, 2005 in New York, NY;

Wednesday, June 29, 2005 in Chicago, IL;

Thursday, July 7, 2005 in San Antonio, TX; and

Tuesday, July 12, 2005 in Washington, DC.

We provided more specific information on meeting locations in a notice published in the **Federal Register** (70 FR 30917).

**Assistance to Individuals With Disabilities at the Public Meetings**

The meeting sites are accessible to individuals with disabilities, and sign language interpreters will be available. If you need an auxiliary aid or service other than a sign language interpreter (e.g., interpreting service such as oral, cued speech, or tactile interpreter, assisted listening device, or materials in an alternative format), notify the contact person listed in this NPRM at least two weeks before the scheduled meeting date. Although we will attempt to meet a request we receive after this date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

**Background**

On December 3, 2004, the Individuals with Disabilities Education Improvement Act of 2004 was enacted into law as Pub L. 108-446. The statute, as passed by Congress and signed by the President, reauthorizes and makes significant changes to the Individuals with Disabilities Education Act.

The Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Act or IDEA), is intended to help children with

disabilities achieve to high standards—by promoting accountability for results, enhancing parental involvement, and using proven practices and materials; and, also, by providing more flexibility and reducing paperwork burdens for teachers, States, and local school districts. Enactment of the new law provides an opportunity to consider improvements in the current regulations that would strengthen the Federal effort to ensure every child with a disability has available a free appropriate public education that—(1) is of high quality, and (2) is designed to achieve the high standards reflected in the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001 (NCLB) and its implementing regulations.

Changes to the current Part B regulations (34 CFR parts 300 and 301) and Part D regulations (34 CFR part 304) are necessary in order for the Department to appropriately and effectively address the provisions of the new law and to assist State and local educational agencies in implementing their responsibilities under the new law. Changes to the current Part C regulations (part 303) also are necessary in order for the Department to appropriately and effectively address the provisions in Part C of the Act and to assist States in completing their responsibilities under the new law. The NPRM for the Part C regulations will be published soon.

On December 29, 2004, the Secretary published a notice in the **Federal Register** requesting advice and recommendations from the public on regulatory issues under the Act, and announcing a series of seven public meetings during January and February of 2005 to seek further input and suggestions from the public for developing regulations based on the new statute.

Over 6000 public comments were received in response to the **Federal Register** notice and at the seven public meetings, including letters from parents and public agency personnel, and parent-advocate and professional organizations. The comments addressed each major provision of the new law (such as discipline procedures, provisions on personnel qualifications and highly qualified teachers, provisions related to evaluation of children and individualized education programs, participation of private school children with disabilities, and provisions on early intervening services). These comments were reviewed and considered in developing this NPRM. The Secretary appreciates the interest and thoughtful attention of

the commenters responding to the December 29, 2004 notice and participating in the seven public meetings.

### General Proposed Regulatory Plan and Structure

In developing this NPRM, we have elected to construct one comprehensive, freestanding document that incorporates virtually all requirements from the new law along with the applicable regulations, rather than publishing a regulation that does not include statutory provisions. The rationale for doing this is to create a single reference document for parents, State personnel, school personnel, and others to use, rather than being forced to shift between one document for regulations and a separate document for the statute. This approach was used in developing the current regulations. Although this approach will result in a larger document, it is our impression that various groups strongly support continuing this practice.

In addition, we have reorganized the regulations by following the general order and structure of provisions in the statute, rather than using the arrangement of the current regulations. We believe this change in organization will be helpful to parents, State and local educational agency personnel, and the public both in reading the regulations, and in finding the direct link between a given statutory requirement and the regulation related to that requirement. Thus, in general, the requirements related to a given statutory section (e.g., *State eligibility* in section 612 of the Act) will be included in one location (subpart B) and in the same general order as in the statute, rather than being spread throughout four or more subparts, as the statutory sections are in the current regulations.

As restructured in this NPRM, the proposed regulations are divided into eight major subparts, each of which is directly linked to, and comports with, the general order of provisions in a specific section of the Act. For example, we have revised subpart G of the regulations to include all provisions regarding the allotment and use of funds from section 611 of the Act, rather than having those provisions dispersed among several different subparts, as they are in the current regulations.

In addition, we have removed part 301 (Preschool Grants for Children with Disabilities) from title 34 and placed the Preschool Grants provisions from section 619 of the Act into a new subpart H under part 300. This restructuring and consolidation of the financial requirements from both the

statute and regulations into a specific location in the regulations should be useful to State and local administrators and others in finding the relevant statutory and regulatory provisions regarding both the Assistance to States and Preschool Grants programs.

In reviewing the current regulations, we considered their continued necessity and relevance in light of a number of factors: Whether statutory changes required changes to existing regulations; whether changes in other laws, or the passage of time and changed conditions rendered the regulations obsolete or unnecessary; whether less burdensome alternatives or greater flexibility was appropriate; and whether the regulation could be changed in light of section 607(b) of the Act (section 607(b) of the Act provides that the Secretary may not publish final regulations that would procedurally or substantively lessen the protections provided to children with disabilities in the regulations that were in effect on July 20, 1983, except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation). In the following discussion of proposed regulatory changes, we identify the changes that would be made to existing regulations after consideration of these factors.

### Proposed Regulatory Changes

#### Subpart A—General

##### Purposes and Applicability

Proposed § 300.1 would be revised only to add, consistent with a change to section 601(d)(1)(A) of the Act, the words “further education” in paragraph (a).

Except for the section heading, proposed § 300.2 would be unchanged from the existing provision.

Section 300.3 of the current regulations would be removed as unnecessary, because the regulations listed in this section already apply, by their own terms, to States and local agencies under Part B of the Act.

##### Definitions Used in This Part

As in the current regulations, proposed § 300.4 (Act) would refer to the Individuals with Disabilities Education Act, as amended.

Proposed § 300.5 (*Assistive technology device*) would retain the current definition, and include the new language from section 602(1) of the Act that the term does not include a medical device that is surgically implanted, or the replacement of that device.

Proposed § 300.6 (*Assistive technology service*) would be consistent with the current regulatory definition of that term.

Proposed § 300.7 (*Charter school*) would define the term to have the meaning given that term in section 5210(1) of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C 6301 *et seq.* (ESEA).

Proposed § 300.8 (*Child with a disability*) would make the following changes to the current regulatory definition in § 300.7: In paragraphs (a)(1) and (a)(2) cross-references to evaluation procedures would be updated to reflect the placement of those procedures in these proposed regulations. The parenthetical following “serious emotional disturbance” in paragraph (a)(1) would be revised to read “referred to in this part as emotional disturbance.” The cross-reference regarding related services in the definition of special education in paragraph (a)(2)(ii) would be updated. In paragraph (b), a parenthetical phrase would be added following the reference to children aged three through nine to clarify that “developmental delay” could be used for any subset of that age range, including children three through five. This reflects a change in section 602(3)(B) of the Act. Paragraph (c)(8) (*Orthopedic impairment*) would revise current § 300.7(c)(8) by removing the parenthetical listing of examples, because these examples are outdated.

Finally, in paragraph (c)(10)(i) of proposed § 300.8, which contains a definition of the term *specific learning disability*, the word “the” would be substituted for “an” before the phrase “imperfect ability to listen, think, \* \* \*” reflecting the addition of “the” in section 602(30)(A) of the Act.

Proposed § 300.9 would incorporate the regulatory definition of *Consent* that appears in § 300.500(b)(1) of the current regulations. The current provision in § 300.8 that cross-references the § 300.500 definition of consent, would be removed.

Consistent with section 602(4) of the Act, proposed § 300.10 would add the new definition of *Core academic subjects* as that term is defined in section 9101 of the ESEA.

Proposed § 300.11 would revise the definitions of *Day; business day; school day* in current § 300.9 only by updating the cross-reference to the regulatory requirement in proposed § 300.148(c) concerning a limitation on reimbursement for private school placements.

The regulatory definition of *Educational service agency* currently in § 300.10 would be moved to proposed § 300.12 and revised by adding the word “schools” after “public elementary” in paragraph (a)(2) of this section to conform with the language in section

602(5) of the Act. In proposed paragraph (c), the provision concerning entities that meet the definition of *intermediate educational unit* in section 602(23) of the Act as in effect prior to June 4, 1997 would be retained. There are entities still providing special education and related services to preschool children with disabilities that meet the definition of *intermediate educational unit*, but may not meet the definition of *educational service agency* because they are not responsible for the provision of special education and related services provided within public elementary schools of the State.

Proposed § 300.13 would reflect the definition of *Elementary school* in section 602(6) of the Act, including the new language specifying that the term includes a public elementary charter school.

Proposed § 300.14 would reflect the current statutory definition of *Equipment* and would be substantially the same as § 300.11 of the current regulations.

Proposed § 300.15 would incorporate the regulatory definition of *Evaluation* that appears in the current regulations in § 300.500(b)(2), with the cross-reference to the evaluation procedures updated to reflect their placement in these proposed regulations and to include the additional procedures regarding specific learning disability. The current regulation, regarding evaluation in § 300.12, which cross-references the definition in current § 300.500, would be removed as duplicative and unnecessary.

Proposed § 300.16 (*Excess costs*), defined in the current regulations in § 300.184, would be revised consistent with changes in section 602(8) of the Act. This provision is substantially the same as the current definition in § 300.184(b).

Proposed § 300.17 (*free appropriate public education* or *FAPE*) would incorporate the provisions of section 602(9) of the Act and be the same as the definition in § 300.13 of the current regulations, except that § 300.17(d) would be updated to add a cross-reference to the individualized education program (IEP) requirements.

A new definition of *highly qualified special education teacher* would be added in proposed § 300.18, reflecting the addition of a definition of this term to the statute in section 602(10) of the Act, with the following modifications: Paragraph (a)(1) of this section would specify that the term “highly qualified” applies only to public elementary school and secondary school special education teachers, consistent with the definition of that term in section 9101

of the ESEA, which is incorporated into the Act and applied to special education teachers in section 602(10) of the Act. We do not believe that the “highly qualified” requirements of the ESEA, or, by statutory cross-reference, the Act, were intended to apply to private school teachers, even in situations where a child with a disability is placed in, or referred to, a private school by a public agency in order to carry out the public agency’s responsibilities under this part, consistent with section 612(a)(10)(B) of the Act and proposed § 300.146. This issue also is addressed in proposed § 300.156.

Proposed § 300.18(b)(2) would specify that a teacher participating in an alternate route to certification program would be considered to be fully certified under certain circumstances. The standard to be applied to an alternate route to certification program would be the same as for those programs under the regulations implementing title I of the ESEA in 34 CFR § 200.56(a)(2)(ii). This would provide for consistency in the interpretation and application of the alternate route to certification provisions across these programs.

In proposed § 300.18(b)(3), a provision would be added to clarify that a public elementary or secondary school teacher who is not teaching a core academic subject would be considered *highly qualified* if the teacher meets the requirements of proposed § 300.18(b)(1) and (2). This provision would reflect note 21 in U.S. House of Representatives Conference Report No. 108–779, (Conf. Rpt.) that special education teachers who are only providing consultative services to other teachers who are highly qualified to teach particular academic subjects, could be highly qualified by meeting the special education qualifications alone. Proposed § 300.18(c)(2) would clarify that all special education teachers who are exclusively teaching students who are assessed based on alternate academic achievement standards, as permitted under the regulations implementing title I of the ESEA, at a minimum, have subject matter knowledge at the elementary level or above, as determined by the State, needed to effectively teach to those standards. Note 21 in the Conf. Rpt. calls for teachers exclusively teaching students who are assessed based on alternate academic achievement standards above the elementary level to have a high level of competency in each of the core academic subjects taught.

The proposed regulation would not specifically address the use of a separate “high objective uniform State standard of evaluation” (HOUSSE) for special

education teachers. However, note 21 in the Conf. Rpt. recognized that some States have developed HOUSSE standards for special education teachers, and indicated that those separate HOUSSE standards should be permitted, including single HOUSSE evaluations that cover multiple subjects, as long as those adaptations of a State's HOUSSE for use with special education teachers would not establish a lesser standard for the content knowledge requirements for special education teachers. We request comment on whether additional regulatory action is needed on this point. Proposed § 300.18(g) would clarify that the requirements in proposed § 300.18 regarding highly qualified special education teachers do not apply with respect to teachers hired by private elementary and secondary schools.

Proposed § 300.19 would reflect the definition of *Homeless children* added to the statute in section 602(11) of the Act.

The definition of *include* in proposed § 300.20 is substantively unchanged from the current regulatory provision in § 300.14.

The proposed definitions of *Indian* and *Indian tribe* in § 300.21 would incorporate the definitions of those terms currently in § 300.264 and reflect the language in sections 602(12) and 602(13) of the Act. The Department of Education seeks comment on the definition of *Indian tribe* because the current definition includes state tribes. The Department of the Interior is only authorized to provide services to Federally Recognized tribes, therefore, States should provide comments on how they would provide these services to State recognized tribes. Nothing in this definition is intended to require the BIA to provide services or funding to a State Indian tribe for which BIA is not responsible.

The definition of *Individualized education program* or *IEP* in proposed § 300.22 would incorporate the regulatory definition of that term currently in § 300.340(a), and would reflect the language in section 602(14) of the Act. The current § 300.15 cross-referencing the § 300.340 definition would be removed as duplicative and unnecessary.

Proposed § 300.23 (*Individualized education program team*) would be the same as § 300.16 of the current regulations. The definition in proposed § 300.24 of *Individualized family service plan* would be the same as the current regulatory definition in § 300.17, except that proposed § 300.24 would appropriately refer to the current statutory definition of IFSP in section

636 of the Act and not to the regulatory definition in 34 CFR 303.340(b).

Proposed § 300.25 (*Infant or toddler with a disability*), § 300.26 (*Institution of higher education*), and § 300.27 (*Limited English proficient*) would reflect statutory definitions of those terms in sections 602(16), 602(17), and 602(18) of the Act, respectively.

Proposed § 300.28 (*Local educational agency* or *LEA*) is substantively unchanged from the current regulatory definition in § 300.18, and would reflect the definition of that term in section 602(19) of the Act.

Proposed § 300.29 (*Native language*) is substantively unchanged from the current regulatory definition of that term in § 300.19.

Proposed § 300.30 (*Parent*) would revise the current regulatory definition of that term in § 300.20 to better reflect the revised statutory definition of *Parent* in section 602(23) of the Act. Proposed § 300.30(a)(2) would reflect the provision regarding a State law prohibition on when a foster parent can be considered a parent, but would add language to recognize that similar restrictions may exist in State regulations or in contractual agreements between a State or local entity and the foster parent, and should be accorded similar deference. Proposed § 300.30(b)(1) would provide that the natural or adoptive parent would be presumed to be the parent for purposes of the regulations if that person were attempting to act as the parent under proposed § 300.30 and more than one person is qualified to act as a parent, unless that person does not have legal authority to make educational decisions for the child, or there is a judicial order or decree specifying some other person to act as the parent under Part B of the Act. Proposed § 300.30(b)(2) would provide that if a person or persons is specified in a judicial order or decree to act as the parent for purposes of § 300.30, that person would be the parent under Part B of the Act. Proposed § 300.30(b)(2) would, however, exclude an agency involved in the education or care of the child from serving as a parent, consistent with the statutory prohibition that applies to surrogate parents in sections 615(b)(2) and 639(a)(5) of the Act. The provisions in proposed § 300.30(b) should assist schools and public agencies in identifying the appropriate person to serve as the parent under Part B of the Act, especially in those difficult situations in which more than one individual wants to make educational decisions.

Proposed § 300.31 would add a new definition of *Parent training and*

*information center* reflecting section 602(25) of the Act. This term would be used in proposed § 300.506.

Proposed §§ 300.32 (*Personally identifiable*) and 300.33 (*Public agency*) are substantively unchanged from current regulatory definitions of these terms in § 300.500(b)(3) and § 300.22, respectively. We note that throughout these proposed regulations, *public agency* has been used to make clear where the requirements do not apply only to States and LEAs.

The current regulatory definition of *Qualified personnel* in § 300.23 would be removed, because personnel qualifications would be adequately addressed in proposed § 300.156.

Proposed § 300.34 (*Related services*), reflecting changes in section 602(26) of the Act, would amend the current regulatory definition in § 300.24 in the following ways: In proposed § 300.34(a) “interpreting services” and “school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the IEP of the child” would be added. Proposed § 300.34(b) would be added to address the statutory limitation on surgically implanted medical devices. Paragraph (b) also would specify that *related services* would not include the costs of maximizing the functioning of a surgically implanted device or the maintenance of a surgically implanted device. School districts should not be required to bear these costs, which are integral to the functioning of the implanted device. Proposed paragraph (c) would include new definitions of *Interpreting services* and *School nurse services*. The list is not intended to be exhaustive and other therapies, as well as other services not listed, may be included in a child's IEP if the IEP Team determines that a particular service is needed for a child to benefit from special education. In all cases concerning related services, the IEP Team's determination about appropriate services must be reflected in the child's IEP and those listed services must be provided in accordance with the IEP at public expense and at no cost to the parents. Nothing in the Act or in the definition of *related services* requires the provision of a related service to a child unless the child's IEP Team has determined that the service is required in order for the child to benefit from special education and has included the service on the child's IEP.

Proposed § 300.35 (*Secondary school*) would revise the current regulatory definition of this term in § 300.25 to add the new statutory language specifying

that the term includes a public secondary charter school.

Proposed § 300.36 (*Services plan*) would add a new definition that would describe the content, development, and implementation of plans for parentally-placed private school children with disabilities who have been designated to receive services. The definition would cross-reference the specific requirements for the provision of services to parentally-placed private school children with disabilities in proposed §§ 300.132 and 300.137 through 300.139.

Proposed § 300.37 (*Secretary*) would reflect the statutory definition of that term in section 602(28) of the Act.

Proposed §§ 300.38 (*Special education*), 300.39 (*State*), and 300.41 (*Supplementary aids and services*) would be substantively unchanged from current regulatory provisions in §§ 300.26, 300.27 and 300.28, respectively, except that *State* would be revised to reference an exception when the term is used in subparts G and H of these regulations. Proposed § 300.38(b)(5) would revise the definition of *vocational education* in current § 300.26(b)(5) to include the definition of *vocational and technical education* and the definition of *vocational and technical education* in the Carl D. Perkins Vocational and Applied Technology Act of 1988, as amended, 20 U.S.C. 2301, 2302(29) would be added in proposed § 300.38(b)(6).

Proposed § 300.42 (*Transition services*) would revise the current regulatory definition of the term in § 300.29, reflecting new statutory language in section 602(34) of the Act.

New proposed definitions would be added in §§ 300.43 and 300.44 reflecting the statutory definitions of *Universal design* and *Ward of the State*, respectively. The definition of *Ward of the State* underscores that the determination of whether a child is a ward of the State is limited to applicable State law. Finally, the current list of definitions found in the Education Department General Administrative Regulations (EDGAR) in § 300.30 would be removed as unnecessary, as these definitions already apply by their own terms, except that the definition of *Secretary* in proposed § 300.37 and *State educational agency* in proposed § 300.40, which are included in the current EDGAR list, would be included in the proposed regulation because they also are defined in section 602(28) and (32) of the Act.

### Subpart B—State Eligibility

#### General

Revised subpart B would incorporate current provisions from other subparts that, under the current regulations, are cross-referenced in subpart B. These changes would be consistent with the statutory structure. Some of the provisions that are consolidated in proposed subpart B would include: certain provisions related to FAPE, currently in subpart C; provisions regarding private school children with disabilities, currently in subpart D; the least restrictive environment (LRE) provisions, currently in subpart E; and the State complaint procedures, currently in subpart F.

Proposed § 300.100 would revise current § 300.110 to provide for the submission of a plan that includes assurances related to the conditions of eligibility for assistance. The requirement that States submit copies of all State statutes, regulations, and other documents would be removed from current § 300.110, consistent with the changes in Section 612(a) of the Act. Consistent with this approach, these proposed regulations would eliminate from the current regulations throughout subpart B all provisions requiring that policies and procedures be on file with the Secretary.

#### FAPE Requirements

Proposed § 300.101 would incorporate the current general FAPE provision in § 300.121(a), and would include a reference to the SEA's obligation to make FAPE available to children who have been suspended or expelled from school, consistent with proposed § 300.530(d). Consistent with changes to the statute, the current provisions in § 300.121(b) regarding submission of State documentation, such as statutes and court orders, would be removed. The current provisions in § 300.121(c), regarding FAPE beginning at age three, generally would be retained. The current provisions in § 300.121(e), regarding children advancing from grade to grade, also would be retained. These provisions provide useful information on appropriate implementation of public agency responsibilities under Part B. Section 300.121(d) of the current regulations would not be retained in these proposed regulations. Instead, the obligation to ensure the right to FAPE for children who have been suspended or expelled from school would be addressed in proposed § 300.530(d) in subpart E.

Proposed § 300.102 would retain the current exceptions to FAPE in § 300.122. For consistency with the

statute, references to "students" would be changed to "children." The proposed regulation would contain a new provision regarding children who are eligible for services under section 619 of the Act, but who are receiving early intervention services under Part C, consistent with the statutory language in section 612(a)(1)(c) of the Act. Proposed § 300.102(b) also would include a new provision that would require that information regarding exceptions to FAPE be current and accurate. This information is necessary for the Department to allocate funds accurately among the States.

#### Other FAPE Requirements

Proposed §§ 300.103, 300.104, and 300.105(b), regarding methods and payments; residential placement; and proper functioning of hearing aids would retain the provisions from §§ 300.301 through 300.303 of the current regulations, respectively. Proposed § 300.105(a), regarding assistive technology, would retain the provisions in current § 300.308.

Proposed §§ 300.106 through 300.108, regarding extended school year services, nonacademic services, and physical education, would retain the current provisions in § 300.309, § 300.306, and § 300.307, respectively. Proposed § 300.109, regarding a full educational opportunity goal, generally would retain the current provisions in §§ 300.123 and 300.124, but would combine them, consistent with section 612(a)(2) of the Act.

Proposed § 300.110, regarding program options, would retain the current provisions in § 300.305.

Proposed § 300.111, regarding child find, generally would retain the current provisions in § 300.125 and, consistent with changes in section 612(a)(3) of the Act, would specifically reference children who are homeless or are wards of the State. In addition, proposed § 300.111(b) would incorporate the provisions related to developmental delay currently in § 300.313(a). The proposed regulation would remove the current provisions in § 300.313(b) regarding use of individual disability categories and § 300.313(c) regarding a common definition of developmental delay as they are unnecessary. States have the option of using developmental delay and other eligibility categories for children with disabilities aged three through nine and subsets of that age range and of using a common developmental delay definition for Parts B and C of the Act. The proposed regulations generally would retain the current provisions in § 300.125(a)(2) and (d), regarding other children included in

child find and the construction of Part B of the Act as not requiring that children be classified by their disability, as long as each child who needs special education and related services is regarded as having a disability under the Act. Consistent with other changes in these regulations to remove eligibility documentation requirements, the proposed regulation would remove the provision in § 300.125(b) of the current regulations that the State must have policies and procedures on file with the Secretary. The proposed regulation also would remove the provision in § 300.125(c) of the current regulations, regarding child find for children from birth through age two when the SEA is the lead agency for the Part C program, because this is a clarification that does not need to be in the regulations. The child find requirement under these regulations has traditionally been interpreted to mean identifying and evaluating children from birth. While child find under Part C of the Act overlaps, in part, with Part B of the Act, the coordination of child find activities under Part B and Part C is an implementation matter that would be best left to each State. Nothing in the Act prohibits the Part C lead agency's participation, with the agreement of the SEA, in the actual implementation of child find activities for infants and toddlers with disabilities.

Proposed § 300.112, regarding individualized education programs (IEPs), would revise the current provisions in § 300.128 by adding an exception that references the requirement in proposed § 300.300(b)(3)(ii). That exception would provide that if the parent of a child with a disability refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency is not required to convene an IEP meeting to develop an IEP for the child for which the public agency requests such consent. Consistent with other changes in these proposed regulations, the proposed regulation would remove § 300.128(b), which requires the State to have policies and procedures on file with the Secretary.

#### **Least Restrictive Environment**

Proposed § 300.114, regarding LRE, generally would retain the current provisions in § 300.550(b). The proposed regulation would remove the documentation requirements of § 300.130(a) and § 300.550(a) and (b), consistent with other changes in these

proposed regulations. The current provision related to an assurance regarding a State's funding mechanism in § 300.130(b)(2) would be retained in proposed § 300.114(b)(1). This section would provide that a State funding mechanism must not result in placements that violate the LRE provisions and that the State must not use a funding mechanism that distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child, as described in the child's IEP. This change is consistent with language in section 612(a)(5)(B)(i) of the Act.

With regard to section 612(a)(5)(B)(i) of the Act, note 89 in the Conf. Rpt. states that some States continue to use funding mechanisms that provide financial incentives for, and disincentives against, certain placements and these new provisions in the statute were added to prohibit States from maintaining funding mechanisms that violate appropriate placement decisions, not to require States to change funding mechanisms that support appropriate placement decisions. Note 89 of the Conf. Rpt. indicates that it is the intent of the changes to section 612(a)(5)(B) of the Act to prevent State funding mechanisms from affecting appropriate placement decisions for children with disabilities. As also set out in note 89, the law requires that each public agency ensure that a continuum of alternative placements (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) is available to meet the needs of children with disabilities for special education and related services. The note further explains that State funding mechanisms must be in place to ensure funding is available to support the requirements of this provision, not to provide an incentive or disincentive for placement and that the LRE principle is intended to ensure that a child with a disability is served in a setting where the child can be educated successfully in the least restrictive setting. Proposed paragraph (b)(2) would replace § 300.130(b)(2) and require a State that does not have policies and procedures to this effect to provide an assurance as soon as feasible to ensure that the mechanism does not result in placements that violate the LRE principle. The other provisions regarding LRE would be retained with appropriate updating of cross-references, as described in the following paragraphs.

Proposed § 300.115, regarding continuum of placements, would retain the language currently in § 300.551. Proposed § 300.116, regarding placements, would retain the language currently in § 300.552, except that paragraph (b)(3) would be revised to clarify that a child's placement must be as close as possible to the child's home unless the parent agrees otherwise. Finally, § 300.116(c) would be revised to require that each public agency ensure that, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school he or she would attend if not disabled, unless the parent agrees otherwise. This additional language, "unless the parent agrees otherwise," in paragraphs (b)(3) and (c) would clarify that parents can choose to send their child to a charter school, magnet school, or other specialized school without causing a violation of the LRE mandate.

Proposed § 300.117, regarding nonacademic settings, would retain the current provisions in § 300.553. Proposed § 300.118, regarding children in public or private institutions, would retain the current provisions in § 300.554.

Proposed § 300.119, regarding technical assistance and training, would retain the current provisions in § 300.555.

Proposed § 300.120, regarding LRE monitoring activities, would retain the current provisions in § 300.556.

#### **Additional Eligibility Requirements**

Proposed § 300.121, regarding procedural safeguards, would retain the current provision in § 300.129(a), but would remove the provision in § 300.129(b) regarding having the safeguards on file with the Secretary, consistent with statutory changes eliminating requirements that States file documentation with the Secretary.

Proposed § 300.122 would remove the current requirement in § 300.126 that evaluation policies and procedures be on file with the Secretary, consistent with statutory changes discussed previously. Consistent with the provision in section 612(a)(7) of the Act, proposed § 300.122 would require that children with disabilities be evaluated consistent with the requirements in subpart D of these proposed regulations. The relevant requirements are addressed elsewhere in this preamble in the discussion of subpart D.

Proposed § 300.123 would remove the current requirement in § 300.127 that policies and procedures related to confidentiality be on file with the Secretary and the criteria the Secretary uses to evaluate those policies and

procedures, consistent with statutory changes discussed previously. Instead, the proposed regulation would require that public agencies comply with subpart F of these regulations relating to the confidentiality of records and information. The relevant requirements are addressed elsewhere in this preamble in the discussion of subpart F.

Proposed § 300.124, regarding the transition of children from the Part C program to preschool programs under Part B, would remove the current requirement in § 300.132 that policies and procedures related to confidentiality be on file with the Secretary, as discussed previously. The proposed regulation generally would retain the other provisions of § 300.132. Proposed § 300.124(c) would clarify that only affected LEAs must participate in transition planning conferences arranged by the designated lead agency under Part C of the Act.

#### **Children in Private Schools**

Proposed § 300.129, concerning State responsibilities regarding children in private schools, would revise the current requirements in § 300.133, by removing the requirement that a State must have on file with the Secretary policies and procedures that ensure that the requirements of current §§ 300.400 through 300.403 and current §§ 300.460 through 300.462 are met. Proposed § 300.129 would make clear that the State must have in effect policies and procedures that ensure that LEAs and, if appropriate, the SEA, meet the private school requirements in proposed §§ 300.130 through 300.148.

#### **Children With Disabilities Enrolled by Their Parents in Private Schools**

Proposed § 300.130, regarding the definition of parentally-placed private school children with disabilities, would incorporate the current provisions in § 300.450.

Proposed § 300.131, regarding child find for parentally-placed private school children with disabilities, generally would retain the current requirements in § 300.451, but would clarify, consistent with the changes in proposed §§ 300.132 and 300.133, that the provisions governing parentally-placed private school children with disabilities apply to children who are enrolled in private schools located in the school district served by the LEA. The new statutory requirements in section 612(a)(10)(A)(ii) of the Act should ensure that parentally-placed private school children will not be denied the opportunity to receive services that would otherwise be available to them because of practical obstacles posed

when they attend a private school located outside their district of residence.

Proposed regulations in § 300.131(b) through (e) also would include new provisions that incorporate the new requirements in section 612(a)(10)(A)(ii) of the Act, designed to ensure that child find for parentally-placed private school children suspected of having disabilities is comparable to child find for public school children suspected of having disabilities. Proposed § 300.131 would require that the participation in child find for parentally-placed private school children with disabilities be equitable, the counts be accurate, the activities undertaken be similar to child find activities for public school children with disabilities, and the period for completion of the child find process be comparable to the period for completion for public school children with disabilities when a parent consents to the evaluation. Similar to the current provision in § 300.453(c), and consistent with section 612(a)(10)(A)(ii)(IV) of the Act, proposed § 300.131(d) would provide that the costs of carrying out the child find requirements for parentally-placed private school children with disabilities, including individual evaluations, may not be considered in determining whether an LEA has met its obligations under proposed § 300.133.

The proposed regulation would remove current § 300.453(d), regarding the permissibility of additional services, as it merely provides clarification for which a regulation is not necessary. Nothing in the Act prohibits SEAs and LEAs from providing other services to parentally-placed private school children with disabilities in addition to the services that are required under Part B of the Act.

Proposed § 300.132(a), regarding the provision of services for parentally-placed private school children with disabilities, would revise current § 300.452(a) in light of changes in section 612(a)(10)(A) of the Act, which refers to children “enrolled in private elementary schools and secondary schools in the school district served by a local educational agency.” Therefore, proposed § 300.132(a) would clarify that the provision of services under the proposed regulations refers only to children with disabilities enrolled by their parents in private schools located in the school district served by the LEA. The proposed regulation also would add a reference to the by-pass provisions in proposed §§ 300.190 through 300.198. Proposed § 300.132(b) generally would retain current § 300.452(b), regarding a services plan for each private school child with a disability designated to

receive special education and related services under Part B. Proposed § 300.132(c) would require each LEA to maintain and provide to the SEA records on the number of private school children with disabilities evaluated, the number determined to be children with disabilities, and the number of private school children with disabilities served, consistent with section 612(a)(10)(A)(i)(V) of the Act.

Proposed § 300.133, regarding expenditures for providing special education and related services to parentally-placed private school children with disabilities, would revise current § 300.453(a), regarding the formula used in determining the proportionate amount of expenditures, in light of changes in section 612(a)(10)(A)(i)(II) of the Act. Proposed § 300.133(a) would provide that the calculation of the proportionate amount of funds allocated for services for parentally-placed private school children be based on the count of parentally-placed private school children attending private schools located in the LEA. The proposed regulation would establish the formula as the number of children with disabilities, ages 3 through 21, who are enrolled by their parents in private schools located in the school district served by the LEA, divided by the total number of children with disabilities, ages 3 through 21, in the LEA’s jurisdiction. Proposed § 300.133(b) would incorporate the provision in section 612(a)(10)(A)(i)(II) of the Act regarding a thorough and complete child find process. Proposed § 300.133(c), regarding child count, generally would retain the current provision in § 300.453(b), but for clarity, would use the term parentally-placed private school children with disabilities. The existing provision in § 300.453(c) would be removed, as similar content would be more fully addressed in proposed § 300.131(d). Proposed § 300.133(d) would incorporate the statutory provision regarding supplementing not supplanting in section 612(a)(10)(A)(i)(IV) of the Act.

Proposed §§ 300.134 and 300.135 would incorporate new provisions in section 612(a)(10)(A)(iii) and (iv) of the Act, regarding timely and meaningful consultation with private school representatives and representatives of parents of parentally-placed private school children with disabilities, including a discussion of: How parentally-placed children identified through the child find process can meaningfully participate; how, where, and by whom special education and related services will be provided; and

how, if the LEA disagrees with the views of the private school officials and the services to be provided, the LEA will provide a written explanation of why the LEA chose not to provide services directly or through a contract. Proposed § 300.135 would require, in accordance with section 612(a)(10)(A)(iv) of the Act, a written affirmation signed by the representatives of the participating private schools that timely and meaningful consultation has occurred. The current provisions in § 300.454(b)(1) through (3), regarding the consultation process, would be removed because they were superseded by new statutory requirements related to consultation in section 612(a)(10)(A)(v) of the Act.

Proposed § 300.136, regarding the right of a private school official to submit to the SEA a complaint related to the LEA's compliance with the timely and meaningful consultation requirements, would incorporate the new provisions in section 612(a)(10)(A)(v) of the Act.

Proposed § 300.137(b) and (c), regarding determination of services to parentally-placed private school children with disabilities, generally would retain the current provisions in § 300.454(a), (b)(4), and (c). Proposed § 300.137(a) also would include language from current § 300.455(a)(3), providing that a parentally-placed private school child with a disability has no individual entitlement to receive some or all of the special education and related services that the child would receive if enrolled in a public school. This is an important clarification of the different responsibilities that public schools have for providing special education and related services to parentally-placed private school children with disabilities. Under the Act, LEAs have an obligation to provide the group of parentally-placed private school children with disabilities with equitable participation in the services funded with Federal IDEA funds. Because Federal funding constitutes only a portion of the excess costs of providing special education and related services to a child with disabilities, LEAs, in consultation with representatives of the private schools, will have to make decisions about how best to use the available Federal funds to address the needs of the parentally-placed private school children with disabilities as a group. In some LEAs, geography, school location, and the needs of the parentally-placed private school children with disabilities may make it possible for most, or even all of those children to receive some services

under section 612(a)(10)(A) of the Act. In other cases, the Federal funds available may not be sufficient to provide all of these children with special education and related services. Decisions about how best to use the available Federal funds to ensure equitable participation of the group of parentally-placed private school children with disabilities are left to LEA personnel, in consultation with the private school representatives, who understand what is feasible and appropriate in particular situations.

Proposed § 300.138, regarding equitable services provided to parentally-placed private school children with disabilities, would retain the current provisions in § 300.455(a)(1) and (2), and (b), regarding standards for personnel who provide services to parentally-placed private school children, different amounts of services that may be provided to parentally-placed private school children as compared with those provided to children in public schools, and the provision of services for each parentally-placed private school child who has been designated to receive services in accordance with a services plan. The proposed regulation also would include language from section 612(a)(10)(A)(vi) of the Act, which provides that the special education and related services be provided directly by employees of the public agency or through contract and that special education and related services, including materials and equipment, be secular, neutral and nonideological.

Proposed § 300.139, regarding the location of services and transportation, generally would retain the current provisions in § 300.456 that clarify that LEAs may provide special education and related services funded under Part B of the Act on site at the private, including religious, schools to the extent consistent with law. It should be noted that LEAs should provide such services for parentally-placed private school children with disabilities on site at their school, unless there is a compelling rationale for these services to be provided off site.

Proposed § 300.140, regarding the unavailability of due process complaints, except for child find and the availability of State complaints, would retain the current provisions in § 300.457. Proposed § 300.140(b) would clarify that the State complaint procedures would be used to address complaints about the implementation of the consultation process in proposed § 300.134. Proposed § 300.141, regarding the requirement that funds not benefit a private school, would retain the current

provisions in § 300.459. Proposed § 300.142 would combine the requirements of current §§ 300.460 and 300.461 regarding the use of public school personnel and private school personnel. Proposed § 300.143, regarding the prohibition of separate classes, would retain the requirements in current § 300.458.

Proposed § 300.144 would incorporate provisions in section 612(a)(10)(A)(vii) of the Act regarding property, equipment, and supplies for the benefit of private school children with disabilities and would replace the current provisions in § 300.462(a). The proposed regulation would retain the current provisions in § 300.462(b) through (e).

#### **Children With Disabilities in Private Schools Placed or Referred by Public Agencies**

Proposed §§ 300.145, 300.146, and 300.147, regarding children with disabilities placed in or referred to private schools by public agencies, generally would retain the current provisions in §§ 300.400, 300.401, and 300.402, which provide that children so placed or referred receive special education and related services in conformity with an IEP at no cost to the parents. This would be consistent with the requirement in section 612(a)(10)(B)(ii) of the Act, which provides that the SEA determine whether such private schools meet the standards that apply to the SEA and LEAs and that children served have all the rights the children would have if served by these agencies. Proposed § 300.146(b) would continue to provide that publicly-placed children with disabilities be provided an education that meets the standards that apply to education provided by the SEA and LEAs, including the requirements of part 300, except for the requirements of §§ 300.18 and 300.156(c). This provision is intended to ensure that children with disabilities who are publicly-placed in or referred to a private school or facility as a means of providing these children with special education and related services would continue to retain the same right to FAPE that they would have if served directly by a public agency. However, because of statutory language in the ESEA that the requirements regarding highly qualified teachers apply only to public school teachers, as well as related language in section 602(10) of the Act and proposed § 300.18, we do not read proposed § 300.146(b) as requiring teachers of children with disabilities who are placed in or referred to private schools by a public agency to meet either the

“highly qualified teacher” standard in the ESEA or the “highly qualified special education teacher” standard in the Act. Proposed § 300.147, regarding implementation by the SEA, would incorporate, without change, the provisions in current § 300.402.

#### **Children With Disabilities Enrolled by Their Parents in Private Schools When FAPE Is at Issue**

Proposed § 300.148, relating to placement of children with disabilities in private schools when the provision of FAPE is at issue, generally would retain the current provisions in § 300.403(a), (c), and (d). Proposed § 300.148 would remove, as unnecessary, language currently in § 300.403(b), which provides that disagreements regarding the availability of an appropriate program for the child and the question of financial responsibility are subject to due process procedures. Disputes about these matters would be subject to the due process procedures even without this provision, because the central issue in such disputes is whether the public agency has made FAPE available to the child. Consistent with statutory language, proposed § 300.148(b) would include the term “school” after “elementary.” Proposed § 300.148(d) would modify current § 300.403(e), based on the specific provisions in section 612(a)(10)(C)(IV) of the Act.

The current provision on documentation of SEA responsibility for general supervision in § 300.141(a) and (b) would be removed consistent with statutory changes regarding documentation. Proposed § 300.149, regarding SEA responsibility for general supervision, would replace current § 300.600(a) and incorporate language in section 612(a)(11) of the Act to include a new provision referencing the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11431. We also are adding a phrase to § 300.149(a)(2) to clarify that the SEA is not responsible for exercising general supervision for education programs for children with disabilities in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. Current § 300.600(b) also would be removed as a result of statutory changes regarding submission of State information.

New language referencing the State monitoring and enforcement responsibilities in proposed §§ 300.602 and 300.606 through 300.608 would be added in § 300.149(b) because State monitoring and enforcement are central to the SEA’s exercise of general supervision. Proposed § 300.149(c) and

(d) respectively, would incorporate current § 300.600(c), clarifying that Part B does not limit the responsibility of agencies other than educational agencies to provide or pay for some or all of the cost of FAPE and § 300.600(d), regarding the ability of a Governor or other individual to assign to a public agency, other than the SEA, responsibility for ensuring that the requirements of Part B are met for students with disabilities convicted as adults and incarcerated in adult prisons. As a general matter, for educational purposes, students who had been enrolled in a BIA funded school and are subsequently convicted as an adult and incarcerated in an adult prison are the responsibility of the State where the adult prison is located. The Secretary is seeking comment on whether further clarification on this issue is warranted.

Proposed § 300.150 would incorporate language from current § 300.143 regarding SEA implementation of procedural safeguards, with a revision. Consistent with other changes to remove State documentation requirements, proposed § 300.150 would require States to have policies in effect, rather than on file with the Department. The cross-reference also would be updated. Current § 300.145, regarding recovery of funds for misclassified children, would be removed. Under section 611 of the Act, funds are no longer distributed based on a count of the children with disabilities served in a given fiscal year.

#### **State Complaint Procedures**

In 1992, the Department moved these procedures into part 300 from 34 CFR 76.780 through 76.782 based on a decision to place the complaint procedures into the specific program regulations to which they relate. Proposed § 300.151, regarding the adoption of State complaint procedures, would incorporate the current provisions in § 300.660, with one substantive change. Proposed § 300.151(b)(1) would remove the reference to monetary reimbursement, so as not to imply that reimbursement would be appropriate in the majority of State complaints. Proposed § 300.152, regarding minimum State complaint procedures, would retain the current provisions in § 300.661, with several changes. Proposed § 300.152(a)(3) would be added in order to incorporate into the State complaint procedures an opportunity for a public agency to respond to a complaint, including a chance to make a proposal to resolve the complaint, and, with the consent of the parent, to engage the parent in mediation or other alternative means of dispute resolution. This change would

encourage meaningful informal resolution of disputes between the parties to the dispute. Proposed § 300.152(b)(1) would add a provision that would allow extensions of the 60-day time limit if the parties agree to extend the timelines so that they can engage in mediation or other alternative means of dispute resolution. This change is intended to support cooperative dispute resolution efforts, and not to result in uniform extensions. Proposed § 300.152(c)(1) would revise the language in current § 300.661(c)(1) to provide a simplified process for setting aside complaints that also are the subject of a due process hearing, which should aid State implementation of the State complaint process. Finally, current § 300.661(c)(3) regarding a complaint involving a public agency’s failure to implement a due process decision would be removed. The enforcement and implementation of due process hearing decisions are matters in the province of State and Federal courts.

Proposed § 300.153, regarding the filing of a complaint, would retain the current provisions in § 300.662, with some changes. Proposed § 300.153(b)(3) and (4) would add new information requirements for complaints, similar to the basic notice requirement for filing a due process complaint, in order to give the public agency the information that would allow it to attempt to resolve the complaint at the earliest opportunity. Proposed § 300.153(c) would revise the language in current § 300.662(c) to require that the complaint must allege a violation that occurred not more than one year prior to the date the complaint is received, removing references to longer periods for continuing violations and for compensatory services claims, to ensure expedited resolution for public agencies and children with disabilities. A one-year timeline is reasonable, and will assist in smooth implementation of the State complaint procedures. Finally, proposed § 300.153(d) would add a new requirement that the party filing a complaint forward a copy to the public agency involved at the same time as the party files the complaint with the SEA. This will ensure that the public agency involved has knowledge of the issues raised, and an opportunity to resolve them directly with the complaining party.

#### **Methods of Ensuring Services**

Proposed § 300.154, regarding methods of ensuring services, generally would retain the current provisions in § 300.142. Consistent with changes in section 612(a)(11) of the Act, the proposed regulation would clarify in § 300.154(b)(1)(i), that a public agency

may fulfill its obligation to ensure FAPE either directly or through contracts or other arrangements pursuant to § 300.154(a) or (c). Likewise, the proposed regulation would clarify, in § 300.154(b)(2), that the LEA or State agency is authorized to claim reimbursement and, in § 300.154(c)(3), that other appropriate written methods also must be approved by the Secretary. Consistent with statutory changes regarding submission of State information, the proposed regulation would remove the current regulatory language in § 300.142(d), that the State have on file with the Secretary, information to demonstrate that the requirements of this regulation are met. However, as reflected in proposed § 300.704(a)(3), section 611(e)(1)(C) of the Act requires that States certify to the Secretary that agreements to establish responsibility for services are current before the State may expend section 611 funds for State administration.

Proposed § 300.154(d)(2)(iv) would include a new provision that to access the parent's public insurance proceeds, the public agency must obtain parental consent, in accordance with proposed § 300.622 the first time that access is sought, and notify parents that refusal to allow access to their public insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. Under Part B of the Act, special education and related services, as well as supplementary aids and services and supports that an IEP Team determines a child with a disability needs in order to receive FAPE, must be provided at no cost to the parents or the child. Use of a parent's insurance often imposes costs to the parent that are not, and often cannot be known at the time the costs are billed to the insurance provider. Under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA), a child's records cannot be released without parental consent, except for a few specified exceptions. No FERPA exception permits public agencies to release educational records for insurance billing purposes without a parent's consent. We must ensure that a parent consents to the release of a child's records for that purpose and that the parents are informed that refusing to give consent to the release of education records for that purpose will not prevent a child from receiving the services that are in the child's IEP.

Proposed § 300.154(e) would retain the current requirements regarding children with disabilities who are covered by private insurance. Proposed § 300.154(f), (g), and (h), respectively, regarding use of Part B funds, proceeds

from public and private insurance, and construction are essentially the same as paragraphs (g), (h), and (i) of § 300.142 of the current regulations.

#### **Additional Eligibility Requirements**

Proposed § 300.155, regarding hearings for LEA eligibility, would remove the current requirements in § 300.144 that States have procedures on file with the Secretary, but generally would retain the requirement that States have procedures to give an LEA notice and an opportunity for a hearing prior to a final determination that it is not eligible for funds under Part B.

Current §§ 300.135 and 300.136, regarding a comprehensive system of personnel development and personnel standards, would be removed consistent with the statutory removal of these provisions in the Act (see section 612(a)(14) and (15) of the Act in effect before December 3, 2004) relating to the comprehensive system of personnel development and personnel standards.

Proposed § 300.156, regarding personnel qualifications, would include the statutory provisions related to States' establishment and maintenance of personnel qualifications for special education teachers that align Part B of the Act with the highly qualified teacher provisions in section 1119(a)(2) of the ESEA; and also address personnel qualifications for related services providers and paraprofessionals. As provided in note 21 of the Conf. Rpt., the incorporated provisions require that special education teachers obtain full State certification as special education teachers, but it does not prevent regular education and other teachers who are highly qualified in particular subjects from providing instruction in core academic subjects to children with disabilities in those subjects. For example, a reading specialist who is highly qualified in reading instruction, but who is not certified as a special education teacher, would not be prohibited from providing reading instruction to children with disabilities. Proposed § 300.156(a) contains the general requirement that a State's qualifications ensure that personnel carrying out the purposes of part 300 are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

Proposed § 300.156(b) would incorporate the provisions in section 612(a)(14)(B) of the Act regarding personnel qualifications for related services providers and paraprofessionals. This would include the requirement that the State's

standards must ensure that related services personnel and paraprofessionals meet qualifications that are consistent with any State-approved or recognized certification, licensing, registration or other comparable requirements for their professional discipline. These procedures also must ensure that related services personnel who deliver services meet applicable qualification standards and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis. Proposed § 300.156(b) reflects the comment in note 97 of the Conf. Rpt. that the current regulations requiring related services providers to meet the highest State standard applicable to their profession across all State agencies have established an unreasonable standard for SEAs to meet, and as a result, have led to a shortage of the availability of related services for students with disabilities. Conferees intended for SEAs to establish rigorous qualifications for related services providers to ensure that students with disabilities receive the appropriate quality and quantity of care. SEAs are encouraged to consult with LEAs, other State agencies, the disability community, and professional organizations to determine the appropriate qualifications for related services providers, including the use of consultative, supervisory, and collaborative models to ensure that students with disabilities receive the services described in their individual IEPs. To that end, proposed § 300.156(b)(2)(iii), similar to the current regulation in § 300.136(f), generally would permit States to allow paraprofessionals and assistants who are appropriately trained and supervised to assist in providing special education and related services under Part B of the Act to children with disabilities.

Proposed § 300.156(c) would incorporate the new requirement in section 612(a)(14)(C) of the Act that all special education teachers be highly qualified by the deadline established in the ESEA (the end of the 2005–2006 school year). It would also specify that this requirement applies only to public school special education teachers, in light of the statutory definition of "highly qualified" in section 602(10) of the Act. Proposed § 300.156(d) would include the statutory authorization for a State to adopt a policy requiring LEAs to take measurable steps to recruit, hire, train, and retain highly qualified personnel.

Proposed § 300.156(e) would incorporate the language in section 612(a)(14)(E) of the Act, regarding the

rule of construction that these provisions do not create a right of action on behalf of an individual student for the failure of a particular SEA or LEA staff person to be highly qualified or prevent a parent from filing a State complaint with the SEA about staff qualifications under §§ 300.151 through 300.153 of the proposed regulations.

Proposed § 300.157, regarding performance goals and indicators, would revise the current § 300.137, consistent with the revised provisions in section 612(a)(15) of the Act. Proposed § 300.157(a)(2) would include a new provision that aligns the goals and indicators with the State's definition of adequate yearly progress, including progress by children with disabilities, under section 1111(b)(2)(C) of the ESEA. Proposed § 300.157(a)(3) would retain the current provision in § 300.137(b), that public agencies must address graduation and dropout rates. In order to conform to the language in section 612(a)(15) of the Act, the proposed regulation would contain the following changes: proposed § 300.157(a)(4) would remove from the current provision in § 300.137(a)(2), the term "maximum" before "extent appropriate" and add the word "any" before "other goals and standards for all children established by the State." Likewise, proposed § 300.157(b) would remove from the current provision in § 300.137(b), the words appearing after the word, "achieving" and add, in their place, the words, "the goals described in paragraph (a) of this section, including measurable annual objectives for progress by children with disabilities under section 1111(b)(2)(C)(v)(II)(cc) of the ESEA; and". Proposed § 300.157(c) would change the requirement for reporting to the public and to the Secretary in current § 300.137(c) from every two years to annually and would provide that elements of the report under section 1111(h) of the ESEA may be included in the annual report under Part B of the Act.

Proposed § 300.160, regarding participation in assessments, would replace §§ 300.138 and 300.139 of the current regulations and would incorporate the changes in section 612(a)(16) of the Act. For reasons of burden reduction described throughout this preamble, the proposed regulation would remove the current requirement in § 300.138 that the State have information on file with the Secretary.

Consistent with language in section 613(a)(16) of the Act, proposed § 300.160(a) would add to the current provision in § 300.138(a) the word "all" before the word "children", and before the phrase "general State and

districtwide assessment programs" and would clarify that this requirement includes assessments described in section 1111 of the ESEA. Proposed § 300.160(a) also would remove, from the current provision in § 300.138(a), "modifications in administration" and add, in its place, "alternate assessments" and would add after the word "necessary", the words, and "as indicated in their respective IEPs."

Proposed § 300.160(b) would require that States, (or, in the case of districtwide assessments, LEAs) develop guidelines for providing appropriate accommodations in assessments. Proposed § 300.160(c)(1) would address guidelines for participation in alternate assessments for those children who cannot participate in regular assessments as indicated in their IEPs. Proposed § 300.160(c)(2) would include a provision that, in the case of assessments of student academic progress, alternate assessments and guidelines under proposed § 300.160(c)(1) are aligned with the State's challenging academic content and challenging student academic achievement standards or the alternate achievement standards, if adopted under the regulations implementing section 1111(b)(1) of the ESEA. Proposed § 300.160(c)(3) would require that the State conduct the alternate assessments described in section 1111(b)(1) of the ESEA.

Proposed § 300.160(d) would incorporate the requirement in section 612(a)(16)(D) of the Act for the SEA, in the case of a statewide assessment, and the LEA, in the case of a districtwide assessment, to report to the public on the assessment of children with disabilities with the same frequency and in the same detail that it reports on the assessment of nondisabled children, and replace the current requirements in § 300.139.

Proposed § 300.160(e) would incorporate the new requirement in section 612(a)(16)(E) of the Act that the SEA, in the case of statewide assessments, and the LEA, in the case of districtwide assessments, to the extent possible, use universal design in developing and implementing assessments.

Consistent with section 612(a)(17) of the Act, the current provisions in § 300.155, regarding use of funds; § 300.152, regarding non-commingling; and § 300.153, regarding State-level nonsupplanting, would be combined into proposed § 300.162. The proposed regulation generally would retain the requirements that Part B funds be expended in accordance with Part B of the Act, that Part B and State funds not

be commingled, and that Part B funds be used to supplement, and in no case to supplant other Federal, State, and local funds expended for special education and related services. Consistent with statutory changes discussed previously, the proposed regulation would eliminate the current provision in § 300.155, that States have policies and procedures on file with the Secretary; would replace the current provisions in § 300.152(a), that States provide the Secretary an assurance; and would replace the current provision in § 300.153(a)(2), that the State have information on file with the Secretary demonstrating compliance with the use of Part B funds to supplement and not supplant, with straightforward statements of the statutory requirements. These changes would be consistent with changes in section 612(a) of the Act regarding State submission of information. Proposed § 300.162(b)(2) would retain the current provision in § 300.152(b) clarifying that use of a separate accounting system including an audit trail of expenditures of Part B funds would satisfy the prohibition on commingling.

Proposed § 300.162(c)(1) would retain the current provision in § 300.153(a)(1), regarding the basic non-supplanting requirement. Proposed § 300.162(c)(2) would retain the current provision in § 300.153(b), regarding the Secretary's ability to waive, in whole or in part, the State-level nonsupplanting requirement if the State provides clear and convincing evidence regarding the availability of FAPE to all children with disabilities. This waiver would be addressed further in proposed § 300.164.

Proposed § 300.163 generally would retain the current provisions in § 300.154, regarding maintenance of State financial support. However, consistent with the language in section 612(a) of the Act, the proposed regulation would eliminate the provision regarding information that States must have on file with the Secretary demonstrating, on either a total or per-capita basis, that the State will not reduce the amount of State financial support for special education and related services for children with disabilities.

Proposed § 300.164, regarding waiver of the requirement regarding supplementing and not supplanting Part B funds, would retain the current provisions in § 300.589, except that to reduce regulatory burden, proposed § 300.164(c)(4) would reduce the number of entities with which a State must consult when determining that FAPE is currently available to all

eligible children with disabilities in the State, and eliminate the requirement for a summary of the input of the entities consulted.

Proposed § 300.165(a) would incorporate the language in section 612(a)(19) of the Act regarding public participation in the adoption of policies and procedures to implement Part B of the Act, which is the same as the current provision in § 300.148(a)(1). Current § 300.148(a)(2) and (b), regarding alternate ways of meeting the public participation requirement and the requirement that the State documentation be on file with the Secretary, would be removed. The current provisions in §§ 300.280 through 300.284 regarding public participation also would be removed. Removing the requirement for States to submit extensive documentation to the Secretary on how the public participation requirements are met should reduce regulatory burden on States. States are required to comply with the public participation requirements of the General Education Provisions Act, in 20 U.S.C. 1232d(b)(7), as provided for in proposed § 300.165(b), as well as State-specific requirements, in adopting policies and procedures relating to Part B of the Act, which should provide sufficient opportunities for public participation.

Proposed § 300.166 would incorporate the language in section 612(a)(20) of the Act, regarding the rule of construction on use of Federal funds to satisfy State-mandated funding of obligations to LEAs for purposes of complying with proposed §§ 300.162 and 300.163.

#### State Advisory Panel

Proposed § 300.167, regarding State advisory panels, would incorporate the provisions in section 612(a)(21)(A) of the Act and would remove from current § 300.650, language regarding information on file with the Secretary. The proposed regulation also would remove the provision from current § 300.650 permitting modification of existing advisory panels to be consistent with section 612(a)(21)(A) of the Act.

Proposed § 300.168, regarding the membership of State advisory panels, generally would retain the current provisions in § 300.651. In addition, proposed § 300.168(a)(5) and (10), would incorporate the statutory references to officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11431 *et seq.*, and a representative from the State child welfare agency responsible for foster care, respectively. Consistent with the Act, proposed § 300.168(b) would

include a provision in the special rule that clarifies that for panel membership a majority of the members of the panel must be individuals with disabilities or parents of children with disabilities (ages birth through 26).

Proposed § 300.169, regarding duties of the advisory panel, generally would retain the current provisions of § 300.652, except that the current language in § 300.652(b), regarding advising on eligible students with disabilities in adult prisons, would be removed. Given the breadth of its statutory responsibilities, nonstatutory mandates on the State advisory panels would be removed.

To provide greater flexibility for States in the operations of advisory panels, the current provision in § 300.653, regarding procedures of the advisory panel, would be removed.

#### Other Provisions Required for State Eligibility

Proposed § 300.170, regarding suspension and expulsion rates, would retain most of the current provisions in § 300.146, but would remove the language that the States have information on file with the Secretary, consistent with statutory changes on State submission of information. In addition, consistent with section 612(a)(22) of the Act, proposed § 300.170(b) would replace, from the current § 300.146(b), “behavioral interventions” with “positive behavioral interventions and supports.”

Proposed § 300.171, regarding the annual description of the use of Part B funds, would clarify the current § 300.156(a)(1) that addresses the amounts retained for State administration and State-level activities, generally would retain the current provisions in § 300.156(a)(2) and (b), and would remove the current provision in § 300.156(c) regarding percentages distributed to LEAs since this information does not assist the Department in determining whether an SEA is complying with Part B of the Act in this regard. Proposed § 300.171 also would add a new paragraph (c) to clarify that, based on section 611(g)(2) of the statute, the provisions of this section do not apply to the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated States.

Proposed § 300.172, regarding access to instructional materials, would incorporate the new language in section 612(a)(23) of the Act regarding the timely provision of instructional materials to blind persons or other persons with print disabilities. Proposed § 300.172 uses “persons” to conform to

the language in the Act. However, in the context of this regulatory provision, “persons” means “children.” Proposed § 300.172(a) would repeat the requirement from section 612(a)(23)(A) of the Act that the State must adopt the National Instructional Materials Accessibility Standard (NIMAS) in a timely manner after its publication in the **Federal Register** by the Department. The NIMAS will be the subject of a separate rulemaking process. In that proposed rulemaking document, we will propose to add the NIMAS to part 300 as an appendix.

Proposed § 300.172(b) would incorporate the provision in section 612(a)(23)(B) of the Act that a State is not required to coordinate with the National Instructional Materials Accessibility Center (NIMAC) and the requirements that apply if an SEA chooses not to coordinate with the NIMAC. Proposed § 300.172(b)(3) would provide that nothing in this section would relieve an SEA of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats, but who do not fall within the category of children for whom the SEA may receive assistance from NIMAC, receive those instructional materials in a timely manner. Timely access to appropriate and accessible instructional materials is an inherent component of public agencies’ obligations under the Act to ensure that FAPE is available for children with disabilities and that they participate in the general education curriculum as specified in their IEPs. The provisions in section 612(a)(23) of the Act will assist SEAs in carrying out that responsibility for most children with disabilities who need accessible instructional materials. Section 674(e)(3)(A) of the Act limits the authority of the NIMAC to provide assistance to SEAs and LEAs in acquiring instructional materials for children who are blind, have visual disabilities, are unable to read or use standard printed materials because of physical limitations, and children who have reading disabilities that result from organic dysfunction, as provided for in 36 CFR § 701.10(b). Clearly, SEAs and LEAs that choose to use the services of the NIMAC will be able to assist blind persons or other persons with print disabilities who need accessible instructional materials through this mechanism. However, SEAs and LEAs still have an obligation to provide accessible instructional materials in a timely manner to other children with disabilities, who also may need accessible materials even though SEAs

and LEAs may not receive assistance for these children from NIMAC.

Proposed paragraph § 172(c) would incorporate the provision in section 612(a)(23)(C) of the Act regarding preparation and delivery of files if an SEA chooses to coordinate with the NIMAC.

In accordance with section 612(a)(23)(D) of the Act, § 300.172(d) would require an SEA, to the maximum extent possible, to collaborate with the State agency responsible for assistive technology programs. Proposed § 300.172(e) contains, in accordance with section 612(a)(23)(E) of the Act, definitions of blind persons or other persons with print disabilities, NIMAC, NIMAS, and specialized formats.

Proposed § 300.173, regarding State policies and procedures designed to prevent inappropriate overidentification and disproportionality, would incorporate the new provision in section 612(a)(24) of the Act. This proposed regulation would require the State to have in effect, consistent with section 618(d) of the Act, policies and procedures to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment.

Proposed § 300.174 would incorporate the new provision in section 612(a)(25) of the Act and would prohibit State and LEA personnel from requiring parents to obtain prescriptions for controlled substances for a child as a condition of the child's school attendance, the child's receipt of a Part B evaluation, or the child's receipt of services. Proposed paragraph § 300.174(b) would contain the statutory rule of construction in section 612(a)(25)(B) of the Act and would clarify that this provision does not create a Federal prohibition against teachers and other school personnel consulting or sharing with parents their observations on the student's functional or academic performance, and behavior in the classroom or school, or the child's possible need for an initial evaluation for special education and related services.

Proposed § 300.175, regarding the SEA as provider of FAPE or direct services, generally would retain the current provisions in § 300.147. The proposed regulation would remove the provision that States must have information on file with the Secretary demonstrating that they meet these requirements, consistent with statutory changes discussed previously.

Consistent with the statutory changes, proposed § 300.176, regarding exceptions for prior State plans and

modifications to the plans, generally would combine and retain the current provisions in §§ 300.111 and 300.112, with some minor changes. The date in proposed § 300.176(a) would be changed to December 3, 2004, the date on which the Act was signed into law. Consistent with the statute, proposed § 300.176(b)(1) would revise the current language from "State decides are necessary" to "State determines necessary." Consistent with the Act, proposed § 300.176(b)(2) would replace references to "policies and procedures" with "application" and "original" State plan. Consistent with the Act, proposed § 300.176(c)(1) would reference December 3, 2004, the date on which the Act was signed into law.

#### Department Procedures

Proposed § 300.178, regarding the Secretary's determination of State eligibility to receive a grant, would retain the current requirements in §§ 300.113(a) and 300.580.

Proposed § 300.179, regarding notice and hearing before determining a State is not eligible to receive a grant, would retain the current requirements in §§ 300.113(b) and 300.581.

Proposed § 300.180, regarding the hearing official or panel, would retain the current requirements in § 300.582.

Proposed § 300.181, regarding the hearing procedures, would retain the current requirements in § 300.583.

Proposed § 300.182, regarding the initial and final hearing decisions, would retain the current requirements in § 300.584 except proposed § 300.182(h) would be revised to clarify that the Secretary rejects or modifies the initial decision of the Hearing Official or Hearing Panel if the Secretary finds that it is clearly erroneous.

Proposed § 300.183, regarding filing requirements, would retain the current requirements in § 300.585.

Proposed § 300.184, regarding judicial review, would retain the current requirements in § 300.586.

Proposed § 300.186, regarding assistance under other Federal programs, would incorporate the provisions in section 612(e) of the Act. Proposed § 300.186 would clarify the current requirements in § 300.601, regarding the relation of Part B to assistance under other Federal programs, and would continue to provide that Part B of the Act may not be construed to permit a State to reduce or alter eligibility for medical or other assistance for children with disabilities under titles V and IX of the Social Security Act, but would reference "with respect to the provision of FAPE for

children with disabilities" instead of "services that are part of FAPE."

#### By-pass for Children in Private Schools

The proposed regulations regarding by-pass for children in private schools would incorporate changes in section 612(f) of the Act and would represent the first amendments to these regulations since they were adopted in 1984. Because the statutory changes related to the participation of parentally-placed private school children with disabilities should make it more likely that these procedures will be implemented, these proposed revisions would align the by-pass provisions from Part B of the Act with the general by-pass procedures in the Department's general administrative regulations in 34 CFR 76.670 through 76.677 that apply to other Department programs, including programs under titles I and IX of the ESEA. This alignment should help to ensure consistent implementation of the by-pass provisions throughout the Department.

Proposed § 300.190, regarding the general by-pass provision, would revise the current requirements in § 300.480. Consistent with changes in section 612(f)(1) of the Act, the proposed regulation would retain the current authority for a by-pass and would add additional authority in cases where the Secretary determines that an SEA, LEA, or other entity has substantially failed or is unwilling to provide for equitable participation. The proposed regulation generally would retain the current provision in § 300.480(b) regarding waiver of the requirements in these proposed regulations governing parentally-placed private school children with disabilities.

Proposed § 300.191, regarding services under a by-pass, generally would retain the current provisions in § 300.481, but with some exceptions. Proposed § 300.191(a)(1) would replace "The prohibition" with "Any prohibition" and would add "and" at the end of § 300.191(a)(1). The current provision in § 300.481(a)(3), regarding policies and procedures, would be removed consistent with other burden reduction changes in these proposed regulations. Proposed § 300.191(a) would add "and, as appropriate, LEA or other public agency officials" and paragraphs (b) and (c)(1) of proposed § 300.191 would add "LEA or other public agency." These changes are necessary to ensure effective implementation of the by-pass provision within an affected State because, in general, a by-pass would be implemented only in a specific LEA or

other public agency within the State and not statewide. Thus, the change in proposed § 300.191(a) would ensure that the Secretary also consults with appropriate agency officials in any affected LEA or public agency within the State.

Proposed § 300.191(c)(1), regarding the calculation of the amount per child that is to be paid to providers, would revise the current provision in § 300.481(c)(1) to reflect the provision in section 612(f)(2)(A) of the Act.

Proposed §§ 300.192 and 300.193, regarding notice of intent to implement a by-pass and request to show cause, would retain the current provisions in §§ 300.482 and 300.483, but would add "LEA or other public agency" for consistency with statutory language.

Proposed § 300.194, regarding the show cause hearing, would retain the current provisions in § 300.484 and would add language to address statutory changes and align the proposed regulation with the by-pass regulations in 34 CFR 76.673 and 76.674 that apply to other Department programs. Proposed § 300.194(a) would add "LEA or other public agency" to make the provisions consistent with language in section 612(f) of the Act. Proposed

§ 300.194(a)(3) is a new provision that would provide an opportunity for an SEA, LEA, or other public agency and representatives of private schools to be represented by legal counsel and to submit oral or written evidence and arguments. Proposed § 300.194(d) would incorporate the by-pass provision in 34 CFR 76.763(b), and would specify that the designee conducting the hearing has no authority to require or conduct discovery. Proposed § 300.194(g) would incorporate the by-pass provision in 34 CFR 76.674(b), and would specify that within 10 days after the hearing, the designee indicates that a decision will be issued on the basis of the existing record or requests further information from one or more of the parties to the hearing.

Proposed § 300.195, regarding the show cause hearing decision, would retain the current provisions in § 300.485 and add language to address statutory changes and to align the proposed regulation with the by-pass regulations in 34 CFR 76.675. Proposed § 300.195(a)(1) would incorporate the 120-day time period for closing the record of the hearing from the by-pass provision in 34 CFR 76.675(a)(1). Proposed § 300.195(b) would replace the 15-day time period to submit comments and recommendations on the designee's decision with the 30-day time period consistent with 34 CFR 76.675(b). Proposed § 300.195(c) would replace

"SEA" with "all parties to the show cause hearing" in order to make the provision consistent with language in section 612(f) of the Act.

Proposed §§ 300.196 and 300.197, regarding filing requirements and judicial review, would retain the current regulations in §§ 300.486 and 300.487, respectively.

Proposed § 300.198, regarding continuation of a by-pass, is a new provision that would incorporate the continuation of a by-pass requirement in 34 CFR 76.677 and would permit continuation of the by-pass until the Secretary determines that the SEA, LEA, or other public agency will meet the requirements for providing services to private school children.

Proposed § 300.199, regarding State administration, would incorporate the requirements in section 608 of the Act requiring that rulemaking conducted by the State conform to the purposes of Part B of the Act, that States minimize the number of rules, regulations, and policies to which LEAs and schools are subject to under the Act, and identify in writing any rule, regulation, or policy that is State-imposed and not required under the Act and its implementing regulations.

#### *Subpart C—LEA Eligibility*

Proposed § 300.200 would be similar to the current § 300.180 regarding the conditions of LEA eligibility, but would be revised consistent with the change in section 613(a) of the Act to require LEAs to provide assurances, rather than demonstrate, to the State that they meet the eligibility conditions. Cross-references to those eligibility conditions would be updated.

Proposed § 300.201, regarding consistency with State policies, would be essentially the same as the current § 300.220(a), with appropriate updating to reflect the structure of these proposed regulations. Current § 300.220(b) concerning policies on file with the SEA would be removed in light of the statutory change requiring only that an LEA provide assurances regarding its policies and procedures.

Proposed § 300.202 would combine the provisions addressed in current §§ 300.184(c) and 300.185, regarding excess cost requirements, and current § 300.230, regarding use of funds, with appropriate updating. Current § 300.184(a) would be removed because it is duplicative of the requirement in proposed § 300.202(a)(2) that Part B funds must be used only to pay the excess costs of special education and related services to children with disabilities. The definition of excess costs in the current § 300.184(b) would

be moved to proposed § 300.16 of subpart A of these proposed regulations.

Proposed § 300.203 would incorporate current § 300.231 on LEA maintenance of effort, with appropriate updating to reflect the structure of these proposed regulations. The standard for determining whether an LEA is complying with the LEA maintenance of effort requirement would be in proposed § 300.203(b) and would be substantively the same as current § 300.231(c). The language in current § 300.231(b) would be removed, based on the statutory change requiring LEAs to provide assurances in their applications to the State, rather than information that demonstrates their compliance.

Proposed § 300.204 would replace current § 300.232, regarding the exceptions to the LEA maintenance of effort provision, with language that more closely reflects the language in section 613(a)(2)(B) of the Act and clarifies the conditions under which the LEA may reduce the level of expenditures under Part B of the Act below the level of expenditures for the preceding year. As a result, we would remove the provisions in the current § 300.232(a) that limit the circumstances under which LEAs may reduce expenditures as a result of the voluntary departure of special education personnel only to situations in which those departing personnel are replaced with qualified, lower-salaried staff. In addition, the requirements that the voluntary departures be in conformity with existing board policies, collective bargaining agreements, and applicable State statutes would be removed. These changes would reduce regulatory burden on school districts and provide increased flexibility in funding decisions. However, the basic requirement that LEAs must ensure the provision of FAPE to eligible children, regardless of the costs, would remain the same.

Proposed § 300.204(e) would add a condition based on section 611(e)(3) of the Act, regarding the assumption of costs by the high cost fund, under which an LEA may reduce its level of expenditures. Proposed § 300.204(e) is needed because LEAs should not be required to maintain a level of fiscal effort based on costs that are assumed by the SEA's high cost fund.

Section 613(a)(2)(C)(i) of the Act was substantially revised to provide an adjustment to local fiscal effort in certain years in place of a provision in the prior law that permitted LEAs to use a portion of the Federal funds they received as local funds for special education. As a result, we would remove the current § 300.233, which

was based on the prior statutory language, and replace it with proposed § 300.205, which is based on the revised statute. Proposed § 300.205 would add an exception that, if an SEA exercises its authority under § 300.230(a), LEAs in the State may not reduce local effort under § 300.205 by more than the reduction in the State funds they receive. Section 300.230 only applies if an SEA pays or reimburses all LEAs in the State 100 percent of the non-Federal share of the costs of special education and related services.

Under proposed § 300.205, in years when the LEA receives an allocation of formula funds that exceeds the amount it received in the prior year, the LEA would be permitted to reduce the level of its local maintenance of effort amount by not more than 50 percent of the increase in its section 611 allocation. The LEA would then be required to use local funds equal to the reduction to carry out activities authorized under the ESEA, as explained in proposed § 300.205(b). In subsequent years, an LEA that reduced local fiscal effort in accordance with proposed § 300.205(a) would be required to meet this lower fiscal effort amount, unless it could again reduce local fiscal effort based on proposed § 300.205. Proposed § 300.205(c) would describe circumstances under which the SEA may prohibit an LEA from reducing the level of local expenditure. Proposed § 300.205(d) would implement the provision in section 613(a)(2)(C)(iv) of the Act that provides that the amount of funds expended for early intervening services will count toward the maximum amount by which an LEA may reduce local maintenance of effort.

LEAs wanting to exercise the authority in section 613(a)(2)(C)(iv) of the Act in conjunction with the authority to use not more than 15 percent of the LEA's total grant for early intervening services under proposed § 300.226 should use caution, however, because as noted in proposed §§ 300.205(a) and (d), and 300.226(a), the operation of the local maintenance of effort reduction provision and the authority to use Part B funds for early intervening services under section 613(f)(1) of the Act and proposed § 300.226(a) would be interconnected. The decisions that an LEA makes about the amount of funds that it would use for one purpose would affect the amount that it may use for the other. The following examples illustrate how these provisions affect one another:

*Example 1:* In this example, the amount that is 15 percent of the LEA's total grant (see proposed § 300.226(a)), which is the maximum amount that the LEA may use for

early intervening services (EIS), is greater than the amount that may be used for local maintenance of effort (MOE) reduction (50 percent of the increase in the LEA's grant from the prior year's grant) (see proposed § 300.205(a)).

*Prior Year's Allocation:* \$900,000.

*Current Year's Allocation:* \$1,000,000.

*Increase:* \$100,000.

*Maximum Available for MOE*

*Reduction:* \$50,000.

*Maximum Available for EIS:*

\$150,000.

- If the LEA chooses to set aside \$150,000 for EIS, it may not reduce its MOE (MOE maximum \$50,000 less \$150,000 for EIS means \$0 can be used for MOE).

- If the LEA chooses to set aside \$100,000 for EIS, it may not reduce its MOE (MOE maximum \$50,000 less \$100,000 for EIS means \$0 can be used for MOE).

- If the LEA chooses to set aside \$50,000 for EIS, it may not reduce its MOE (MOE maximum \$50,000 less \$50,000 for EIS means \$0 can be used for MOE).

- If the LEA chooses to set aside \$30,000 for EIS, it may reduce its MOE by \$20,000 (MOE maximum \$50,000 less \$30,000 for EIS means \$20,000 can be used for MOE).

- If the LEA chooses to set aside \$0 for EIS, it may reduce its MOE by \$50,000 (MOE maximum \$50,000 less \$0 for EIS means \$50,000 can be used for MOE).

*Example 2:* In this example, the amount that is 15 percent of the LEA's total grant (see proposed § 300.226(a)), which is the maximum amount that the LEA may use for EIS, is less than the amount that may be used for MOE reduction (50 percent of the increase in the LEA's grant from the prior year's grant) (see proposed § 300.205(a)).

*Prior Year's Allocation:* \$1,000,000.

*Current Year's Allocation:* \$2,000,000.

*Increase:* \$1,000,000.

*Maximum Available for MOE*

*Reduction:* \$500,000.

*Maximum Available for EIS:*

\$300,000.

- If the LEA chooses to use no funds for MOE, it may set aside \$300,000 for EIS (EIS maximum \$300,000 less \$0 means \$300,000 for EIS).

- If the LEA chooses to use \$100,000 for MOE, it may set aside \$200,000 for EIS (EIS maximum \$300,000 less \$100,000 means \$200,000 for EIS).

- If the LEA chooses to use \$150,000 for MOE, it may set aside \$150,000 for EIS (EIS maximum \$300,000 less \$150,000 means \$150,000 for EIS).

- If the LEA chooses to use \$300,000 for MOE, it may not set aside anything for EIS (EIS maximum \$300,000 less \$300,000 means \$0 for EIS).

- If the LEA chooses to use \$500,000 for MOE, it may not set aside anything for EIS (EIS maximum \$300,000 less \$500,000 means \$0 for EIS).

With regard to the new statutory provision on which proposed § 300.205 is based, note 122 of the Conf. Rpt. states:

The Conferees intend for school districts to have meaningful flexibility to use local funds that are generated from their reduction in the maintenance of effort. The Conferees do not intend that school districts have to use these local funds for programs exclusively authorized under the Elementary and Secondary Education Act of 1965. The conferees recognize that most state and local education programs are consistent with the broad flexibility that is provided in section 5131 of the Elementary and Secondary Education Act of 1965.

The Conferees intend that in any fiscal year in which the local educational agency or State educational agency reduces expenditures pursuant to section 613(a)(2)(C) or section 613(j), the reduced level of effort shall be considered the new base for purposes of determining the required level of fiscal effort for the succeeding year.

In order to effectuate the flexibility in the use of local funds suggested by this language, proposed § 300.205(b) would provide that the local funds equal to the reduction in local expenditures for special education and related services authorized by proposed § 300.205(a) may be used to carry out activities that could be supported with funds under the ESEA regardless of whether the LEA is actually using funds under the ESEA for those activities. An LEA can demonstrate that it meets the requirements in proposed § 300.205(b) by showing that it has expended, for elementary and secondary education, an increased amount of local funds equal to the reduction under proposed § 300.205(a) when compared to local expenditures for elementary and secondary education for the prior year.

Proposed § 300.206, regarding schoolwide programs under title I of the ESEA, would be essentially the same as the current § 300.234, with appropriate updating.

Proposed § 300.207, regarding personnel development, would reflect the new requirement under section 613(a)(3) of the Act that LEAs ensure that all needed personnel be appropriately and adequately prepared subject to the requirements that apply to SEAs regarding personnel qualifications and requirements under section 2122 of the ESEA.

Current § 300.221 on implementation of the State's comprehensive system of personnel development (CSPD) would be removed, as section 612(a) of the Act

no longer requires that a State develop and implement a CSPD.

Proposed § 300.208 on permissive uses of LEA funds would revise the current § 300.235 in the following ways: Paragraph (a)(2) from the current § 300.235 would be removed, as the authority to use Part B funds to develop and implement an integrated and coordinated services system was removed from the statute. Paragraphs (a)(2) and (3) of proposed § 300.208 would incorporate the new statutory provisions permitting LEAs to use Part B funds for early intervening services and to establish and implement cost or risk sharing arrangements for high cost special education and related services, consistent with section 613(a)(4)(A)(ii) and (iii) of the Act. Paragraph (b) of proposed § 300.208 would incorporate the new statutory authority for LEAs to use Part B funds for administrative case management services related to serving children with disabilities in section 613(a)(4)(B) of the Act. Current § 300.235(b) would be removed because that information would be conveyed by the introductory material in proposed § 300.208(a), with the cross-references updated.

Proposed § 300.209 would revise current § 300.241, concerning treatment of charter schools and their students (based on changes in section 613(a)(5) of the Act), and would also incorporate current § 300.312, regarding children with disabilities in public charter schools. Paragraph (a) of proposed § 300.209 would include current § 300.312(a), to clarify that children with disabilities who attend public charter schools retain all rights afforded under this part. Proposed § 300.209(b) would include the provisions from section 613(a)(5) of the Act to clarify (in paragraph (b)(1)(i)) that, in providing services to children with disabilities attending charter schools that are public schools of the LEA, the LEA must provide supplementary and related services on site at the charter school to the same extent as it does at its other public schools. Paragraph (b)(1)(ii) of proposed § 300.209 would specify that an LEA must provide funds under Part B of the Act to the LEA's charter schools on the same basis as it provides funds to its other schools, including proportional distribution based on the relative enrollment of children with disabilities, and that it must provide those funds at the same time as the LEA distributes funds to its other public schools.

Proposed § 300.209(b)(2) would include current § 300.312(c), to provide that if the public charter school is a school of an LEA that receives funding

under § 300.705 and includes other public schools, the LEA is responsible for ensuring that the requirements of this part are met (unless State law assigns that responsibility to some other entity), and must meet the requirements of proposed paragraph (b)(1) of this section.

Proposed § 300.209(c) would add current § 300.312(b) (regarding public charter schools that are LEAs), to specify that a charter school covered by this paragraph is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity.

Proposed § 300.209(d) would include current § 300.312(d). Paragraph (d)(1) of proposed § 300.209 would provide that if a public charter school is not an LEA receiving funding under this part or a school that is part of an LEA receiving funding, the SEA is responsible for ensuring that the requirements of this part are met. Proposed § 300.209(d)(2) would clarify that a State would not be precluded from assigning that responsibility to another entity, but the SEA must maintain the ultimate responsibility for ensuring compliance with this part.

Proposed § 300.210 would incorporate the new requirement in section 613(a)(6) of the Act that not later than two years after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004 (that is, not later than December 3, 2006), an LEA, when purchasing print instructional materials, must acquire those materials in the same manner as an SEA under proposed § 300.172. Proposed § 300.210(b)(1) also would make clear that an LEA would not be required to coordinate with the NIMAC, and proposed § 300.210(b)(2) would explain that if it chooses not to so coordinate, the LEA would be required to provide an assurance to the SEA that the LEA will provide instructional materials to blind and other print disabled persons in a timely manner. For the reasons explained elsewhere in this preamble under the discussion of proposed § 300.172, we would add paragraph (b)(3) to proposed § 300.210 specifying that nothing in proposed § 300.210 would relieve an LEA of its obligations to ensure that children with disabilities who need instructional materials in accessible formats receive those instructional materials in a timely manner, even if it could not obtain assistance from NIMAC in doing so.

Proposed § 300.211 on LEAs providing information to the SEA to enable the SEA to carry out its duties under Part B of the Act would be essentially the same as the current

§ 300.240(a), but would be appropriately updated. The current § 300.240(b) regarding assurances the LEA would have to file with the SEA would be removed as unnecessary because that condition would be covered by proposed § 300.200.

Proposed § 300.212 on public availability of LEA eligibility information would be essentially the same as current § 300.242, but with appropriate updating.

Proposed § 300.213 would reflect the new provision in section 613(a)(9) of the Act regarding LEA cooperation with the Secretary's efforts under section 1308 of the ESEA to ensure the linkage of health and educational information pertaining to migratory children among the States.

Proposed § 300.220 on an exception for prior local plans would essentially consolidate the requirements in current §§ 300.181 and 300.182. In proposed § 300.220, we use the term "policies and procedures" in place of the term "application," which is used in section 613(b)(2) of the Act because we use the term policies and procedures in the current regulation. The statutory authority for proposed § 300.220 is not new, and was not changed from prior law.

Proposed § 300.221 on notification of the LEA or State agency if determined ineligible, proposed § 300.222 on LEA and State agency compliance determinations, proposed § 300.223 on joint establishment of eligibility, and proposed § 300.224 on the requirements for establishing joint eligibility are essentially the same as current §§ 300.181, 300.196, 300.197, 300.190 and 300.192, respectively, but with appropriate updating.

The requirements in current § 300.244 regarding permissible use of a portion of the LEA's Part B funds on coordinated services systems and current §§ 300.245 through 300.250 regarding LEA use of Part B funds in school based improvement plans would be removed, as the statutory authority for those uses has been eliminated.

Proposed § 300.226 would implement the new authority under section 613(f) of the Act, which provides that an LEA may use not more than 15 percent of the Part B funds it receives for a fiscal year, less certain reductions, if any, to develop and implement coordinated, early intervening services for children who have not been identified as eligible under the Act but who need additional academic and behavioral support to succeed in a general education environment. Paragraph (c) of proposed § 300.226 would clarify that nothing in proposed § 300.226 is construed to either limit or create a right to FAPE

under Part B of the Act or to delay appropriate evaluation of a child suspected of having a disability. We have included the language regarding evaluation of children suspected of having a disability in proposed § 300.226(c) because we believe it is critical to ensure that any child suspected of being a child with a disability is evaluated in a timely manner and without any undue or unnecessary delay. Proposed paragraph § 300.226(d) would reflect the reporting requirement in section 613(f)(4) of the Act. The term “children” would be used in this provision, in lieu of the statutory term “students” to be consistent throughout part 300. Proposed § 300.226(e) would implement the provision in section 613(f)(5) of the Act that funds to provide early intervening services may be used in conjunction with ESEA funds for early intervening services aligned with ESEA activities under certain circumstances.

Proposed § 300.227 would incorporate provisions from the regulations in current §§ 300.360 and 300.361 on direct services by the SEA when an LEA or State agency has not demonstrated its eligibility or has failed to apply for funds, is unable to establish and maintain programs of FAPE consistent with Part B of the Act, is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain programs of FAPE, or has one or more children best served by a regional or State program or service delivery system. Proposed § 300.227(a)(1) would include the phrase “or elected not to apply for its Part B allotment” because there could be situations in which an LEA chooses not to accept funds under Part B of the Act. Finally, proposed § 300.227 would reflect editorial changes made to eliminate repetition.

Proposed § 300.228 on State agency eligibility would be essentially the same as current § 300.194, but with the appropriate updating of cross-references.

Proposed § 300.229 regarding disciplinary information would be the same as current § 300.576.

Proposed § 300.230 would incorporate the new provision from section 613(i) of the Act on exceptions to SEA maintenance of effort requirements for a State for which the amount of the State's allocation under section 611 of the Act exceeds the amount available to the State for the preceding fiscal year and the State pays or reimburses all LEAs in the State, from State revenues, 100 percent of the non-Federal share of the costs of special education. Under these conditions, the SEA would be permitted

to reduce its level of expenditures from State sources for the education of children with disabilities by not more than 50 percent of the amount of the increase in its section 611 allocation from the prior fiscal year, unless prohibited from doing so by the Secretary, as provided in proposed § 300.230(b). Paragraph (e)(2) of proposed § 300.230, which is not in section 613(i) of the Act, would specify that if an SEA used its authority to reduce its effort under proposed § 300.230, LEAs in the State would not be able to reduce local effort under proposed § 300.205 by more than the reduction in State funds that they receive. Proposed § 300.230(e)(2) is necessary to ensure that SEAs and LEAs are not independently calculating the reduction in maintenance of effort permitted when a State is providing 100 percent of the non-Federal share of the costs of special education and related services.

#### *Subpart D—Evaluations, Eligibility Determinations, IEPs, and Educational Placements*

The provisions in subpart D of these proposed regulations would reflect the requirements of section 614 of the Act. As a result, the provisions on parental consent and evaluations and reevaluations contained in subpart E of current regulations would be moved to subpart D of these proposed regulations. Also, the provisions on IEPs contained in subpart C of the current regulations would be renumbered, and in some cases, have been moved to subpart D of these proposed regulations.

#### **Parental Consent**

Proposed § 300.300 regarding parental consent for initial evaluations, reevaluations, and the initial provision of services would replace § 300.505 of the current regulations and would incorporate new requirements regarding parental consent contained in section 614(a)(1)(D) of the Act. Some of the provisions contained in proposed § 300.300 would be similar to those contained in § 300.505 of the current regulations, but with some differences.

Proposed § 300.300(a)(1)(i) would incorporate section 614(a)(1)(D)(i)(I) of the Act, and would provide that with the exception of children who are wards of the State, the public agency proposing to conduct the evaluation must obtain informed parental consent before conducting an initial evaluation of a child to determine if the child qualifies as a child with a disability under the Act.

Proposed § 300.300(a)(1)(ii) would retain the provision in § 300.505(a)(2) of

the current regulations that consent for the initial evaluation may not be construed as consent for the initial provision of special education and related services. The proposed regulations would use the term “initial provision” rather than the statutory term “receipt” of special education and related services. This would make clear that consent does not need to be sought every time a particular service is provided to the child. The proposed regulation would continue to refer to consent for the initial provision of services, in lieu of using the statutory language, which refers to “consent for placement for receipt of special education and related services.” This would be consistent with the revised language in section 614(a)(1)(D)(i)(I) of the Act and the Department's position that placement refers to the provision of special education services rather than as a specific place, such as a specific classroom or specific school.

Proposed § 300.300(a)(2)(i), which would incorporate the new requirement in section 614(a)(1)(D)(iii) of the Act regarding informed parental consent prior to the initial evaluation for wards of the State, would set out the general rule that the public agency must make reasonable efforts to obtain informed consent from the parent for an initial evaluation if the child is a ward of the State and is not residing with the parent. Proposed § 300.300(a)(2)(ii) would incorporate the language in section 614(a)(1)(D)(iii)(II) of the Act, which identifies the exceptions to this general rule. These include when the public agency cannot find the parent, despite reasonable efforts to do so, when parental rights have been terminated under State law, or when parental rights have been subrogated by a judge in accordance with State law, and consent has been given by an individual appointed by the judge to represent the child. With regard to this last exception, note 146(b) of the Conf. Rpt. explains Congressional intent that “\* \* \* in the case of children who are wards of the State, consent may be provided by individuals legally responsible for the child's welfare or appointed by the judge to protect the rights of the child.” This should ensure that consent for a child who is a ward of the State is obtained from an appropriate individual who has the legal authority to provide consent.

Proposed paragraph (a)(3) of § 300.300 would replace § 300.505(b) of the current regulations and would reflect language in section 614(a)(1)(D)(ii) of the Act regarding absence of consent. As was true under § 300.505(b) of the current regulations, the proposed

regulations would provide that if a parent does not provide consent or if the parent fails to respond to a request for consent, the public agency may pursue the initial evaluation of a child by using the procedural safeguards in subpart E of these proposed regulations, including applicable mediation and due process procedures, except to the extent inconsistent with State law. However, consistent with the Department's position that public agencies should use their consent override procedures only in rare circumstances, proposed § 300.300(a)(3) would clarify that a public agency is not required to pursue an initial evaluation of a child suspected of having a disability if the parent does not provide consent for the initial evaluation. States and LEAs do not violate their obligation to locate, identify, and evaluate children suspected of being children with disabilities under the Act if they decline to pursue an evaluation to which a parent has failed to consent.

In addition, paragraph (a)(3) of this section would permit consent override only for children who are enrolled in public school or seeking to be enrolled in public school. For children who are home schooled or placed in a private school by the parents at their own expense, consent override is not authorized. The district can always use the override procedures to evaluate the child at some future time should the parents choose to return their child to public school.

Of course, public agencies do have an obligation to actively seek parental consent to evaluate private school (including home school, if considered a private school under State law) children who are suspected of being children with disabilities under the Act. However, if the parents of a private school child withhold consent for an initial evaluation, the public agency would have no authority to conduct an evaluation under proposed § 300.131 and no obligation to consider that child as eligible for services under proposed §§ 300.132 through 300.144.

Proposed § 300.300(b)(1), which is essentially the same as, and would replace, § 300.505(a)(1)(ii) of the current regulations, would incorporate the provision in section 614(a)(1)(D)(i)(II) of the Act specifying that the public agency responsible for making FAPE available to the child must seek to obtain informed parental consent before the initial provision of special education and related services.

Proposed § 300.300(b)(2) would incorporate the new requirement added by section 614(a)(1)(D)(ii)(II) of the Act that prohibits a public agency from

providing special education and related services by using the procedural safeguards in subpart E of these proposed regulations if the parents fail to respond or do not provide consent to services. We believe that the Act gives parents the ultimate choice as to whether their child should receive special education and related services, and this proposed regulation would reflect this statutory interpretation.

Proposed § 300.300(b)(3) would incorporate the new provision in section 614(a)(1)(D)(ii)(III) of the Act, that relieves public agencies of any potential liability for failure to convene an IEP meeting or for failure to provide the special education and related services for which consent was requested but withheld.

Proposed § 300.300(c)(1) would reflect the requirement in current § 300.505(b)(1)(i) that parental consent be obtained before a reevaluation.

Proposed § 300.300(c)(2) would incorporate the provision in § 300.505(c)(1) of the current regulations that informed parental consent need not be obtained for a reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent and the parent failed to respond.

However, in lieu of prescribing "reasonable measures," and to reduce regulatory burden, § 300.505(c)(2) of the current regulations, which refers to the reasonable measures that public agencies must use in this situation, would be removed. As a practical matter, because public agencies take seriously their obligation to obtain parental consent for a reevaluation because of their ongoing obligation to ensure the provision of FAPE to eligible students with disabilities, they typically would use a number of informal measures to obtain such consent. Eliminating the provision currently in § 300.505(c)(2) from these proposed regulations should give public agencies increased flexibility to use the measures they deem reasonable and appropriate.

Proposed paragraph (d)(1) of § 300.300 is the same as § 300.505(a)(3) of the current regulations and would provide that public agencies are not required to obtain parental consent before reviewing the existing data as part of an evaluation or reevaluation, or before administering a test or evaluation that is administered to all children, unless consent is required of parents of all children. Proposed paragraph § 300.300(d)(2) is the same as § 300.505(d) of the current regulations, regarding additional State consent requirements, and would continue to permit a State to maintain such

requirements, provided its public agencies establish and implement effective procedures to ensure that the failure to provide consent does not result in the failure to provide FAPE to a child with a disability. Proposed § 300.300(d)(3) would incorporate the provision, in § 300.505(e) of the current regulations, consistent with the Department's longstanding policy that a public agency may not use a parent's refusal to consent to one service or activity as a basis for denying the child any other service, benefit, or activity of the public agency, except as required by Part B of the Act.

#### *Evaluations and Reevaluations*

Most of the provisions contained in subpart E of the current regulations governing procedures for evaluation and determination of eligibility would be moved to subpart D of the proposed regulations. Section 300.530 of the current regulations governing the SEA's obligation to ensure that LEAs establish and implement conforming evaluation procedures would be removed as unnecessary. It is covered elsewhere by proposed § 300.122 governing the SEA's responsibilities regarding evaluations.

Proposed § 300.301(a) would incorporate the requirements in § 300.531 of the current regulations that a public agency conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability. The cross-references to the regulations governing the initial evaluation would be updated. Proposed paragraph (b) of this section would incorporate section 614(a)(1)(B) of the Act and would provide that, consistent with the parental consent requirements in proposed § 300.300, either a parent or a public agency may initiate a request for an initial evaluation to determine if a child is a child with a disability. This clarification underscores that a public agency may only conduct an evaluation of a child subject to the informed consent requirements discussed previously.

Proposed § 300.301(c)(1) would incorporate the new provision in section 614(a)(1)(C)(i)(I) of the Act regarding conducting the initial evaluation within 60 days of receiving parental consent for the evaluation, or within another timeframe if the State establishes a timeframe for conducting the initial evaluation. Section 300.343(b) of the current regulations requires that the public agency ensure, within a reasonable period of time following receipt of parental consent, that the child is evaluated, and if found eligible, that special education and related

services are made available to the child. The current regulation does not specify a timeframe for conducting the initial evaluation following receipt of parental consent.

Proposed § 300.301(c)(2), regarding procedures for the initial evaluation, would incorporate the provision in section 614(a)(1)(C)(i)(I) of the Act as well as portions of § 300.320(a)(1) and (2) of the current regulations, and would clarify that the initial evaluation must consist of procedures to determine whether the child is a child with a disability under § 300.8 and to determine the child's educational needs. The remainder of § 300.320 of the current regulations would be removed as these requirements are addressed in proposed §§ 300.304 through 300.306.

Proposed § 300.301(d) would incorporate the new provision in section 614(a)(1)(C)(ii) of the Act, which provides an exception to the timeframe requirement for conducting the initial evaluation following receipt of parental consent and specifies when this exception would apply. However, for greater clarity, the proposed regulations would reorder the statutory language to make clear that the 60-day timeframe or a timeframe established by State law is inapplicable to a public agency if the child's parent repeatedly refuses to produce the child for an evaluation or the child enrolls in a school after the timeframe has commenced for the child's previous public agency to have completed an evaluation of the child, and the parent and subsequent public agency agree to a specific timeframe by which the evaluation must be completed. Proposed § 300.301(d)(2)(ii) would clarify, in accordance with section 614(a)(1)(C)(ii) of the Act, that this exception would apply only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation and the parent and the public agency agree to a specific timeframe when the evaluation will be completed.

Proposed § 300.302 would incorporate the new requirement in section 614(a)(1)(E) of the Act to clarify that screening for instructional purposes by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not considered an evaluation for eligibility for special education and related services, and therefore could occur without obtaining informed parental consent for the screening.

Proposed § 300.303, regarding reevaluations, would incorporate section 614(a)(2)(A) of the Act, and would supersede § 300.536 of the current regulations, which does not

reflect the new requirements governing the timing and conduct of reevaluations. Proposed § 300.303(a) would require a public agency to ensure that a reevaluation is conducted in accordance with proposed §§ 300.304 through 300.311 if it determines that the educational or related services needs, including the need for improved academic achievement and functional performance of the child, would warrant a reevaluation, or if the child's parent or teacher requests a reevaluation.

Under the circumstances set forth in the Act and proposed § 300.303(a), proposed paragraph (b)(1) of this section would provide that the reevaluation occur not more than once a year unless the parent and the public agency agree otherwise. Proposed § 300.303(b)(2) would continue the general requirement for three-year reevaluations from current § 300.536(b), except that in accordance with section 614(a)(2)(B) of the Act, a parent and a public agency could agree that a three-year reevaluation is unnecessary.

Proposed §§ 300.304 and 300.305 would incorporate some of the evaluation procedures contained in §§ 300.532 and 300.533 of the current regulations, with appropriate updates to reflect statutory changes in section 614(b) of the Act. Proposed § 300.304(a) would incorporate the new requirement in section 614(b)(1) of the Act that the public agency provide notice to the parents of a child with a disability, in accordance with § 300.503 of these proposed regulations, of any evaluation procedures that the agency proposes to conduct. (Under proposed § 300.503(b)(3), public agencies are required to include in the prior written notice to parents a description of each evaluation procedure, test, record, or report the agency used as the basis for the proposal or refusal, not the tests the agency would be proposing to conduct.)

#### Evaluation Procedures

Proposed § 300.304(b)(1) would incorporate the procedures governing conduct of evaluations in section 614(b)(2) of the Act. This proposed regulation would replace § 300.532(b)(1) and (2) of the current regulations and would require that the public agency use a variety of assessment tools and strategies, including information provided by the parent, to gather relevant functional, developmental, and academic information about the child.

Proposed § 300.304(b)(2) would incorporate the language from § 300.532(f) of the current regulations, based on section 612(a)(6)(B) of the Act, prohibiting the use of a single measure or assessment as the sole criterion for

determining whether a child is a child with a disability or for determining an appropriate educational program for the child.

Proposed § 300.304(b)(3) would replace § 300.532(i) of the current regulations and would require, in accordance with section 614(b)(2)(c) of the Act, that the public agency, in conducting the evaluation, use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to developmental factors.

Proposed § 300.304(c) would address other evaluation procedures and would incorporate the requirements of sections 612(a)(6)(B) and 614(b)(3) of the Act regarding the use of assessments and other evaluation materials. Unlike the current regulations, which refer to standardized tests, the proposed regulations would refer to assessments and other evaluation materials, which is the terminology used in section 614(b)(3) of the Act.

Proposed § 300.304(c)(1)(i) would incorporate the provision in section 612(a)(6)(B) of the Act and continue the longstanding requirement that procedures used for evaluation and placement of children with disabilities not be discriminatory on a racial or cultural basis. This proposed regulation would replace § 300.532(a)(1)(i) of the current regulations, which contains a similar requirement.

In order to provide information and guidance regarding evaluation and assessment in one place, proposed § 300.304(c)(1)(ii) would incorporate section 614(b)(3)(A)(ii) of the Act, and also would include language from the requirement in section 612(a)(6)(B) of the Act regarding the form of assessments and other evaluation materials used to assess limited English proficient children under the Act. Based on additional clarity provided in the statute, the proposed regulation would require public agencies to provide and administer assessments in the child's native language, including ensuring that the form in which the test is provided or administered is most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer the assessment in this manner. This proposed regulation would replace § 300.532(a)(1)(ii) of the current regulations, which contains the general standard for assessing limited English proficient children, and provides, in accordance with section 612(a)(6)(B) of the Act, that the child be assessed in his or her native language or

other mode of communication, unless clearly not feasible to do so.

Proposed § 300.304(c)(1)(iii) through (v) would incorporate the requirements of section 614(b)(3)(A)(iii) through (v) of the Act. This proposed regulation would replace similar requirements contained in 300.532(a)(2)(i) and (ii) of the current regulations. Proposed paragraph (c)(1)(iii) would reflect new language in section 614(b)(3)(A)(iii) of the Act, which requires assessments or measures to be used for purposes that are valid and reliable. Current § 300.532(c)(2), which requires that the evaluation report include a description of the extent to which the evaluation varied from standard conditions, has been removed from these proposed regulations. This is standard test administration practice and need not be repeated in the regulations.

Proposed § 300.304(c)(2) would be substantially the same as § 300.532(d) of the current regulations and would reflect the longstanding regulatory requirement that assessments and other evaluation materials be tailored to address individual educational needs, rather than merely designed to provide a single general intelligence quotient. Proposed § 300.304(c)(3)(v)(C) would replace § 300.532(e) of the current regulations and would reflect the longstanding regulatory requirement that assessment selection or administration ensures that the assessment results accurately reflect the child's aptitude or achievement levels, or whatever other factors the assessment purports to measure, not the child's impaired sensory, manual, or speaking skills, unless the assessment purports to measure those skills.

Proposed § 300.304(c)(4), which would incorporate section 614(b)(3)(B) of the Act, would require that the child be assessed in all areas related to the suspected disability, and would replace § 300.532(g) of the current regulations. This proposed section would incorporate the longstanding requirement that the child be assessed in all areas related to the suspected disability including, if appropriate: health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

Proposed § 300.304(c)(5) would incorporate the new requirement from section 614(b)(3)(D) of the Act that provides for expeditious coordination among school districts to better ensure prompt completion of full evaluations for children with disabilities who transfer from one public agency to another public agency in the same academic year. Section 300.532(h) of the

current regulations would be reflected in proposed § 300.304(c)(6), and would continue to require that the evaluation be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. With regard to this requirement, note 152 of the Conf. Rpt. states:

Conferees intend the evaluation process for determining eligibility of a child under this Act to be a comprehensive process that determines whether the child has a disability, and as a result of that disability, whether the child has a need for special education and related services. As part of the evaluation process, conferees expect the multi-disciplinary evaluation team to address the educational needs of the child in order to fully inform the decisions made by the IEP Team when developing the educational components of the child's IEP. Conferees expect the IEP Team to independently review any determinations made by the evaluation team, and that the IEP Team will utilize the information gathered during the evaluation to appropriately inform the development of the IEP for the child.

Thus, proposed § 300.304(c)(6) would emphasize the direct link between the evaluation and the IEP processes and should ensure that the evaluation is sufficiently comprehensive to inform the development of the child's IEP.

Proposed § 300.304(c)(7), in accordance with section 614(c) of the Act, would replace §§ 300.532(j) of the current regulations and would continue to require that the public agency use assessment tools and strategies providing relevant information that directly assists persons in determining the educational needs of the child.

Proposed § 300.305, which addresses additional requirements for evaluations and reevaluations, would combine §§ 300.533 and 300.534(c) of the current regulations. Proposed § 300.305(a)(2) would include the language in section 614(c)(1)(B)(i) through (iv) of the Act regarding determinations about the child's eligibility under this part. Proposed paragraphs (b) through (d) of § 300.305 would reflect § 300.533 of the current regulations regarding procedures for determining whether additional data are needed as part of the initial evaluation or the reevaluation, but with minor modifications to incorporate section 614(c)(2) of the Act. For example, in accordance with section 614(c)(2) of the Act, proposed paragraph (c) of § 300.305, regarding source of data, would replace § 300.533(c) of the current regulations, regarding need for additional data.

Proposed § 300.305(e), regarding evaluations before change in placement,

would replace § 300.534(c) of the current regulations, regarding the requirement to conduct an evaluation before determining that the child is no longer a child with a disability, as well as the exception to that requirement for students who graduate from secondary school with a regular high school diploma or who exceed age eligibility for FAPE under State law. However, proposed paragraph (e)(3) would incorporate the new requirement in section 614(c)(5)(B)(ii) of the Act that the public agency provide a summary of academic and functional performance, including recommendations to assist the student in meeting postsecondary goals, for students whose eligibility terminates because of graduation with a regular high school diploma or because of exceeding the age eligibility for FAPE under State law.

Proposed § 300.306, regarding determination of eligibility, would replace paragraphs (a) and (b) of §§ 300.534 and 300.535 of the current regulations and would incorporate the language in section 614(b)(4) and (5) of the Act, which is substantially the same as the language in the current regulations. This proposed regulation would provide that, upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals, including the child's parent, determine whether the child is a child with a disability and the educational needs of the child. As is true under the current regulation, the public agency would be required to provide a copy of the evaluation report to the parent, including the documentation of determination of eligibility.

Proposed section § 300.306(b) would include the provision in current § 300.534(b)(2) that makes clear that a child must not be determined to be a child with a disability under this part if the determinant factor is lack of instruction in reading, lack of instruction in math, or limited English proficiency, and the child does not otherwise meet the eligibility criteria under 300.8(a).

Proposed paragraph (c) of § 300.306 would replace § 300.535 of the current regulations and would incorporate the longstanding regulatory requirements that public agencies use a multifaceted approach in determining eligibility and placement and develop an IEP for a child found eligible for services under the Act.

### Additional Procedures for Evaluating Children With Specific Learning Disabilities

Proposed §§ 300.307 through 300.311 would revise §§ 300.540 through 300.543 of the current regulations regarding additional procedures for evaluating children suspected of having specific learning disabilities and would implement the new requirements of section 614(b)(6) of the Act. Proposed § 300.307(a) would generally require a State to adopt criteria for determining whether a child has a specific learning disability (SLD) as defined in proposed § 300.8. Specifically, proposed § 300.307(a)(1) would allow States to prohibit the use of a severe discrepancy between achievement and intellectual ability criterion for determining whether a child has an SLD. Proposed § 300.307(a)(2) would make it clear that the State may not require LEAs to use a discrepancy model for determining whether a child has an SLD. In addition, proposed § 300.307(a)(3) would require States to permit a process that examines whether the child responds to scientific, research-based intervention as part of the evaluation procedures. Proposed § 300.307(a)(4) would allow States to permit the use of other alternative procedures for determining whether a child has an SLD as defined in § 300.8. Proposed § 300.307(b) would clarify that a public agency must use State criteria in determining whether a child has an SLD.

Recent consensus reports and empirical syntheses concur in suggesting major changes in the approach to the identification of an SLD. These reports recommend abandoning the IQ-discrepancy model and recommend the use of response to intervention (RTI) models (Donovan & Cross, 2002; Lyon *et al.*, 2001; President's Commission on Excellence in Special Education, 2002; Stuebing *et al.*, 2002). These reports find that SLD is a group of heterogeneous disorders, but recommend changes in the seven domains identified in current § 300.541(a)(2) because of areas of difficulty for students with SLD that have not been identified under current regulations (e.g., reading fluency).

There are many reasons why use of the IQ-discrepancy criterion should be abandoned. The IQ-discrepancy criterion is potentially harmful to students as it results in delaying intervention until the student's achievement is sufficiently low so that the discrepancy is achieved. For most students, identification as having an SLD occurs at an age when the academic problems are difficult to remediate with

the most intense remedial efforts (Torgesen *et al.*, 2001). Not surprisingly, the "wait to fail" model that exemplifies most current identification practices for students with SLD does not result in significant closing of the achievement gap for most students placed in special education. Many students placed in special education as SLD show minimal gains in achievement and few actually leave special education (Donovan & Cross, 2002).

The use of the IQ-discrepancy drives assessment practices for most special education services (President's Commission on Excellence in Special Education, 2002). Nationwide, virtually every student considered for special education eligibility receives IQ tests. This practice consumes significant resources, with the average cost of an eligibility evaluation running several thousand dollars (MacMillan & Siperstein, 2002; President's Commission on Excellence in Special Education, 2002). Yet these assessments have little instructional relevance and often result in long delays in determining eligibility and therefore services.

Alternative models are possible. The type of model most consistently recommended uses a process based on systematic assessment of the student's response to high quality, research-based general education instruction. The Department strongly recommends that States consider including this model in its criteria. Other models focus on the assessment of achievement skills identifying SLD by examining the strengths and weaknesses in achievement, or simply rely on an absolute level of low achievement. These models are directly linked to instruction. (Fletcher, *et al.*, 2003). Other models use alternative approaches to determining aptitude-achievement discrepancies that do not involve IQ, including multiple assessments of cognitive skills. However, these models do not identify a unique group of low achievers and maintain a focus on assessment as opposed to intervention. In considering alternative models for identification, we believe that the focus should be on assessments that are related to instruction, and that identification should promote intervention. For these reasons, models that incorporate response to a research-based intervention should be given priority in any effort to identify students with SLD. Identification models that incorporate response to intervention represent a shift in special education toward the goals of better achievement and behavioral outcomes for students

identified with SLD because the students who are identified under such models are most likely to require special education and related services.

Proposed § 300.308, regarding eligibility group members, would revise § 300.540 of the current regulations. Under this proposed regulation, the group making the determination of whether a child has an SLD would include a special education teacher. Further, this proposed regulation would require that the group be collectively qualified to conduct individual diagnostic assessments relevant to SLD, interpret and apply critical analysis to assessment data, develop appropriate educational and transitional recommendations, and deliver specifically designed instruction and services to meet the needs of students with SLD. It is intended that the group described in proposed § 300.308 would serve as the required group under proposed § 300.306(a)(1).

The current requirements in § 300.541 permit the group to determine that an SLD is present if the child does not achieve commensurate with his or her age and ability levels and if the group finds a severe discrepancy between achievement and intellectual ability. Proposed § 300.309 would address the elements required for determining the existence of an SLD and would revise § 300.541 of the current regulations in light of the statutory provision in section 614(b)(6)(A) of the Act, which protects LEAs from being required to use a severe discrepancy between intellectual ability and academic achievement. Under the proposed regulations, the first element of a determination that a child has an SLD is a finding that the child does not achieve commensurate with the child's age in one or more of the eight specified areas when provided with learning experiences appropriate to the child's age.

The second element for a determination that a child has an SLD is a finding that the child failed to make sufficient progress in meeting State-approved results when using a response to scientific, research-based intervention process, or the child exhibits a pattern of strengths and weaknesses that the team determines is relevant to the identification of an SLD. The pattern of strengths and weaknesses may be in performance, achievement, or both or may be in performance, achievement, or both relative to intellectual development. Proposed § 300.309(a)(3) would incorporate the exclusions from section 602(30)(C) of the Act and would prohibit the eligibility group from finding an SLD if the SLD is primarily

the result of other visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. These exclusions are in addition to the special rule for eligibility determination in section 614(b)(5) of the Act and proposed § 300.306(b).

Proposed § 300.309(b) would require the group to consider evidence that the child was provided appropriate instruction prior to, or as a part of, the referral process. These requirements would emphasize the importance of using high-quality, research-based instruction in regular education settings consistent with relevant sections of the ESEA, including that the instruction was delivered by qualified personnel. Also important is evidence that data-based documentation reflecting formal assessment of progress during instruction through repeated assessments of achievement at reasonable intervals is provided to the parents and documentation that the timelines described in proposed §§ 300.301 and 300.303 are adhered to, unless extended by mutual written agreement of the child's parents and a group of qualified professionals as described in § 300.308. These requirements would be included in § 300.309(c) and (d), respectively, of the proposed regulations.

Proposed § 300.310 would revise § 300.542 of the current regulations regarding observation. Proposed § 300.310(a) would require that at least one member of the group described in proposed § 300.308, other than the child's teacher, who observes the child be trained in observation. This should ensure that the group member or members conducting the observation know what to look for when they observe the child. Proposed § 300.310(a) also would provide additional parameters for conducting the observation, and would specify that the observation document academic performance and behavior in the areas of difficulty. Proposed § 300.310(b) would be substantively unchanged from § 300.542(b) of the current regulations.

Proposed § 300.311, regarding a written report, would revise § 300.543 of the current regulations and incorporate much of the content of that section. The proposed regulation would remove the reference in § 300.543(a)(6) of the current regulation as to whether a child has a severe discrepancy between achievement and ability that is not correctable without special education and related services and the reference in current § 300.543(a)(7) regarding the effects of environmental, cultural, and economic disadvantage. This language

is included in proposed § 300.306. Proposed § 300.311(a)(5) would require that the report address only whether the child does not achieve commensurate with the child's age rather than the discrepancy model referred to in current § 300.531(a)(2). The proposed regulation also would require that the written report address two additional factors: whether there are strengths and weaknesses in performance or achievement, or both, or relative to intellectual development that require special education and related services; and the instructional strategies used and the response to student data collected if the response to the scientific, research-based process was implemented. These additional provisions should ensure that the report is a more useful document for educators in determining the existence of an SLD. It is intended that the written report in this section would serve as the required evaluation report and documentation of the determination of eligibility as required by proposed § 300.306(a)(2).

#### **Individualized Education Programs**

Proposed §§ 300.320 through 300.328 would replace some of the provisions in §§ 300.340 through 300.350 of the current regulations regarding IEPs. Proposed § 300.320 would contain a definition of individualized education program or IEP that would incorporate the definition in section 614(d)(1)(A)(i) of the Act as well as provisions contained in section 614(d)(6) of the Act. This definition would replace and expand § 300.340(a) of the current regulations, which contains only a brief definition of the term IEP. The definition of "participating agency" contained in § 300.340(b) of the current regulations would be removed from these proposed regulations as unnecessary. Many of the provisions in the new definition of IEP are taken from provisions in §§ 300.346 through 300.347 of the current regulations, but appropriate modifications also would be included in this definition to reflect new provisions of the Act.

The first sentence of the definition in § 300.320 would refer to the IEP as a written statement for a child with a disability that is developed, reviewed, and revised at a meeting in accordance with §§ 300.320 through 300.324. Proposed paragraph (a)(1) would require, in accordance with section 614(d)(1)(A)(i)(I) of the Act, that the IEP include a statement of the child's present levels of academic achievement and functional performance. This proposed regulation would supersede § 300.347(a)(1) of the current regulations, which requires that the IEP

include a statement of the child's present levels of educational performance. Proposed § 300.320(a)(1)(i) would be the same as § 300.347(a)(1)(i) of the current regulations, except that the phrase used in the Act, "general education curriculum," would be substituted for "general curriculum," and the proposed regulation would continue to explain, as do the current regulations, that the general education curriculum is the same curriculum as for nondisabled children. Proposed § 300.320(a)(1)(ii), regarding the participation of preschool children in appropriate activities, is the same as § 300.347(a)(1)(ii) of the current regulations.

Proposed § 300.320(a)(2) is similar to § 300.347(a)(2) of the current regulations, except for minor language changes from section 614(d)(1)(A)(i)(II) of the Act. Proposed § 300.320(a)(2)(i)(A) and (B) would be the same as § 300.347(a)(2)(i) and (ii) of the current regulations.

Proposed § 300.320(a)(2)(ii) would add a new provision consistent with section 614(d)(1)(A)(i)(I)(cc) of the Act that would require the IEP to contain a statement of benchmarks or short-term objectives for children with disabilities who take alternate assessments aligned to alternate achievement standards. In accordance with changes made in section 614(d)(1)(A)(i)(III) of the Act, proposed § 300.320(a)(3) would replace § 300.347(a)(7) of the current regulations, and would require that the IEP include a statement of how the child's progress on the annual goals is being measured. In accordance with section 614(d)(1)(A)(i)(III) of the Act, proposed § 300.320(a)(3)(ii) would clarify that periodic progress reports could be issued concurrently with quarterly report cards.

Proposed § 300.320(a)(4) would replace § 300.347(a)(3) of the current regulations, and would incorporate the language in section 614(d)(1)(A)(IV) of the Act regarding a statement of special education and related services and supplementary aids and services, based on peer-reviewed research, to the extent practicable. Proposed § 300.320(a)(5), which would require an explanation of the extent, if any, to which a child will not participate with nondisabled children in the regular class and in other activities, would incorporate current § 300.347(a)(4), which is the same as section 614(d)(1)(A)(i)(V) of the Act. Proposed § 300.320(a)(6) would replace § 300.347(a)(5), regarding participation of children with disabilities in State and districtwide assessments of student achievement, and would incorporate section

614(d)(1)(A)(VI) of the Act. This section would require that the IEP include a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments, consistent with proposed § 300.160. If the IEP Team determines that the child should take a particular alternate assessment on a particular State or districtwide assessment of student achievement, the IEP must include a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child. Proposed § 300.320(a)(7), regarding the projected date for the beginning of services and modifications and the anticipated frequency, location, and duration of those services and modifications, is the same as § 300.347(a)(6) of the current regulations.

Proposed § 300.320(b) would replace current § 300.347(b), regarding transition services, and would incorporate some of the new statutory requirements regarding postsecondary goals in section 614(d)(1)(A)(VIII) of the Act. Beginning with the first IEP in effect after the child turns age 16 or younger if determined appropriate, and updated annually thereafter, this proposed paragraph would require that the IEP include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills, and the transition services, including courses of study needed to assist the child in reaching those goals. As under the current regulations, proposed § 300.320(b) would continue to apply the requirements regarding transition services for students younger than age 16, if determined appropriate by the IEP Team. However, § 300.347(b)(1) of the current regulations, regarding including a statement of transition services needs under the applicable components of the student's IEP in the IEPs of students beginning at age 14 or younger, would be removed from these proposed regulations because it is no longer required under the Act. Proposed § 300.320(c) would replace § 300.347(c) of the current regulations, regarding transfer of rights, and would incorporate section 614(d)(1)(A)(i)(VIII)(cc) of the Act to require that beginning not later than one year before the rights transfer, the child is informed that his or her rights under Part B will transfer to the

child upon reaching the age of majority under State law.

Proposed § 300.320(d) would be based on section 614(d)(1)(A)(ii) of the Act and § 300.346(e) of the current regulations. The first clause would provide that the IEP is not required to include additional information beyond what is explicitly required under section 614(d) of the Act. The second clause, which is the same as § 300.346(e) of the current regulations, would provide that this section would not require the IEP to include information under one component of the child's IEP that is already contained under another component of the IEP.

Section 300.341 of the current regulations, regarding responsibility of the SEA and other public agencies for IEPs, would not be retained in these proposed regulations. The statutory authority for that section is not based on the IEP provisions in section 614(d) of the Act, and the substance of the provision is essentially covered by proposed § 300.149, which would address the SEA responsibility for general supervision, including responsibility to ensure development and implementation of IEPs.

Proposed § 300.321 would include a requirement regarding the composition of the IEP Team, and is substantially the same as § 300.344 of the current regulations addressing a public agency's responsibility to ensure that the IEP Team includes the required participants. Proposed § 300.321(a) would replace § 300.344(a) of the current regulations. As with the current regulation, proposed paragraph (a)(7) would provide that, in accordance with the Act, whenever appropriate, the child be a member of the IEP Team.

Proposed § 300.321(b) would address transition services participants and would replace and modify § 300.344(b) of the current regulations to reflect changes to the Act's requirements on transition services. Proposed § 300.321(b)(1) would provide that the child be invited to the IEP meeting if a purpose of the meeting is consideration of the child's postsecondary goals and the transition services needed to achieve those goals. Proposed § 300.321(b)(2) is substantially the same as § 300.344(b)(2) of the current regulations, regarding the public agency's obligation to take other steps to ensure that the student's preferences and interests are considered if the child is unable to attend the meeting. Proposed § 300.321(b)(3) would replace and modify § 300.344(b)(3)(i) of the current regulations and would require, to the extent appropriate, and with the consent of the parent or a child who has reached

the age of majority, that a representative of a participating agency that is likely to be responsible for providing or paying for transition services be invited to the meeting. Current § 300.344(b)(3)(ii), addressing the public agency's obligations to take steps to obtain the participation of the other agency in the planning for transition services if the other agency does not send a representative, would be removed as it is an unnecessary burden. Proposed § 300.321(c), regarding determination of knowledge and special expertise of other individuals invited by the parent or public agency to be members of the IEP Team, is essentially the same as, and would replace, § 300.344(c) of the current regulations. Proposed § 300.321(d), regarding designating a public agency representative, is essentially the same as, and would replace, § 300.344(d) of the current regulations.

Proposed § 300.321(e) would add a new provision regarding IEP meeting attendance and would incorporate section 614(d)(2)(C) of the Act. Proposed § 300.321(e)(1) would specify when a member of the IEP Team would not be required to attend the IEP meeting in whole or in part. Proposed § 300.321(e)(2) would specify when a member of the IEP Team may be excused from attending the IEP meeting in whole or in part, subject to the parent's and public agency's written consent to the member's excusal, and subject to the member's written submission to the parent and public agency of input into the development of the IEP prior to the meeting.

Proposed § 300.321(f) would incorporate a new requirement in section 614(d)(2)(D) of the Act for the initial IEP meeting for a child who was previously served under Part C of the Act, and would require, to ensure the child's smooth transition, that an invitation to that meeting, at the request of the parent, be sent to the Part C services coordinator or a representative of the Part C system.

Consistent with the statutory requirement that a parent, as a member of the IEP Team, provide significant input into the child's IEP, proposed § 300.322 would address parent participation and would replace § 300.345 of the current regulations. Proposed § 300.322(a), regarding notifying the parents of the meeting early enough to ensure they will have an opportunity to attend and scheduling the meeting at a mutually convenient time and place, would be the same as § 300.345(a) of the current regulations. Proposed § 300.322(b), regarding information in the notice, would be the

same as § 300.345(b) of the current regulations, except that paragraph (b)(2), regarding notifying a student age 14 or younger about an IEP meeting to develop a statement of needed transition services would be removed because the participation of a child age 14 or younger in the transition services planning process is not required under the Act. Proposed § 300.322(b)(1), which would be the same as § 300.345(b)(1) of the current regulations, would continue to require the public agency to notify the parents of the purpose, time, and location of the meeting and who will be in attendance, including informing parents of the provisions in § 300.322 regarding the participation of other individuals with knowledge or special expertise about the child. Paragraph (b)(3) of current § 300.345 would be modified, would become proposed § 300.322(b)(2) and would require that the parent be notified, not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, if a purpose of the meeting will be the consideration of postsecondary goals and transition services for the child. The notice would indicate that the agency will invite the child to the meeting and also would identify any other agency that will be sending a representative to the meeting. Proposed § 300.322(c), regarding other methods to ensure parent participation if neither parent can attend, would replace § 300.345(c) of the current regulations, and would be modified to address the use of other methods, including individual or conference telephone calls, subject to § 300.328 of the proposed regulations relating to alternative means of meeting participation. Proposed § 300.322(d), regarding conducting a meeting without a parent in attendance, would replace § 300.345(d) of the current regulations, except that the proposed regulation would not specify the methods that the public agency must use to keep a record of its attempts to convince the parent that he or she should attend the meeting. Current section 300.345(e), regarding the use of interpreters or other action, as appropriate, would be removed from these proposed regulations because public agencies are required by other Federal statutes to take appropriate actions to ensure that parents who themselves have disabilities and limited English proficient parents understand proceedings at the IEP meeting. The other Federal statutory provisions that apply in this regard are Section 504 of the Rehabilitation Act of 1973 and its implementing regulations in 34 CFR

Part 104 (prohibiting discrimination on the basis of disability by recipients of Federal financial assistance) and title II of the Americans With Disabilities Act and its implementing regulations in 28 CFR Part 35 (prohibiting discrimination on the basis of disability by public entities, regardless of receipt of Federal funds), and title VI of the Civil Rights Act of 1964 and its implementing regulations in 34 CFR Part 100 (prohibiting discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance).

Proposed § 300.322(f) would replace § 300.345(f) of the current regulations and would continue to require that public agencies give a parent a copy of their child's IEP at no cost to the parent.

Proposed § 300.323 would address when IEPs must be in effect and would replace some of the provisions of § 300.342 of the current regulations. Proposed § 300.323(a), which is essentially the same as § 300.342(a) of the current regulations, would require a public agency to ensure that an IEP is in effect for each child with a disability at the beginning of each school year. Proposed § 300.323(b), regarding an IEP or IFSP for children aged three through five, would replace and modify § 300.342(c) of the current regulations. The proposed regulation would incorporate language in section 614(d)(2)(B) of the Act as well as language in section 636 of the Act to require the IEP Team to consider an IFSP that contains the IFSP content described in section 636 of the Act, and that is developed in accordance with § 300.324 of these proposed regulations. Under both the Act and the proposed regulations, the IFSP could serve as the IEP if consistent with State policy and agreed to by the parent and the agency. Proposed § 300.323(b)(1) would specify further that, in order for the IFSP to be considered as the IEP, the IFSP must contain the IFSP content, including the natural environments statement and an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children with IFSPs who are at least three years of age. Proposed § 300.323(b)(2) would be consistent with the current regulation in § 300.342(c)(2)(i) and (ii) that requires that the child's parents be provided a detailed explanation of the differences between an IFSP and an IEP, and written informed consent from the parent if the parent chooses an IFSP. Proposed § 300.323(c), regarding initial IEPs and provision of services, would combine §§ 300.342(b)(2)(ii) and 300.343(b)(2) of the current regulations

and would continue the longstanding requirement in § 300.343(b)(2) that an initial IEP be developed within 30 days of a determination that the child needs special education and related services. However, § 300.342(b)(1)(i) of the current regulations, requiring that an IEP be in effect before special education and related services are provided to a child, would be removed from these proposed regulations. This requirement is covered by proposed § 300.323(a), which would require that each public agency have an IEP in effect for each child with a disability in the public agency's jurisdiction at the beginning of each school year, and by section 614(d)(2)(A) of the Act.

Proposed § 300.323(c)(2) would combine current § 300.343(b)(2), which requires that a meeting to develop an IEP "be conducted within 30 days of a determination that the child needs special education and related services" with current § 300.342(b)(1)(ii), which requires an IEP to be "implemented as soon as possible following the meetings described in § 300.343." This combined language would provide a clearer, more direct, and more specific requirement than what is contained in current §§ 300.342(b)(1)(ii) and 300.343(b)(2).

Proposed § 300.323(d), regarding accessibility of the child's IEP to the regular education teacher and others responsible for its implementation, would replace § 300.342(b)(2) of the current regulations. However § 300.342(b)(3) of the current regulations, which requires that each person responsible for implementing the IEP be informed of his or her specific responsibilities related to implementing the child's IEP, and the specific accommodations, modifications and supports that must be provided for the child in accordance with the IEP, would be removed from the proposed regulations as unnecessary. Public agencies are required to share this information with responsible individuals in order to meet their obligations under the Act.

Proposed § 300.323(e) would implement the new requirement in section 614(d)(2)(C) of the Act regarding programs for children who transfer public agencies within the same academic year. Proposed § 300.323(e)(1)(i) would implement the Act and the Department's longstanding policy regarding students who transfer public agencies within the same State. The proposed regulation would require that the new school district provide the child with FAPE, including services comparable to those described in a previously held IEP until the public agency adopts the previously held IEP

or develops, adopts, and implements a new IEP that is consistent with Federal and State law. Proposed § 300.323(e)(1)(ii) would incorporate a statutory change that requires, in the case of a child who had an IEP in effect and who transfers from a public agency outside the State in the same academic year, that the public agency provide the child with FAPE, including services comparable to those described in the previously held IEP, until the public agency conducts an evaluation of the child, if determined necessary by the public agency, and develops a new IEP for the child, if appropriate, that is consistent with Federal and State law.

Proposed § 300.323(e)(2) would incorporate the new requirement in section 614(d)(2)(C)(ii) of the Act regarding transmittal of education records to facilitate the transition of a child who transfers public agencies within the same State. It also would address the responsibility of the new public agency and previous public agency to take reasonable steps regarding making prompt requests for, and transmission of, education records consistent with 34 CFR 99.31(a)(2), implementing FERPA.

Paragraph (d) of § 300.342 of the current regulations, regarding effective dates for new IEP requirements, is unnecessary and would be removed from the proposed regulations. All the IEP requirements of Part B of the Act will take effect on July 1, 2005. Further, it is not anticipated that public agencies will need additional time to implement these new requirements, some of which provide additional flexibility to public agencies and parents and reduce regulatory burden.

#### Development of IEP

Proposed § 300.324 would address the development, review, and revision of IEPs. This section would incorporate some requirements regarding IEP development, review, and revision, which are currently addressed in §§ 300.343 and 300.346 of the regulations.

Proposed § 300.324(a) would incorporate section 614(d)(3)(A) of the Act regarding considerations in IEP development. Although most of the language from § 300.346(a) of the current regulations would be retained, the requirement in § 300.346(a)(1)(iii), regarding consideration in IEP development of the child's performance on State or districtwide assessments, as appropriate, would be removed. Instead, the proposed regulation would include language from section 614(d)(3)(A)(iv) of the Act regarding consideration of the academic, developmental, and

functional needs of the child in IEP development. In accordance with section 614(d)(3)(B) of the Act, proposed § 300.324(a)(2), regarding consideration of special factors in IEP development, would be substantially the same as, and would replace, § 300.346(a)(2) of the current regulations. Proposed § 300.324(a)(3) would continue to require, in accordance with section 614(d)(3)(C) of the Act, that the regular education teacher, as a member of the IEP Team, to the extent appropriate, participate in IEP development in the areas specified in the Act. This proposed regulation would replace § 300.346(d) of the current regulations, which contains a similar provision regarding the role of the regular education teacher in the development, review, and revision of the IEP. Because the Act no longer requires the consideration of special factors in IEP review and revision, § 300.346(b) of the current regulations would be removed. Section 300.346(c) of the current regulations, regarding the requirement to include a statement in the child's IEP about a child's need for a particular device or service in order to receive FAPE, would be removed because it is covered in proposed § 300.320(a)(4).

Proposed § 300.324(a)(4) would incorporate section 614(d)(3)(D) of the Act and would permit the parent and the public agency to agree not to convene an IEP meeting to make changes to the child's IEP after the annual IEP meeting for the school year has taken place. Instead, in accordance with this new statutory provision, this proposed regulation would permit the parent and the public agency to develop a written document to amend or modify the child's current IEP without convening an IEP meeting.

To incorporate section 614(d)(3)(E) of the Act, proposed § 300.324(a)(5) would address consolidation of IEP meetings and would require the public agency, to the extent possible, to encourage the consolidation of reevaluation meetings and other IEP meetings for the child.

To incorporate section 614(d)(3)(F) of the Act, proposed § 300.324(a)(6) would permit changes to the IEP to be made either by the entire IEP Team, or in accordance with proposed § 300.324(a)(4), by amending the IEP, rather than redrafting the entire IEP. This proposed paragraph would also provide that a parent who requests a copy of the revised IEP with the amendments incorporated must be provided with it.

Section 300.343(a) of the current regulations, regarding the public agency's responsibility to initiate and conduct meetings to develop, review,

and revise a child's IEP, would be removed because it is covered in § 300.320(a) of the proposed regulations. Proposed § 300.324(b)(1) would address review and revision of IEPs and is essentially the same as § 300.343(c) of the current regulations. Proposed § 300.324(b)(2) would require the participation of the regular education teacher in the review and revision of the child's IEP, consistent with proposed § 300.324(a)(3).

Proposed § 300.324(c), regarding failure to meet transition objectives, is essentially the same as, and would replace § 300.348 of the current regulations. Proposed § 300.324(c)(1) would implement section 614(d)(6) of the Act, which requires the public agency to reconvene the IEP Team to develop alternative strategies if the agency responsible for providing transition services fails to provide those services. Proposed § 300.324(c)(2) would continue the longstanding regulatory requirement in current § 300.348(b) that a participating agency, including a State vocational rehabilitation agency, is not relieved of its responsibility to provide or pay for transition services that the agency would otherwise provide if the student meets the eligibility requirements for those services.

Proposed § 300.324(d)(1), regarding children with disabilities in adult prisons, would conform to section 614(d)(7) of the Act. Unlike § 300.347(d) of the current regulations, which merely cross-references other applicable regulatory requirements, proposed § 300.324(d)(1) would specify the requirements from which public agencies would be exempt with respect to these children. Specifically, public agencies would be exempt from the requirements in § 300.160 and § 300.320(a)(6), regarding participation in State and districtwide assessments, and the requirements in § 300.320(b), regarding transition services, which do not apply to children who exceed age eligibility under Part B of the Act prior to their release from prison, based on their sentence and eligibility for early release.

Proposed § 300.324(d)(2)(i) would, consistent with section 614(a)(7) of the Act, continue to permit the IEP Team of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison to modify the child's IEP or placement if the State has demonstrated a bona fide security or penological interest that cannot otherwise be accommodated. Proposed § 300.324(d)(2)(ii) would continue to provide that the requirements in current §§ 300.347(d)

and 300.313, regarding LRE, would not apply to these IEP and placement modifications.

Proposed § 300.325, regarding private school placements by public agencies, would be essentially the same as § 300.349 of the current regulations, and would implement section 612(a)(10)(B) of the Act. The proposed regulation would require that children placed in private schools by public agencies receive required special education and related services at no cost to the parents in accordance with an IEP developed under Part B of the Act. Further, even if the private school implements the child's IEP, responsibility for ensuring compliance with the Act rests with the SEA and the public agency.

Section 300.350 of the current regulations, regarding IEP accountability, would be removed from the proposed regulations as unnecessary. The requirement in § 300.350(a) that each child eligible for services under Part B of the Act be provided services in accordance with an IEP is unnecessary because entitlement to FAPE under the Act includes the provision of special education and related services in accordance with an IEP. Paragraph (a)(2) and (b) of § 300.350 is unnecessary as we believe that other federal laws, such as title I of the ESEA, already provide sufficient motivation for agency effort to assist children with disabilities in making academic progress. Section 300.350(c), regarding accountability, would be removed as it merely provides explanatory information.

Proposed § 300.327, regarding educational placements, would replace § 300.501(c)(1) of the current regulations, and would continue to require, in accordance with section 614(e) of the Act, that each public agency ensure that parents are members of any group that makes decisions on the educational placement of their child. Current § 300.501(c)(2), regarding other methods to ensure parent participation, would be removed from these proposed regulations because it is covered by proposed § 300.328.

Proposed § 300.328 would incorporate section 614(f) of the Act and would give a parent and a public agency the option of agreeing to use alternative means, such as video conferences and conference calls, to meet their obligations for participation in IEP and placement meetings and in carrying out administrative matters, such as scheduling, exchange of witness lists, and conference calls.

#### *Subpart E—Procedural Safeguards*

##### *Due Process Procedures for Parents and Children*

Proposed § 300.500 on the responsibility of SEAs and other public agencies would include the current regulatory language in § 300.500(a), appropriately updated. The definitions of the terms “consent,” “evaluation,” and “personally identifiable” in current § 300.500(b) would be moved to subpart A of 34 CFR part 300.

Proposed § 300.501 concerning the opportunity to examine records and parent participation in meetings generally would reflect the language in current § 300.501 with appropriate updating of cross-references and two substantive changes. First, proposed § 300.501(c)(4) would not include the current concluding phrase requiring that public agencies keep a record of attempts to involve parents in placement decisions, including information consistent with the records that must be maintained if an IEP meeting is to be held without a parent in attendance. The phrase would be removed to provide school personnel greater flexibility in how they document attempts to involve parents. However, public agencies still must maintain documentation of their efforts in this regard. Second, the regulatory requirement in current § 300.501(c)(5) would be removed as unnecessarily duplicative. The requirement that agencies make reasonable efforts to enable parents to understand and participate in discussions about placement of their child is inherent in the obligation in proposed § 300.501(b)(1) that parents be afforded an opportunity to participate in meetings about the identification, evaluation, educational placement and provision of FAPE to their child.

Proposed § 300.502 would incorporate the provisions of the current § 300.502, regarding independent educational evaluations, with some minor changes. References to hearings throughout would be modified to indicate that the hearing involved is a due process hearing, or a hearing on a due process complaint. Proposed § 300.502(c)(2) also would be revised to clarify that the results of a parent-initiated independent educational evaluation at public expense may be introduced by any party as evidence at a hearing on a due process complaint.

Proposed § 300.503, on prior written notice, would incorporate two substantive changes from current § 300.503. First, current § 300.503(a)(2) would be removed. It is not necessary to explain in the regulation that prior

written notice can be provided at the same time as parental consent is requested because parental consent cannot be obtained without this notice. Second, the elements of the contents of the notice would be revised in § 300.503(b) to reflect new statutory language in section 615(c)(1) of the Act.

Proposed § 300.504(a) would be revised consistent with new statutory language in section 615(d)(1) of the Act regarding the timing of procedural safeguards notices. In addition, proposed § 300.504(a)(2) would clarify that a procedural safeguards notice must be provided upon receipt of the first filing of a State complaint or request for a due process hearing in a school year, as opposed to the first request at any point in a child's school career. This should aid implementation at the school district level without unduly burdening school districts, and ensure that parents have information about the due process procedures when they are most likely to need it.

Throughout these proposed regulations we use the term “due process complaint,” instead of the statutory term “complaint” in order to provide clarity and reduce confusion between a due process complaint and a complaint under the State complaint procedures in §§ 300.660 through 300.662 of the current regulations and provided for in these proposed regulations in §§ 300.151 through 300.153.

A new § 300.504(b) would be added concerning Internet posting of the procedural safeguards notice, consistent with section 615(d)(1)(B) of the Act.

The contents of the procedural safeguards notice would be updated in proposed § 300.504(c), reflecting revised statutory language in section 615(d)(2) of the Act. The notice also would have to explain the differences between the due process complaint and the State complaint procedures as provided for in proposed § 300.504(c)(5)(iii). This change also should assist in reducing confusion about these alternatives. Cross-references would be updated, as appropriate.

Proposed § 300.505 would incorporate language from section 615(n) of the Act providing that a parent may elect to receive required notices by electronic mail, if the public agency makes that option available. Provisions in current § 300.505 concerning parental consent would be moved to subpart D of the proposed regulations that addresses parental consent in the context of evaluations, reevaluations and the initial provision of services to children with disabilities.

Proposed § 300.506 would revise the current regulatory language on mediation to reflect changes in section 615(e) of the Act. In proposed § 300.506(a), new language would be added providing that mediation be made available to resolve any dispute, including matters that arise before a party has requested a due process hearing. In proposed § 300.506(b), language would be added to reflect section 615(e)(2)(B) of the Act and would provide that public agencies may establish procedures to offer parents and schools that choose not to use mediation the opportunity to learn about the benefits and use of mediation. In addition, proposed § 300.506(b)(3)(ii) would replace the current language in § 300.506(b)(2)(ii), regarding party involvement in the selection of mediators, with more general language providing that the SEA select mediators on a random, rotational, or some other impartial basis. Proposed § 300.506(b)(2)(ii) should provide SEAs additional flexibility in selecting mediators, while ensuring that mediators are impartial. Proposed § 300.506(b)(6), (b)(7), and (b)(8) would include new provisions from section 615(e)(2)(F) and (G) of the Act concerning written agreements when mediation results in an agreement to resolve the dispute, and confidentiality of mediation agreements. However, each of these provisions would clarify that the limitation placed on the use of information discussed during mediation as evidence would apply only to actions arising out of the same dispute. Without this clarifying language, there could be a misperception that the Department would be attempting to restrict the powers of State courts. Proposed § 300.506(b)(9) would be added in light of note 208 of Conf. Rpt. indicating the Conference Committee's intention that parties could be required to sign confidentiality pledges prior to the commencement of mediation, without regard to whether the mediation ultimately resolves the dispute.

Proposed § 300.506(c) would be similar to current § 300.506(c) concerning requirements for the impartiality of the mediator. However, consistent with the language in section 615(f)(3)(A)(i)(II) regarding due process hearing officers, and the Senate Report No. 108-185, p. 37, proposed § 300.506(c)(1) would permit employees of LEAs that are not involved in the education or care of the child involved in the dispute being mediated to serve as mediators. In addition, the cross-references would be updated. Current § 300.506(d), regarding a meeting to

encourage mediation, would be removed, reflecting the change in section 615(e)(2)(B) of the Act.

Proposed § 300.507(a)(1) would revise the current regulatory language regarding initiating a due process hearing on matters relating to the identification, evaluation, or educational placement of a child, or the provision of FAPE to the child to specify that a party could "file a due process complaint," as opposed to "initiate," a hearing on these matters. This change would be made in light of new language concerning the resolution process, particularly in section 615(b)(7)(B) of the Act, requiring that a sufficient due process hearing notice be provided, and section 615(f)(1)(B) of the Act, requiring that a resolution process occur (unless waived by joint agreement of the parties) before a hearing will be available. Current § 300.507(c)(4), regarding a parent's right to a due process hearing for failure to provide the requisite notice, would be removed as it is inconsistent with the new statutory language requiring that a resolution session occur, unless waived by joint agreement of the parties. Current § 300.507(a)(2), providing that parents be advised of the availability of mediation whenever a hearing is initiated, would be removed. Under the proposed regulations, mediation must be available to resolve any dispute, not just when a hearing has been requested, as was the case under the prior law. In addition, under the new statute, additional opportunities will exist to resolve disputes when a hearing has been requested, such as through the resolution process. Proposed § 300.507(a)(2) would reflect the new requirement in section 615(b)(6)(B) of the Act concerning the time period for filing a request for a due process hearing after the alleged violation has occurred. Proposed § 300.507(b) would contain the information currently in the regulations in § 300.507(a)(3) on available free or low-cost legal or other relevant services, but would be revised to refer to "requests a hearing" as opposed to "initiates a hearing" for the reasons discussed previously.

Proposed § 300.508(a), (b), and (c) would incorporate new language from section 615(b)(7) of the Act concerning the obligation to provide a due process complaint to the other party, the required content of the complaint notice, and the requirement that a due process hearing may not be held until the party, or the attorney representing the party, files the due process complaint. These changes should also help clarify that the complaint and complaint notice would be the same

document, which should aid in smooth implementation of these new provisions. Proposed § 300.508(a) and (b) are similar to current § 300.507(c)(1) and (2), but would be revised as required by the Act. Proposed § 300.508(a)(2) would require that the party requesting the hearing forward a copy of the due process complaint to the SEA. Proposed § 300.508(c) would address the contents of this due process complaint. Proposed § 300.508(d) and (e) would incorporate the new language from section 615(c)(2) of the Act concerning due process complaint sufficiency and response to a due process complaint. Proposed § 300.508(e) would address the public agency's responsibility to send a parent a response to the due process complaint if the public agency had not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint. The proposed regulation would outline what information must be contained in the response. Proposed § 300.508 would incorporate but reorder the statutory provisions slightly to clarify and provide an organized discussion of each topic.

Proposed § 300.509 would incorporate the new requirement from section 615(b)(8) of the Act that SEAs develop a model form to assist parents in filing a due process complaint, including the content of the complaint. Proposed § 300.509 also would require States to develop model forms for filing State complaints, consistent with the changes regarding proposed §§ 300.151 through 300.153 discussed elsewhere in this preamble. The proposed language would replace the current regulatory requirement in § 300.507(c)(3).

Proposed § 300.510 would incorporate the new requirements concerning resolution process from section 615(f)(1)(B) of the Act. Proposed § 300.510(a)(1) would clarify that the resolution meeting must be held within 15 days of receipt of notice of the due process complaint, and prior to the initiation of a due process hearing. Proposed § 300.510(a)(4) would be added in light of note 212 of the Conf. Rpt. providing that parents and the LEA must determine the relevant members of the IEP Team to attend the resolution meeting. Proposed § 300.510(b)(2) would clarify that the regulatory timeline for issuing a final due process hearing decision begins at the end of the new 30-day resolution period that starts when the due process complaint is received. This provision is based on the language in section 615(f)(1)(B)(ii) of the Act stating that the applicable due process timelines commence at the end

of this 30-day period. Proposed § 300.510(b)(3) would provide, however, that the resolution session and due process hearing would be delayed until the meeting is held if a parent filing a due process complaint fails to participate in the resolution meeting. Proposed § 300.510(b)(3) is based on H. Rep. No. 108-77, page 114 that provides:

[If] the parent and the LEA mutually agree that the meeting does not need to occur, the resolution session meeting does not need to take place. However, unless such an agreement is reached, the failure of the party bringing the complaint to participate in the meeting will delay the timeline for convening a due process hearing until the meeting is held.

Proposed § 300.510 would incorporate the requirement from section 615(f)(1)(B) of the Act regarding the conducting of resolution sessions, unless waived by joint agreement of the parties prior to the opportunity for an impartial due process hearing.

Proposed § 300.511(a) and (b) would incorporate the language from section 615(f)(1)(A) of the Act regarding impartial due process hearings.

Proposed § 300.511(b) is the same as the current § 300.507(b). Proposed § 300.511(c)(1) would incorporate the language regarding qualifications of hearing officers from section 615(f)(3)(A) of the Act, and would replace current language in § 300.508(a) and (b) of the current regulations. Proposed § 300.511(c)(2) and (3) would incorporate the regulatory language currently in § 300.508(b) and (c) regarding the non-employee status of the hearing officer and the requirement for the public agency to keep a list of hearing officers and their qualifications. Proposed § 300.511(d), (e) and (f) would include the new requirements in section 615(f)(3)(B), (C), and (D) of the Act concerning the subject matter of the due process hearings, timelines for requesting hearings and exceptions to the timelines.

Proposed § 300.512(a), (b), and (c) would incorporate the due process hearing rights addressed in section 615(f)(2) and (h) of the Act, and the current regulatory language in § 300.509(a), (b) and (c)(1). The language in current § 300.509(c)(2) concerning providing the record of the hearing and decision at no cost to the parents would be moved to proposed § 300.512(c)(3). Under proposed § 300.512(a)(4), parents would have a right to obtain copies of a written, or, at the option of the parents, electronic, verbatim record of the hearing and copies of findings of fact and decisions, and public agencies would remain responsible for ensuring

that these rights are effectively implemented.

Proposed § 300.513(a) would reflect the new language in section 615(f)(3)(E) of the Act concerning the nature of hearing officer decisions, including the requirement that decisions be made on substantive grounds, standards for when procedural violations can be found to deny FAPE, and clarifying that a hearing officer can order an LEA to comply with procedural requirements. Proposed § 300.513(b) would incorporate the construction clause from section 615(f)(3)(F) of the Act, but would clarify that language based on note 225 of the Conf. Rpt., which indicates that the statutory reference to a complaint was intended to address a State-level administrative appeal process, if available in that State. Proposed § 300.513(c) would incorporate the requirement from section 615(o) of the Act that nothing prevents a parent from filing a separate due process complaint on an issue separate from the due process complaint that has already been filed. However, note 220 of the Conf. Rpt. states that “the Conferees intend to encourage the consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint.”

Proposed § 300.513(d) would incorporate the current regulatory language from § 300.509(d) concerning the availability of hearing decisions to the public and the State advisory panel, based on section 615(h)(4) of the Act.

Proposed § 300.514, on finality of decisions, appeals, and impartial reviews, and § 300.515, regarding timelines and convenience of hearings, would be the same as current §§ 300.510 and 300.511 respectively, with cross-references updated. Proposed § 300.515(a) also would be revised to start the 45-day timeline from the expiration of the 30-day period for resolution under proposed § 300.510, rather than from the date when the agency receives a request for a due process hearing. This change is based on new language in section 615(f)(1)(B)(ii) of the Act providing that the timelines for due process commence at the expiration of the resolution period.

Proposed § 300.516, on civil actions, would be essentially the same as the current § 300.512 with updated references, and one substantive change. Specifically, proposed § 300.516(b) would be added to reflect the new requirement in section 615(i)(2)(B) of the Act that provides for a time limit of 90 days from the date of the final State administrative decision to file a civil action, or if the State has an explicit time limitation for bringing a civil

action under Part B of the Act, in the time allowed by that State law.

Proposed § 300.517, concerning attorneys’ fees, would revise current § 300.513 to reflect new language in section 615(i)(3)(B) through (G) of the Act. Proposed § 300.517(a)(1) would reflect changes in section 615(i)(3)(B) of the Act providing that either the parents or an SEA or LEA could receive reasonable attorneys’ fees in appropriate circumstances. Proposed § 300.517(a)(2) would be added to reflect the language in section 615(i)(3)(B)(ii) of the Act clarifying that the attorneys’ fees limitation in the District of Columbia Appropriations Act, 2005, P.L. 108-335, would not be affected by this regulation. Proposed § 300.517(c)(2)(iii) would be added to incorporate language from section 615(i)(3)(D)(iii) of the Act providing that attorneys’ fees are not available for preliminary meetings that are a part of the new resolution proceedings.

Finally, proposed § 300.517(c)(4)(i) would provide that action by either the parent, or the parent’s attorney, to unreasonably protract the final resolution of the controversy would be a basis to reduce the amount of attorneys’ fees, consistent with a corresponding change in section 615(i)(3)(F)(i) of the Act.

Proposed § 300.518, concerning the child’s status during proceedings, would be substantially the same as the current regulation in § 300.514, with appropriate updating of cross-references.

Proposed § 300.519 would revise the current regulation in § 300.515 concerning surrogate parents in the following ways: In proposed § 300.519(a)(2), we would use the statutory word “locate” rather than the current “discover the whereabouts” of the parent. Proposed § 300.519(a)(4) would be added to reflect the new language in section 615(b)(2)(A)(ii) of the Act requiring that a child’s rights be protected if the child is an unaccompanied homeless youth as defined under the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11431 *et seq.* Proposed § 300.519(c) would be added to provide that a judge overseeing a child’s case could appoint a surrogate if the child were a ward of the State, consistent with section 615(b)(2)(A)(i) of the Act. Proposed § 300.519 would remove current § 300.515(c)(3) regarding the option for a public agency to select as a surrogate an employee of a nonpublic agency that only provides noneducational care for the child, to ensure that surrogates do not have interests that conflict with the interest of the child. Proposed

§ 300.519(f) would be added concerning the potential appointment of temporary surrogates for unaccompanied homeless youth based on language in note 189 of the Conf. Rpt. providing that:

The Conferees recognize that, because the parents of homeless unaccompanied youth may be unavailable or unwilling to participate in the youth's education, homeless unaccompanied youth face unique problems in obtaining a free appropriate public education.

Accordingly, the Conferees intend that the surrogate parent process be available for such youth \* \* \* the Conferees intend that appropriate staff members of emergency shelters, transitional shelters, independent living programs, and street outreach programs not be considered to be employees of agencies involved in the education or care of youth, for purposes of the prohibition of certain agency employees from acting as surrogates for parents \* \* \*, provided that such role is temporary until a surrogate can be appointed that meets the requirements and such role in no way conflicts with, or is in derogation of, the provision of a free appropriate public education to these youth.

Finally, in light of the new requirement in section 615(b)(2)(B) of the Act, proposed § 300.519(h) would require that the SEA make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that a surrogate is needed. It is anticipated that only rare situations would cause the appointment of a surrogate to take 30 days.

Proposed § 300.520, concerning the transfer of parental rights at the age of majority, would be unchanged from the current regulatory language in § 300.517. With regard to the permissive transfer of rights to individuals who are in correctional institutions, we would not include the reference, from the statute, to Federal correctional institutions, as States do not have an obligation to provide special education and related services under the Act to individuals in Federal facilities.

### Discipline Procedures

The discipline provisions of the regulations would be substantially revised or removed, in light of significant changes to section 615(k) of the Act. In light of these statutory changes, the current regulations in §§ 300.520 through 300.528 would be removed. Proposed § 300.530(a) would provide that school personnel may consider unique circumstances, on a case-by-case basis when deciding whether a change in placement, consistent with the requirements of proposed § 300.530, would be appropriate for a particular child for a violation of a school code of student

conduct. This provision would be based on statutory language in section 615(k)(1)(A) of the Act, and the Conf. Rpt. in notes 237–245, which provides that “[It] is the intent of the Conferees that when a student has violated a code of conduct school personnel may consider any unique circumstances on a case-by-case basis to determine whether a change of placement for discipline purposes is appropriate.” Proposed § 300.530(b) would reflect the language in section 615(k)(1)(B)(1) of the Act, permitting school personnel to remove a child with a disability who violates a school code of conduct for not more than 10 school days, except that the regulatory language would clarify that these removals could be for not more than 10 consecutive school days, and that additional removals in the same school year would be possible, as long as those removals do not amount to a change of placement for the child. It is important for purposes of school safety and order to preserve the authority that school personnel have under the regulations to be able to remove a child for a discipline infraction for a short period of time, even though the child may have been removed for more than 10 days in that school year, as long as the pattern of removals does not itself constitute a change in placement of the child.

However, because it is also important to preserve the concept from the current regulations that discipline not be used as a means of disconnecting a child with a disability from education, the requirement in proposed § 300.530(b)(2) would provide that a child receive educational services consistent with paragraph (d) of § 300.530 after the first 10 days of removal in a school year.

Paragraphs (c) and (d)(1) and (2) of proposed § 300.530 would incorporate the statutory provisions from section 615(k)(1)(C) and (D) of the Act concerning removals for more than 10 school days and the provision of services during periods of removal. Proposed § 300.530(d)(3) would clarify that public agencies need not provide services to a child removed for 10 school days or less in a school year, as long as the public agency does not provide educational services to nondisabled children removed for the same amount of time. This is the same policy as in the current regulations in § 300.121(d)(1).

Paragraph (d)(4) of proposed § 300.530 would provide that where a child has been removed for more than 10 school days in the same school year, but not for more than 10 consecutive school days and not a change of placement, school personnel, in

consultation with at least one of the child's teachers, would determine the extent to which services are needed, if any, and the location where needed services would be provided. We believe that this requirement is important to ensure that children with disabilities in this situation receive appropriate services, while preserving the flexibility of school personnel to move quickly to remove a child when needed and determine how best to address the child's needs during these relatively brief periods of removal. The consultation by school personnel with at least one of the child's teachers does not require that a meeting be held.

Proposed § 300.530(d)(5) would provide that the child's IEP Team determines appropriate services, including the location of services when a child is removed for more than 10 consecutive school days, or the removal otherwise is a change of placement. We believe that in instances of these longer-term removals, the child's IEP Team should make the determination of what services are appropriate for the child.

Proposed § 300.530(e) and (f) would incorporate the new requirements concerning manifestation determinations from section 615(k)(1)(E) and (F) of the Act, with one addition. An introductory phrase would be included in proposed § 300.530(e)(1) to clarify that a manifestation determination would not need to be conducted for removals for not more than 10 consecutive school days or that do not otherwise constitute a change of placement. This added language is consistent with the regulatory policy in current § 300.523(a).

Proposed § 300.530(g) and (h) would incorporate the requirements from section 615(k)(1)(G) and (H) of the Act, which address the circumstances under which school personnel can remove a child for not more than 45 school days, including the new authority to remove a child who has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or LEA. In addition, proposed § 300.530(h) would contain parental notification requirements. Proposed § 300.530(i) would contain definitions drawn from section 615(k)(7) of the Act. The Act uses the definition of “serious bodily injury” from section 1365 of title 18, United States Code (*i.e.*, “bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted or obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty”).

Proposed §§ 300.531 and 300.532(a) and (b) reflect the new language in section 615(k)(2) and (3) of the Act concerning the determination of the interim alternative educational setting by the IEP Team, the right to request a hearing to appeal placement and manifestation decisions, and the authority of the hearing officer in appeals under the discipline procedures. We add proposed § 300.532(b)(3) to the regulations to clarify that in appropriate circumstances, a school district could seek a subsequent hearing to continue a child in an interim alternative educational placement if the school district believes that the child would be dangerous if returned to his or her original placement at the end of a removal that was based on a determination that maintaining the child's regular placement was substantially likely to result in injury to the child or others. Proposed § 300.532(c)(1) would incorporate the statutory right to a hearing from section 615(f)(1)(A) of the Act.

Proposed § 300.532(c)(2) would reflect the language in section 615(k)(4)(B) of the Act regarding expedited timelines in cases of hearings under the discipline procedures. In proposed § 300.532(c)(3) and (4), we propose shortened timelines for the resolution session process in expedited hearings in light of the shortened timelines for these expedited hearings under the statute. Proposed § 300.532(c)(5) and (6) would repeat language from current § 300.528(c) and (d) that provides useful flexibility for States in designing their expedited hearing procedures.

Proposed § 300.533 would address the issue of the child's placement during appeals. This section would reflect the language in section 615(k)(4)(A) of the Act providing that the child remain in the interim alternative educational setting pending the decision of the hearing officer or the expiration of the time period provided for removals based on a determination that the behavior is not a manifestation of the child's disability. We would add, however, in proposed § 300.530(g), that this provision also would apply to removals of up to 45 school days.

Proposed § 300.534 concerning, in the context of discipline, the protections for children not yet determined eligible for special education and related services would replace the current § 300.527, and would reflect the new language in section 615(k)(5) of the Act. Proposed § 300.535 would be essentially the same as current § 300.529, and is based on section 615(k)(6) of the Act. Proposed § 300.536 would include a description

of when a change in placement occurs because of a disciplinary removal. The concept of change of placement under discipline is raised in section 615(k)(1)(A) and (k)(3)(B) of the Act, and it is important to have a clear understanding of when a change in placement occurs so as to ensure that discipline does not effectively result in the cessation of services to a child with a disability, in violation of the FAPE requirements in section 612(a)(1)(A) of the Act. Proposed § 300.536 is similar to current § 300.519 but would include the additional provision that the child's behavior, if substantially similar to the child's behavior in the incidents that resulted in a series of removals, taken cumulatively, is a manifestation of the child's disability. This addition should assist in the appropriate application of the change in placement provisions.

#### **Current Sections Incorporated Elsewhere in This Part**

Current §§ 300.530 through 300.543 are incorporated into subpart D of these proposed regulations, as appropriate. Current §§ 300.550 through 300.556 are incorporated into subpart B of these proposed regulations, as appropriate. Current §§ 300.560 through 300.577 are incorporated into subpart F of these proposed regulations. Current §§ 300.580 through 300.586 and § 300.589 are incorporated in subpart B of these proposed regulations. Current § 300.587 is incorporated into subpart F of these proposed regulations, as appropriate.

#### *Subpart F—Monitoring, Enforcement, Confidentiality, and Program Information*

#### **Monitoring, Technical Assistance and Enforcement**

Subpart F reflects certain portions of section 616 of the Act that address State activities and those activities where the Department must establish and enforce particular procedures for withholding actions. Proposed § 300.600 would reflect the new provisions of section 616(a) and (b)(2)(c)(ii) of the Act concerning monitoring and enforcement, which sets forth the responsibility of States to monitor the implementation of, enforce, and annually report on performance under part 300. Proposed § 300.600 would further reflect the new statutory requirement that the primary focus of monitoring is on improving educational results and functional outcomes for children with disabilities. The provisions of current § 300.600 have been moved to proposed § 300.149 to follow the order of the Act. Proposed

§ 300.600(c) would reflect new requirements in section 616(a)(3) of the Act that States measure performance in monitoring priority areas using quantifiable indicators and such qualitative indicators as are needed to adequately measure performance. Proposed § 300.600(c) clarifies that these indicators are established by the Secretary in the context of informing States of what they need to do under the State's performance plan.

Proposed § 300.601 would reflect new statutory language requiring States to have a performance plan that evaluates their efforts to implement the requirements and purposes of part 300 and describes how the State will improve implementation within one year of enactment of the Act. Under proposed § 300.601 the plan must establish measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in section 613(a)(3) of the Act and must be submitted to the Secretary for approval. Consistent with the new statutory language, proposed § 300.601 would require States to review their performance plans at least once every six years and submit any amendments to the Secretary. The proposed regulation also incorporates the statutory requirements from section 616(b)(2)(B)(ii) regarding data collection and specifies that nothing in these regulations authorizes the development of a nationwide database of personally identifiable information on individuals involved in studies or other data collections. These provisions are based on section 616(b)(1), (2)(A) and (2)(B) of the Act.

Proposed § 300.601(b)(1) contains language requiring that each State must collect valid and reliable information on all the indicators in the performance plan concerning the priority areas in section 616(a)(3) of the Act.

Proposed § 300.602 would reflect new statutory language from section 616(b)(2)(C) of the Act requiring States to use the targets established in their performance plans to analyze the performance of each LEA. These targets will include the priority areas in section 616(a)(3) of the Act. Under proposed § 300.602, which largely tracks the language in section 616(b)(2)(C) of the Act, States would be required to report annually to the public on the performance of each LEA in the State on the targets in the performance plan and make the performance plan available to the public. Notes 253 through 258 of the Conf. Rpt. explain that the expectation is that the State performance plans, indicators and targets are to be developed with broad stakeholder input

and public dissemination. Proposed § 300.602(b)(1)(i) would include the statutory requirements from section 616(b)(2)(C) of the Act that States report annually to the public on the performance of each LEA in the State on the targets in the State's performance plan, and make the State's performance plan publicly available. Proposed § 300.602(b)(1)(ii) would add that if the State, in meeting the requirements of § 300.602(b)(1)(i), collects performance data through State monitoring or sampling, the State must include in its report the most recently available performance data on each LEA and the date the data were obtained. When appropriate, monitoring or sampling can be an effective means of data collection, reduce burden on States, and provide meaningful information on LEAs' performance.

Reflecting new language in section 616(b)(2)(C) of the Act, proposed § 300.602(b)(2) also would require each State to report annually to the Secretary on the performance of the State under its performance plan, but the State would not be required to report to the public or the Secretary any information on performance that would disclose personally identifiable information about individual children. Furthermore, under proposed § 300.602(b)(3), States would not be required to report their student data if the available data are insufficient to yield statistically reliable information.

Proposed § 300.603 would reflect new language in section 616(d) of the Act requiring the Secretary to review the State's annual performance report and based on information in the annual performance report, or information obtained through monitoring visits or other public information, determine if the State (1) meets the requirements and purposes of Part B of the Act, (2) needs assistance in implementing the requirements of Part B of the Act, (3) needs intervention in implementing the requirements of Part B of the Act, or (4) needs substantial intervention in implementing the requirements of Part B of the Act. Proposed § 300.603(b)(2) would reflect the language from section 616(d)(2)(B) of the Act that would provide States with notice and an opportunity for a hearing for determinations under proposed § 300.603(b)(1)(iii) and (b)(1)(iv). Proposed § 300.603(b)(2)(ii) also would clarify that the hearing would consist of an opportunity to meet with the Assistant Secretary for the Office of Special Education and Rehabilitative Services to demonstrate why the Department should not make the determination. We propose this

regulatory provision because the Department has determined that this type of hearing would provide the appropriate amount of process due a State prior to one of these determinations. Should specific enforcement action subsequently be contemplated, as provided for in section 616(e) of the Act, other hearing procedures then may apply, as provided for in proposed § 300.604 and in the General Education Provisions Act as amended, 20 U.S.C. 1221 *et seq.* (GEPA), and implementing regulations.

Proposed § 300.604 (Enforcement) would reflect new requirements in section 616(e) of the Act that set forth the various actions the Secretary takes with respect to each State's level of compliance as determined by the Secretary's review of the state performance reports under proposed § 300.603. Thus, if the Secretary determines that a State needs assistance, needs intervention, or needs significant enforcement actions that the Secretary may take. For example, if it is determined that a State needs substantial intervention, the Secretary takes one or more of the actions described in paragraph (c) of proposed § 300.604, including recovering funds under section 452 of GEPA, withholding in whole or in part any further payments to the State under Part B of the Act, referring the case to the Office of the Inspector General at the Department of Education, or referring the matter for appropriate enforcement action, which may include referral to the Department of Justice.

Under proposed § 300.604(d), the Secretary reports to appropriate congressional committees within 30 days of taking enforcement action against a State for any of the levels of compliance described in the preceding paragraph, describing the specific action that has been taken, and the reasons why the action was taken.

Proposed § 300.605(a), which reflects the language in section 616(e)(4)(A) of the Act on reasonable notice and the opportunity for a hearing prior to a withholding, would essentially be the same as current § 300.587(c)(4).

Proposed § 300.605(b) would reflect new language from section 616(e)(4)(B) of the Act that, pending the outcome of any hearing to withhold payments, the Secretary may do one or both of the following: Suspend payments to a recipient or suspend authority of the recipient to obligate funds under Part B of the Act provided that the recipient has been given reasonable notice and an opportunity to show cause why future payments or the authority to obligate

Part B funds should not be suspended. Proposed § 300.605(c) on the nature of withholding actions would reflect the current regulatory provisions in § 300.587(c)(1) and (c)(2) with minor language revisions to make the section consistent with the language in section 616(e)(6) of the Act.

Proposed § 300.606, on bringing pending withholding actions to the attention of the public, would reflect the new language in section 616(e)(7) of the Act, which is very similar to the language in current § 300.587(c)(3), except that section 616(e)(7) of the Act would apply to States only and not to SEAs, LEAs, or other agencies.

Proposed § 300.607 regarding divided State responsibility would reflect the regulatory language in current § 300.587(e), which is consistent with the language from section 616(h) of the Act.

Proposed § 300.608 would reflect the new language in section 616(f) of the Act that requires an SEA to prohibit an LEA from reducing the LEA's maintenance of effort under 613(a)(2)(C) if the SEA determines that the LEA is not meeting the requirements of Part B of the Act, including the targets in the State's performance plan.

Consistent with the new statutory provisions in section 616(e) of the Act, proposed § 300.609 would provide that nothing in the proposed regulations restricts the Secretary from utilizing any authority under GEPA to monitor and enforce the requirements under the Act.

#### Confidentiality of Information

Proposed § 300.610 would reflect the provision in section 617(c) of the Act regarding confidentiality of information. Proposed §§ 300.611 through 300.627 on the confidentiality of information would be the same as current § 300.560 through 300.575 and 300.577, with minor updates to cross-references. (Current § 300.576 would be addressed in proposed § 300.229.)

#### Reports—Program Information

Proposed §§ 300.640 through 300.646 on program information would substantially reflect the regulatory provisions from current §§ 300.750 through 300.755, with some changes. Proposed § 300.640(a) would remove the requirement from current § 300.750 that the information required by section 618 of the Act be submitted no later than February 1 and would replace it with the requirement that the information be submitted at times specified by the Secretary. Proposed § 300.640(b) on reporting on forms provided by the Secretary would be the same as the

regulatory language in current § 300.750(b).

Proposed § 300.641(a) would revise the regulatory provisions in current § 300.751 by removing the age spans listed in current § 300.751(a)(1) through (a)(3). Proposed § 300.641 also would remove the requirement from current § 300.751(c) that reports must include the number of children with disabilities within each disability category. SEAs must specify information required by these regulatory provisions on the forms provided by the Secretary pursuant to proposed § 300.640(b). Finally, proposed § 300.641(a) would permit States to count children with disabilities for purposes of the reporting required by proposed § 300.640 on any date between October 1 and December 1 of each year. This change will provide States greater flexibility in coordinating their IDEA Part B child count date with counts they conduct for other State purposes, while providing reasonable consistency across States.

Proposed § 300.641(b), regarding age at count date, would be substantially the same as current regulation § 300.751(b), but would reflect the revision in the count date proposed in paragraph (a) of this section. Proposed § 300.641(c) and (d) would be substantially the same as the regulatory provisions in current § 300.751(e) and (f) regarding how to meet the reporting requirements.

Proposed § 300.642(a) would reflect the new provisions in section 618(b)(1) of the Act requiring each State to report data in a manner that does not result in disclosure of personally identifiable information. Proposed § 300.642(b) on sampling, which reflects the language in section 618(b)(2) of the Act, would be substantially unchanged from current § 300.751(d).

Proposed § 300.643 on certification of the annual report of children served is substantially unchanged from current § 300.752.

Proposed § 300.644 on criteria for counting children in the annual report of children served would be substantially unchanged from current § 300.753(a). Current 300.753(b) on reporting on children receiving special education that is solely funded by the Federal government would be removed as unnecessary because the funding formula is no longer based on child count. Proposed § 300.644(c) clarifies current § 300.753(a)(3) regarding the counting of children enrolled by their parents in private schools.

Proposed § 300.645 on other responsibilities of the SEA related to the annual report of children served would be the same as current § 300.754.

Proposed § 300.646(a) would revise the regulatory provisions in current § 300.755 on determination of significant disproportionality to reflect changes in section 618(d) of the Act. Proposed § 300.646(a) would include new language requiring States to collect and examine data on disproportionality based on ethnicity as well as race. Proposed § 300.646(a) also would require States to determine if significant disproportionality is occurring in the State as well as within the LEAs of the State. Proposed § 300.646(a)(1) and (a)(2) on collecting and examining data related to identification of children with disabilities would be the same as the regulatory language in current § 300.755(a)(1) and (a)(2). Proposed § 300.646(a)(3) would reflect the new provisions in section 618(d)(1)(C) of the Act requiring States to collect and examine race and ethnicity data with respect to the incidence, duration and type of disciplinary actions, including suspensions and expulsions.

Proposed § 300.646(b)(1) concerning the review and revision of policies, practices and procedures, which reflects the language in section 618(d)(2) of the Act, would be the same as current § 300.755(b). Proposed § 300.646(b)(2) would incorporate the new requirement in section 618(d)(2)(B) of the Act that States must ensure that any LEA identified under proposed § 300.646(b)(1) as having policies, practices, or procedures that do not comply with Part B of the Act reserves the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to children in the LEA, particularly children in those groups that were significantly overidentified. Proposed § 300.646(b)(3) would incorporate new language from section 618(d)(2)(C) of the Act that requires the LEA to report on the revision of policies, practices and procedures that do not comply with the Act.

*Subpart G: Authorization; Allotment; Use of Funds; Authorization of Appropriations*

Proposed subpart G would reflect the provisions in section 611 of the Act regarding the Department's allocation of Part B section 611 funds to States, outlying areas, the freely associated States, and the Secretary of the Interior. The proposed title of subpart G, "Authorization; Allotment; Use of Funds; Authorization of Appropriations," would be revised from "Allocation of Funds; Reports" to reflect the statutory headings listed under section 611 of the Act.

Proposed § 300.700, regarding grants to States, would contain the language in current § 300.701 but would be revised to reflect the order of, and revisions to, section 611(a) of the Act. Specific revisions would include the changes that were made in: (1) Section 611(a)(1) of the Act to include a reference to freely associated States as receiving Part B grants; (2) section 611(a)(2)(A) of the Act to clarify that the current definition of the maximum amount a State may receive applies for fiscal years 2005 and 2006; and (3) section 611(a)(2)(B) of the Act to clarify the maximum amount a State may receive for fiscal year 2007 and subsequent fiscal years and to allow for adjustments described in 611(a)(2)(B)(iii) of the Act. The adjustments would be reflected in proposed § 300.700(b)(2)(iii). Current § 300.700, regarding the special definition of the term State, and current § 300.702, regarding the definition of average per-pupil expenditure in public elementary and secondary schools in the United States, would not be substantively changed but would be moved to proposed § 300.717 to a general "Definitions" section for subpart G.

Proposed § 300.701, regarding grants to outlying areas and freely associated States, and the Secretary of the Interior, would incorporate the language in the current regulations in §§ 300.715(a), 300.717, 300.719, and 300.720, as revised to reflect changes in section 611(b) of the Act. Proposed § 300.701 would not contain the definition of "freely associated states" from section 611(b)(1)(C) of the Act. The definition of "freely associated states," which is substantively unchanged, would be in proposed § 300.717 in the general "Definitions" section for subpart G. As noted in the preceding paragraph, current § 300.701, regarding grants to States, would be moved to proposed § 300.700, consistent with the structure of section 611 of the Act. Proposed § 300.701(a)(1)(ii) would clarify the provision in section 611(b)(1)(A)(ii) of the Act that requires that, as a condition of receiving a grant under this part, each freely associated State must meet the "applicable requirements of Part B of the Act." The proposed revision would specify what the "applicable requirements" are, similar to what is done with respect to information requirements for the Secretary of the Interior in current § 300.260 (proposed § 300.708).

Proposed § 300.702, regarding technical assistance, would contain the language in section 611(c) of the Act, which allows the Secretary to reserve Part B funds to support technical

assistance activities authorized under section 616(i) of the Act.

Proposed § 300.703, regarding allocations to States, would be revised to incorporate the language of current §§ 300.703 and 303.706 through 303.709. The proposed regulation would be revised to reflect section 611(d) of the Act, which: (1) Requires the Secretary to allocate Part B funds to States after reserving funds for technical assistance under section 611(c) of the Act and making payments to outlying areas, the freely associated States and the Secretary of Interior under section 611(b); (2) removed language regarding interim and permanent formulas; and (3) established 1999 as the base year for minimum state allocations under section 611(d)(3)(A)(i)(I) and (B)(ii)(I) of the Act and calculations of ratable reductions if the amount available for allocations to States is less than the amount allocated for the preceding fiscal year under section 611(d)(4) of the Act.

Proposed § 300.704, regarding State-level activities, would incorporate certain provisions of section 611(e) of the Act regarding the use of Part B funds under section 611 of the Act for authorized State-level activities. Proposed § 300.704(a)(1) and (2) would contain the new maximum amount States and outlying areas may reserve for State administration. The proposed regulation would establish fiscal year 2004 as the base year for States (as defined under proposed § 300.717) and the greater of \$35,000 or five percent of the Part B grant for outlying areas and would provide for cumulative annual adjustments based on the rate of inflation to the maximum amount a State may reserve, consistent with section 611(e)(1)(A) and (B) of the Act. Proposed § 300.704(a)(3) would contain the new certification requirement language in section 611(e)(1)(C) of the Act that prior to the expenditure of funds under section 611(e)(1) of the Act, the State must certify to the Secretary that the arrangements to establish financial responsibility for services pursuant to section 612(a)(12)(A) of the Act are current. Proposed § 300.704(a)(4) would contain a regulatory provision that would allow SEAs that reserve funds under § 300.704(a) to use Part B State administration funds to administer Part C of the Act if the SEA is the lead agency designated under Part C, consistent with section 611(e)(1)(D) of the Act.

Proposed § 300.704(b)(1) and (2) would generally reflect and clarify the new requirements in section 611(e)(2)(A) of the Act regarding the

amount of funds that States may reserve for other State-level activities, depending on the amount they reserve for administration and whether they establish a high-cost fund under section 611(e)(3) of the Act. Proposed § 300.704(b)(3) would incorporate the new provision in section 611(e)(2)(B) of the Act, but would clarify that some portion of funds reserved for other State-level activities under § 300.704(b)(1) must be used for monitoring, enforcement and complaint investigation, and to establish and implement the mediation process required under section 615(e) of the Act. Proposed § 300.704(b)(3) would not prohibit States from using State funds for these monitoring, enforcement, complaint investigation, or mediation activities.

Proposed § 300.704(b)(4) would incorporate section 611(e)(2)(C) of the Act, which allows funds reserved for other State-level activities under § 300.704(b)(1) to be used for certain authorized activities. These activities would include support and direct services, paperwork reduction activities and capacity building activities, and improving the delivery of services by LEAs, improving the use of technology in the classroom and supporting its use, developing and implementing postsecondary transition programs, providing technical assistance to schools and LEAs identified for improvement under section 1116 of the ESEA, and assisting LEAs in providing positive behavioral interventions and supports and appropriate mental health services for children with disabilities and meeting personnel shortages.

Proposed § 300.704(c) would contain a new provision that incorporates the language of section 611(e)(3) of the Act regarding the State's option to use ten percent of the amount it reserves for other State-level activities under § 300.704(b)(1) for financing an LEA high cost fund and would set forth detailed content and timeline requirements for the State's plan for the high cost fund. Proposed § 300.704(c)(1)(i)(A) would clarify the statutory language by providing that these funds would be used by a State to finance the high cost fund and to make disbursements from that fund. Proposed § 300.704(c)(1)(i)(B) and (ii) would reflect the statutory language on using the high cost fund to support innovative cost sharing and the special definition of LEA that applies in this context. Proposed § 300.704(c)(2)(i) would generally reflect the language in section 611(e)(3)(B)(i) of the Act, but also would clarify that the funds reserved for the high cost fund are solely for

disbursement to the LEAs and may not be used for costs associated with establishing, supporting, and otherwise administering the high cost fund. This provision also would specify that the State may use State administration funds under § 300.704(a) for those administrative costs, consistent with the language in section 611(e)(3)(B)(i) of the Act.

Proposed § 300.704(c)(2)(ii) would limit States to not more than five percent of the funds they reserve each fiscal year under proposed § 300.704(c) to support innovative cost sharing, consistent with section 611(e)(3)(B)(ii) of the Act.

Proposed § 300.704(c)(3) would incorporate the requirements in section 611(e)(3)(C) of the Act, regarding the State plan for the high cost fund, with one addition. Proposed § 300.704(c)(3)(i)(C) would add a requirement that the State plan establish criteria to ensure that the placements of children whose costs are supported under the high cost fund are made consistent with the LRE requirements. This would reinforce that the funds would not be used to encourage inappropriate placements outside of the general education environment. Nothing in the proposed regulations would prohibit an SEA from using high cost funds to support costs of providing appropriate services in a general education environment when those costs meet the standard established by the State in its State plan. Proposed § 300.704(c)(3)(i)(A)(2) would incorporate the requirement in section 611(e)(3)(C)(ii)(I)(bb) of the Act that the State must establish a definition of a high need child with a disability that, at a minimum, ensures that the cost of the high need child with a disability is greater than three times the average per pupil expenditure (APPE). Under this provision, a State could, for example, establish a definition that ensures that the cost of a high need child with a disability is four times greater than the APPE.

Proposed § 300.704(c)(4) through (c)(6) would incorporate the requirements in section 611(e)(3)(D) through (F) of the Act regarding disbursements from the fund, legal fees, and assurance of FAPE, with two additions. In proposed § 300.704(c)(4)(ii), we would add language on appropriate costs to clarify that the costs of room and board for a necessary residential placement could be supported by the high cost fund. Proposed § 300.704(c)(4)(iii) would provide that the funds in the high cost fund would remain under the control of the SEA until disbursed, under the State

plan, to support a specific child, or until reallocated to LEAs in the subsequent year. This provision is needed to make clear that these funds must be distributed to LEAs under the high cost State plan formula.

Proposed § 300.704(c)(7) through (9) would incorporate the provisions of section 611(e)(3)(G) through (I) of the Act regarding the special rule for risk pool and high need assistance programs that predated the new statute, the effect on Medicaid services, and the reallocation of funds remaining at the end of the fiscal year. Proposed § 300.704(c)(9) generally would reflect and clarify the requirement in section 611(e)(3)(I) of the Act that funds reserved for a high cost fund, but not spent in accordance with section 611(e)(3)(D) of the Act before the beginning of their last year of availability for obligation, must be allocated to LEAs in the same manner as other funds from the appropriation for that fiscal year are allocated to LEAs under section 611(f) of the Act during their final year of availability. States that are not reserving funds for the high cost fund, but that offer LEAs support for extraordinary expenses for particular children from other funds would not need to develop a State plan for a high cost fund under the proposed regulations.

Proposed § 300.704(d) would incorporate the language of section 611(e)(4) of the Act, which contains the exemptions of funds reserved for administration and other State-level activities from Part B's commingling and nonsupplanting provisions in sections 612(a)(17)(B) and (C) of the Act. Proposed § 300.704(e) would incorporate section 611(e)(6) of the Act, which allows a State to use funds reserved for administration under § 300.704(a)(1) as a result of inflationary increases to carry out activities such as providing support and direct services, assisting LEAs in providing positive behavioral interventions and supports, assisting LEAs in meeting personnel shortages, and supporting capacity building, as authorized under § 300.704(b)(4)(i), (iii), (vii), or (viii). Proposed § 300.704(f) would incorporate the new provisions of section 611(e)(7) of the Act that allow flexibility in using certain Part B funds (identified in sections 611(e)(1)(A), 611(f)(3) and 619(f)(5) of the Act). States may use these funds to develop and implement a State policy option that is available under section 635(c) of the Act for making Part C early intervention services available to children beyond age three who are eligible under section 619 under the circumstances set forth

under proposed § 300.704 and Part C of the Act.

Proposed § 300.705, regarding subgrants to LEAs, would contain the language in current §§ 300.711, 300.712, and 300.714 and would incorporate section 611(f) of the Act regarding State subgrants to LEAs using Part B section 611 funds. Proposed § 300.705(a) would specify that LEAs include public charter schools that operate as LEAs, consistent with section 611(f)(1) of the Act. The language in current § 300.713 regarding former Chapter 1 State agencies would be removed as the corresponding statutory provision was also removed. Proposed § 300.705(b)(1) and (2) would establish 1999 as the base year for allocation to LEAs, consistent with section 611(f)(2)(A) of the Act.

Proposed § 300.706 would contain the language in current § 300.710 regarding allocations to a State in which a by-pass is implemented for parentally-placed private school children with disabilities, consistent with section 612(f) of the Act, with cross-references updated.

#### Secretary of The Interior—Eligibility

Proposed §§ 300.707 through 300.716 would incorporate and update current §§ 300.260 through 300.267 and §§ 300.715 through 300.716 based on the requirements in section 611(h) of the Act concerning the payment to the Secretary of the Interior.

Proposed § 300.707(a) would add new definitions of *Reservation* and *Tribal governing body of a school* to apply for purposes of §§ 300.707 through 300.716. The term *reservation* would be defined to mean Indian Country under 18 U.S.C. 1151. The term *tribal governing body of a school* would be defined to mean the body or bodies of the Indian tribe involved and that represent at least 90 percent of the students served by the school. Adding these definitions should provide clarity to the responsibilities of the Department of the Interior under the IDEA.

The Department of Education seeks comment on the necessity of adding a new definition of LEA for the purposes of regulations related to schools operated or funded by the Secretary of the Department of the Interior. The Department of Education also seeks comment on the necessity of adding a new definition of SEA for the purposes of regulations related to schools operated or funded by the Secretary of the Department of the Interior.

Proposed § 300.707(b) would incorporate current § 300.715(b) and add the new requirement in section 611(h)(1)(A)(i) and (ii) of the Act that 80 percent of the amount allotted under section 611(b)(2) of the Act must be

allocated to elementary schools and secondary schools operated or funded by the Secretary of the Interior by July 1, after the Secretary of the Interior reserves funds for administration under proposed § 300.710. The remaining 20 percent must be allocated to those schools by September 30. Current § 300.715(a) is reflected in section 611(b)(2) of the Act and would be incorporated in proposed § 300.701(b) to align with the order of section 611. Current § 300.715 (c) has been removed from the regulations because a State can no longer require a BIA funded school to attain or maintain State accreditation. This provision is not applicable at this time. Paragraph (c) of proposed § 300.707 would reflect the language in section 611(h)(1)(C) of the Act concerning children aged 3 through 21 on reservations. This provision would replace current § 300.300(c) to align with the order of the statute. Under paragraph (c) of proposed § 300.707, with respect to all other children aged 3 through 21 on reservations, the SEA of the state in which the reservation is located, must ensure that all of the requirements of Part B of the Act are implemented. Generally, if the reservation were located in more than one State, the State in which the student resides would be responsible for ensuring the requirements of Part B of the Act are met for that student.

Proposed § 300.708 would incorporate current § 300.260, update references to the eligibility requirements that apply to the Secretary of the Interior to reflect the new requirements in the Act, and add one new paragraph discussed as follows. Paragraph (a) of proposed § 300.708 would modify current § 300.260(a) by updating references to section 612 of the Act and adding the new requirements in section 612 of the Act that apply to the Secretary of the Interior. Paragraph (b) of proposed § 300.708 would incorporate current § 300.260(b). Paragraph (c) of proposed § 300.708 would incorporate current § 300.260(c) with updated references to section 613 of the Act. Paragraph (c) of proposed § 300.708 also would clarify that references to LEAs in section 613 of the Act that are included in proposed § 300.708(c) must be read as references to elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. Proposed § 300.708 would add a new paragraph (d) that would reflect the requirements in section 611(h)(2)(A) and (F) and section 611(h)(3) of the Act, which provide that the monitoring and enforcement requirements in section 616 of the Act apply to the Secretary of

the Interior. Paragraph (d) of proposed § 300.708 would also clarify that references to LEAs in section 616 of the Act must be read as references to elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior.

Proposed paragraphs (e) through (j) of proposed § 300.708 would incorporate current § 300.260(d) through (i), with cross-references updated. Consistent with section 611(h)(3) of the Act, proposed § 300.708(j) would remove the sentence in current § 300.260(i) that section 616(a) of the Act applies to the information described in this section. Instead, the proposed regulation would add a sentence providing that the Secretary withholds payments under § 300.707 with respect to the requirements described in this section in the same manner as the Secretary withholds payments under section 616(e)(6) of the Act.

Proposed §§ 300.709 through 300.710 would incorporate the current regulations in §§ 300.261 through 300.262 concerning public participation and use of Part B funds for administration, with cross-references updated.

Proposed § 300.711 would add a provision that would permit the Secretary of the Interior to allow each elementary school and secondary school for Indian children operated or funded by the Secretary of the Interior to use funds to develop and implement coordinated, early intervening services consistent with section 613(f) of the Act.

Proposed § 300.712 would incorporate the current regulation in § 300.716 concerning payments for education and services for Indian children with disabilities aged three through five with cross-references updated.

Proposed § 300.713 would incorporate the current regulation in § 300.263 regarding the plan for coordination of services. This provision does not make the BIA responsible for services for children with disabilities not enrolled in BIA funded schools. The Department of Education seeks comment on the best way to implement section 611(h)(5) of the Act for developing a plan for coordination of services on reservations. The Department of Education seeks comments on how a plan would be developed to cover those reservations where the State provides all services and those reservations where the State and BIA provide services.

The proposed regulations would remove current § 300.264, which sets out the definition of Indian and Indian tribe. Proposed § 300.21 would incorporate the definition of Indian and Indian tribe.

Proposed §§ 300.714 through 715 would incorporate current §§ 300.265 through 300.266 regarding the establishment of the advisory board and annual reports.

Proposed § 300.716 would incorporate current § 300.267 regarding the regulatory provisions that apply to the Secretary of the Interior, with cross-references updated and regulatory provisions added that implement the new statutory requirements that apply to the Secretary of the Interior.

Proposed § 300.717 would contain definitions that would be substantively unchanged from current regulations and that would apply only in subpart G. The defined terms would be: “freely associated States” (from section 611(b)(1)(C) of the Act), “outlying areas” (from section 602(22) of the Act), “State” (from section 611(g) of the Act), and “Average per-pupil expenditure in public elementary and secondary schools in the United States” (from section 611(g) of the Act). The definitions for “outlying areas,” “State,” and “Average per-pupil expenditure in public elementary and secondary schools in the United States” are contained in current §§ 300.718, 300.700, and 300.702, respectively.

Proposed § 300.718, regarding the acquisition of equipment and the construction or alteration of facilities, would incorporate the requirements of current § 300.756.

Current requirements in §§ 300.750 through 300.755 regarding State Part B data reporting requirements under section 618 of the Act would be moved to proposed §§ 300.640 through 300.646 in subpart F, consistent with the structure of the Act.

#### *Subpart H—Preschool Grants for Children With Disabilities*

Proposed §§ 300.800 through 300.818 would reflect an overall change in the placement of the Preschool Grants for Children with Disabilities Program from current 34 CFR part 301 to subpart H of part 300. Proposed §§ 300.800 through 300.810 and §§ 300.812 through 300.818 would incorporate current language from 34 CFR part 301, but with minor changes to reflect statutory language and the structure of the Act. Proposed § 300.811 would be added to clarify how the Secretary would make allocations under section 619 of the Act for a State in which a by-pass is implemented for parentally-placed private school children with disabilities. Proposed § 300.813(b) would reflect the statutory change in section 619(e) of the Act that a State may use funds reserved for administration for the administration of Part C of the Act even if the SEA is not

the lead agency under Part C of the Act. Proposed § 300.814 would incorporate two new substantive amendments from section 619(f) of the Act concerning the use of funds reserved for other State-level activities.

Proposed § 300.800 would reflect the language in section 619(a) of the Act describing the general purpose of the program. This provision would replace current § 301.1.

Consistent with a change made in subpart A, the current § 301.4, regarding applicable regulations, would be removed, as those regulations apply by their own terms.

Proposed § 300.803 would specify the definition of State, which would be the same as the definition used in current § 301.5, except that it would add the phrase, “As used in this subpart” to reflect different usages of the term in other subparts. Other definitions in current § 301.5 would be removed as unnecessary or as already covered in subpart A.

Proposed § 300.804 would describe a State’s eligibility for grants under section 619 of the Act, consistent with section 619(b) of the Act. This provision would replace current § 301.10.

Proposed § 300.806, concerning sanctions, would update current § 301.12(c) to be consistent with section 681(e) of the Act. Paragraphs (a) and (b) of current § 301.12 would be removed. Paragraph (a) of current § 301.12 would be reflected in proposed § 300.804. Paragraph (b) of current § 301.12 appears in section 611(d)(2) of the Act and would be incorporated in proposed § 300.703(b).

Proposed § 300.807 on allocations to States would amend current § 301.20 to reflect changes in the statutory language. Consistent with section 619(c)(1) of the Act, proposed § 300.807 would remove the phrase, “After reserving funds for studies and evaluations under section 674(e) of the Act.” Proposed § 300.807 would also update a cross-reference to allocations provisions in proposed §§ 300.808 through 300.810.

Proposed § 300.808 on increases in appropriated funds would amend current § 301.21 to reflect changes in statutory language. Proposed § 300.808 would also update the cross-references to other allocations provisions to be consistent with other proposed regulations.

Proposed § 300.809 on limitations in State allocations would update all cross-references to other proposed regulations from those in current § 301.22, and make other minor changes to conform to the statutory language.

Proposed § 300.810 would make minor technical changes to current § 301.23 to reflect statutory language, but would retain most of the regulatory language on the decrease in funds. However, paragraph (b)(2) of current § 301.23 would be removed as unnecessary, because it would be incorporated into proposed § 300.810(b) by adding the words “or less than” after “is equal to” and by substituting “fiscal year 1997, ratably reduced, if necessary” for “that year.” Proposed § 300.810 also would update the cross-reference to other regulations addressing allocations to States.

Proposed § 300.811 would be added to clarify how the Secretary would make allocations under section 619 of the Act for States in which a by-pass is implemented for parentally-placed private school children with disabilities, consistent with section 612(f)(2) of the Act.

Proposed § 300.812 on reservation for State activities would be substantively unchanged from current § 301.24, but would make a few changes, including updating the cross-references to State administration and State-level activities provisions, and substituting the word, “reserve” for the word “retain.”

Proposed § 300.813 on State administration would make technical changes to current § 301.25 to conform to revised statutory language. Consistent with section 619(e)(2) of the Act, proposed § 300.813(b) would remove the phrase “if the SEA is the lead agency for the State under that Part” from current § 301.25(b) to clarify that a State may use funds reserved for administration for the administration of Part C of the Act even if the SEA is not the lead agency under that Part.

Proposed § 300.814 relating to use of State funds for other State-level activities under section 619 of the Act reflects both substantive and technical changes to conform current § 301.26 to revised language in section 619(f) of the Act. Proposed § 300.814 would require States to use funds they reserve under § 300.812, but do not use for administration under § 300.813, for one or more of the activities outlined in § 300.814(a) through (f). Proposed § 300.814 also would update both the cross-references to other proposed regulations (reservation for State activities and State administration) and the cross-reference to the applicable sections in the Act.

Proposed § 300.814(e) would, in conformity with section 619(f)(5) of the Act, provide that a State may use any funds reserved for State activities and not used for administration to provide early intervention services in

accordance with Part C of the Act to children with disabilities who are eligible for services under section 619 of the Act, and who previously received services under Part C of the Act, until such children enter, or are eligible under State law to enter kindergarten.

Proposed § 300.814(f) would, consistent with section 619(f)(6) of the Act, provide that a State that elects to provide early intervention services to children eligible under section 619 of the Act in accordance with section 635(c) of the Act may use funds reserved for State activities and not used for administration, to continue service coordination or case management for families who receive services under Part C of the Act, consistent with proposed § 300.814(e).

Proposed § 300.815 on subgrants to LEAs would amend current regulatory language in § 301.30 by updating cross-references and by making a few technical amendments consistent with statutory language in section 619(g)(1) of the Act.

Proposed § 300.816 on allocations to LEAs would update the cross-reference to subgrants to LEAs and would make technical changes to current § 301.31, consistent with minor changes to the language in section 619(g)(1) of the Act.

Proposed § 300.817 on reallocation of LEA funds would reflect technical changes to current § 301.32 consistent with the statutory language in section 619(g)(2) of the Act. The proposed language would also be similar to current § 300.32, except that current § 301.32(b) would be removed. Current § 301.32(b) reflects the requirement in section 613(g) of the Act and would be incorporated in the proposed § 300.227 consistent with the structure of the Act.

Proposed § 300.818 would incorporate the statutory language from section 619(h) of the Act on the circumstances of Part C inapplicability. This provision would replace current § 301.6.

*Part 304—Service Obligations Under Special Education—Personnel Development To Improve Services and Results for Children With Disabilities*

Current §§ 304.2, 304.4, and 304.20, all of which refer to the personnel preparation grant program generally, would be removed because the Department intends for part 304 to focus on the service obligation component of the program only and not on the personnel preparation grant program generally.

Proposed § 304.3 would remove the reference to the terms defined in 34 CFR part 77 because those definitions apply to all personnel preparation grant competitions. Proposed § 304.3(c),

regarding early intervention services, would change current § 304.3(b)(2), to clarify that an infant or toddler with a disability, as defined in section 632(5) of the Act, includes, at a State’s discretion, at risk infants and toddlers. In addition, proposed § 304.3(f) would define the term *repayment* instead of *payback* (defined in the current § 304.3(b)) to conform to the language used elsewhere in this proposed part 304.

Proposed §§ 304.21 and 304.22, regarding allowable costs and requirements for grantees in disbursing scholarships, would clarify that stipends are not included in the cost of attendance and thus are not limited by the cap in proposed 304.22(b), which references Title IV of the Higher Education Act of 1965, as amended.

Proposed § 304.23 would retain the grantee’s obligation to enter into an agreement with the scholar. However, the requirements that the scholar must carry out with respect to the service obligation would be moved to proposed § 304.30 to more clearly identify the obligations of the scholar. Also, while retaining the requirements that the grantee establish exit certification policies and provide necessary information and notices to the Secretary, proposed § 304.23 would conform these requirements to the new statutory language in section 662(h)(3) of the Act, which requires that the Secretary, rather than grantees, ensure that scholars comply with the service obligation requirements.

Proposed § 304.30 would consolidate all the requirements imposed on scholars into one section and eliminate some duplicative provisions. Proposed § 304.30 would describe the content of the agreement that grantees must enter into with scholars, which is contained in the current § 304.23, and the consequences of a scholar failing to meet the service obligation requirements, which are contained in current § 304.32. Proposed § 304.30(i) would require the scholar to provide information to the Secretary, reflecting the new language in section 662(h)(3) of the Act, which requires that the Secretary rather than grantees ensure that scholars comply with the service obligation requirements.

Proposed § 304.30(e) would clearly state how a scholar could satisfy the work obligation through positions in supervision, postsecondary faculty, and research. Proposed § 304.30(e) also would clarify that a scholar who goes on to receive a more advanced degree can satisfy the work obligation requirement for a lesser degree in special education by maintaining relevant employment in

the areas of supervision, postsecondary faculty, or research. Likewise, § 304.30(e) would allow a scholar who receives a scholarship from a leadership preparation program (for an advanced degree) to satisfy the work obligation by providing special education, related services, or early intervention services.

Proposed § 304.31 would reflect the new statutory language in section 662(h)(3) of the Act, which requires that the Secretary rather than grantees ensure that scholars comply with the service obligation requirements. Proposed § 304.31 also would delete the specific deferrals in current § 304.31(5) and (6) for scholars with a temporary disability that prevents the scholar from working or for scholars who are unable to secure employment by reason of care provided to a disabled family member. The Department believes that these deferrals are inappropriate.

#### Executive Order 12866

##### 1. Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

##### Summary of Potential Costs and Benefits Costs and Benefits of Statutory Changes

For the information of readers, the following is an analysis of the costs and benefits of the most significant statutory changes made by the Act that are incorporated into the proposed regulations governing the Assistance to States for the Education of Children with Disabilities program under Part B of the IDEA. In conducting this analysis, the Department examined the extent to which the proposed regulations would add to or reduce the costs for public agencies and others in relation to the costs of implementing the program regulations prior to the enactment of the new statute. Based on this analysis, the Secretary has concluded that the statutory changes reflected in these proposed regulations would not impose significant net costs in any one year, and may result in savings to SEAs and LEAs. An analysis of specific provisions follows:

##### Requirement for State Certification for Highly Qualified Special Education Teachers

Proposed § 300.156(c) would require that persons employed as special education teachers in elementary or secondary schools be highly qualified as defined in proposed § 300.18 by no later than the end of the 2005–2006 school year. Proposed § 300.18(b)(1) would require that every public elementary

and secondary school special education teacher obtain full State certification as a special education teacher or pass the State special education teacher licensing examination, and hold a license to teach in the State as a special education teacher as one of the conditions of being considered highly qualified to teach special education. Previously, special education teachers were not required by Federal law to be certified as special education teachers in their States. The proposed regulation would preclude teachers for whom the special education certification or licensure requirements were waived on an emergency, temporary, or provisional basis from meeting the definition of a highly qualified special education teacher. Teachers employed by a public charter school would be exempt from these requirements and subject to the requirements for highly qualified teachers in their State's public charter school law.

The impact of the requirement in the proposed regulation that all special education teachers have full special education certification by the end of the 2005–2006 school year will depend on whether States and districts comply with the requirement by helping existing teachers who lack certification acquire it, or by hiring new fully-certified teachers, or some combination of the two.

According to State-reported data collected by the Department's Office of Special Education Programs, certification or licensure requirements have been waived for eight percent of special education teachers or approximately 30,000 teachers. If States and districts responded to the proposed regulation by hiring certified teachers to fill these positions, it would cost well over \$1 billion to cover the salaries for a single year. (Occupational Employment and Wages Survey, November 2003, indicates a median national salary of \$42,630 for elementary school teachers and \$44,920 for secondary school teachers.) However, given that the *Study of Personnel Needs in Special Education* (SPENSE) found that in 1999–2000, 12,241 positions for special education teachers were left vacant or filled by substitute teachers because suitable candidates could not be found, it is unlikely that States and districts would be able to meet this requirement through hiring.

The SPENSE study also found that 12 percent of special education teachers who lack full certification in their main teaching assignment field are fully certified in another State. This means that States should be able to certify an

estimated 3,600 additional special education teachers at relatively little expense through reciprocal certification agreements with other States.

Responses to the 1999–2000 *Schools and Staffing Survey* indicate that nearly 10 percent (approximately 3,000 teachers) of special education teachers who lacked full certification, including those teaching under provisional, temporary, or emergency certification, were enrolled in a program to obtain State certification. If teachers already participating in a certification program are presumed to be within 10 semester hours of meeting their coursework requirements and the estimated cost of a semester hour in a university or college program is \$200, then it would cost \$6 million to help these teachers obtain full State certification. If teachers require more than 10 semester hours to complete their certification programs, they are unlikely to obtain certification through coursework by the end of the 2005–2006 school year.

States and districts are unlikely to be able to meet the requirements of the proposed regulation entirely through reciprocity agreements and college and university programs. The above estimates involve fewer than 7,000 of the approximately 30,000 teachers who lack full certification. Other options States and districts might use to certify the more than 23,000 remaining teachers include assessments of academic skill and subject matter knowledge and professional development. Assessment requirements for special education teachers vary across States and teaching assignment fields, but most States require at least two subject matter tests, a general test on core content knowledge, and a disability-specific test, for special education teacher certification. The average cost of each test is \$75. The SPENSE study found that one-fourth of beginning special education teachers who took a certification test reported having to take it more than once before passing. If States and districts certified the remaining 23,000 teachers through existing assessments and 25 percent of the teachers took the tests twice, the cost would be approximately \$4.3 million.

Some subset of special education teachers currently teaching through waivers will require additional training to obtain special education certification. The cost of certifying these teachers will depend on State special education certification requirements and the types of professional development needed to help these teachers meet the requirements. Most studies found that district expenditures for professional

development range from one to four percent of a district's total budget or \$2,062 per teacher in 2000 dollars. If 18,000 teachers need additional training, costing an average expenditure of \$2,000 per teacher for professional development, the cost of certifying these teachers through training would be \$36 million.

Because there is little information available on what would be required to implement this proposed regulation and the cost of doing so, the Secretary concludes that the cost may be significant given the number of special education teachers who lack certification. The Secretary further concludes that the benefits of State certification may not necessarily outweigh the costs.

The Secretary believes that teacher certification can be a valuable tool in ensuring that teachers have the knowledge and skills they need to help students meet high academic standards. Since the highly qualified teacher requirements in the No Child Left Behind Act, which focus on content knowledge, already applied to special education teachers providing instruction in core academic subjects, the benefits of requiring special education teachers to also meet State certification requirements for special education teachers will largely depend on the extent to which these requirements reflect pedagogical knowledge and other teacher characteristics that are likely to have a positive effect on achievement of students with disabilities. As of now, there is a dearth of research showing the relationship between special education certification and academic achievement for students with disabilities.

#### **Special Education Teachers Teaching To Alternate Achievement Standards**

Section 9101 of the ESEA requires that teachers of a core academic subject have full State teacher certification, hold at least a bachelor's degree, and be able to demonstrate knowledge of the subject matter they teach by the end of the 2005–2006 school year. Elementary level teachers may demonstrate subject matter expertise by passing a rigorous State test of their subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum, but middle or secondary school teachers must demonstrate a high level of competence in each of the academic subjects that they teach.

Proposed § 300.18(c) would permit special education teachers who teach core academic subjects exclusively to children who are assessed against the

alternate achievement standards, established under 34 CFR 200.1(d), to fulfill the highly qualified teacher requirements in section 9101(23) of the ESEA as applied to an elementary school teacher, or, in the case of instruction above the elementary level, to meet the requirements for an elementary school teacher and have subject matter knowledge appropriate to the level of instruction being provided, including at a minimum, subject matter knowledge at the elementary level or above, as determined by the State, needed to effectively teach to those standards.

The cost of demonstrating subject area competence under current law depends on the number of special education teachers who teach core academic subjects exclusively to children assessed against alternate achievement standards, the number of these teachers who already would be considered highly qualified under section 9101(23) of the ESEA and the number who would not, and the cost of helping special education teachers who are not highly qualified meet the highly qualified teacher requirements for teaching core academic subjects at the middle and high school levels (or replacing them with highly qualified teachers). The proposed regulation would generate savings for public agencies to the extent that the cost of helping teachers demonstrate subject area competence at the elementary level and obtain the knowledge appropriate to the level of instruction needed to teach to alternate achievement standards is lower than the cost of demonstrating subject matter competence at the level (middle or high school) at which they are teaching.

Under 34 CFR 200.1(d), States are permitted to assess up to one percent of students against alternate achievement standards. Based on projections of school enrollment in 2005–2006 using school enrollment data collected by the National Center for Education Statistics (NCES) for the 2002–2003 school year, States could assess up to 257,650 students in the middle and secondary levels (grades 6–12) against alternate achievement standards. Based on a typical ratio of one teacher for every six students for instruction based on alternate achievement standards, as many as 43,000 special education teachers may be able to demonstrate that they fulfill the requirements for highly qualified teachers in section 9101 of the ESEA by demonstrating subject matter knowledge appropriate to the level of instruction being provided instead of the student's grade level. The number of affected teachers will depend on the extent to which these special education

teachers are teaching exclusively children assessed against alternate achievement standards.

Although it is difficult to estimate the potential savings from this proposed regulation, the Secretary would expect some savings to be produced because affected special education teachers would not be required to demonstrate the same level of content knowledge as other middle and high school teachers of core academic subjects, thereby reducing the amount of additional coursework or professional development that might have been needed to meet State standards. The savings would depend on the gap between what State standards require in terms of content knowledge for middle and high school teachers in various academic areas and what the affected teachers would have been able to demonstrate in the academic subjects they are teaching. Any savings will be offset in part by the cost of developing a means for the affected teachers to demonstrate subject matter knowledge appropriate to the level of instruction being provided. However, this cost is not expected to be significant. Since States have already developed standards for demonstration of core academic subject competence at the elementary level, States would not likely develop additional High Objective Uniform State Standards of Evaluation (HOSSE) or subject matter competence evaluations for use with special education teachers to comply with the proposed regulation. On balance, the Secretary concludes that the proposed regulation could produce significant savings without adversely affecting the quality of instruction provided to children assessed against alternate achievement standards.

#### **Special Education Teachers Teaching Multiple Subjects**

Consistent with current law, proposed § 300.18(d) would permit special education teachers who are not new to the profession and teach two or more core academic subjects exclusively to children with disabilities to demonstrate competence in all the core academic subjects that the teacher teaches in the same manner as other teachers, including through a single HOSSE covering multiple subjects. The proposed regulation would allow more time (two years after the date of employment) for new special education teachers who teach multiple subjects and who have met the highly qualified requirements for mathematics, language arts, or science to demonstrate competence in other core academic

subjects that they teach, as required by 34 CFR 200.56(c).

We are unable at this time to estimate the number of new teachers who teach two or more core academic subjects exclusively to children with disabilities who might be affected by the additional time afforded by the proposed regulation. However, the extent of savings would relate to the number of subjects taught by teachers of multiple subjects and the benefits of enabling the affected teachers to take whatever coursework they need to demonstrate competence in those additional areas over a longer period of time. Under prior law, public agencies might have needed to employ additional teachers (or redeploy some existing teachers) in those subject areas in which their newly hired teachers could not immediately demonstrate competence. The Secretary concludes that the benefits of being able to hire teachers who are qualified in at least one subject area outweigh any costs to students being taught by teachers who currently do not meet the requirements in other areas but are working to demonstrate their knowledge in other areas in which they teach.

#### Limitation on Number of Reevaluations in a Single Year

Proposed § 300.303(b)(1) would prohibit conducting more than one reevaluation in a single year without the agreement of the school district and the parent. The current regulations require reevaluations when conditions warrant one or at the request of either the child's parent or teacher.

Multiple evaluations in a single year are rare and are conducted in instances in which parents are not satisfied with the evaluation findings or methodology, children have a degenerative condition that affects the special education and related services needed, or very young children (ages three through four) are experiencing rapid development that may affect the need for services. The proposed regulation would not significantly affect the number of evaluations in the latter two instances because public agencies and parents are likely to agree that multiple evaluations are warranted. These cases, however, account for a very small number of the cases in which multiple evaluations are conducted each year.

Because evaluation findings may be used to support complaints, we can use data on the number of requests for due process hearings to estimate the number of cases in which more than one evaluation in a single year would have been conducted because parents were not satisfied with the evaluation findings or methodology. Based on data

from the recent Government Accountability Office (GAO) report, "Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts" (GAO-03-897), in which States reported receiving 11,068 requests for due process hearings during 1999-2000, we estimate that States would receive 20 requests for every 10,000 students with disabilities during the 2005-2006 school year. Based on the prevalence of complaints by parents, we estimate that, of the 1.7 million children estimated to be eligible for reevaluation in 2005-2006, multiple evaluations would have been requested by parents for an estimated 3,400 children. If we assume that these additional evaluations would cost about \$1,000 each, public agencies could save \$3.4 million under the proposed regulation by not agreeing to more than one evaluation of children in these instances.

#### Triennial Evaluations

The current regulations require a school district to conduct an evaluation of each child served under the Act every three years to determine, among other things, whether the child is still eligible for special education. The current regulations permit the evaluation team to dispense with additional tests to determine the child's continued eligibility if the team concludes that this information is not needed and the parents provide consent. Proposed § 300.303(b)(2) would permit districts to dispense with the triennial evaluation altogether when the child's parents and the public agency agree that a reevaluation is unnecessary. The impact of this change will depend on the following factors: the number of children eligible for a reevaluation, the cost of the evaluation, and the extent to which districts and parents agree to waive reevaluations.

Published estimates of the cost of multidisciplinary evaluations range from \$500 to \$2,500, but these estimates may overestimate potential savings because testing is a significant factor in the cost of evaluations, and districts are already permitted to dispense with additional testing when extant data are sufficient for reevaluation. The extent to which States and districts eliminated unnecessary testing during triennial evaluations under the current regulations is unclear, but program officers estimate that additional testing or observation by a school psychologist is not needed for as many as half of the approximately 1.7 million children eligible for triennial evaluations each year. In the estimated 850,000 cases in

which additional testing is not needed, review of the extant data may still be warranted to determine if a child still needs special education and related services under the Act or to assess whether any additions or modifications to the special education and related services being provided are needed to help the child meet his or her IEP goals. Even if additions or modifications to special education and related services are not likely, parents may not want to dispense with the triennial evaluation if they believe further information could be gained from the extant data or they want to compare their child's progress against his or her previous assessments. If parents and the district agree that a reevaluation is not needed in 15 percent, or 127,500, of these cases and a reevaluation using only extant data would have cost \$150, the proposed regulation could save \$19.125 million.

These savings would be partially offset by increased administrative costs associated with obtaining consent from parents to dispense with reevaluation. To estimate the cost of obtaining parental consent, the Department assumes that schools could use a standard pre-printed document that would take approximately 15 minutes of administrative personnel time to fill out and send to parents. In addition, we estimate that an average of 2.5 additional written notices or telephone calls would be needed to obtain consent, requiring 15 minutes of administrative personnel time per additional contact. At an average hourly compensation of \$24, the cost to public agencies of obtaining parental consent would be \$2.7 million, resulting in estimated net savings to public agencies from the proposed regulation of \$16.4 million.

#### IEP Team Attendance

Proposed § 300.321(e)(1) would permit a member of the IEP team to be excused from attending an IEP meeting, in whole or in part, if the parent of the child with a disability and the public agency agree in writing that the member's attendance is not necessary because the member's area of the curriculum or related services is not being modified or discussed. The current regulations require that all IEP meetings include the parents of the child, at least one regular education teacher (if the child is, or may be, participating in the regular education environment), at least one special education teacher, a representative of the public agency, and someone who could interpret the instructional implications of the evaluation results (who may be one of the other required

IEP team members). The extent to which public agencies may realize savings from the proposed regulation depends on which team members are excused from how much of the meeting. If the average IEP meeting lasts 1.5 hours and requires a half an hour of teacher preparation, then we estimate that the opportunity costs for a teacher of attending a meeting (based on average compensation per hour of \$46.25) would be \$92.50. If we assume an average of 1.2 IEP meetings are held for each of the 6.933 million children with disabilities, then 8.32 million IEP meetings will be held in 2005–2006. If one teacher could be excused from five percent of these meetings, the proposed regulation could result in savings of \$38.5 million.

These savings would be partially offset by increased administrative costs associated with obtaining written consent from parents and public agency staff. Based on the above estimate of the cost of obtaining consent from parents under proposed § 300.303(b)(2), the Department estimates that cost to public agencies of obtaining written consent for these parents would be \$8.7 million, resulting in net savings to public agencies from the proposed regulation of \$29.8 million.

Proposed § 300.321(e)(2) would permit members of an IEP team to be excused from attending an IEP meeting that involves a modification to or discussion of the member's area of the curriculum or related service if the parent and the public agency consent in writing to the excusal and the member submits written input to the parent and the other members of the IEP team prior to the meeting. The proposed change is unlikely to generate notable savings because reduced time spent in meetings is likely to be offset by the time required to draft written input, send it to the parents and other IEP team members, and secure the consent of parents and public agency to the excusal. In cases in which IEP meetings take longer than the average time of 1.5 hours, there are likely to be controversial issues or significant modifications to the IEP under discussion. Parents are presumably less likely to consent to the excusal of team members in these instances.

#### Definition of Individualized Education Program

Proposed § 300.320(a)(2)(i) would require that each IEP include a statement of measurable annual goals, including academic and functional goals, for the child. The current regulations require that each IEP contain benchmarks or short-term objectives for

each of the annual goals. By eliminating the need to develop benchmarks or short-term objectives, the proposed regulation could result in teachers spending less time on each IEP. Under proposed § 300.320(a)(2)(ii), however, IEPs for the estimated 488,000 children with disabilities who take alternate assessments aligned to alternate achievement standards would still be required to include a statement of benchmarks or short-term objectives.

Based on average compensation for teachers of \$46.25 per hour, a reduction in time as modest as 15 minutes could save approximately \$11.56 per IEP or \$74.5 million total in opportunity costs for teachers related to the development of IEPs during the 2005–2006 school year for the 6.445 million children with disabilities who do not take alternate assessments aligned to alternate achievement standards.

#### Amendments to an IEP

When changes to a child's IEP are needed after the annual IEP meeting for the school year has been held, proposed § 300.324(a)(4) would allow the parent of a child with a disability and the public agency to agree to forego a meeting and develop a written document to amend or modify the child's current IEP. Under the current regulations, the IEP team must be reconvened in order to make amendments to an IEP. Based on our estimate of an average of 1.2 IEP meetings per child per year, approximately 1.4 million IEP meetings beyond the required annual IEP meeting would be held during the 2005–2006 school year. If half of these meetings concerned amendments or modifications to an IEP and parents and agency representatives agreed to forego a meeting and develop a written document in half of these cases, then 346,650 IEP meetings would not be needed. The combined opportunity costs for personnel participating in a typical IEP meeting are estimated at \$297. If drafting a written document to amend or modify an IEP is assumed to cost half as much as a meeting, then this change could result in savings of \$51.4 million.

#### Procedural Safeguards Notice

Proposed § 300.504(a), which incorporates changes in section 615(d)(1) of the Act, would require that a copy of the procedural safeguards notice be given to parents of children with disabilities only once a year, except that a copy must also be given: when an initial evaluation or request for an evaluation occurs; the first time a due process hearing is requested during

a school year; and when a parent requests the notice. The prior law required that a copy of the procedural safeguards notice be given to the parents upon initial referral for an evaluation, each notification of an IEP team meeting, each reevaluation of the child, and the registration of each request for a due process hearing. Under the proposed regulation, a copy of the procedural safeguards notice would no longer have to be given to parents upon each notice for an IEP team meeting or every time a request for a due process hearing is received. Instead, the document only would have to be given to parents once a year, and the first time a due process hearing is requested in a year, when a copy of the document is specifically requested by a parent, or when an initial evaluation or request for a reevaluation occurs.

To determine the impact of this change, it is necessary to estimate the savings created by providing fewer notices to parents who are notified about more than one IEP meeting during the year or who file more than one request for a due process hearing. Given the small number of hearing requests in a year (about 20 per 10,000 children with disabilities), our analysis will focus on the number of parents involved in more than one IEP meeting. Although we lack detailed data on the number of IEP meetings conducted each year, we estimate that approximately 6.933 million children with disabilities will be served in school year 2005–2006. For the vast majority of these children, we believe there will only be one IEP meeting during the year. For purposes of estimating an upper limit on savings, if we assume an average of 1.2 meetings per year per child, 1.39 million children will have two IEP meetings each year and the change reflected in proposed § 300.504(a) will result in 1.39 million fewer procedural notices provided to parents. While some people may believe this change represents a significant reduction in paperwork for schools, the actual savings are likely to be minimal given the low cost of producing a notice of this size (about 10 pages) and the small amount of administrative staff time involved in providing this notice to parents (about 10 minutes). Taking all of this into consideration, total savings are unlikely to exceed \$5 million.

#### Due Process Request Notices

Proposed § 300.511(d) would prohibit the party who requested the due process hearing from raising issues not raised in the due process request notice, unless the other party agrees. Under current regulations, there is no prohibition on raising issues at due process hearings

that were not raised in the due process notice.

By encouraging the party requesting the hearing to clearly identify and articulate issues sooner, the proposed regulation could generate actual savings by facilitating early resolution of disagreements through less costly means, such as mediation or resolution sessions. But early identification of issues could come at the cost of more extensive involvement of attorneys earlier in the process. At the same time, prohibiting the party requesting the hearing from raising new issues at the time of the hearing could result in additional complaints or protracted conflict and litigation. On balance, net costs or savings are not likely to be significant.

Using data from recent State data collections conducted by the Consortium for Appropriate Dispute Resolution in Special Education (CADRE), in which States reported receiving 12,914 requests for due process hearings during 2000–2001, we estimate that there will be approximately 14,031 requests in 2005–2006. Because some parties already hire attorneys or consult other resources such as advocates or parent training centers to develop the request for due process, the Department assumes that only a portion of the requests would be affected by this new requirement. Although we have no reliable data on average attorneys' fees in due process cases, for purposes of this analysis, the Department assumes an hourly rate of \$300 as an upper limit. The Department further assumes that each instance in which a party chooses to hire an attorney sooner as a result of this change will involve no more than three additional hours of work. Even if we assume that parties requesting the hearing will incur this additional cost in the case of 8,000 of the expected requests for due process, the total costs would not be significant (less than \$8 million), and could be outweighed by the benefits of early identification and resolution of issues. Although such benefits are largely unquantifiable, early identification and resolution of disputes would likely benefit all parties involved in disputes.

#### Resolution Sessions

Proposed § 300.510 would require the parents, relevant members of the IEP team, and a representative of the public agency to participate in a resolution session, prior to the initiation of a due process hearing, unless the parents and LEA agree to use mediation or agree to waive the requirement for a resolution session. The impact of this proposed

regulation will depend on the following factors: The number of requests for due process hearings, the extent to which disagreements are already resolved without formal hearings, the likelihood that parties will agree to participate in mandatory resolution sessions instead of other potentially more expensive alternatives to due process hearings (e.g., mediation), and the likelihood that parties will avoid due process hearings by reaching agreement as a result of mandatory resolution sessions.

Available data suggest that overall savings are not likely to be significant because of the small number of due process requests and the extent to which disagreements are already being successfully resolved through mediation.

Based on data reported in a recent CADRE State data collection in which States reported receiving 12,914 requests for due process hearings during 2000–2001, we estimate that there will be approximately 14,031 requests for due process hearings in school year 2005–2006. Based on data from the same study, we also estimate that the large majority of these disagreements will be successfully resolved through mediation or dropped. Out of the 12,914 requests for school year 2000–2001, approximately 5,536 went to mediation and only 3,659 ended up in formal hearings. Assuming no change in the use and efficacy of mediation, we predict that 6,021 requests would go to mediation in school year 2005–2006. We further predict that another 4,035 complaints will be dropped, leaving no more than 3,975 requests for due process that would require resolution sessions.

Because of the high cost of due process hearings and the low expected cost of conducting a resolution session, there would likely be some savings for all parties involved if resolution sessions are relatively successful in resolving disagreements. For example, California reports an average cost of \$18,600 for a due process hearing, while Texas reports having spent an average of \$9,000 for a hearing officer's services. Anticipating that attorneys will participate in approximately 40 percent of the predicted 3,945 resolution sessions (including drafting legally binding agreements when parties reach agreement), we expect resolution sessions to cost just over twice the average cost of IEP meetings, or approximately \$700 per session. Even with a very low success rate (eight percent), given the expected costs of these sessions compared to the high cost of conducting a hearing, all parties involved would likely realize some

modest savings. However, because disputes that result in formal hearings tend to be the most difficult to resolve, we do not expect that mandatory resolution sessions will be highly successful in resolving such cases. By definition, these are cases in which the parties are not amenable to using existing alternatives to formal hearings such as mediation. Moreover, assuming an average cost of between \$10,000 and \$20,000 per due process hearing, even if as many as 20 percent of the 3,975 complaints were successfully resolved through resolution sessions, net savings still would not exceed \$10 million. (Note that it is unclear to what extent data on average mediation and due process hearing costs account for LEA opportunity costs (e.g., cost per teacher and/or administrator participating). To the extent that these data do not reflect the opportunity costs of participating LEA officials and staff, we have underestimated the potential savings from resolution session).

Beyond those savings to all parties resulting from reductions in the total number of formal hearings, we would also expect some additional savings to the extent parties agree to participate in resolution sessions instead of mediation, particularly if the resolution sessions are as effective as mediation in resolving disagreements. However, unlike due process, the expected cost of conducting a resolution session (\$700 per session) is only somewhat less than the cost of a mediation session (between \$600 and \$1,800 per session). Because the cost differential between resolution sessions and mediations is relatively small (compared to the difference in cost between resolutions sessions and due process hearings) the potential for savings generated by parties agreeing to resolution sessions instead of mediation is minimal.

The Secretary concludes that requiring parties to participate in resolution sessions prior to due process hearings could generate modest savings for all parties to disputes, insofar as mandatory resolution sessions could result in fewer due process hearings and may be used as a less expensive alternative to mediation.

#### Manifestation Determination Review Procedures

Proposed § 300.530(e) and (f) would incorporate the change in the statutory standard for conducting manifestation determination reviews. Under the prior law, the IEP team could conclude that the behavior of a child with a disability was not a manifestation of his or her disability only after considering a list of factors, determining that the child's IEP

and placement were appropriate, and that FAPE, supplemental services, and behavioral intervention strategies were being provided in a manner consistent with the child's IEP. Previous law also required the IEP team to consider whether a child's disability impaired his or her ability to understand the impact and consequences of the behavior in question, and to control such behavior. The new statute eliminated or substantially revised these requirements. The proposed regulations would simply require IEP teams to review all relevant information in the student's file to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the LEA's failure to implement the IEP. The purpose of the change in the law is to simplify the discipline process and make it easier for school officials to discipline children with disabilities when discipline is appropriate and justified.

Because fewer factors would need to be considered during each manifestation determination review, the time required to conduct such reviews would likely be reduced, and some minimal savings may be realized. However, the more significant impact relates to secondary effects. Because it would be less burdensome for school personnel to conduct manifestation determinations, it is reasonable to expect an overall increase in the number of these reviews as school personnel take advantage of the streamlined process to pursue disciplinary actions against those students with disabilities who commit serious violations of student codes of conduct. Even more importantly, the changes in the law would make it less difficult for review team members to conclude that the behavior in question is not a manifestation of a child's disability, enabling school personnel to apply disciplinary sanctions in more cases involving children with disabilities.

We have minimal data on the number of manifestation determination reviews being conducted. However, State-reported data for the 2002–2003 school year suggest that schools are conducting a relatively small number of manifestation reviews. According to these data, for every 1,000 children with disabilities, approximately 11 will be suspended or expelled for longer than 10 days during the school year (either through a single suspension or as a result of multiple short-term suspensions)—the disciplinary action triggering a manifestation review. (Please note that we have no way of

accurately estimating what portion of short-term suspensions that sum to 10 days would be determined by school personnel to constitute a change in placement. Therefore, we assume, for purposes of this analysis, that 100 percent of these instances would require a manifestation review because they would be deemed a change in placement). Based on a recent GAO study, which concludes there is little difference in how school personnel discipline regular and special education students, we assume that under previous law, at least 85 percent of manifestation reviews resulted in disciplinary actions (e.g., long-term suspensions or expulsion). In other words, approximately 15 percent of all manifestation reviews did not result in disciplinary action because the behavior in question was determined to be a manifestation of the child's disability.

Without taking into consideration increases in the frequency of manifestation reviews, using suspension and expulsion data from previous years, we estimate that the total number of manifestation reviews in 2005–2006 would be approximately 87,701. If we assume that the streamlining reflected in the proposed regulation would produce a 20 percent increase in the total number of manifestation reviews, we predict that 17,540 additional meetings would occur, for a total of 105,241 meetings.

Under the proposed regulation, the Secretary also expects an increase in the total number of manifestation reviews resulting in disciplinary actions, but it is not likely to be a significant increase. GAO's finding that there is little practical difference in how school personnel disciplined regular and special education students under previous law suggests that manifestation reviews are already highly likely to result in disciplinary actions.

The Secretary concludes that the proposed regulation would generate some minimal savings from the reduction in time required to conduct the manifestation reviews. Schools would also realize some unquantifiable benefits related to the increased likelihood that the outcome of the review will result in disciplinary action, thereby fostering a school environment that is safer, more orderly, and more conducive to learning. The Secretary acknowledges that the proposed regulation could create additional costs for parents of children who, but for this change, would not have been subject to disciplinary removals to the extent that such parents disagree with the manifestation determination and choose to appeal it. On balance, the Secretary

believes that the benefits likely to result from this change relating to school safety and order outweigh the costs to families.

#### Authority To Remove Students With Disabilities to Interim Alternative Educational Settings

Proposed §§ 300.530(g) through 300.532 would incorporate two significant statutory changes relating to the authority of school personnel to remove children with disabilities to interim alternative educational settings. First, the Act now gives school personnel the authority to remove students who have inflicted serious bodily injury to interim alternative educational settings. Under previous law, school personnel were only authorized to remove students to alternative settings for misconduct involving: (1) The use and possession of weapons; and (2) the knowing possession, sale, or use of illegal drugs or controlled substances. The Act added the commission of serious bodily injury to this list. In cases involving serious bodily injury, school personnel would be able to unilaterally remove children with disabilities to interim alternative educational settings for up to 45 school days without having to request a hearing officer review of the facts to determine whether or not the student is substantially likely to harm himself or others. Second, the 45-day rule has changed. Under previous law, students could not be removed to interim alternative settings for more than 45 days. Now, under the Act, the comparable time limitation is 45 *school* days.

Although the addition of serious bodily injury significantly simplifies the process for removing a student who has engaged in such misconduct, the data suggest that the savings from the proposed regulation would be minimal. Recent Department of Justice data show that "fighting without a weapon" is by far the most common type of serious misconduct engaged in by all students. However, State-reported data suggest that of the 20,000 instances in 2002–2003 in which children with disabilities were suspended or expelled for longer than 10 days, only 1,200 involved serious bodily injury or removal "by a hearing officer for likely injury." We estimate that approximately 6.933 million students with disabilities will be served during the 2005–2006 school year. Using these data, we project that there would have been approximately 1,258 instances in 2005–2006 in which a school district might have requested approval from a hearing officer to remove a child for inflicting serious

bodily injury, if the law had not been changed. Taking into account the time that would have been spent by both relevant school administrators and the hearing officers and their estimated hourly wages (about \$125 per hour for hearing officers and \$50 per hour for school administrators), we conclude that the unilateral authority afforded school officials under the proposed regulation produces only minimal savings (less than \$1 million).

A much more significant benefit relates to the enhanced ability of school officials to provide for a safe and orderly environment for all students in the 1,258 cases in which school officials would have been expected to seek and secure hearing officer approval for removing a student to an alternative setting and the other cases in which they might not have taken such action, but where removal of a student who has caused injury is justified and produces overall benefits for the school.

The change in how days are to be counted (*e.g.*, from “calendar days” under previous law to “school days” under the proposed regulation) would allow school officials to extend placements in alternative settings for approximately two additional weeks. This would generate some savings to the extent that it obviates the need for school officials to seek hearing officer approval to extend a student’s placement in an alternative setting.

While school personnel are not required to use the new authority to remove children who have inflicted serious bodily injury or to remove children for the total amount of time that is authorized, we acknowledge that it would create additional costs for schools that choose to take full advantage of this authority because of the added costs of providing educational services in an alternative setting. Using data from a recent GAO study, we estimate that approximately 3,000 students will be removed to an alternative interim setting in 2005–2006 for misconduct involving drugs or weapons and at least another 1,258 for misconduct involving serious bodily injury. Although we do not have data on the costs of educating these students in an alternative setting for 45 school days, the Secretary concludes that the costs of doing so would be outweighed by the unquantifiable benefits to schools associated with ensuring students a safe and orderly environment that is conducive to learning.

#### *Costs and Benefits of Proposed Non-Statutory Regulatory Provisions*

The following is an analysis of the costs and benefits of the proposed non-

statutory regulatory provisions that includes consideration of the special effects these changes may have on small entities.

The proposed regulations would primarily affect SEAs and LEAs, which are responsible for carrying out the requirements of Part B of the Act as a condition of receiving Federal financial assistance under the Act. Some of the proposed changes would also affect children attending private schools and consequently indirectly affect private schools.

For purposes of this analysis as it relates to small entities, the Secretary has focused on LEAs because these regulations most directly affect local public agencies. The analysis uses a definition of small school district developed by the NCES for purposes of its recent publication, *Characteristics of Small and Rural School Districts*. In that publication, NCES defines a small school district as “one having fewer students in membership than the sum of (a) 25 students per grade in the elementary grades it offers (usually K–8) and (b) 100 students per grade in the secondary grades it offers (usually 9–12).” Using this definition, approximately 38 percent of the nation’s public agencies in the 2002–2003 *Common Core of Data* were considered small and served three percent of the Nation’s students. Approximately 17 percent of students in small districts had IEPs.

Both small and large districts would be affected economically by the proposed regulations, but no data are available to analyze the effect on small districts separately. For this reason, this analysis assumes that the effect of the proposed regulations on small entities would be roughly proportional to the number of children with disabilities served by those districts.

For school year 2005–2006, we project that approximately 48.8 million children will be enrolled in public elementary and secondary schools. Using the NCES definition and assuming that all districts grew at the same rate between school year 2002–2003 and 2005–2006, we estimate that in the 2005–2006 school year approximately 1.48 million children will be enrolled in small districts. Based on the percentage of students in small districts with IEPs in 2002–2003, we estimate that in the 2005–2006 school year these districts will serve approximately 251,000 children with disabilities of the 6.9 million children with disabilities served nationwide.

There are many provisions in the proposed regulations that are expected to result in economic impacts, both

positive and negative. The following analysis estimates the impact of the proposed regulations that were not required by the Act:

#### *Procedures for Evaluating Children With Specific Learning Disabilities*

Proposed § 300.307(a) would require that States adopt criteria for determining whether a child has a specific learning disability. Under the proposed regulation, States may not require, but may prohibit, that LEAs use criteria based on a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability. The proposed regulation would also require that criteria adopted by States permit the use of a process that determines if the child responds to scientific, research-based intervention. States would also be permitted to use other alternative procedures to determine if a child has a specific learning disability.

Before determining that a child has a specific learning disability, proposed § 300.309(b) would require that the evaluation team consider data that demonstrate that prior to, or as part of the referral process, the child received appropriate high-quality, research-based instruction in regular education settings and that data-based documentation of repeated assessments of achievement during instruction was provided to the child’s parents. If the child had not made adequate progress under these conditions after an appropriate period of time, the proposed regulation would further require that the public agency refer the child for an evaluation to determine if special education and related services are needed. Under the proposed regulation, the child’s parents and the team of qualified professionals, described in proposed § 300.308, would be permitted to extend the evaluation timelines described in proposed §§ 300.301 through 300.303 by mutual written agreement.

If the estimated number of initial evaluations each year is 1.7 million and the percentage of evaluations involving children with specific learning disabilities is equivalent to the percentage of all children served under Part B of the Act with specific learning disabilities, then the proposed regulation would affect approximately 816,000 evaluations each year. Depending on the criteria adopted by their States pursuant to proposed § 300.307(a), public agencies could realize savings under the proposed regulation by reducing the amount of a school psychologist’s time involved in conducting cognitive assessments that would have been needed to document

an IQ discrepancy. However, these savings could be offset by increased costs associated with documenting student achievement through regular formal assessments of their progress, as required under proposed § 300.309(b).

Although the cost of evaluating children suspected of having specific learning disabilities might be affected by the proposed regulations, the Department expects that the most significant benefits of the proposed changes would be achieved through improved identification of children suspected of having specific learning disabilities. By requiring that States permit alternatives to an IQ-discrepancy criterion, the proposed regulation would facilitate more appropriate and timely identification of children with specific learning disabilities, so that they can benefit from research-based interventions that have been shown to produce better achievement and behavioral outcomes.

The proposed regulations may impose additional costs on small public agencies that lack capacity currently to conduct repeated assessments of achievement during instruction and provide parents with documentation of the formal assessments of their child's progress. These costs are likely to be offset by reduced need for psychologists to administer intellectual assessments. To the extent that small districts may not employ school psychologists, the proposed criteria may alleviate testing burdens felt disproportionately by small districts under an IQ discrepancy evaluation model.

#### Transition Requirements

Proposed § 300.321(b) would modify current regulations regarding transition services planning for children with disabilities who are 16 through 21 years old. Public agencies would still be required to invite other agencies that are likely to be responsible for providing or paying for transition services to the child's IEP meeting. If the invited agency does not send a representative, public agencies would no longer be required to take additional steps to obtain the participation of those agencies in the planning of transition, as required under current § 300.344(b)(3)(ii).

Public agencies would realize savings from the proposed change to the extent that they would not have to continue to contact agencies that declined to participate in IEP meetings on transition planning. In school year 2005–2006, we project that public agencies will conduct 1,191,218 meetings for students with disabilities who are 16 through 21 years old. We used data from the

*National Longitudinal Transition Study 2 (NLTS2)* on school contacts of outside agency personnel to project the number of instances in which outside agencies would be invited to IEP meetings during the 2005–2006 school year. Based on these data, we project that schools will invite 1,490,241 personnel from other agencies to IEP meetings for these students during the 2005–2006 school year. The NLTS2 also collected data on the percentage of students with a transition plan for whom outside agency staff were actively involved in transition planning. Based on these data, we project that 436,047 (29 percent) of the contacts will result in the active participation of outside agency personnel in transition planning for students with disabilities 16 through 21.

We base our estimate of the potential savings from the proposed change on the projected 1,054,194 (71 percent) instances in which outside agencies would not participate in transition planning despite school contacts that, under the current regulations, would include both an invitation to participate in the child's IEP meeting and additional follow-up attempts. If public agencies made only one additional attempt to contact the outside agency and each attempt required 15 minutes of administrative personnel time, then the proposed change would save \$6.3 million (based on an average hourly compensation for office and administrative support staff of \$24).

Studies of best practices conducted by the National Center on Secondary Education and Transition indicate that effective transition planning requires structured interagency collaboration. Successful approaches cited in the studies included memoranda of understanding between relevant agencies and interagency teams or coordinators to ensure that educators, State agency personnel and other community service providers share information with parents and children with disabilities. The current regulation focuses on administrative contact instead of active strategic partnerships between agencies that facilitate seamless transitions for students with disabilities between school and adult settings. For this reason, the Department believes that the proposed elimination of the non-statutory requirement that public agencies make additional attempts to contact other agencies would reduce administrative burden and allow public agencies to focus their efforts on interagency collaborative transition planning for children with disabilities.

## 2. Clarity of the Regulations

Executive Order 12866 and the Presidential Memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a number heading; for example, § 300.172 Access to instructional materials.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulation easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make this proposed regulation easier to understand to the person listed in the **ADDRESSES** section of the preamble.

#### *Regulatory Flexibility Act Certification*

The Secretary certifies that these proposed regulations would not impose significant net costs in any one year, and may result in savings to SEAs and LEAs.

The small entities that would be affected by these proposed regulations are small local educational agencies (LEAs) receiving Federal funds under this program. Both small and large school districts will be affected economically by the proposed regulations. The effect of the proposed regulations on small entities would be roughly proportional to the number of children with disabilities served by those districts.

To the extent that small districts may not employ school psychologists, the proposed changes to the procedures for evaluating children with specific learning disabilities may alleviate testing burdens felt disproportionately by small districts that would no longer be required to use a discrepancy model.

*Paperwork Reduction Act of 1995*

These proposed regulations contain information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). A description of these provisions is given below with an estimate of the annual recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

The Department invites comments on:

- Whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- The accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- The quality, usefulness, and clarity of the information we collect; and
- Ways to minimize the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

The proposed IDEA regulation includes 21 information collection requirements associated with the following provisions: Proposed §§ 300.100 through 300.176, § 300.182, § 300.199, §§ 300.201 through 300.213, § 300.224, § 300.226, §§ 300.506 through 300.507, § 300.511, §§ 300.601 through 300.602, § 300.640, § 300.704, § 300.804, and §§ 304.1 through 304.31. In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department has submitted the information collections provisions of this proposed rule to OMB for review. The Department recognizes that information collection requests requiring aggregate data on race and ethnicity do not reflect the 1997 OMB Standards for Data on Race and Ethnicity. The Department anticipates providing guidance to implement those standards in forthcoming collections.

Interested persons are requested to send comments regarding the information collections to the Department of Education within 60 days after publication of the proposed rule. This comment period does not affect the deadline for public comments associated with the proposed rule.

*Collection of Information:* Annual State Application under Part B of the Act. §§ 300.100 through 300.176 and

§ 300.182, and § 300.804. Each State is eligible for assistance under Part B of the Act for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the eligibility criteria under Part B of the Act and these proposed regulations. Under the new statute, States will no longer be required to have on file with the Secretary policies and procedures to demonstrate to the satisfaction of the Secretary that the State meets specific conditions for assistance under Part B of the Act. Information collection 1820–0030 has been revised to reflect this change in the statute and appropriate proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average eight hours for each response for 57 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for information collection 1820–0030 is estimated to be 456 hours. This new statutory change will result in a reduction in the burden to States and in the overall cost to the Federal Government.

Under 34 CFR 1320.11, we requested that OMB review information collection 1820–0030 on an emergency basis. Although OMB has approved this information collection on an emergency basis, we continue to invite your comments on this collection.

*Collection of Information:* Part B State Performance Plan (SPP) and Annual Performance Report (APR). §§ 300.601 through 300.602. Each State must have in place, not later than one year after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004, a performance plan that evaluates the State's efforts to implement the requirements and purposes of Part B of the Act and these proposed regulations and describe how the State will improve such implementation. Each State shall report annually to the public on the performance of each LEA located in the State on the targets in the State's performance plan. The State must report annually to the Secretary on the performance of the State under the State's performance plan. A notice was initially published in the **Federal Register** on March 8, 2005 giving the public 60 days to comment on this information collection (OMB No. 1820–0624). The initial comment period for this collection ended on May 9, 2005.

Comments regarding this information collection are being reviewed and revisions are being made to the collection based on the comments received. A second notice will be published in the **Federal Register** notifying the public of an additional 30-day public comment period. Once the information collection is approved, the Department will disseminate the collection instrument to the public and collect the required information. If, as a result of the final regulations adopted by the Department, additional changes are required to the collection, the Department will revise the information collection and resubmit the collection for public comment.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 300 hours for each response for 60 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for information collection 1820–0624 is estimated to be 18,000 hours.

*Collection of Information:* LEA Application under Part B of the Act. §§ 300.201 through 300.213, § 300.224, and § 300.226. Each LEA must submit a plan to the SEA that provides assurances to the SEA that the LEA meets each of the conditions in proposed §§ 300.201 through 300.213, if applicable, meets the requirements in § 300.224, and, if applicable, reports to the SEA on the number of children served under proposed § 300.226 and the number of children served under § 300.226 who subsequently receive special education and related services under Part B of the Act during the preceding two year period. Under the new statute, LEAs are no longer required to have on file with the SEA information to demonstrate that the agency meets such requirements. Information collection 1820–0600 has been revised to reflect these changes and the appropriate proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average two hours for each response for 15,000 respondents, including the time for reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for information collection 1820–0600 is estimated to be 30,000 hours.

*Collection of Information:* List of Hearing Officers and Mediators. §§ 300.506(b)(3)(i) and 300.511(c)(3). Each State must maintain a list of

individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. Each public agency must also keep a list of the persons who serve as hearing officers. Information collection 1820-0509 has been revised to reflect appropriate proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average three hours annually for each of 57 States and 14,312 public agencies to develop and maintain these lists. Thus, the total annual reporting and recordkeeping burden for information collection 1820-0509 is estimated to be 43,107 hours.

*Collection of Information:* Complaint Procedures. §§ 300.151 through 300.153. Each SEA is required to adopt written procedures for resolving any complaint that meets the requirements in these proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 10 hours to issue a written decision to a complaint. It is estimated there are 1,191 complaints resolved annually. Thus, the annual reporting and recordkeeping burden for information collection 1820-0599 is estimated to be 11,910 hours.

*Collection of Information:* Early Intervening Services Annual Report. §§ 300.208(a)(2) and 300.226. Each LEA that develops and maintains coordinated, early intervening services is required to annually report to the SEA on the number of children served through early intervening services and the number of children who subsequently receive special education and related services under Part B of the Act during the preceding two year period. The Secretary has determined that it is necessary to require each State to report these data to the Secretary to assist in determining that these provisions are properly implemented.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 22 hours for each of 5,691 LEAs to gather the data needed and prepare information to submit to SEAs. It is estimated to average 16 hours annually for each of 60 SEAs to collect, review, and maintain data received from LEAs and seven hours for each SEA to prepare and report the data to the Secretary. Thus, the total annual reporting and recordkeeping burden for this new collection is estimated to be 126,582 hours.

*Collection of Information:* LEA Consultation with Private School Representatives. §§ 300.134(e) and 300.135. The LEA is required to provide to private school officials a written

explanation of the reasons why the LEA chose not to provide services directly or through a contract and, when timely and meaningful consultation as required under Part B of the Act has occurred, the LEA is required to obtain a written affirmation signed by the representatives of participating private schools and forward the documentation of the consultation process to the SEA.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 12 hours for each of 2,849 LEAs to obtain a written affirmation and forward documentation to the SEA and 24 hours for each SEA to review and maintain records. Thus, the total annual reporting and recordkeeping burden for this new collection is estimated to be 35,556 hours.

*Collection of Information:* Private School Complaint of Noncompliance with Consultation Requirements.

§ 300.136. A private school official is permitted to submit a complaint to the SEA that the LEA did not engage in consultation that was meaningful and timely, or did not give due consideration of the private school official. Further, a private school official may submit a complaint to the Secretary if the official is dissatisfied with the decision of the SEA.

Annual reporting and recordkeeping burden for this collection of information is estimated to average two hours for each of 200 private school officials to submit a complaint to the SEA, two hours for each of 30 private school officials to submit a complaint to the Secretary, 16 hours for each SEA decision rendered for each of 200 complaints, two hours for the SEA to forward documentation to the Secretary for each of 30 complaints, and four hours for each of 200 LEAs to forward documentation to the SEA, including the time for reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this new collection is estimated to be 4,520 total hours.

*Collection of Information:* Identification of State-Imposed Rules, Regulations, or Policies. § 300.199. Each State that receives funds under Part B of the Act must identify in writing to LEAs located in the State and the Secretary any rule, regulation, or policy as a State-imposed requirement that is not required by Part B of the Act and Federal regulations.

It is estimated that 50 States will be required to inform LEAs and the Secretary in writing of State-imposed requirements that are not required by Federal regulations implementing Part B of the Act. It is estimated that it will

take respondents 40 hours to identify all State-imposed requirements and inform LEAs and the Secretary in writing. The total annual reporting and recordkeeping burden for this new collection is estimated to be 2,000 hours annually.

*Collection of Information:* Number of Children with Disabilities Enrolled in Private Schools by Their Parents. § 300.132. Each LEA is required to maintain in its records and annually provide to the SEA the number of children enrolled in private schools by their parents that are evaluated by the LEA to determine whether they are children with disabilities under Part B of the Act, the number of children determined to be children with disabilities under Part B of the Act, and the number of children receiving special education and related services in accordance with Part B of the Act.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 10 hours for each of 14,229 LEAs to maintain a record of the number of children and report the numbers to the SEA and 20 hours for each SEA to process, review, and maintain the reports. Thus, the total annual reporting and recordkeeping burden for this new collection is estimated to be 143,430 hours.

*Collection of Information:* State Plan for High Cost Fund. § 300.704(c)(3)(ii). Any SEA that chooses to reserve funds under Part B of the Act shall annually review, and amend as necessary, a State plan for the high cost fund.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 40 hours for each response for 40 respondents, including the time for reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this new collection is estimated to be 1,600 hours.

*Collection of Information:* Free and Low-Cost Legal Services. § 300.507(b). Each public agency must inform the parent of any free or low-cost legal or other relevant services available in the area if the parent requests the information or the parent or agency requests a hearing under Part B of the Act.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 30 minutes for each response for 13,056 requests, including the time for preparing the information. Thus, the total annual reporting and recordkeeping burden for this new collection is estimated to be 6,528 hours.

*Collection of Information:* Confidentiality Pledge Prior to the

Commencement of Mediation.

§ 300.506(b)(9). Parties to mediation may be required to sign a confidentiality pledge prior to the commencement of mediation to ensure that all discussions that occur during mediation remain confidential.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 30 minutes for each response for 4,668 requests, including the time for preparing the information and obtaining the signed pledge. Thus, the total annual reporting and recordkeeping burden for this new collection is estimated to be 2,334 hours.

*Collection of Information:* Report of Children with Disabilities Receiving Special Education under Part B of the Individuals with Disabilities Education Act. § 300.160. Each State that receives assistance under Part B of the Act shall provide data each year to the Secretary and the public on children with disabilities by race/ethnicity, disability, gender, and Limited English Proficiency status receiving special education and related services in each State.

Annual reporting and recordkeeping burden for this collection is estimated to be 8.5 hours for each of 60 State agencies and 2 hours for each of an average of 260 LEAs per State. Thus, the total annual reporting and recordkeeping burden for collection 1820-0043 is 31,710.

*Collection of Information:* Special Education-Personnel Preparation to Improve Services and Results for Children with Disabilities. §§ 304.1 through 304.31. Individuals who receive a scholarship through personnel preparation projects funded under the Act must subsequently provide early intervention, special education or related services to children with disabilities. These proposed regulations would implement requirements governing, among other things, the service obligation for scholars, oversight by grantees, repayment of scholarship, and procedures for obtaining deferrals or exemptions from service or repayment obligations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 4 hours for a grantee to establish written agreements and maintain information on each scholarship recipient. It is estimated that each of the 375 grantees will establish agreements and maintain information for 20 scholars. It is estimated to average 2 hours for each of 4,000 scholars to provide information to the Secretary of their progress in meeting the service requirement. Thus,

the total annual reporting burden for collection 1820-0622 is 38,000 hours.

*Collection of Information:* Report of the Participation and Performance of Students with Disabilities on State Assessments. § 300.160(d). Each State (or, in the case of a district-wide assessment, the LEA) must report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, by grade and subject, the number of children with disabilities served under part B of the Act that participated in regular assessments; regular assessments with accommodations; alternate assessments aligned with academic content and achievement standards; and alternate assessments aligned with alternate achievement standards, and the performance results of children with disabilities on regular assessments and on alternate assessments. Information collection 1820-0659 has been revised to reflect changes in the statute and appropriate proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 60 hours for each of 60 State agencies, including the time for collecting and aggregating the data and reporting data to the Secretary. Thus, the total annual reporting and recordkeeping burden for information collection 1820-0659 is 3,600 hours.

*Collection of Information:* Report of Children with Disabilities Subject to Disciplinary Removal. § 300.640. Each State must provide data to the Secretary and the public by race, ethnicity, limited English proficiency status, gender, and disability category on children with disabilities who are removed to an interim alternative educational setting and the acts or items precipitating those removals. Data must also be reported by race, ethnicity, limited English proficiency status, gender, and disability category on the number of children with disabilities who are subject to long-term suspensions or expulsions. In addition, data must be reported on the number and percentage of children with disabilities who are removed to alternative educational settings or expelled as compared to children without disabilities, and on the incidence and duration of disciplinary actions, including suspensions of one day or more. Information collection 1820-0621 has been revised to reflect the new statutory requirements and the proposed regulations.

Annual reporting and record keeping burden for this collection of information is estimated to average 17.5 hours for each of an average of 260 LEAs per State to collect, review, and report the data

and 74 hours per State agency (60) to collect, maintain, and report these data. Thus, the total annual reporting and recordkeeping burden for information collection 1820-0621 for all States (60) is estimated to be 277,440 hours.

*Collection of Information:* Personnel (in Full-time Equivalency of Assignments) Employed to Provide Special Education and Related Services for Children with Disabilities. § 300.207. Each LEA must ensure that all personnel are appropriately and adequately prepared and each SEA must establish and maintain qualifications to ensure that personnel are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. To help ensure that these requirements are met, the Secretary must collect data that can be used to monitor these requirements. Information collection 1820-0518 has been revised to reflect the new statutory requirements and the proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 0.5 hours for each of an average of 260 LEAs per State and 2.5 hours for each of 60 State agencies. Thus, the total annual reporting and recordkeeping burden for information collection 1820-0518 for all States is 7,950 hours.

*Collection of Information:* Report of Children with Disabilities Exiting Special Education. § 300.640. Each State must report to the Secretary children by race, ethnicity, limited English proficiency status, gender, and disability category, the number of children with disabilities aged 14 through 21 who stopped receiving special education and related services because of program completion (including graduation with a regular secondary school diploma), or other reasons, and the reasons why those children stopped receiving special education and related services. Information collection 1820-0521 has been revised to reflect the new statutory requirements and the proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 6 hours for each of an average of 260 LEAs per State and 11 hours for each of 60 State agencies. Thus, the total annual reporting and recordkeeping burden for information collection 1820-0521 for all States is 94,260 hours.

*Collection of Information:* Part B, Individuals with Disabilities Education Act Implementation of FAPE Requirements. § 300.640. Each State

must provide to the Secretary and the public data on children with disabilities by race, ethnicity, limited English proficiency status, gender, and disability category who are receiving a free appropriate public education, participating in regular education, in separate classes, separate schools or facilities, or public or private residential facilities. Information collection 1820–0517 has been revised to reflect the new statutory requirement.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 27 hours for each of an average of 260 LEAs per State and 28 hours for each of 60 State agencies. Thus, the total annual reporting and recordkeeping burden for information collection 1820–0517 for all States is 422,880 hours.

*Collection of Information:* Report of Dispute Resolution Under Part B of the Individuals with Disabilities Education Act: Complaints, Mediations, and Due Process Hearings. § 300.640. Each State must report to the Secretary and the public, the number of due process complaints filed under section 615 of the Act and the number of hearings conducted; the number of hearings requested under section 615(k) of the Act and the number of changes in placement ordered as a result of those hearings; and the number of mediations held and the number of settlement agreements reached through those mediations. This new information collection has been developed to reflect the new statutory requirement.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 70 hours for each of 60 State agencies. Thus, the total annual reporting and recordkeeping burden for this new information collection is estimated to be 4,200 hours.

Requests for copies of the submission for OMB review may be accessed from <http://edicsweb.ed.gov> by selecting the “Browse Pending Collections” link. When you access the information collection, click on “Download Attachments” to view. Written request for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address [OCIO\\_RIMG@ed.gov](mailto:OCIO_RIMG@ed.gov) or faxed to (202) 245–6621.

If you want to comment on the information collection requirements, please send your comments to Troy R. Justesen, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac

Center Plaza, room 5126, Washington, DC 20202–2641.

*Intergovernmental Review*

This program is subject to the Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of the Department’s specific plans and actions for this program.

*Assessment of Educational Impact*

The Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

*Electronic Access to This Document*

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (PDF) at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF you must have Adobe Acrobat, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO) toll free at 1–800–293–4922; or in the Washington, DC area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 300 AND THE CORRESPONDING SECTION IN THIS NPRM <sup>1</sup>—Continued

A. Current regulatory section number	B. Corresponding section in NPRM
<b>Definitions Used in This Part</b>	
300.4 Act .....	300.4.
300.5 Assistive technology device.	300.5.
300.6 Assistive technology service.	300.6.
300.7 Child with a disability	300.8.
300.8 Consent .....	Removed.
300.9 Day; business day; school day.	300.11.
300.10 Educational service agency.	300.12.
300.11 Equipment .....	300.14.
300.12 Evaluation .....	Removed.
300.13 Free appropriate public education.	300.17.
300.14 Include .....	300.20.
300.15 Individualized education program.	Removed.
300.16 Individualized education program team.	300.23.
300.17 Individualized family service plan.	300.24.
300.18 Local educational agency.	300.28.
300.19 Native language .....	300.29.
300.20 Parent .....	300.30.
300.21 Personally identifiable.	Removed.
300.22 Public agency .....	300.33.
300.23 Qualified personnel	Removed.
300.24 Related services .....	300.34.
300.25 Secondary school ...	300.35.
300.26 Special education ...	300.38.
300.27 State .....	300.39.
300.28 Supplementary aids and services.	300.41.
300.29 Transition services ..	300.42.
300.30 Definitions in EDGAR.	Removed.

**Subpart B—State and Local Eligibility**

300.110 Condition of assistance.	300.100.
300.111 Exception for prior State policies and procedures on file with the Secretary.	300.176(a).
300.112 Amendments to State policies and procedures.	300.176(b) and (c).
300.113 Approval by the Secretary.	300.178.
(a) General.	
(b) Notice and hearing before determining a State is not eligible.	300.179.
300.121 Free appropriate public education (FAPE).	300.101(a)
(a) General.	
(b) Required information	Removed.

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 300 AND THE CORRESPONDING SECTION IN THIS NPRM <sup>1</sup>

A. Current regulatory section number	B. Corresponding section in NPRM
<b>Subpart A—General</b>	
300.1 Purposes .....	300.1.
300.2 Applicability of this part to State, local, and private agencies.	300.2.
300.3 Regulations that apply.	Removed.

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 300 AND THE CORRESPONDING SECTION IN THIS NPRM <sup>1</sup>—Continued

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 300 AND THE CORRESPONDING SECTION IN THIS NPRM <sup>1</sup>—Continued

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 300 AND THE CORRESPONDING SECTION IN THIS NPRM <sup>1</sup>—Continued

A. Current regulatory section number	B. Corresponding section in NPRM	A. Current regulatory section number	B. Corresponding section in NPRM	A. Current regulatory section number	B. Corresponding section in NPRM
(c) FAPE for children beginning at age 3.	300.101(b).	300.143 SEA implementation of procedural safeguards.	300.150.	300.200 Consistency with State policies.	
(d) FAPE for children suspended or expelled from school.	300.530(d)	300.144 Hearings relating to LEA eligibility.	300.155.	(a) General .....	300.201. Removed.
(e) Children advancing from grade to grade..	300.101(c).	300.145 Recovery of funds for misclassified children.	Removed.	(b) Policies on file with SEA.	
300.122 Exception to FAPE for certain ages.	300.102.	300.146 Suspension and expulsion rates.	300.170.	300.221 Implementation of CSPD.	
300.123 Full educational opportunity goal (FEOG).	300.109.	300.147 Additional information if SEA provides direct services.	300.175.	(a) .....	300.207. Removed.
300.124 FEOG—timetable	300.109.	300.148 Public participation (a) General; exception.	300.175.	(b) .....	300.202. 300.203.
300.125 Child find .....	300.111(a).	(1)	300.165.	300.230 Use of amounts. ...	
(a) General requirement.	Removed.	(2) [Conditions Re-(a)(1)]	Removed.	300.231 Maintenance of effort.	
(b) Documents related to child find.	Removed.	(b) Documentation .....	Removed.	300.232 Exception to maintenance of effort.	300.204.
(c) Child find for children from birth through age 2 when the SEA and lead agency for the Part C program are different.	Removed.	300.150 State advisory panel.	Removed.	300.233 Treatment of federal funds in certain fiscal years.	300.205.
(d) Construction .....	300.111(d).	300.151 [Reserved].	300.162(b).	300.234 Schoolwide programs under title I of the ESEA.	300.206.
(e) Confidentiality of child find data.	Removed.	300.152 Prohibition against commingling.	300.162(c), 300.164.	300.235 Permissive use of funds.	300.208.
300.126 Procedures for evaluation and determination of eligibility.	300.122.	300.153 State-level nonsupplanting.	300.163.	300.240 Information for SEA.	
300.127 Confidentiality of personally identifiable information.	300.123.	300.154 Maintenance of State financial support.	300.162(a).	(a) .....	300.211. Removed.
300.128 Individualized education programs.	300.112.	300.155 Policies and procedures for use of Part B funds.	300.171.	(b) .....	300.209.
(a) General	Removed.	300.156 Annual description of use of Part B funds. (a)(1)–(2) and (b).	Removed.	300.241 Treatment of charter schools and their students.	
(b) Required information	300.121.	(a)(3) [Re: % to LEAs] ...	300.171.	300.242 Public information	300.212. Removed.
300.129 Procedural safeguards.	300.114.	<b>LEA and State Agency Eligibility</b>	Removed.	300.244 Coordinated services system.	Removed.
300.130 Least restrictive environment.	300.124.	300.180 Condition of assistance.	300.200.	300.245 School-based improvement plan.	Removed.
300.132 Transition of children from Part C to preschool programs.	300.129.	300.181 Exception for prior LEA or State agency policies and procedures on file with the SEA.	300.220(a).	300.246 Plan requirements	Removed.
300.133 Children in private schools.	300.129.	300.182 Amendments to LEA policies and procedures.	300.220(b) and (c).	300.247 Responsibilities of the LEA.	Removed.
300.134 [Reserved]	Removed.	300.184 Excess cost requirement.	300.202(a)(2).	300.248 Limitation .....	Removed.
300.135 Comprehensive system of personnel development.	Removed.	(a) General.	300.16.	300.249 Additional requirements.	Removed.
300.136 Personnel standards.	Removed.	(b) Definition .....	300.202(b).	300.250 Extension of plan ..	Removed.
300.137 Performance goals and indicators.	300.157.	(c) Limitation on use of Part B funds.	300.202(b)(2).	<b>Secretary of the Interior</b>	
300.138 Participation in assessments.	300.160.	300.185 Meeting the excess cost requirement.	300.202(b)(3), 300.223.	300.260 Submission of information.	300.708.
300.139 Reports relating to assessments.	300.160(d).	300.190 Joint establishment of eligibility.	300.224.	300.261 Public participation funds.	300.709. 300.710.
300.141 SEA responsibility for general supervision.	Removed.	300.192 Requirements for establishing eligibility.	300.228.	300.262 Use of Part B	
300.142 Methods of ensuring services.	300.154.	300.194 State agency eligibility.	300.221.	300.263 Plan for coordination of services.	300.713.
(a)–(c); (e)–(i).	Removed.	300.196 Notification of LEA or State agency in case of ineligibility.	300.222.	300.264 Definitions .....	300.21. 300.714.
(d) Information .....	Removed.	300.197 LEA and State agency compliance.		300.265 Establishment of advisory board.	300.715.
				300.266 Annual report by advisory board.	300.716.
				300.267 Applicable regulations.	
				<b>Public Participation</b>	
				300.280 Public hearings before adopting State policies and procedures.	Removed.
				300.281 Notice .....	Removed.



REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 300 AND THE CORRESPONDING SECTION IN THIS NPRM <sup>1</sup>—Continued

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 300 AND THE CORRESPONDING SECTION IN THIS NPRM <sup>1</sup>—Continued

REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 300 AND THE CORRESPONDING SECTION IN THIS NPRM <sup>1</sup>—Continued

A. Current regulatory section number	B. Corresponding section in NPRM	A. Current regulatory section number	B. Corresponding section in NPRM	A. Current regulatory section number	B. Corresponding section in NPRM		
300.523	300.530(e).	<p style="text-align: center;"><b>Confidentiality of Information</b></p> <p>300.560 Definitions .....</p> <p>300.561 Notice to parents ..</p> <p>300.562 Access rights .....</p> <p>300.563 Record of access ..</p> <p>300.564 Records on more than one child.</p> <p>300.565 List of types and locations of information.</p> <p>300.566 Fees .....</p> <p>300.567 Amendment of records at parent's request.</p> <p>300.568 Opportunity for a hearing.</p> <p>300.569 Result of hearing ..</p> <p>300.570 Hearing procedures.</p> <p>300.571 Consent .....</p> <p>300.572 Safeguards .....</p> <p>300.573 Destruction of information.</p> <p>300.574 Children's rights ....</p> <p>300.575 Enforcement .....</p> <p>300.576 Disciplinary information.</p> <p>300.577 Department use of personally identifiable information.</p> <p style="text-align: center;"><b>Department Procedures</b></p> <p>300.580 Determination by the Secretary that a State is eligible.</p> <p>300.581 Notice and hearing before determining that a State is not eligible.</p> <p>300.582 Hearing official or panel.</p> <p>300.583 Hearing procedures.</p> <p>300.584 Initial decision; final decision.</p> <p>300.585 Filing requirements</p> <p>300.586 Judicial review .....</p> <p>300.587 Enforcement .....</p> <p>300.589 Waiver of requirement regarding supplementing and not supplanting with Part B funds.</p>		300.611.	300.621 Allowable costs .....		
300.524	300.530(c).			300.612.	300.622 Subgrants to LEAs for capacity-building and improvement.		
300.525	300.532.			300.613.	300.623 Amount required for subgrants to LEAs.		
300.526	300.533.			300.614.	300.624 State discretion in awarding subgrants.		
300.527	300.534.			300.615.	300.650 Establishment of advisory panels.		
300.528	300.532(c).			300.616.	300.651 Membership .....		
300.529	300.535.			300.617.	300.652 Advisory panel functions.		
<p style="text-align: center;"><b>Procedures for Evaluation and Determination of Eligibility</b></p> <p>300.530 General .....</p> <p>300.531 Initial evaluation ....</p> <p>300.532 Evaluation procedures.</p> <p>300.533 Determination of needed evaluation data.</p> <p>300.534 Determination of eligibility.</p> <p>300.535 Procedures for determining eligibility and placement.</p> <p>300.536 Reevaluation .....</p> <p style="text-align: center;"><b>Additional Procedures for Evaluating Children With Specific Learning Disabilities</b></p> <p>300.540 Additional team members.</p> <p>300.541 Criteria for determining the existence of a specific learning disability.</p> <p>300.542 Observation .....</p> <p>300.543 Written report .....</p> <p style="text-align: center;"><b>Least Restrictive Environment</b></p> <p>300.550 General LRE requirements.</p> <p>300.551 Continuum of alternative placements.</p> <p>300.552 Placements .....</p> <p>300.553 Nonacademic settings.</p> <p>300.554 Children in public or private institutions.</p> <p>300.555 Technical assistance and training activities.</p> <p>300.556 Monitoring activities.</p>				300.618.	300.653 Advisory panel procedures.		
				300.619.	300.660 Adoption of State complaint procedures.		
				300.620.	300.661 Minimum State complaint procedures.		
				300.621.	300.662 Filing a complaint		
				300.622.	<p style="text-align: center;"><b>Subpart G Allocation of Funds; Reports; Allocations</b></p> <p>300.700 Special definition of the term "State".</p> <p>300.701 Grants to States ...</p> <p>300.702 Definition .....</p> <p>300.703 Allocations to States.</p> <p>300.706 Permanent formula</p> <p>300.707 Increase in funds ..</p> <p>300.708 Limitation .....</p> <p>300.709 Decrease in funds</p> <p>300.710 Allocation for State in which by-pass is implemented for private school children with disabilities.</p> <p>300.711 Subgrants to LEAs</p> <p>300.712 Allocations to LEAs</p> <p>300.713 Former Chapter 1 State agencies.</p> <p>300.714 Reallocation of LEA funds.</p> <p>300.715(a) and (b) Payments to the Secretary of the Interior for the education of Indian children.</p> <p>300.715(c) Calculation of number of children.</p> <p>300.716 Payments for education and services for Indian children with disabilities aged 3 through 5.</p> <p>300.717 Outlying areas and freely associated States.</p> <p>300.718 Outlying area-definition.</p> <p>300.719 Limitation for freely associated States.</p> <p>300.720 Special rule .....</p> <p>300.722 Definition .....</p>		
				300.623.			300.717(c).
				300.624.			300.700.
		300.625.	300.717(d).				
		300.626.	300.703(a).				
		300.627.	Removed.				
300.627.	300.703(c)(1).						
300.628.	300.703(c)(2), (3).						
300.629.	300.703(d).						
300.630.	300.706.						
300.631.	300.705(a).						
300.632.	300.705(b).						
300.633.	Removed.						
300.634.	300.705(c).						
300.635.	300.707.						
300.636.	Removed.						
300.637.	300.712.						
300.638.	300.701.						
300.639.	300.717(b).						
300.640.	Removed.						
300.641.	300.701(a)(2).						
300.642.	300.717(a).						
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REDESIGNATION TABLE SHOWING EACH CURRENT REGULATORY SECTION IN 34 CFR PART 300 AND THE CORRESPONDING SECTION IN THIS NPRM <sup>1</sup>—Continued

A. Current regulatory section number	B. Corresponding section in NPRM
300.750 Annual report of children served—report requirement.	300.640.
300.751 Annual report of children served—information required in the report.	300.641.
300.752 Annual report of children served—certification.	300.643.
300.753 Annual report of children served—criteria for counting children.	300.644.
300.754 Annual report of children served other responsibilities of the SEA.	300.645.
300.755 Disproportionality ..	300.646.
300.756 Acquisition of equipment; construction or alteration of facilities.	300.718.

<sup>1</sup> See explanation at the end of this table.

*Explanation of Table:* The purpose of this table is to help readers find where a given section number in the current regulations (column A of Table) is located in this NPRM, as shown under column B. (In general, the table *does not* include any new requirements added by Pub. L. 108–446, or any proposed new regulations that would be added.) In the Table, if a specific section of the current regulations would be removed by the NPRM (e.g., “Consent” under current § 300.8, which includes a reference to the definition of “Consent” in § 300.500(b)(1)), it would be shown as “Removed” under column B. However, because the definition of “consent” under current § 300.500(b)(1) would be moved to Subpart A (“Definitions”) of this NPRM, its new location (§ 300.9) would be shown opposite § 300.500(b)(1) in column B of the Table.

#### List of Subjects

##### 34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

##### 34 CFR Part 301

Education of individuals with disabilities, Elementary and secondary education, Equal educational

opportunity, Grant programs—education, Infants and children, Reporting and recordkeeping requirements

##### 34 CFR Part 304

Service obligations under special education, Personnel development to improve services and results for children with disabilities.

Dated: June 10, 2005.

**Margaret Spellings,**  
*Secretary of Education.*

For the reasons discussed in this preamble, the Secretary proposes to amend title 34 of the Code of Federal Regulations as follows:

1. Revise part 300 to read as follows:

### PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

#### Subpart A—General

##### Purposes and Applicability

Sec.

300.1 Purposes.

300.2 Applicability of this part to State and local agencies.

##### Definitions Used in This Part

300.4 Act.

300.5 Assistive technology device.

300.6 Assistive technology service.

300.7 Charter school.

300.8 Child with a disability.

300.9 Consent.

300.10 Core academic subjects.

300.11 Day; business day; school day.

300.12 Educational service agency.

300.13 Elementary school.

300.14 Equipment.

300.15 Evaluation.

300.16 Excess costs.

300.17 Free appropriate public education.

300.18 Highly qualified special education teacher.

300.19 Homeless children.

300.20 Include.

300.21 Indian and Indian tribe.

300.22 Individualized education program.

300.23 Individualized education program team.

300.24 Individualized family service plan.

300.25 Infant and toddler with a disability.

300.26 Institution of higher education.

300.27 Limited English proficient.

300.28 Local educational agency.

300.29 Native language.

300.30 Parent.

300.31 Parent training and information center.

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**Authority:** 20 U.S.C. 1221e–3, 1406, 1411–1419, unless otherwise noted.

#### Subpart A—General

##### Purposes and Applicability

###### § 300.1 Purposes.

The purposes of this part are—  
 (a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(b) To ensure that the rights of children with disabilities and their parents are protected;

(c) To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and

(d) To assess and ensure the effectiveness of efforts to educate children with disabilities.

(Authority: 20 U.S.C. 1400(d))

###### § 300.2 Applicability of this part to State and local agencies.

(a) *States.* This part applies to each State that receives payments under Part B of the Act, as defined in § 300.4.

(b) *Public agencies within the State.*

The provisions of this part—

(1) Apply to all political subdivisions of the State that are involved in the education of children with disabilities, including:

(i) The State educational agency (SEA).

(ii) Local educational agencies (LEAs), educational service agencies (ESAs), and public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA.

(iii) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for children with deafness or children with blindness).

(iv) State and local juvenile and adult correctional facilities; and

(2) Are binding on each public agency in the State that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B of the Act.

(c) *Private schools and facilities.* Each public agency in the State is responsible for ensuring that the rights and protections under Part B of the Act are given to children with disabilities—

(1) Referred to or placed in private schools and facilities by that public agency; or

(2) Placed in private schools by their parents under the provisions of § 300.148(b)

(Authority: 20 U.S.C. 1412)

##### Definitions Used in This Part

###### § 300.4 Act.

*Act* means the Individuals with Disabilities Education Act, as amended.

(Authority: 20 U.S.C. 1400(a))

###### § 300.5 Assistive technology device.

*Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of that device.

(Authority: 20 U.S.C. 1401(1))

###### § 300.6 Assistive technology service.

*Assistive technology service* means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes—

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

(Authority: 20 U.S.C. 1401(2))

### § 300.7 Charter school.

*Charter school* has the meaning given the term in section 5210(1) of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 6301 *et seq.* (ESEA).

(Authority: 20 U.S.C. 7221i(1))

### § 300.8 Child with a disability.

(a) *General.* (1) *Child with a disability* means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

(2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under §§ 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with § 300.38(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

(b) *Children aged three through nine experiencing developmental delays.* *Child with a disability* for children aged three through nine (or any subset of that age range, including ages three through five), may, at the discretion of the State and the LEA and in accordance with § 300.111(b), include a child—

(1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas:

Physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(2) Who, by reason thereof, needs special education and related services.

(c) *Definitions of disability terms.* The terms used in this definition of a child with a disability are defined as follows:

(1) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(i) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.

(ii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

(2) *Deaf-blindness* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) *Deafness* means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4)(i) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

(5) *Hearing impairment* means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(6) *Mental retardation* means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

(7) *Multiple disabilities* means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness.

(8) *Orthopedic impairment* means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(9) *Other health impairment* means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

(ii) Adversely affects a child's educational performance.

(10) *Specific learning disability.* (i) *General.* Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do

mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) *Disorders not included.* Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) *Speech or language impairment* means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

(12) *Traumatic brain injury* means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

(13) *Visual impairment including blindness* means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(Authority: 20 U.S.C. 1401(3); 1401(30))

### § 300.9 Consent.

*Consent* means that—

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and (c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.

(2) If a parent revokes consent, that revocation is not retroactive (*i.e.*, it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(Authority: 20 U.S.C. 1414(a)(1)(D))

### § 300.10 Core academic subjects.

*Core academic subjects* means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.

(Authority: 20 U.S.C. 1401(4))

### § 300.11 Day; business day; school day.

(a) *Day* means calendar day unless otherwise indicated as business day or school day.

(b) *Business day* means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day, as in § 300.148(c)(1)(ii)).

(c)(1) *School day* means any day, including a partial day, that children are in attendance at school for instructional purposes.

(2) *School day* has the same meaning for all children in school, including children with and without disabilities.

(Authority: 20 U.S.C. 1221e-3)

### § 300.12 Educational service agency.

*Educational service agency* means—

(a) A regional public multiservice agency—

(1) Authorized by State law to develop, manage, and provide services or programs to LEAs;

(2) Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State;

(b) Includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school; and

(c) Includes entities that meet the definition of intermediate educational unit in section 602(23) of the Act as in effect prior to June 4, 1997.

(Authority: 20 U.S.C. 1401(5))

### § 300.13 Elementary school.

*Elementary school* means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

(Authority: 20 U.S.C. 1401(6))

### § 300.14 Equipment.

*Equipment* means—

(a) Machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house the machinery, utilities, or equipment; and

(b) All other items necessary for the functioning of a particular facility as a

facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

(Authority: 20 U.S.C. 1401(7))

### § 300.15 Evaluation.

*Evaluation* means procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.

(Authority: 20 U.S.C. 1414(a)-(c))

### § 300.16 Excess costs.

*Excess costs* means those costs that are in excess of the average annual per-student expenditure in an LEA during the preceding school year for an elementary school or secondary school student, as may be appropriate, and that must be computed after deducting—

(a) Amounts received—  
(1) Under Part B of the Act;  
(2) Under Part A of title I of the ESEA; and

(3) Under Parts A and B of title III of the ESEA and;

(b) Any State or local funds expended for programs that would qualify for assistance under any of the parts described in paragraph (a) of this section.

(Authority: 20 U.S.C. 1401(8))

### § 300.17 Free appropriate public education.

*Free appropriate public education* or *FAPE* means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

(Authority: 20 U.S.C. 1401(9))

### § 300.18 Highly qualified special education teacher.

(a) *General.* For any public elementary or secondary school special education teacher, the term *highly qualified* has the meaning given the term in section 9101 of the ESEA and 34 CFR 200.56, except that the requirements for highly qualified also—

(1) Include the requirements described in paragraph (b) of this section; and

(2) Include the option for teachers to meet the requirements of section 9101 of the ESEA by meeting the requirements of paragraphs (c) and (d) of this section.

(b) *Requirements for highly qualified special education teachers.* (1) When used with respect to any public elementary school or secondary school special education teacher teaching in a State, highly qualified means that—

(i) The teacher has obtained full State certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that when used with respect to any teacher teaching in a public charter school, highly qualified means that the teacher meets the requirements set forth in the State's public charter school law;

(ii) The teacher has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) The teacher holds at least a bachelor's degree.

(2) A teacher will be considered to meet the standard in paragraph (b)(1)(i) of this section if that teacher is participating in an alternative route to certification program under which—

(i) The teacher—

(A) Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;

(B) Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

(C) Assumes functions as a teacher only for a specified period of time not to exceed three years; and

(D) Demonstrates satisfactory progress toward full certification as prescribed by the State; and

(ii) The State ensures, through its certification and licensure process, that the provisions in paragraph (b)(2)(i) of this section are met.

(3) Any public elementary school or secondary school special education teacher teaching in a State, who is not teaching a core academic subject, is highly qualified if the teacher meets the requirements of paragraph (b)(1) or (b)(2) of this section.

(c) *Requirements for highly qualified special education teachers teaching to*

*alternate achievement standards.* When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate achievement standards established under 34 CFR 200.1(d), highly qualified means the teacher, whether new or not new to the profession, may either—

(1) Meet the applicable requirements of section 9101 of the ESEA and 34 CFR 200.56 for any elementary, middle, or secondary school teacher who is new or not new to the profession; or

(2) Meet the requirements of subparagraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher, or, in the case of instruction above the elementary level, meet the requirements of subparagraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher and have subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards.

(d) *Requirements for highly qualified special education teachers teaching multiple subjects.* When used with respect to a special education teacher who teaches two or more core academic subjects exclusively to children with disabilities, highly qualified means that the teacher may either—

(1) Meet the applicable requirements of section 9101 of the ESEA and 34 CFR 200.56(b) or (c);

(2) In the case of a teacher who is not new to the profession, demonstrate competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession under 34 CFR 200.56(c) which may include a single, high objective uniform State standard of evaluation covering multiple subjects; or

(3) In the case of a new special education teacher who teaches multiple subjects, and who is highly qualified in mathematics, language arts, or science, demonstrate, not later than two years after the date of employment, competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher under 34 CFR 200.56(c), which may include a single, high objective State standard of evaluation covering multiple subjects.

(e) *Rule of construction.*

Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this section or part shall be construed to create a right of action on behalf of

an individual student or class of students for the failure of a particular SEA or LEA employee to be highly qualified.

(f) *Definition for purposes of the ESEA.* A teacher who is highly qualified under this section is considered highly qualified for purposes of the ESEA.

(g) The requirements in this section do not apply to teachers hired by private elementary schools and secondary schools.

(Authority: 20 U.S.C. 1401(10))

#### § 300.19 Homeless children.

*Homeless children* has the meaning given the term *homeless children and youths* in section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11431 *et seq.*

(Authority: 20 U.S.C. 1401(11))

#### § 300.20 Include.

*Include* means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1221e-3)

#### § 300.21 Indian and Indian tribe.

(a) *Indian* means an individual who is a member of an Indian tribe.

(b) *Indian tribe* means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*).

(Authority: 20 U.S.C. 1401(12) and (13))

#### § 300.22 Individualized education program.

*Individualized education program* or *IEP* means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with §§ 300.320 through 300.324.

(Authority: 20 U.S.C. 1401(14))

#### § 300.23 Individualized education program team.

*Individualized education program team* or *IEP Team* means a group of individuals described in § 300.321 that is responsible for developing, reviewing, or revising an IEP for a child with a disability.

(Authority: 20 U.S.C. 1414(d)(1)(B))

#### § 300.24 Individualized family service plan.

*Individualized family service plan* or *IFSP* has the meaning given the term in section 636 of the Act.

(Authority: 20 U.S.C. 1401(15))

**§ 300.25 Infant or toddler with a disability.**

*Infant or toddler with a disability* has the meaning given the term in section 632(5) of the Act.

(Authority: 20 U.S.C. 1401(16))

**§ 300.26 Institution of higher education.**

*Institution of higher education*—

(a) Has the meaning given the term in section 101 of the Higher Education Act of 1965, as amended, 20 U.S.C. 1021 *et seq.* (HEA); and

(b) Also includes any community college receiving funds from the Secretary of the Interior under the Tribally Controlled Community College or University Assistance Act of 1978, 25 U.S.C. 1801, *et seq.*

(Authority: 20 U.S.C. 1401(17))

**§ 300.27 Limited English proficient.**

*Limited English proficient* has the meaning given the term in section 9101(25) of the ESEA.

(Authority: 20 U.S.C. 1401(18))

**§ 300.28 Local educational agency.**

(a) *General. Local educational agency* or *LEA* means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(b) *Educational service agencies and other public institutions or agencies.* The term includes—

(1) An educational service agency, as defined in § 300.12; and

(2) Any other public institution or agency having administrative control and direction of a public elementary school or secondary school, including a public charter school that is established as an LEA under State law.

(c) *BIA funded schools.* BIA funded schools include an elementary school or secondary school funded by the Bureau of Indian Affairs, and not subject to the jurisdiction of any SEA other than the Bureau of Indian Affairs, but only to the extent that the inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under the Act with the smallest student population.

(Authority: 20 U.S.C. 1401(19))

**§ 300.29 Native language.**

(a) *Native language*, when used with respect to an individual who is limited English proficient, means the following:

(1) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in paragraph (a)(2) of this section.

(2) In all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment.

(b) For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).

(Authority: 20 U.S.C. 1401(20))

**§ 300.30 Parent.**

(a) *Parent* means—

(1) A natural or adoptive parent of a child;

(2) A foster parent, unless State law, regulations or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

(3) A guardian (but not the State if the child is a ward of the State);

(4) An individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(5) A surrogate parent who has been appointed in accordance with sections 615(b)(2) or 639(a)(5) of the Act.

(b)(1) Except as provided in paragraph (b)(2) of this section, the natural or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the natural or adoptive parent does not have legal authority to make educational decisions for the child.

(2) If a judicial decree or order identifies a specific person or persons to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this section, except that a public agency that provides education or care for the child may not act as the parent.

(Authority: 20 U.S.C. 1401(23))

**§ 300.31 Parent training and information center.**

Parent training and information center means a center assisted under sections 671 or 672 of the Act.

(Authority: 20 U.S.C. 1401(25))

**§ 300.32 Personally identifiable.**

*Personally identifiable* means information that contains—

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1415(a))

**§ 300.33 Public agency.**

*Public agency* includes the SEA, LEAs, ESAs, public charter schools that are not otherwise included as LEAs or ESAs and are not otherwise included as LEAs or ESAs, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. 1412(a)(11))

**§ 300.34 Related services.**

(a) *General. Related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also includes school health services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the IEP of the child, social work services in schools, and parent counseling and training.

(b) *Exception.* Related services do not include a medical device that is surgically implanted, the optimization of device functioning, maintenance of the device, or the replacement of that device.

(c) *Individual related services terms defined.* The terms used in this definition are defined as follows:

(1) *Audiology* includes—

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of children, parents, and teachers regarding hearing loss; and

(vi) Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) *Counseling services* means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) *Early identification and assessment of disabilities in children* means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) *Interpreting services*, as used with respect to children who are deaf or hard of hearing, includes oral transliteration services, cued language transliteration services, and sign language interpreting services.

(5) *Medical services* means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(6)(i) *Occupational therapy* means—

(i) Services provided by a qualified occupational therapist; and

(ii) Includes—

(A) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(B) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(C) Preventing, through early intervention, initial or further impairment or loss of function.

(7) *Orientation and mobility services*—(i) Means services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(ii) Includes travel training instruction, and teaching students the following, as appropriate:

(A) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line

of travel (e.g., using sound at a traffic light to cross the street);

(B) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;

(C) To understand and use remaining vision and distance low vision aids; and

(D) Other concepts, techniques, and tools.

(8) *Parent counseling and training* means—

(i) Assisting parents in understanding the special needs of their child;

(ii) Providing parents with information about child development; and

(iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

(9) *Physical therapy* means services provided by a qualified physical therapist.

(10) *Psychological services* includes—

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies.

(11) *Recreation* includes—

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(12) *Rehabilitation counseling services* means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*

(13) *School nurse services* means services provided by a qualified school nurse, designed to enable a child with

a disability to receive FAPE as described in the child's IEP.

(14) *Social work services in schools* includes—

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and

(v) Assisting in developing positive behavioral intervention strategies.

(15) *Speech-language pathology services* includes—

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(16) *Transportation* includes—

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(26))

### § 300.35 Secondary school.

*Secondary school* means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

(Authority: 20 U.S.C. 1401(27))

### § 300.36 Services plan.

*Services plan* means a written statement that describes the special education and related services the LEA will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services, including the location

of the services and any transportation necessary, consistent with § 300.132, and is developed and implemented in accordance with §§ 300.137 through 300.139.

(Authority: 20 U.S.C. 1412(a)(10)(A))

**§ 300.37 Secretary.**

*Secretary* means the Secretary of Education.

(Authority: 20 U.S.C. 1401(28))

**§ 300.38 Special education.**

(a) *General.* (1) *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) *Special education* includes each of the following, if the services otherwise meet the requirements of paragraph

(a)(1) of this section—

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) *Individual special education terms defined.* The terms in this definition are defined as follows:

(1) *At no cost* means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) *Physical education:*

(i) Means the development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

(3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) *Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) *Vocational education:* means (i) organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree; and

(ii) Includes vocational and technical education.

(6) *Vocational and technical education* means organized educational activities that—

(i) Offer a sequence of courses that—

(A) Provides individuals with the rigorous and challenging academic and technical knowledge and skills the individuals need to prepare for further education and for careers (other than careers requiring a Master's or doctoral degree) in current or emerging employment sectors;

(B) May include the provision of skills or courses necessary to enroll in a sequence of courses that meet the requirements of this subparagraph; and

(C) Provides, at the postsecondary level, for a 1-year certificate, an associate degree, or industry-recognized credential; and

(ii) Include competency-based applied learning that contributes to the academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, technical skills, and occupation-specific skills, or an individual.

(Authority: 20 U.S.C.1401(29))

**§ 300.39 State.**

*State* means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(Authority: 20 U.S.C. 1401(31))

**§ 300.40 State educational agency.**

*State educational agency* or *SEA* means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(Authority: 20 U.S.C. 1401(32))

**§ 300.41 Supplementary aids and services.**

*Supplementary aids and services* means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.112 through 300.116.

(Authority: 20 U.S.C. 1401(33))

**§ 300.42 Transition services.**

(a) *Transition services* means a coordinated set of activities for a child with a disability that—

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences and interests; and includes—

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(b) *Transition services* for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

(Authority: 20 U.S.C. 1401(34))

**§ 300.43 Universal design.**

Universal design has the meaning given the term in section 3 of the Assistive Technology Act of 1998, as amended, 29 U.S.C. 3002.

(Authority: 20 U.S.C. 1401(35))

**§ 300.44 Ward of the State.**

(a) General. Subject to paragraph (b) of this section, *ward of the State* means a child who, as determined by the State where the child resides, is—

(1) A foster child;

(2) A ward of the State; or

(3) In the custody of a public child welfare agency.

(b) *Exception.* Ward of the State does not include a foster child who has a foster parent who meets the definition of a *parent* in § 300.30.

(Authority: 20 U.S.C. 1401(36))

## Subpart B—State Eligibility

### General

#### § 300.100 Eligibility for assistance.

A State is eligible for assistance under Part B of the Act for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the conditions in §§ 300.101 through 300.176.

(Authority: 20 U.S.C. 1412(a))

### FAPE Requirements

#### § 300.101 Free appropriate public education (FAPE).

(a) *General.* A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d).

(b) *FAPE for children beginning at age 3.* (1) Each State must ensure that—

(i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and

(ii) An IEP or an IFSP is in effect for the child by that date, in accordance with § 300.323(b).

(2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin.

(c) *Children advancing from grade to grade.* (1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child is advancing from grade to grade.

(2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making those determinations.

(Authority: 20 U.S.C. 1412(a)(1)(A))

#### § 300.102 Limitation—exception to FAPE for certain ages.

(a) *General.* The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:

(1) Children aged 3, 4, 5, 18, 19, 20, or 21 in a State to the extent that its

application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children of those ages.

(2)(i) Children aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility—

(A) Were not actually identified as being a child with a disability under § 300.8; and

(B) Did not have an IEP under Part B of the Act.

(ii) The exception in paragraph (a)(2)(i) of this section does not apply to children with disabilities, aged 18 through 21, who—

(A) Had been identified as a child with a disability under § 300.8 and had received services in accordance with an IEP, but who left school prior to their incarceration; or

(B) Did not have an IEP in their last educational setting, but who had actually been identified as a child with a disability under § 300.8.

(3)(i) Children with disabilities who have graduated from high school with a regular high school diploma.

(ii) The exception in paragraph (a)(3)(i) of this section does not apply to students who have graduated but have not been awarded a regular high school diploma.

(iii) Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice in accordance with § 300.503.

(4) Children with disabilities who are eligible under subpart H of this part, but who receive early intervention services under Part C of the Act.

(b) *Documents relating to exceptions.* The State must assure that the information it has provided to the Secretary regarding the exceptions in paragraph (a) of this section, as required by § 300.700 (for purposes of making grants to States under this part), is current and accurate.

(Authority: 20 U.S.C. 1412(a)(1)(B)–(C))

### Other FAPE Requirements

#### § 300.103 FAPE—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, if it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies

involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.

(c) Consistent with § 300.323(c), the State must ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined.

(Authority: 20 U.S.C. 1401(8), 1412(a)(1))

#### § 300.104 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(10)(B))

#### § 300.105 Assistive technology; proper functioning of hearing aids.

(a)(1) Each public agency must ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5 and 300.6, respectively, are made available to a child with a disability if required as a part of the child's—

(i) Special education under § 300.36;

(ii) Related services under § 300.34; or

(iii) Supplementary aids and services under §§ 300.38 and 300.114(a)(2)(ii).

(2) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE.

(b) Each public agency must ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(12)(B)(i))

#### § 300.106 Extended school year services.

(a) *General.* (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not—

(i) Limit extended school year services to particular categories of disability; or

(ii) Unilaterally limit the type, amount, or duration of those services.

(b) *Definition.* As used in this section, the term extended school year services means special education and related services that—

(1) Are provided to a child with a disability—

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA.

(Authority: 20 U.S.C. 1412(a)(1))

### § 300.107 Nonacademic services.

The State must ensure the following:

(a) Each public agency must take steps to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(Authority: 20 U.S.C. 1412(a)(1))

### § 300.108 Physical education.

The State must ensure that public agencies in the State comply with the following:

(a) *General.* Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE.

(b) *Regular physical education.* Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless—

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's IEP.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's IEP, the public

agency responsible for the education of that child must provide the services directly or make arrangements for those services to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a child with a disability who is enrolled in a separate facility must ensure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(Authority: 20 U.S.C. 1412(a)(5)(A))

### § 300.109 Full educational opportunity goal (FEOG).

The State must have in effect policies and procedures to demonstrate that the State has established a goal of providing full educational opportunity to all children with disabilities, aged birth through 21, and a detailed timetable for accomplishing that goal.

(Authority: 20 U.S.C. 1412(a)(2))

### § 300.110 Program options.

The State must ensure that each public agency takes steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(Authority: 20 U.S.C. 1412(a)(2), 1413(a)(1))

### § 300.111 Child find.

(a) *General.* (1) The State must have in effect policies and procedures to ensure that—

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(b) *Use of term developmental delay.* (1) The following provisions apply with respect to implementing the child find requirements of this section:

(i) A State that adopts a definition of *developmental delay* under § 300.8(b) determines whether the term applies to children aged three through nine, or to a subset of that age range (e.g., ages three through five).

(ii) A State may not require an LEA to adopt and use the term

*developmental delay* for any children within its jurisdiction.

(iii) If an LEA uses the term *developmental delay* for children described in § 300.8(b), the LEA must conform to both the State's definition of that term and to the age range that has been adopted by the State.

(iv) If a State does not adopt the term *developmental delay*, an LEA may not independently use that term as a basis for establishing a child's eligibility under this part.

(2) [Reserved].

(c) *Other children in child find.* Child find also must include—

(1) Children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children.

(d) *Construction.* Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in § 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

(Authority: 20 U.S.C. 1401(3); 1412(a)(3))

### § 300.112 Individualized education programs (IEP).

The State must ensure that an IEP, or an IFSP that meets the requirements of section 636(d) of the Act, is developed, reviewed, and revised for each child with a disability in accordance with §§ 300.320 through 300.324, except as provided in § 300.300(b)(3)(ii).

(Authority: 20 U.S.C. 1412(a)(4))

### § 300.113 [Reserved]

### Least Restrictive Environment (LRE)

#### § 300.114 LRE requirements.

(a) *General.* (1) Except as provided in § 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120.

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if

the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(b) *Additional requirement-State funding mechanism.*

(1) *General.* (i) A State funding mechanism must not result in placements that violate the requirements of paragraph (a) of this section; and

(ii) A State must not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child, as described in the child's IEP.

(2) *Assurance.* If the State does not have policies and procedures to ensure compliance with paragraph (b)(1) of this section, the State must provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that the mechanism does not result in placements that violate that paragraph.

(Authority: 20 U.S.C. 1412(a)(5))

#### **§ 300.115 Continuum of alternative placements.**

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(Authority: 20 U.S.C. 1412(a)(5))

#### **§ 300.116 Placements.**

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—

(a) The placement decision—

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

(b) The child's placement—

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home, unless the parent agrees otherwise;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled, unless the parent agrees otherwise;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

(Authority: 20 U.S.C. 1412(a)(5))

#### **§ 300.117 Nonacademic settings.**

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of that child.

(Authority: 20 U.S.C. 1412(a)(5))

#### **§ 300.118 Children in public or private institutions.**

Except as provided in § 300.149(d) (regarding agency responsibility for general supervision for some individuals in adult prisons), an SEA must ensure that § 300.114 is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

(Authority: 20 U.S.C. 1412(a)(5))

#### **§ 300.119 Technical assistance and training activities.**

Each SEA must carry out activities to ensure that teachers and administrators in all public agencies—

(a) Are fully informed about their responsibilities for implementing § 300.114; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(Authority: 20 U.S.C. 1412(a)(5))

#### **§ 300.120 Monitoring activities.**

(a) The SEA must carry out activities to ensure that § 300.112 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 300.114, the SEA must—

(1) Review the public agency's justification for its actions; and

(2) Assist in planning and implementing any necessary corrective action.

(Authority: 20 U.S.C. 1412(a)(5))

#### **Additional Eligibility Requirements**

##### **§ 300.121 Procedural safeguards.**

(a) *General.* The State must have procedural safeguards in effect to ensure that each public agency in the State meets the requirements of §§ 300.500 through 300.536.

(b) *Procedural safeguards identified.* Children with disabilities and their parents must be afforded the procedural safeguards identified in paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(6)(A))

##### **§ 300.122 Evaluation.**

Children with disabilities must be evaluated in accordance with §§ 300.300 through 300.311 of subpart D of this part.

(Authority: 20 U.S.C. 1412(a)(7))

##### **§ 300.123 Confidentiality of personally identifiable information.**

The State must have policies and procedures in effect to ensure that public agencies in the State comply with §§ 300.610 through 300.626 related to protecting the confidentiality of any personally identifiable information collected, used, or maintained under Part B of the Act.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

##### **§ 300.124 Transition of children from the Part C program to preschool programs.**

The State must have in effect policies and procedures to ensure that—

(a) Children participating in early intervention programs assisted under Part C of the Act, and who will participate in preschool programs assisted under Part B of the Act, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(9) of the Act;

(b) By the third birthday of a child described in paragraph (a) of this section, an IEP or, if consistent with § 300.323(b) and section 636(d) of the Act, an IFSP, has been developed and is being implemented for the child consistent with § 300.101(b); and

(c) Each affected LEA will participate in transition planning conferences arranged by the designated lead agency under section 635(a)(10) of the Act.

(Authority: 20 U.S.C. 1412(a)(9))

**§§ 300.125–300.128 [Reserved]**

**Children in Private Schools**

**§ 300.129 State responsibility regarding children in private schools.**

The State must have in effect policies and procedures that ensure that LEAs, and, if applicable, the SEA, meet the private school requirements in §§ 300.130 through 300.148.

(Authority: 20 U.S.C. 1412(a)(10))

**Children With Disabilities Enrolled by Their Parents in Private Schools**

**§ 300.130 Definition of parentally-placed private school children with disabilities.**

*Parentally-placed private school children with disabilities* means children with disabilities enrolled by their parents in private schools or facilities other than children with disabilities covered under §§ 300.145 through 300.147.

(Authority: 20 U.S.C. 1412(a)(10)(A))

**§ 300.131 Child find for parentally-placed private school children with disabilities.**

(a) *General.* Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with paragraphs (b) through (e) of this section, and §§ 300.111 and 300.201.

(b) *Child find design.* The child find process must be designed to ensure—

(1) The equitable participation of parentally-placed private school children; and

(2) An accurate count of those children.

(c) *Activities.* In carrying out the requirements of this section, the LEA, or, if applicable, the SEA, must undertake activities similar to the activities undertaken for the agency's public school children.

(d) *Cost.* The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation under § 300.133.

(e) *Completion period.* The child find process must be completed in a time period comparable to that for other students attending public schools in the LEA consistent with § 300.301.

(Authority: 20 U.S.C. 1412(a)(10)(A)(ii))

**§ 300.132 Provision of services for parentally-placed private school children with disabilities—basic requirement.**

(a) *General.* To the extent consistent with the number and location of

children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, provision is made for the participation of those children in the program assisted or carried out under Part B of the Act by providing them with special education and related services, including direct services determined in accordance with § 300.137, unless the Secretary has arranged for services to those children under the by-pass provisions in §§ 300.190 through 300.198.

(b) *SEA responsibility—services plan.* In accordance with paragraph (a) of this section and §§ 300.137 through 300.139, a services plan must be developed and implemented for each private school child with a disability who has been designated by the LEA in which the private school is located to receive special education and related services under this part.

(c) *Record keeping.* Each LEA must maintain in its records, and provide to the SEA, the following information related to parentally-placed private school children covered under §§ 300.130 through 300.144:

(1) The number of children evaluated;

(2) The number of children determined to be children with disabilities; and

(3) The number of children served.

(Authority: 20 U.S.C. 1412(a)(10)(A)(i))

**§ 300.133 Expenditures.**

(a) *Formula.* To meet the requirement of § 300.132(a), each LEA shall spend the following on providing special education and related services (including direct services) to parentally-placed private school children with disabilities:

(1) For children aged 3 through 21, an amount that is the same proportion of the LEA's total subgrant under section 611(g) of the Act as the number of private school children with disabilities aged 3 through 21 who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged 3 through 21.

(2) For children aged three through five, an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as the number of parentally-placed private school children with disabilities aged three through five who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school

district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged three through five.

(b) *Calculating proportionate amount.* In calculating the proportionate amount of Federal funds to be provided for parentally-placed private school children with disabilities, the LEA, after timely and meaningful consultation with representatives of private schools under § 300.134, must conduct a thorough and complete child find process to determine the number of parentally-placed children with disabilities attending private schools located in the LEA.

(c) *Child count.* (1) Each LEA must—

(i) Consult with representatives of parentally-placed private school children with disabilities (consistent with § 300.134) in deciding how to conduct the annual count of the number of parentally-placed private school children with disabilities; and

(ii) Ensure that the count is conducted on any date between October 1 and December 1 of each year.

(2) The child count must be used to determine the amount that the LEA must spend on providing special education and related services to parentally-placed private school children with disabilities in the next subsequent fiscal year.

(d) *Supplement, not supplant.* State and local funds may supplement and in no case supplant the proportionate amount of Federal funds required to be expended for parentally-placed private school children with disabilities under this part.

(Authority: 20 U.S.C. 1412(a)(10)(A))

**§ 300.134 Consultation.**

To ensure timely and meaningful consultation, an LEA, or, if appropriate, an SEA, must consult with private school representatives and representatives of parents of parentally-placed private school children with disabilities during the design and development of special education and related services for the children regarding the following:

(a) *Child find.* The child find process, including—

(1) How parentally-placed private school children suspected of having a disability can participate equitably; and

(2) How parents, teachers, and private school officials will be informed of the process.

(b) *Proportionate share of funds.* The determination of the proportionate share of Federal funds available to serve parentally-placed private school children with disabilities under § 300.133(b), including the

determination of how the proportionate share of those funds was calculated.

(c) *Consultation process.* The consultation process among the LEA, private school officials, and representatives of parents of parentally-placed private school children with disabilities, including how the process will operate throughout the school year to ensure that parentally-placed children with disabilities identified through the child find process can meaningfully participate in special education and related services.

(d) *Provision of special education and related services.* How, where, and by whom special education and related services will be provided for parentally-placed private school children with disabilities, including a discussion of—

(1) The types of services, including direct services and alternate service delivery mechanisms; and

(2) How special education and related services will be apportioned if funds are insufficient to serve all parentally-placed private school children; and

(3) How and when those decisions will be made;

(e) *Written explanation by LEA regarding services.* How, if the LEA disagrees with the views of the private school officials on the provision of services or the types of services (whether provided directly or through a contract) the LEA will provide to the private school officials a written explanation of the reasons why the LEA chose not to provide services directly or through a contract.

(Authority: 20 U.S.C. 1412(a)(10)(A)(iii))

#### **§ 300.135 Written affirmation.**

(a) When timely and meaningful consultation, as required by § 300.134, has occurred, the LEA must obtain a written affirmation signed by the representatives of participating private schools.

(b) If the representatives do not provide the affirmation within a reasonable period of time, the LEA must forward the documentation of the consultation process to the SEA.

(Authority: 20 U.S.C. 1412(a)(10)(A)(iv))

#### **§ 300.136 Compliance.**

(a) *General.* A private school official has the right to submit a complaint to the SEA under §§ 300.151 through 300.153 that the LEA—

(1) Did not engage in consultation that was meaningful and timely; or

(2) Did not give due consideration to the views of the private school official.

(b) *Procedure.* (1) If the private school official wishes to submit a complaint, the official must provide to the SEA the

basis of the noncompliance by the LEA with the applicable private school provisions in this part; and

(2) The LEA must forward the appropriate documentation to the SEA.

(3)(i) If the private school official is dissatisfied with the decision of the SEA, the official may submit a complaint to the Secretary by providing the information on noncompliance described in paragraph (b)(1) of this section; and

(ii) The SEA must forward the appropriate documentation to the Secretary.

(Authority: 20 U.S.C. 1412(a)(10)(A)(v))

#### **§ 300.137 Equitable services determined.**

(a) *No individual right to special education and related services.* No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

(b) *Decisions.* (1) Decisions about the services that will be provided to parentally-placed private school children with disabilities under §§ 300.130 through 300.144 must be made in accordance with paragraph (c) of this section and § 300.134(c).

(2) The LEA must make the final decisions with respect to the services to be provided to eligible parentally-placed private school children with disabilities.

(c) *Services plan for each child served under §§ 300.130 through 300.144.* If a child with a disability is enrolled in a religious or other private school by the child's parents and will receive special education or related services from an LEA, the LEA must—

(1) Initiate and conduct meetings to develop, review, and revise a services plan for the child, in accordance with § 300.138(b); and

(2) Ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the LEA shall use other methods to ensure participation by the religious or other private school, including individual or conference telephone calls.

(Authority: 20 U.S.C. 1412(a)(10)(A))

#### **§ 300.138 Equitable services provided.**

(a) *General.* (1) The services provided to parentally-placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools.

(2) Parentally-placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

(b) *Services provided in accordance with a services plan.* (1) Each parentally-placed private school child with a disability who has been designated to receive services under § 300.132 must have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the process described in §§ 300.134 and 300.137, it will make available to parentally-placed private school children with disabilities.

(2) The services plan must, to the extent appropriate—

(i) Meet the requirements of § 300.320, or for a child ages three through five, meet the requirements of § 300.323(b) with respect to the services provided; and

(ii) Be developed, reviewed, and revised consistent with §§ 300.321 through 300.324.

(c) *Provision of equitable services.* (1) The provision of services pursuant to this section and §§ 300.139 through 300.143 must be provided:

(i) By employees of a public agency; or

(ii) Through contract by the public agency with an individual, association, agency, organization, or other entity.

(2) Special education and related services provided to parentally-placed private school children with disabilities, including materials and equipment, must be secular, neutral, and nonideological.

(Authority: 20 U.S.C. 1412(a)(10)(A)(vi))

#### **§ 300.139 Location of services and transportation.**

(a) *Services on private school premises.* Services to parentally-placed private school children with disabilities may be provided on the premises of private, including religious, schools, to the extent consistent with law.

(b) *Transportation.* (1) *General.*

(i) If necessary for the child to benefit from or participate in the services provided under this part, a parentally-placed private school child with a disability must be provided transportation—

(A) From the child's school or the child's home to a site other than the private school; and

(B) From the service site to the private school, or to the child's home, depending on the timing of the services.

(ii) LEAs are not required to provide transportation from the child's home to the private school.

(2) *Cost of transportation.* The cost of the transportation described in paragraph (b)(1)(i) of this section may be included in calculating whether the

LEA has met the requirement of § 300.133.

(Authority: 20 U.S.C. 1412(a)(10)(A))

**§ 300.140 Due process complaints and State complaints.**

(a) *Due process not applicable, except for child find.* (1) Except as provided in paragraph (a)(2) of this section, the procedures in §§ 300.504 through 300.519 do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.132 through 300.139, including the provision of services indicated on the child's services plan.

(2) The procedures in §§ 300.504 through 300.519 do apply to complaints that an LEA has failed to meet the requirements of § 300.131, including the requirements of §§ 300.300 through 300.311.

(b) *State complaints.* Complaints that an SEA or LEA has failed to meet the requirements of §§ 300.132 through 300.144 must be filed under the procedures in §§ 300.151 through 300.153.

(Authority: 20 U.S.C. 1412(a)(10)(A))

**§ 300.141 Requirement that funds not benefit a private school.**

(a) An LEA may not use funds provided under section 611 or 619 of the Act to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The LEA must use funds provided under Part B of the Act to meet the special education and related services needs of parentally-placed private school children with disabilities, but not for—

- (1) The needs of a private school; or
- (2) The general needs of the students enrolled in the private school.

(Authority: 20 U.S.C. 1412(a)(10)(A))

**§ 300.142 Use of personnel.**

(a) *Use of public school personnel.* An LEA may use funds available under sections 611 and 619 of the Act to make public school personnel available in other than public facilities—

(1) To the extent necessary to provide services under §§ 300.130 through 300.144 for parentally-placed private school children with disabilities; and

(2) If those services are not normally provided by the private school.

(b) *Use of private school personnel.* An LEA may use funds available under sections 611 and 619 of the Act to pay for the services of an employee of a private school to provide services under §§ 300.130 through 300.144 if—

(1) The employee performs the services outside of his or her regular hours of duty; and

(2) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1412(a)(10)(A))

**§ 300.143 Separate classes prohibited.**

An LEA may not use funds available under section 611 or 619 of the Act for classes that are organized separately on the basis of school enrollment or religion of the students if—

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1412(a)(10)(A))

**§ 300.144 Property, equipment, and supplies.**

(a) A public agency must control and administer the funds used to provide special education and related services under §§ 300.137 through 300.139, and hold title to and administer materials, equipment, and property purchased with those funds for the uses and purposes provided in the Act.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the Part B program.

(c) The public agency must ensure that the equipment and supplies placed in a private school—

(1) Are used only for Part B purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency must remove equipment and supplies from a private school if—

(1) The equipment and supplies are no longer needed for Part B purposes; or

(2) Removal is necessary to avoid unauthorized use of the equipment and supplies for other than Part B purposes.

(e) No funds under Part B of the Act may be used for repairs, minor remodeling, or construction of private school facilities.

(Authority: 20 U.S.C. 1412(a)(10)(A)(vii))

**Children With Disabilities in Private Schools Placed or Referred by Public Agencies**

**§ 300.145 Applicability of §§ 300.145 through 300.147.**

Sections 300.146 through 300.147 apply only to children with disabilities who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. 1412(a)(10)(B))

**§ 300.146 Responsibility of State educational agency.**

Each SEA must ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency—

(a) Is provided special education and related services—

(1) In conformance with an IEP that meets the requirements of §§ 300.320 through 300.325; and

(2) At no cost to the parents;

(b) Is provided an education that meets the standards that apply to education provided by the SEA and LEAs including the requirements of this part, except for § 300.18 and § 300.156(c); and

(c) Has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. 1412(a)(10)(B))

**§ 300.147 Implementation by State educational agency.**

In implementing § 300.146, the SEA must—

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a child with a disability; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

(Authority: 20 U.S.C. 1412(a)(10)(B))

**Children With Disabilities Enrolled by Their Parents in Private Schools When FAPE Is at Issue**

**§ 300.148 Placement of children by parents if FAPE is at issue.**

(a) *General.* This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§ 300.131 through 300.144.

(b) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing

officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(c) *Limitation on reimbursement.* The cost of reimbursement described in paragraph (b) of this section may be reduced or denied—

(1) If—

(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (c)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(d) *Exception.* Notwithstanding the notice requirement in paragraph (c)(1) of this section, the cost of reimbursement—

(1) Must not be reduced or denied for failure to provide the notice if—

(i) The school prevented the parent from providing the notice;

(ii) The parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (c)(1) of this section; or

(iii) Compliance with paragraph (c)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if—

(i) The parent is not literate or cannot write in English; or

(ii) Compliance with paragraph (c)(1) of this section would likely result in serious emotional harm to the child.

(Authority: 20 U.S.C. 1412(a)(10)(C))

**§ 300.149 State educational agency responsibility for general supervision.**

(a) The SEA is responsible for ensuring—

(1) That the requirements of this part are carried out; and

(2) That each educational program for children with disabilities administered within the State, including each program administered by any other State or local agency (but not including elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior)—

(i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and

(ii) Meets the educational standards of the SEA (including the requirements of this part).

(3) In carrying out this part with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 *et seq.*) are met.

(b) The State must have in effect policies and procedures to ensure that it complies with the monitoring and enforcement requirements in §§ 300.600 through 300.602 and §§ 300.606 through 300.608.

(c) Part B of the Act does not limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

(d) Notwithstanding paragraph (a) of this section, the Governor (or another individual pursuant to State law) may assign to any public agency in the State the responsibility of ensuring that the requirements of Part B of the Act are met with respect to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(Authority: 20 U.S.C. 1412(a)(11); 1416)

**§ 300.150 State educational agency implementation of procedural safeguards.**

The SEA (and any agency assigned responsibility pursuant to § 300.149(d)) must have in effect procedures to inform each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

(Authority: 20 U.S.C. 1412(a)(11); 1415(a))

**State Complaint Procedures**

**§ 300.151 Adoption of State complaint procedures.**

(a) *General.* Each SEA must adopt written procedures for—

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of § 300.153 by—

(i) Providing for the filing of a complaint with the SEA; and

(ii) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint; and

(2) Widely disseminating to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State procedures under §§ 300.151 through 300.153.

(b) *Remedies for denial of appropriate services.* In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address—

(1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child; and

(2) Appropriate future provision of services for all children with disabilities.

(Authority: 20 U.S.C. 1221e-3)

**§ 300.152 Minimum State complaint procedures.**

(a) *Time limit; minimum procedures.* Each SEA must include in its complaint procedures a time limit of 60 days after a complaint is filed under § 300.153 to—

(1) Carry out an independent on-site investigation, if the SEA determines that an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Provide the public agency with the opportunity to respond to the complaint, including, at a minimum—

(A) At the discretion of the public agency, a proposal to resolve the complaint; and

(B) With the consent of the parent, an opportunity for the public agency to engage the parent in mediation, or alternative means of dispute resolution;

(4) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and

(5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the SEA's final decision.

(b) *Time extension; final decision; implementation.* The SEA's procedures described in paragraph (a) of this section also must—

(1) Permit an extension of the time limit under paragraph (a) of this section only if—

(i) Exceptional circumstances exist with respect to a particular complaint; or

(ii) The parent and the public agency involved agree to extend the time to conduct the activities pursuant to paragraph (a)(3)(B) of this section; and

(2) Include procedures for effective implementation of the SEA's final decision, if needed, including—

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) *Complaints filed under this section and due process hearings under § 300.507 and §§ 300.530 through 300.532.* (1) If a written complaint is received that is also the subject of a due process hearing under § 300.507 or §§ 300.530 through 300.532, the State must set aside the complaint until the conclusion of the procedures in § 300.507 or §§ 300.530 through 300.532.

(2) If an issue is raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties—

(i) The due process hearing decision is binding on that issue; and

(ii) The SEA must inform the complainant to that effect.

(Authority: 20 U.S.C. 1221e-3)

#### **§ 300.153 Filing a complaint.**

(a) An organization or individual may file a signed written complaint under the procedures described in §§ 300.151 through 300.152.

(b) The complaint must include—

(1) A statement that a public agency has violated a requirement of Part B of the Act or of this part;

(2) The facts on which the statement is based;

(3) The signature and contact information for the complainant; and

(4) If alleging violations against a specific child—

(i) The name and address of the residence of the child;

(ii) The name of the school the child is attending;

(iii) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;

(iv) A description of the nature of the problem of the child, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(c) Except for complaints covered under § 300.507(a)(2), the complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with § 300.151.

(d) The party filing the complaint must forward a copy of the complaint to the LEA or public agency serving the child at the same time the party files the complaint with the SEA.

(Authority: 20 U.S.C. 1221e-3)

#### **Methods of Ensuring Services**

##### **§ 300.154 Methods of ensuring services.**

(a) *Establishing responsibility for services.* The Chief Executive Officer of a State or designee of that officer must ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each noneducational public agency described in paragraph (b) of this section and the SEA, in order to ensure that all services described in paragraph (b)(1) of this section that are needed to ensure FAPE are provided, including the provision of these services during the pendency of any dispute under paragraph (a)(3) of this section. The agreement or mechanism must include the following:

(1) An identification of, or a method for defining, the financial responsibility of each agency for providing services described in paragraph (b)(1) of this section to ensure FAPE to children with disabilities. The financial responsibility of each noneducational public agency described in paragraph (b) of this section, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of the LEA (or the State agency responsible for developing the child's IEP).

(2) The conditions, terms, and procedures under which an LEA must be reimbursed by other agencies.

(3) Procedures for resolving interagency disputes (including procedures under which LEAs may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or

otherwise implement the provisions of the agreement or mechanism.

(4) Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in paragraph (b)(1) of this section.

(b) *Obligation of noneducational public agencies.* (1)(i) If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy or pursuant to paragraph (a) of this section, to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in § 300.5 relating to assistive technology devices, § 300.6 relating to assistive technology services, § 300.34 relating to related services, § 300.41 relating to supplementary aids and services, and § 300.42 relating to transition services) that are necessary for ensuring FAPE to children with disabilities within the State, the public agency must fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to paragraph (a) of this section or an agreement pursuant to paragraph (c) of this section.

(ii) A noneducational public agency described in paragraph (b)(1)(i) of this section may not disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context.

(2) If a public agency other than an educational agency fails to provide or pay for the special education and related services described in paragraph (b)(1) of this section, the LEA (or State agency responsible for developing the child's IEP) must provide or pay for these services to the child in a timely manner. The LEA or State agency is authorized to claim reimbursement for the services from the noneducational public agency that failed to provide or pay for these services and that agency must reimburse the LEA or State agency in accordance with the terms of the interagency agreement or other mechanism described in paragraph (a) of this section.

(c) *Special rule.* The requirements of paragraph (a) of this section may be met through—

(1) State statute or regulation;

(2) Signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(3) Other appropriate written methods as determined by the Chief Executive Officer of the State or designee of that officer and approved by the Secretary.

(d) *Children with disabilities who are covered by public insurance.* (1) A public agency may use the Medicaid or other public insurance benefits programs in which a child participates to provide or pay for services required under this part, as permitted under the public insurance program, except as provided in paragraph (d)(2) of this section.

(2) With regard to services required to provide FAPE to an eligible child under this part, the public agency—

(i) May not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of the Act;

(ii) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2) of this section, may pay the cost that the parent otherwise would be required to pay;

(iii) May not use a child's benefits under a public insurance program if that use would—

(A) Decrease available lifetime coverage or any other insured benefit;

(B) Result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school;

(C) Increase premiums or lead to the discontinuation of insurance; or

(D) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures; and

(iv) Must obtain parental consent consistent with § 300.622.

(e) *Children with disabilities who are covered by private insurance.* (1) With regard to services required to provide FAPE to an eligible child under this part, a public agency may access a parent's private insurance proceeds only if the parent provides informed consent consistent with § 300.9.

(2) Each time the public agency proposes to access the parent's private insurance proceeds, the agency must—

(i) Obtain parental consent in accordance with paragraph (e)(1) of this section; and

(ii) Inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

(f) *Use of Part B funds.* (1) If a public agency is unable to obtain parental consent to use the parent's private insurance, or public insurance when the parent would incur a cost for a specified service required under this part, to ensure FAPE the public agency may use its Part B funds to pay for the service.

(2) To avoid financial cost to parents who otherwise would consent to use private insurance, or public insurance if the parent would incur a cost, the public agency may use its Part B funds to pay the cost that the parents otherwise would have to pay to use the parent's insurance (e.g., the deductible or co-pay amounts).

(g) *Proceeds from public or private insurance.* (1) Proceeds from public or private insurance will not be treated as program income for purposes of 34 CFR 80.25.

(2) If a public agency spends reimbursements from Federal funds (e.g., Medicaid) for services under this part, those funds will not be considered "State or local" funds for purposes of the maintenance of effort provisions in §§ 300.163 and 300.203.

(h) *Construction.* Nothing in this part should be construed to alter the requirements imposed on a State Medicaid agency, or any other agency administering a public insurance program by Federal statute, regulations or policy under title XIX, or title XXI of the Social Security Act, 42 U.S.C. 1396 through 1396v and 42 U.S.C. 1397aa through 1397jj, or any other public insurance program.

(Authority: 20 U.S.C. 1412(a)(12) and (e))

#### **Additional Eligibility Requirements**

##### **§ 300.155 Hearings relating to LEA eligibility.**

The SEA must not make any final determination that an LEA is not eligible for assistance under Part B of the Act without first giving the LEA reasonable notice and an opportunity for a hearing under 34 CFR 76.401(d).

(Authority: 20 U.S.C. 1412(a)(13))

##### **§ 300.156 Personnel qualifications.**

(a) *General.* The SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(b) *Related services personnel and paraprofessionals.* The qualifications under paragraph (a) of this section must include qualifications for related services personnel and paraprofessionals that—

(1) Are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services; and

(2) Ensure that related services personnel who deliver services in their discipline or profession—

(i) Meet the requirements of paragraph (b)(1) of this section; and

(ii) Have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) Allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services under this part to children with disabilities.

(c) *Qualifications for special education teachers.* The qualifications described in paragraph (a) of this section must ensure that each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school is highly qualified as a special education teacher by the deadline established in section 1119(a)(2) of the ESEA.

(d) *Policy.* In implementing this section, a State must adopt a policy that includes a requirement that LEAs in the State take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services under this part to children with disabilities.

(e) *Rule of construction.*

Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to—

(1) Create a right of action on behalf of an individual student for the failure of a particular SEA or LEA staff person to be highly qualified; or

(2) Prevent a parent from filing a complaint under §§ 300.151 through 300.153 about staff qualifications with the SEA as provided for under this part.

(Authority: 20 U.S.C. 1412(a)(14))

##### **§ 300.157 Performance goals and indicators.**

The State must—

(a) Have in effect established goals for the performance of children with disabilities in the State that—

(1) Promote the purposes of this part, as stated in § 300.1;

(2) Are the same as the State's objectives for progress by children in its definition of adequate yearly progress, including the State's objectives for progress by children with disabilities, under section 1111(b)(2)(C) of the ESEA, 20 U.S.C. 6311;

(3) Address graduation rates and dropout rates, as well as such other factors as the State may determine; and

(4) Are consistent, to the extent appropriate, with any other goals and academic standards for children established by the State;

(b) Have in effect established performance indicators the State will use to assess progress toward achieving the goals described in paragraph (a) of this section, including measurable annual objectives for progress by children with disabilities under section 1111(b)(2)(C)(v)(II)(cc) of the ESEA, 20 U.S.C. 6311; and

(c) Annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under paragraph (a) of this section, which may include elements of the reports required under section 1111(h) of the ESEA.

(Authority: 20 U.S.C. 1412(a)(15))

### § 300.160 Participation in assessments.

(a) *General.* The State must ensure that all children with disabilities are included in all general State and districtwide assessment programs, including assessments described in section 1111 of the ESEA, 20 U.S.C. 6311, with appropriate accommodations and alternate assessments, if necessary, and as indicated in their respective IEPs.

(b) *Accommodation guidelines.* The State (or, in the case of a districtwide assessment, the LEA) must develop guidelines for the provision of appropriate accommodations.

(c) *Alternate assessments.* (1) The State (or, in the case of a districtwide assessment, the LEA) must develop and implement alternate assessments and guidelines for the participation of children with disabilities in those alternate assessments for those children who cannot participate in regular assessments under paragraph (a) of this section with accommodations as indicated in their respective IEPs.

(2) The alternate assessments and guidelines under paragraph (c)(1) of this section must provide for alternate assessments that in the case of assessments of student academic progress—

(i) Are aligned with the State's challenging academic content standards

and challenging student academic achievement standards; and

(ii) If the State has adopted alternate achievement standards permitted under the regulations promulgated to carry out section 1111(b)(1) of the ESEA, measure the achievement of children with disabilities against those standards.

(3) The State must conduct the alternate assessments described in this section.

(d) *Reports.* The SEA (or, in the case of a districtwide assessment, the LEA) must make available to the public, and report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(1) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations in order to participate in those assessments.

(2) The number of those children with disabilities participating in alternate assessments described in paragraph (c)(2)(i) of this section.

(3) The number of those children with disabilities participating in alternate assessments described in paragraph (c)(2)(ii) of this section.

(4) The performance results of children with disabilities on regular assessments and on alternate assessments if—

(i) The number of those children participating in those assessments is sufficient to yield statistically reliable information; and

(ii) Reporting that information will not reveal personally identifiable information about an individual student, compared with the achievement of all children, including children with disabilities, on those assessments.

(e) *Universal design.* The SEA (or, in the case of a districtwide assessment, the LEA) must, to the extent possible, use universal design principles in developing and administering any assessments under this section.

(Authority: 20 U.S.C. 1412(a)(16))

### § 300.161 [Reserved]

### § 300.162 Supplementation of State, local, and other Federal funds.

(a) *Expenditures.* Funds paid to a State under this part must be expended in accordance with all the provisions of this part.

(b) *Prohibition against commingling.* (1) Funds paid to a State under this part must not be commingled with State funds.

(2) The requirement in paragraph (b)(1) of this section is satisfied by the

use of a separate accounting system that includes an audit trail of the expenditure of funds paid to a State under this part. Separate bank accounts are not required. (See 34 CFR 76.702 (Fiscal control and fund accounting procedures)).

(c) *State-level nonsupplanting.* (1) Except as provided in § 300.202, funds paid to a State under Part B of the Act must be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of the SEA or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act, and in no case to supplant those Federal, State, and local funds.

(2) If the State provides clear and convincing evidence that all children with disabilities have available to them FAPE, the Secretary may waive, in whole or in part, the requirements of paragraph (c)(1) of this section if the Secretary concurs with the evidence provided by the State under § 300.164.

(Authority: 20 U.S.C. 1412(a)(17))

### § 300.163 Maintenance of State financial support.

(a) *General.* A State must not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

(b) *Reduction of funds for failure to maintain support.* The Secretary reduces the allocation of funds under section 611 of the Act for any fiscal year following the fiscal year in which the State fails to comply with the requirement of paragraph (a) of this section by the same amount by which the State fails to meet the requirement.

(c) *Waivers for exceptional or uncontrollable circumstances.* The Secretary may waive the requirement of paragraph (a) of this section for a State, for one fiscal year at a time, if the Secretary determines that—

(1) Granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(2) The State meets the standard in § 300.164 for a waiver of the requirement to supplement, and not to supplant, funds received under Part B of the Act.

(d) *Subsequent years.* If, for any fiscal year, a State fails to meet the requirement of paragraph (a) of this section, including any year for which

the State is granted a waiver under paragraph (c) of this section, the financial support required of the State in future years under paragraph (a) of this section shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(Authority: 20 U.S.C. 1412(a)(18))

**§ 300.164 Waiver of requirement regarding supplementing and not supplanting with Part B funds.**

(a) Except as provided under §§ 300.202 through 300.205, funds paid to a State under Part B of the Act must be used to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of SEAs or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act and in no case to supplant those Federal, State, and local funds. A State may use funds it retains under § 300.704(a) and (b) without regard to the prohibition on supplanting other funds.

(b) If a State provides clear and convincing evidence that all eligible children with disabilities throughout the State have FAPE available to them, the Secretary may waive for a period of one year in whole or in part the requirement under § 300.162 (regarding State-level nonsupplanting) if the Secretary concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver under this section, it must submit to the Secretary a written request that includes—

(1) An assurance that FAPE is currently available, and will remain available throughout the period that a waiver would be in effect, to all eligible children with disabilities throughout the State, regardless of the public agency that is responsible for providing FAPE to them. The assurance must be signed by an official who has the authority to provide that assurance as it applies to all eligible children with disabilities in the State;

(2) All evidence that the State wishes the Secretary to consider in determining whether all eligible children with disabilities have FAPE available to them, setting forth in detail—

(i) The basis on which the State has concluded that FAPE is available to all eligible children in the State; and

(ii) The procedures that the State will implement to ensure that FAPE remains available to all eligible children in the State, which must include—

(A) The State's procedures under § 300.111 for ensuring that all eligible

children are identified, located and evaluated;

(B) The State's procedures for monitoring public agencies to ensure that they comply with all requirements of this part;

(C) The State's complaint procedures under §§ 300.151 through 300.153; and

(D) The State's hearing procedures under §§ 300.511 through 300.516 and §§ 300.530 through 300.536;

(3) A summary of all State and Federal monitoring reports, and State complaint decisions (see §§ 300.151 through 300.153) and hearing decisions (see §§ 300.511 through 300.516 and §§ 300.530 through 300.536), issued within three years prior to the date of the State's request for a waiver under this section, that includes any finding that FAPE has not been available to one or more eligible children, and evidence that FAPE is now available to all children addressed in those reports or decisions; and

(4) Evidence that the State, in determining that FAPE is currently available to all eligible children with disabilities in the State, has consulted with the State advisory panel under § 300.167.

(d) If the Secretary determines that the request and supporting evidence submitted by the State makes a *prima facie* showing that FAPE is, and will remain, available to all eligible children with disabilities in the State, the Secretary, after notice to the public throughout the State, conducts a public hearing at which all interested persons and organizations may present evidence regarding the following issues:

(1) Whether FAPE is currently available to all eligible children with disabilities in the State.

(2) Whether the State will be able to ensure that FAPE remains available to all eligible children with disabilities in the State if the Secretary provides the requested waiver.

(e) Following the hearing, the Secretary, based on all submitted evidence, will provide a waiver, in whole or in part, for a period of one year if the Secretary finds that the State has provided clear and convincing evidence that FAPE is currently available to all eligible children with disabilities in the State, and the State will be able to ensure that FAPE remains available to all eligible children with disabilities in the State if the Secretary provides the requested waiver.

(f) A State may receive a waiver of the requirement of section 612(a)(18)(A) of the Act and § 300.164 if it satisfies the requirements of paragraphs (b) through (e) of this section.

(g) The Secretary may grant subsequent waivers for a period of one year each, if the Secretary determines that the State has provided clear and convincing evidence that all eligible children with disabilities throughout the State have, and will continue to have throughout the one-year period of the waiver, FAPE available to them.

(Authority: 20 U.S.C. 1412(a)(17)(C), (18)(C)(ii))

**§ 300.165 Public participation.**

(a) Prior to the adoption of any policies and procedures needed to comply with Part B of the Act (including any amendments to those policies and procedures), the State must ensure that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

(b) Before submitting a State plan under this part, a State must comply with the public participation requirements in paragraph (a) of this section and those in 20 U.S.C. 1232d(b)(7).

(Authority: 20 U.S.C. 1412(a)(19); 20 U.S.C. 1232d(b)(7))

**§ 300.166 Rule of construction.**

In complying with §§ 300.162 and 300.163, a State may not use funds paid to it under this part to satisfy State-law mandated funding obligations to LEAs, including funding based on student attendance or enrollment, or inflation.

(Authority: 20 U.S.C. 1412(a)(20))

**State Advisory Panel**

**§ 300.167 State advisory panel.**

The State must establish and maintain an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State.

(Authority: 20 U.S.C. 1412(a)(21)(A))

**§ 300.168 Membership.**

(a) *General.* The advisory panel must consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population and be composed of individuals involved in, or concerned with the education of children with disabilities, including—

(1) Parents of children with disabilities (ages birth through 26);

(2) Individuals with disabilities;

(3) Teachers;

(4) Representatives of institutions of higher education that prepare special

education and related services personnel;

(5) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, (42 U.S.C. 11431 *et seq.*);

(6) Administrators of programs for children with disabilities;

(7) Representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(8) Representatives of private schools and public charter schools;

(9) Not less than one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

(10) A representative from the State child welfare agency responsible for foster care; and

(11) Representatives from the State juvenile and adult corrections agencies.

(b) *Special rule.* A majority of the members of the panel must be individuals with disabilities or parents of children with disabilities (ages birth through 26).

(Authority: 20 U.S.C. 1412(a)(21)(B) and (C))

#### § 300.169 Duties.

The advisory panel must—

(a) Advise the SEA of unmet needs within the State in the education of children with disabilities;

(b) Comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(c) Advise the SEA in developing evaluations and reporting on data to the Secretary under section 618 of the Act;

(d) Advise the SEA in developing corrective action plans to address findings identified in Federal monitoring reports under Part B of the Act; and

(e) Advise the SEA in developing and implementing policies relating to the coordination of services for children with disabilities.

(Authority: 20 U.S.C. 1412(a)(21)(D))

#### Other Provisions Required for State Eligibility

##### § 300.170 Suspension and expulsion rates.

(a) *General.* The SEA must examine data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities—

(1) Among LEAs in the State; or

(2) Compared to the rates for nondisabled children within those agencies.

(b) *Review and revision of policies.* If the discrepancies described in paragraph (a) of this section are occurring, the SEA reviews and, if appropriate, revises (or requires the affected State agency or LEA to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

(Authority: 20 U.S.C. 1412(a)(22))

##### § 300.171 Annual description of use of Part B funds.

(a) In order to receive a grant in any fiscal year a State must annually describe—

(1) How amounts retained for State administration and State-level activities under § 300.704 will be used to meet the requirements of this part; and

(2) How those amounts will be allocated among the activities described in § 300.704 to meet State priorities based on input from LEAs.

(b) If a State's plans for use of its funds under § 300.704 for the forthcoming year do not change from the prior year, the State may submit a letter to that effect to meet the requirement in paragraph (a) of this section.

(c) The provisions of this section do not apply to the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated States.

(Authority: 20 U.S.C. 1411(e)(5))

##### § 300.172 Access to instructional materials.

(a) *General.* The State must adopt the National Instructional Materials Accessibility Standard (NIMAS) for the purposes of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after publication of the NIMAS in the **Federal Register**.

(b) *Rights and responsibilities of SEA.* (1) Nothing in this section shall be construed to require any SEA to coordinate with the National Instructional Materials Access Center (NIMAC).

(2) If an SEA chooses not to coordinate with the NIMAC, the agency must provide an assurance to the Secretary that the agency will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

(3) Nothing in this section relieves an SEA of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats, but for whom the NIMAC may not provide assistance to the SEA, receive those instructional materials in a timely manner.

(c) *Preparation and delivery of files.* If an SEA chooses to coordinate with the NIMAC, not later than December 3, 2006, two years after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004, the agency, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, must enter into a written contract with the publisher of the print instructional materials to—

(1) Require the publisher to prepare and, on or before delivery of the print instructional materials, provide to NIMAC electronic files containing the contents of the print instructional materials using the NIMAS; or

(2) Purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

(d) *Assistive technology.* In carrying out this section, the SEA, to the maximum extent possible, must work collaboratively with the State agency responsible for assistive technology programs.

(e) *Definitions.* In this section and § 300.210—

(1) *Blind persons or other persons with print disabilities* means children served under this part who may qualify to receive books and other publications produced in specialized formats in accordance with the Act entitled "An Act to provide books for adult blind," approved March 3, 1931, 2 U.S.C 135a;

(2) *National Instructional Materials Access Center or NIMAC* means the center established pursuant to section 674(e) of the Act;

(3) *National Instructional Materials Accessibility Standard or NIMAS* has the meaning given the term in section 674(e)(3)(B) of the Act; and

(4) *Specialized formats* has the meaning given the term in section 674(e)(3)(D) of the Act.

(Authority: 20 U.S.C. 1412(a)(23))

##### § 300.173 Overidentification and disproportionality.

The State must have in effect, consistent with the purposes of this part and with section 618(d) of the Act, policies and procedures designed to prevent the inappropriate overidentification or disproportionate

representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in § 300.8.

(Authority: 20 U.S.C. 1412(a)(24))

**§ 300.174 Prohibition on mandatory medication.**

(a) *General.* The SEA must prohibit State and LEA personnel from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a child as a condition of attending school, receiving an evaluation under §§ 300.300 through 300.311, or receiving services under this part.

(b) *Rule of construction.* Nothing in paragraph (a) of this section shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under § 300.111 (related to child find).

(Authority: 20 U.S.C. 1412(a)(25))

**§ 300.175 SEA as provider of FAPE or direct services.**

If the SEA provides FAPE to children with disabilities, or provides direct services to these children, the agency—

(a) Must comply with any additional requirements of §§ 300.201 and 300.202 and §§ 300.206 through 300.226 as if the agency were an LEA; and

(b) May use amounts that are otherwise available to the agency under Part B of the Act to serve those children without regard to § 300.202(b) (relating to excess costs).

(Authority: 20 U.S.C. 1412(b))

**§ 300.176 Exception for prior State plans.**

(a) *General.* If a State has on file with the Secretary policies and procedures approved by the Secretary that demonstrate that the State meets any requirement of § 300.100, including any policies and procedures filed under Part B of the Act as in effect before, December 3, 2004, the Secretary considers the State to have met the requirement for purposes of receiving a grant under Part B of the Act.

(b) *Modifications made by a State.* (1) Subject to paragraph (b)(2) of this section, policies and procedures submitted by a State in accordance with this subpart remain in effect until the State submits to the Secretary the

modifications that the State determines necessary.

(2) The provisions of this subpart apply to a modification to an application to the same extent and in the same manner that they apply to the original plan.

(c) *Modifications required by the Secretary.* The Secretary may require a State to modify its policies and procedures, but only to the extent necessary to ensure the State's compliance with this part, if—

(1) After December 3, 2004, the provisions of the Act or the regulations in this part are amended;

(2) There is a new interpretation of this Act by a Federal court or a State's highest court; or

(3) There is an official finding of noncompliance with Federal law or regulations.

(Authority: 20 U.S.C. 1412(c)(2) and (3))

**§ 300.177 [Reserved]**

**Department Procedures**

**§ 300.178 Determination by the Secretary that a State is eligible to receive a grant.**

If the Secretary determines that a State is eligible to receive a grant under Part B of the Act, the Secretary notifies the State of that determination.

(Authority: 20 U.S.C. 1412(d))

**§ 300.179 Notice and hearing before determining that a State is not eligible to receive a grant.**

(a) *General.* (1) The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until providing the State—

- (i) With reasonable notice; and
- (ii) With an opportunity for a hearing.

(2) In implementing paragraph (a)(1)(i) of this section, the Secretary sends a written notice to the SEA by certified mail with return receipt requested.

(b) *Content of notice.* In the written notice described in paragraph (a)(2) of this section, the Secretary—

- (1) States the basis on which the Secretary proposes to make a final determination that the State is not eligible;
- (2) May describe possible options for resolving the issues;
- (3) Advises the SEA that it may request a hearing and that the request for a hearing must be made not later than 30 days after it receives the notice of the proposed final determination that the State is not eligible; and
- (4) Provides the SEA with information about the hearing procedures that will be followed.

(Authority: 20 U.S.C. 1412(d)(2))

**§ 300.180 Hearing official or panel.**

(a) If the SEA requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.

(b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(Authority: 20 U.S.C. 1412(d)(2))

**§ 300.181 Hearing procedures.**

(a) As used in §§ 300.179 through 300.184 the term party or parties means the following:

(1) An SEA that requests a hearing regarding the proposed disapproval of the State's eligibility under this part.

(2) The Department official who administers the program of financial assistance under this part.

(3) A person, group or agency with an interest in and having relevant information about the case that has applied for and been granted leave to intervene by the Hearing Official or Hearing Panel.

(b) Within 15 days after receiving a request for a hearing, the Secretary designates a Hearing Official or Hearing Panel and notifies the parties.

(c) The Hearing Official or Hearing Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Hearing Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Hearing Official or Hearing Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of the case.

(2) The Hearing Official or Hearing Panel may schedule a prehearing conference with the Hearing Official or Hearing Panel and the parties.

(3) Any party may request the Hearing Official or Hearing Panel to schedule a prehearing or other conference. The Hearing Official or Hearing Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or Hearing Panel and the parties may consider subjects such as—

- (i) Narrowing and clarifying issues;
- (ii) Assisting the parties in reaching agreements and stipulations;
- (iii) Clarifying the positions of the parties;

(iv) Determining whether an evidentiary hearing or oral argument should be held; and

(v) Setting dates for—

(A) The exchange of written documents;

(B) The receipt of comments from the parties on the need for oral argument or evidentiary hearing;

(C) Further proceedings before the Hearing Official or Hearing Panel (including an evidentiary hearing or oral argument, if either is scheduled);

(D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimation of time for each presentation; or

(E) Completion of the review and the initial decision of the Hearing Official or Hearing Panel.

(5) A prehearing or other conference held under paragraph (b)(4) of this section may be conducted by telephone conference call.

(6) At a prehearing or other conference, the parties must be prepared to discuss the subjects listed in paragraph (b)(4) of this section.

(7) Following a prehearing or other conference the Hearing Official or Hearing Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(d) The Hearing Official or Hearing Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(e) The Hearing Official or Hearing Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Hearing Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Hearing Official or Panel.

(g) The Hearing Official or Hearing Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Hearing Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Hearing Panel may examine witnesses.

(j) The Hearing Official or Hearing Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Hearing Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Hearing Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m)(1) The parties must present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Hearing Panel shall determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Hearing Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Hearing Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Hearing Panel gives each party, in addition to the opportunity to be represented by counsel—

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Hearing Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p)(1) The Hearing Official or Hearing Panel—

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party must file with the Hearing Official or Hearing Panel all written motions, briefs, and other documents and must at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. 1412(d)(2))

#### **§ 300.182 Initial decision; final decision.**

(a) The Hearing Official or Hearing Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under § 300.179 including any amendments to or further clarifications of the issues, under § 300.181(c)(7).

(b) The initial decision of a Hearing Panel is made by a majority of Panel members.

(c) The Hearing Official or Hearing Panel mails, by certified mail with return receipt requested, a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secretary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Hearing Panel within 15 days of the date the party receives the Panel's decision.

(e) The Hearing Official or Hearing Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Hearing Panel within seven days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Hearing Panel forwards the parties' initial and responsive comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Hearing Panel becomes the final decision of the Secretary unless, within 25 days after the end of the time for receipt of written comments and recommendations, the Secretary informs the Hearing Official or Hearing Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary rejects or modifies the initial decision of the Hearing Official or Hearing Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the transcript of the Hearing Official's or Hearing Panel's proceedings, and written comments.

(j) The Secretary may remand the matter to the Hearing Official or Hearing Panel for further proceedings.

(k) Unless the Secretary remands the matter as provided in paragraph (j) of this section, the Secretary issues the final decision, with any necessary modifications, within 30 days after notifying the Hearing Official or Hearing Panel that the initial decision is being further reviewed.

(Authority: 20 U.S.C. 1412(d)(2))

#### **§ 300.183 Filing requirements.**

(a) Any written submission by a party under §§ 300.179 through 300.184 must be filed by hand delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for

confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary, the Hearing Official, or the Hearing Panel, as applicable, may require the filing of a follow-up hard copy by hand delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. 1412(d))

#### **§ 300.184 Judicial review.**

If a State is dissatisfied with the Secretary's final decision with respect to the eligibility of the State under section 612 of the Act, the State may, not later than 60 days after notice of that decision, file with the United States Court of Appeals for the circuit in which that State is located a petition for review of that decision. A copy of the petition must be transmitted by the clerk of the court to the Secretary. The Secretary then files in the court the record of the proceedings upon which the Secretary's decision was based, as provided in 28 U.S.C. 2112.

(Authority: 20 U.S.C. 1416(e)(8))

#### **§ 300.185 [Reserved]**

#### **§ 300.186 Assistance under other Federal programs.**

Part B of the Act may not be construed to permit a State to reduce medical and other assistance available, or to alter eligibility, under titles V and XIX of the Social Security Act with respect to the provision of FAPE for children with disabilities in the State.

(Authority: 20 U.S.C. 1412(e))

#### **By-Pass for Children in Private Schools**

##### **§ 300.190 By-pass—general.**

(a) If, on December 2, 1983, the date of enactment of the Education of the Handicapped Act Amendments of 1983, an SEA was prohibited by law from providing for the equitable participation in special programs of children with disabilities enrolled in private elementary schools and secondary schools as required by section 612(a)(10)(A) of the Act, or if the Secretary determines that an SEA, LEA, or other public agency has substantially failed or is unwilling to provide for such equitable participation then the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to these children through arrangements which shall be

subject to the requirements of section 612(a)(10)(A) of the Act.

(b) The Secretary waives the requirement of section 612(a)(10)(A) of the Act and of §§ 300.131 through 300.144 if the Secretary implements a by-pass.

(Authority: 20 U.S.C. 1412(f)(1))

##### **§ 300.191 Provisions for services under a by-pass.**

(a) Before implementing a by-pass, the Secretary consults with appropriate public and private school officials, including SEA officials, in the affected State, and as appropriate, LEA or other public agency officials to consider matters such as—

(1) Any prohibition imposed by State law that results in the need for a by-pass; and

(2) The scope and nature of the services required by private school children with disabilities in the State, and the number of children to be served under the by-pass.

(b) After determining that a by-pass is required, the Secretary arranges for the provision of services to private school children with disabilities in the State, LEA or other public agency in a manner consistent with the requirements of section 612(a)(10)(A) of the Act and §§ 300.131 through 300.144 by providing services through one or more agreements with appropriate parties.

(c) For any fiscal year that a by-pass is implemented, the Secretary determines the maximum amount to be paid to the providers of services by multiplying—

(1) A per child amount determined by dividing the total amount received by the State under Part B of the Act for the fiscal year by the number of children with disabilities served in the prior year as reported to the Secretary under section 618 of the Act; by

(2) The number of private school children with disabilities (as defined in §§ 300.8(a) and 300.130) in the State, LEA or other public agency, as determined by the Secretary on the basis of the most recent satisfactory data available, which may include an estimate of the number of those children with disabilities.

(d) The Secretary deducts from the State's allocation under Part B of the Act the amount the Secretary determines is necessary to implement a by-pass and pays that amount to the provider of services. The Secretary may withhold this amount from the State's allocation pending final resolution of any investigation or complaint that could result in a determination that a by-pass must be implemented.

(Authority: 20 U.S.C. 1412(f)(2))

##### **§ 300.192 Notice of intent to implement a by-pass.**

(a) Before taking any final action to implement a by-pass, the Secretary provides the SEA and, as appropriate, LEA or other public agency with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed by-pass in sufficient detail to allow the SEA and, as appropriate, LEA or other public agency to respond; and

(2) Advises the SEA and, as appropriate, LEA or other public agency that it has a specific period of time (at least 45 days) from receipt of the written notice to submit written objections to the proposed by-pass and that it may request in writing the opportunity for a hearing to show cause why a by-pass should not be implemented.

(c) The Secretary sends the notice to the SEA and, as appropriate, LEA or other public agency by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1412(f)(3)(A))

##### **§ 300.193 Request to show cause.**

An SEA, LEA or other public agency in receipt of a notice under § 300.192 that seeks an opportunity to show cause why a by-pass should not be implemented must submit a written request for a show cause hearing to the Secretary, within the specified time period in the written notice in § 300.192(b)(2).

(Authority: 20 U.S.C. 1412(f)(3))

##### **§ 300.194 Show cause hearing.**

(a) If a show cause hearing is requested, the Secretary—

(1) Notifies the SEA and affected LEA or other public agency, and other appropriate public and private school officials of the time and place for the hearing;

(2) Designates a person to conduct the show cause hearing. The designee must not have had any responsibility for the matter brought for a hearing; and

(3) Notifies the SEA, LEA or other public agency, and representatives of private schools that they may be represented by legal counsel and submit oral or written evidence and arguments at the hearing.

(b) At the show cause hearing, the designee considers matters such as—

(1) The necessity for implementing a by-pass;

(2) Possible factual errors in the written notice of intent to implement a by-pass; and

(3) The objections raised by public and private school representatives.

(c) The designee may regulate the course of the proceedings and the

conduct of parties during the pendency of the proceedings. The designee takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order.

(d) The designee has no authority to require or conduct discovery.

(e) The designee may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(f) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(g) Within 10 days after the hearing, the designee—

(1) Indicates that a decision will be issued on the basis of the existing record; or

(2) Requests further information from the SEA, LEA, other public agency, representatives of private schools or Department officials.

(Authority: 20 U.S.C. 1412(f)(3))

#### **§ 300.195 Decision.**

(a) The designee who conducts the show cause hearing—

(1) Within 120 days after the record of a show cause hearing is closed, issues a written decision that includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 30 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies all parties to the show cause hearing of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1412(f)(3))

#### **§ 300.196 Filing requirements.**

(a) Any written submission under § 300.194 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(f) A party must show a proof of mailing to establish the filing date under paragraph (b)(2) of this section as provided in 34 CFR 75.102(d).

(Authority: 20 U.S.C. 1412(f)(3))

#### **§ 300.197 Judicial review.**

If dissatisfied with the Secretary's final action, the SEA may, within 60 days after notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located. The procedures for judicial review are described in section 612(f)(3)(B) through (D) of the Act.

(Authority: 20 U.S.C. 1412(f)(3)(B)–(D))

#### **§ 300.198 Continuation of a by-pass.**

The Secretary continues a by-pass until the Secretary determines that the SEA, LEA or other public agency will meet the requirements for providing services to private school children.

(Authority: 20 U.S.C. 1412(f)(2)(C))

#### **§ 300.199 State administration.**

(a) *Rulemaking.* Each State that receives funds under Part B of the Act must—

(1) Ensure that any State rules, regulations, and policies relating to this part conform to the purposes of this part;

(2) Identify in writing to LEAs located in the State and the Secretary any such rule, regulation, or policy as a State-imposed requirement that is not required by Part B of the Act and Federal regulations; and

(3) Minimize the number of rules, regulations, and policies to which the LEAs and schools located in the State are subject under Part B of the Act.

(b) *Support and facilitation.* State rules, regulations, and policies under Part B of the Act must support and facilitate LEA and school-level system improvement designed to enable children with disabilities to meet the challenging State student academic achievement standards.

(Authority: 20 U.S.C. 1407)

### **Subpart C—Local Educational Agency Eligibility**

#### **§ 300.200 Condition of assistance.**

An LEA is eligible for assistance under Part B of the Act for a fiscal year if the agency submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in §§ 300.201 through 300.213.

(Authority: 20 U.S.C. 1413(a))

#### **§ 300.201 Consistency with State policies.**

The LEA, in providing for the education of children with disabilities within its jurisdiction, must have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under §§ 300.101 through 300.163, and §§ 300.165 through 300.174.

(Authority: 20 U.S.C. 1413(a)(1))

#### **§ 300.202 Use of amounts.**

(a) *General.* Amounts provided to the LEA under Part B of the Act—

(1) Must be expended in accordance with the applicable provisions of this part;

(2) Must be used only to pay the excess costs of providing special education and related services to children with disabilities, consistent with paragraph (b) of this section; and

(3) Must be used to supplement State, local, and other Federal funds and not to supplant those funds.

(b) *Excess cost requirement.* (1) *General.*

(i) The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to paragraph (b)(1)(ii) of this section.

(ii) The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the ages 3, 4, 5, 18, 19, 20, or 21, if no local or State funds are available for nondisabled children of these ages. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services for these children.

(2)(i) An LEA meets the excess cost requirement if it has spent at least a minimum average amount for the education of its children with disabilities before funds under Part B of the Act are used.

(ii) The amount described in paragraph (b)(2)(i) of this section is determined in accordance with the definition of *excess costs* in § 300.16.

That amount may not include capital outlay or debt service.

(3) If two or more LEAs jointly establish eligibility in accordance with § 300.223, the minimum average amount is the average of the combined minimum average amounts determined in accordance with the definition of excess costs in § 300.16 in those agencies for elementary or secondary school students, as the case may be.

(Authority: 20 U.S.C. 1413(a)(2)(A))

### § 300.203 Maintenance of effort.

(a) *General.* Except as provided in §§ 300.204 and 300.205, funds provided to an LEA under Part B of the Act must not be used to reduce the level of expenditures for the education of children with disabilities made by the LEA from local funds below the level of those expenditures for the preceding fiscal year.

(b) *Standard.* (1) Except as provided in paragraph (b)(2) of this section, the SEA must determine that an LEA complies with paragraph (a) of this section for purposes of establishing the LEA's eligibility for an award for a fiscal year if the LEA budgets, for the education of children with disabilities, at least the same total or per-capita amount from either of the following sources as the LEA spent for that purpose from the same source for the most recent prior year for which information is available:

- (i) Local funds only.
- (ii) The combination of State and local funds.

(2) An LEA that relies on paragraph (b)(1)(i) of this section for any fiscal year must ensure that the amount of local funds it budgets for the education of children with disabilities in that year is at least the same, either in total or per capita, as the amount it spent for that purpose in the most recent fiscal year for which information is available and the standard in paragraph (b)(1)(i) of this section was used to establish its compliance with this section.

(3) The SEA may not consider any expenditures made from funds provided by the Federal Government for which the SEA is required to account to the Federal Government or for which the LEA is required to account to the Federal Government directly or through the SEA in determining an LEA's compliance with the requirement in paragraph (a) of this section.

(Authority: 20 U.S.C. 1413(a)(2)(A))

### § 300.204 Exception to maintenance of effort.

Notwithstanding the restriction in § 300.203(a), an LEA may reduce the level of expenditures by the LEA under

Part B of the Act below the level of those expenditures for the preceding fiscal year if the reduction is attributable to any of the following:

(a) The voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel.

(b) A decrease in the enrollment of children with disabilities.

(c) The termination of the obligation of the agency, consistent with this part, to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as determined by the SEA, because the child—

(1) Has left the jurisdiction of the agency;

(2) Has reached the age at which the obligation of the agency to provide FAPE to the child has terminated; or

(3) No longer needs the program of special education.

(d) The termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities.

(e) The assumption of cost by the high cost fund operated by the SEA under § 300.704(c).

(Authority: 20 U.S.C. 1413(a)(2)(B))

### § 300.205 Adjustment to local fiscal efforts in certain fiscal years.

(a) *Amounts in excess.* Notwithstanding § 300.202(a)(2) and (b) and § 300.203(a), and except as provided in paragraph (d) of this section and § 300.230(e)(2), for any fiscal year for which the allocation received by an LEA under section § 300.705 exceeds the amount the LEA received for the previous fiscal year, the LEA may reduce the level of expenditures otherwise required by § 300.203(a) by not more than 50 percent of the amount of that excess.

(b) *Use of amounts to carry out activities under ESEA.* If an LEA exercises the authority under paragraph (a) of this section, the LEA must use an amount of local funds equal to the reduction in expenditures under paragraph (a) of this section to carry out activities that could be supported with funds under the ESEA regardless of whether the LEA is using funds under the ESEA for those activities.

(c) *State prohibition.* Notwithstanding paragraph (a) of this section, if an SEA determines that an LEA is unable to establish and maintain programs of FAPE that meet the requirements of section 613(a) of the Act and this part or the SEA has taken action against the LEA under section 616 of the Act and subpart F of these regulations, the SEA must prohibit the LEA from reducing

the level of expenditures under paragraph (a) of this section for that fiscal year.

(d) *Special rule.* The amount of funds expended by an LEA for early intervening services under § 300.226 shall count toward the maximum amount of expenditures that the LEA may reduce under paragraph (a) of this section.

(Authority: 20 U.S.C. 1413(a)(2)(C))

### § 300.206 Schoolwide programs under title I of the ESEA.

(a) *General.* Notwithstanding the provisions of §§ 300.202 and 300.203 or any other provision of Part B of the Act, an LEA may use funds received under Part B of the Act for any fiscal year to carry out a schoolwide program under section 1114 of the ESEA, except that the amount used in any schoolwide program may not exceed—

(1)(i) The amount received by the LEA under Part B of the Act for that fiscal year; divided by

(ii) The number of children with disabilities in the jurisdiction of the LEA; and multiplied by

(2) The number of children with disabilities participating in the schoolwide program.

(b) *Funding conditions.* The funds described in paragraph (a) of this section are subject to the following conditions:

(1) The funds must be considered as Federal Part B funds for purposes of the calculations required by § 300.202(a)(2) and (a)(3).

(2) The funds may be used without regard to the requirements of § 300.202(a)(1).

(c) *Meeting other Part B requirements.* Except as provided in paragraph (b) of this section, all other requirements of Part B of the Act must be met by an LEA using Part B funds in accordance with paragraph (a) of this section, including ensuring that children with disabilities in schoolwide program schools—

(1) Receive services in accordance with a properly developed IEP; and

(2) Are afforded all of the rights and services guaranteed to children with disabilities under the Act.

(Authority: 20 U.S.C. 1413(a)(2)(D))

### § 300.207 Personnel development.

The LEA must ensure that all personnel necessary to carry out Part B of the Act are appropriately and adequately prepared, subject to the requirements of § 300.156 (related to personnel qualifications) and section 2122 of the ESEA.

(Authority: 20 U.S.C. 1413(a)(3))

**§ 300.208 Permissive use of funds.**

(a) *Uses.* Notwithstanding §§ 300.202, 300.203(a), and § 300.162(b), funds provided to an LEA under Part B of the Act may be used for the following activities:

(1) *Services and aids that also benefit nondisabled children.* For the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child, even if one or more nondisabled children benefit from these services.

(2) *Early intervening services.* To develop and implement coordinated, early intervening educational services in accordance with § 300.226.

(3) *High cost education and related services.* To establish and implement cost or risk sharing funds, consortia, or cooperatives for the LEA itself, or for LEAs working in a consortium of which the LEA is a part, to pay for high cost special education and related services.

(b) *Administrative case management.* An LEA may use funds received under Part B of the Act to purchase appropriate technology for recordkeeping, data collection, and related case management activities of teachers and related services personnel providing services described in the IEP of children with disabilities, that is needed for the implementation of those case management activities.

(Authority: 20 U.S.C. 1413(a)(4))

**§ 300.209 Treatment of charter schools and their students.**

(a) *Rights of children with disabilities.* Children with disabilities who attend public charter schools and their parents retain all rights under this part.

(b) *Charter schools that are public schools of the LEA.* (1) In carrying out Part B of the Act and these regulations with respect to charter schools that are public schools of the LEA, the LEA must—

(i) Serve children with disabilities attending those charter schools in the same manner as the LEA serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the LEA has a policy or practice of providing such services on the site to its other public schools; and

(ii) Provides funds under Part B of the Act to those charter schools—

(A) On the same basis as the LEA provides funds to the LEA's other public schools, including proportional distribution based on relative

enrollment of children with disabilities; and

(B) At the same time as the LEA distributes other Federal funds to the LEA's other public schools, consistent with the State's charter school law.

(2) If the public charter school is a school of an LEA that receives funding under § 300.705 and includes other public schools—

(i) The LEA is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity; and

(ii) The LEA must meet the requirements of paragraph (b)(1) of this section.

(c) *Public charter schools that are LEAs.* If the public charter school is an LEA, consistent with § 300.28, that receives funding under § 300.705, that charter school is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity.

(d) *Public charter schools that are not an LEA or a school that is part of an LEA.* (1) If the public charter school is not an LEA receiving funding under § 300.705, or a school that is part of an LEA receiving funding under § 300.705, the SEA is responsible for ensuring that the requirements of this part are met.

(2) Paragraph (d)(1) of this section does not preclude a State from assigning initial responsibility for ensuring the requirements of this part are met to another entity. However, the SEA must maintain the ultimate responsibility for ensuring compliance with this part, consistent with § 300.149.

(Authority: 20 U.S.C. 1413(a)(5))

**§ 300.210 Purchase of instructional materials.**

(a) *General.* Not later than December 3, 2006, two years after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004, an LEA that chooses to coordinate with the National Instructional Materials Access Center, when purchasing print instructional materials, must acquire those instructional materials in the same manner, and subject to the same conditions as an SEA under § 300.172.

(b) *Rights of LEA.* (1) Nothing in this section shall be construed to require an LEA to coordinate with the National Instructional Materials Access Center.

(2) If an LEA chooses not to coordinate with the National Instructional Materials Access Center, the LEA must provide an assurance to the SEA that the LEA will provide instructional materials to blind persons

or other persons with print disabilities in a timely manner.

(3) Nothing in this section relieves an LEA of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats but for whom the NIMAC may not provide assistance, receive those instructional materials in a timely manner.

(Authority: 20 U.S.C. 1413(a)(6))

**§ 300.211 Information for SEA.**

The LEA must provide the SEA with information necessary to enable the SEA to carry out its duties under Part B of the Act, including, with respect to §§ 300.157 and 300.160, information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act.

(Authority: 20 U.S.C. 1413(a)(7))

**§ 300.212 Public information.**

The LEA must make available to parents of children with disabilities and to the general public all documents relating to the eligibility of the agency under Part B of the Act.

(Authority: 20 U.S.C. 1413(a)(8))

**§ 300.213 Records regarding migratory children with disabilities.**

The LEA must cooperate in the Secretary's efforts under section 1308 of the ESEA to ensure the linkage of records pertaining to migratory children with disabilities for the purpose of electronically exchanging, among the States, health and educational information regarding those children.

(Authority: 20 U.S.C. 1413(a)(9))

**§§ 300.214–300.219 [Reserved]****§ 300.220 Exception for prior local plans.**

(a) *General.* If an LEA or a State agency described in § 300.228 has on file with the SEA policies and procedures that demonstrate that the LEA or State agency meets any requirement of § 300.200, including any policies and procedures filed under Part B of the Act as in effect before December 3, 2004, the SEA must consider the LEA or State agency to have met that requirement for purposes of receiving assistance under Part B of the Act.

(b) *Modification made by an LEA or State agency.* Subject to paragraph (c) of this section, policies and procedures submitted by an LEA or a State agency in accordance with this subpart remain in effect until the LEA or State agency submits to the SEA the modifications that the LEA or State agency determines are necessary.

(c) *Modifications required by the SEA.* The SEA may require an LEA or a State agency to modify its policies and procedures, but only to the extent necessary to ensure the LEA's or State agency's compliance with Part B of the Act or State law, if—

(1) After December 3, 2004, the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the applicable provisions of the Act (or the regulations developed to carry out the Act) are amended;

(2) There is a new interpretation of an applicable provision of the Act by Federal or State courts; or

(3) There is an official finding of noncompliance with Federal or State law or regulations.

(Authority: 20 U.S.C. 1413(b))

**§ 300.221 Notification of LEA or State agency in case of ineligibility.**

If the SEA determines that an LEA or State agency is not eligible under Part B of the Act, then the SEA must—

(a) Notify the LEA or State agency of that determination; and

(b) Provide the LEA or State agency with reasonable notice and an opportunity for a hearing.

(Authority: 20 U.S.C. 1413(c))

**§ 300.222 LEA and State agency compliance.**

(a) *General.* If the SEA, after reasonable notice and an opportunity for a hearing, finds that an LEA or State agency that has been determined to be eligible under this subpart is failing to comply with any requirement described in §§ 300.201 through 300.213, the SEA must reduce or must not provide any further payments to the LEA or State agency until the SEA is satisfied that the LEA or State agency is complying with that requirement.

(b) *Notice requirement.* Any State agency or LEA in receipt of a notice described in paragraph (a) of this section must, by means of public notice, take the measures necessary to bring the pendency of an action pursuant to this section to the attention of the public within the jurisdiction of the agency.

(c) *Consideration.* In carrying out its responsibilities under this section, each SEA must consider any decision resulting from a hearing held under §§ 300.511 through 300.533 that is adverse to the LEA or State agency involved in the decision.

(Authority: 20 U.S.C. 1413(d))

**§ 300.223 Joint establishment of eligibility.**

(a) *General.* An SEA may require an LEA to establish its eligibility jointly with another LEA if the SEA determines that the LEA will be ineligible under

this subpart because the agency will not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

(b) *Charter school exception.* An SEA may not require a charter school that is an LEA to jointly establish its eligibility under paragraph (a) of this section unless the charter school is explicitly permitted to do so under the State's charter school statute.

(c) *Amount of payments.* If an SEA requires the joint establishment of eligibility under paragraph (a) of this section, the total amount of funds made available to the affected LEAs must be equal to the sum of the payments that each LEA would have received under § 300.705 if the agencies were eligible for those payments.

(Authority: 20 U.S.C. 1413(e)(1) and (2))

**§ 300.224 Requirements for establishing eligibility.**

(a) *Requirements for LEAs in general.* LEAs that establish joint eligibility under this section must—

(1) Adopt policies and procedures that are consistent with the State's policies and procedures under §§ 300.101 through 300.163, and §§ 300.165 through 300.174; and

(2) Be jointly responsible for implementing programs that receive assistance under Part B of the Act.

(b) *Requirements for educational service agencies in general.* If an educational service agency is required by State law to carry out programs under Part B of the Act, the joint responsibilities given to LEAs under Part B of the Act—

(1) Do not apply to the administration and disbursement of any payments received by that educational service agency; and

(2) Must be carried out only by that educational service agency.

(c) *Additional requirement.* Notwithstanding any other provision of §§ 300.223 through 300.224, an educational service agency must provide for the education of children with disabilities in the least restrictive environment, as required by § 300.112.

(Authority: 20 U.S.C. 1413(e)(3) and (4))

**§ 300.225 [Reserved]**

**§ 300.226 Early intervening services.**

(a) *General.* An LEA may not use more than 15 percent of the amount such agency receives under Part B of the Act for any fiscal year, less any amount reduced by the agency pursuant to § 300.205, if any, in combination with other amounts (which may include amounts other than education funds), to

develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who have not been identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.

(b) *Activities.* In implementing coordinated, early intervening services under this section, an LEA may carry out activities that include—

(1) Professional development (which may be provided by entities other than LEAs) for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and

(2) Providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.

(c) *Construction.* Nothing in this section shall be construed to either limit or create a right to FAPE under Part B of the Act or to delay appropriate evaluation of a child suspected of having a disability.

(d) *Reporting.* Each LEA that develops and maintains coordinated, early intervening services under this section must annually report to the SEA on—

(1) The number of children served under this section; and

(2) The number of children served under this section who subsequently receive special education and related services under Part B of the Act during the preceding two year period.

(e) *Coordination with ESEA.* Funds made available to carry out this section may be used to carry out coordinated, early intervening services aligned with activities funded by, and carried out under the ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for the activities and services assisted under this section.

(Authority: 20 U.S.C. 1413(f))

**§ 300.227 Direct services by the SEA.**

(a) *General.* (1) An SEA must use the payments that would otherwise have been available to an LEA or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that LEA, or for whom that State agency is responsible, if the SEA

determines that the LEA or State agency—

(i) Has not provided the information needed to establish the eligibility of the LEA or State agency, or elected not to apply for its Part B allotment, under Part B of the Act;

(ii) Is unable to establish and maintain programs of FAPE that meet the requirements of this part;

(iii) Is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain the programs; or

(iv) Has one or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of these children.

(2) *SEA administrative procedures.* (i) In meeting the requirements in paragraph (a)(1) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

(ii) The excess cost requirements of § 300.202(b) do not apply to the SEA.

(b) *Manner and location of education and services.* The SEA may provide special education and related services under paragraph (a) of this section in the manner and at the locations (including regional or State centers) as the SEA considers appropriate. The education and services must be provided in accordance with this part.

(Authority: 20 U.S.C. 1413(g))

#### **§ 300.228 State agency eligibility.**

Any State agency that desires to receive a subgrant for any fiscal year under § 300.705 must demonstrate to the satisfaction of the SEA that—

(a) All children with disabilities who are participating in programs and projects funded under Part B of the Act receive FAPE, and that those children and their parents are provided all the rights and procedural safeguards described in this part; and

(b) The agency meets the other conditions of this subpart that apply to LEAs.

(Authority: 20 U.S.C. 1413(h))

#### **§ 300.229 Disciplinary information.**

(a) The State may require that a public agency include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children.

(b) The statement may include a description of any behavior engaged in by the child that required disciplinary

action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

(c) If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action that has been taken against the child.

(Authority: 20 U.S.C. 1413(i))

#### **§ 300.230 SEA flexibility.**

(a) *Adjustment to State fiscal effort in certain fiscal years.* For any fiscal year for which the allotment received by a State under § 300.703 exceeds the amount the State received for the previous fiscal year and if the State in school year 2003–2004 or any subsequent school year pays or reimburses all LEAs within the State from State revenue 100 percent of the non-Federal share of the costs of special education and related services, the SEA, notwithstanding §§ 300.162 through 300.163 (related to State-level nonsupplanting and maintenance of effort), and § 300.175 (related to direct services by the SEA) may reduce the level of expenditures from State sources for the education of children with disabilities by not more than 50 percent of the amount of such excess.

(b) *Prohibition.* Notwithstanding paragraph (a) of this section, if the Secretary determines that an SEA is unable to establish, maintain, or oversee programs of FAPE that meet the requirements of this part, or that the State needs assistance, intervention, or substantial intervention under § 300.603, the Secretary prohibits the SEA from exercising the authority in paragraph (a) of this section.

(c) *Education activities.* If an SEA exercises the authority under paragraph (a) of this section, the agency must use funds from State sources, in an amount equal to the amount of the reduction under paragraph (a) of this section, to support activities authorized under the ESEA, or to support need-based student or teacher higher education programs.

(d) *Report.* For each fiscal year for which an SEA exercises the authority under paragraph (a) of this section, the SEA must report to the Secretary—

(1) The amount of expenditures reduced pursuant to that paragraph; and

(2) The activities that were funded pursuant to paragraph (c) of this section.

(e) *Limitation.* (1) Notwithstanding paragraph (a) of this section, an SEA may not reduce the level of expenditures described in paragraph (a)

of this section if any LEA in the State would, as a result of such reduction, receive less than 100 percent of the amount necessary to ensure that all children with disabilities served by the LEA receive FAPE from the combination of Federal funds received under Part B of the Act and State funds received from the SEA.

(2) If an SEA exercises the authority under paragraph (a) of this section, LEAs in the State may not reduce local effort under § 300.205 by more than the reduction in the State funds they receive.

(Authority: 20 U.S.C. 1413(j))

### **Subpart D—Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements**

#### **Parental Consent**

##### **§ 300.300 Parental consent.**

(a) Consent for initial evaluation. (1)(i) Except as provided in paragraph (a)(2) of this section (regarding consent for wards of the State), the public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must obtain informed consent from the parent of the child before conducting the evaluation.

(ii) Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

(2)(i) If the child is a ward of the State and is not residing with the child's parent, the public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.

(ii) The public agency is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if—

(A) Despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child;

(B) The rights of the parents of the child have been terminated in accordance with State law; or

(C) The rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

(3) If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the

parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent.

(b) *Parental consent for services.* (1) A public agency that is responsible for making FAPE available to a child with a disability must seek to obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

(2) If the parent of a child fails to respond or refuses to consent to services under paragraph (b)(1) of this section, the public agency may not use the procedures in Subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child.

(3) If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency—

(i) Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and

(ii) Is not required to convene an IEP meeting or develop an IEP under §§ 300.320 and 300.324 for the child for the special education and related services for which the public agency requests such consent.

(c) *Parental consent for reevaluations.* (1) Subject to paragraph (c)(2) of this section, each public agency must obtain informed parental consent, in accordance with § 300.300(a), prior to conducting any reevaluation of a child with a disability.

(2) The informed parental consent described in paragraph (c)(1) of this section need not be obtained if the public agency can demonstrate that—

(i) It had taken reasonable measures to obtain such consent; and

(ii) The child's parent has failed to respond.

(d) *Other consent requirements.*

(1) Parental consent is not required before—(i) Reviewing existing data as

part of an evaluation or a reevaluation; or

(ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(2) In addition to the parental consent requirements described in paragraph (a) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(3) A public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a) and (d)(2) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.

(Authority: 20 U.S.C. 1414(a)(1)(D) and 1414(c))

## Evaluations and Reevaluations

### § 300.301 Initial evaluations.

(a) *General.* Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) *Request for initial evaluation.* Consistent with the consent requirements in § 300.300, either a parent of a child, or a public agency, may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(c) *Procedures for initial evaluation.* The initial evaluation—

(1)(i) Must be conducted within 60 days of receiving parental consent for the evaluation; or

(ii) If the State establishes a timeframe within which the evaluation must be conducted, within that timeframe; and

(2) Must consist of procedures—

(i) To determine if the child is a child with a disability under § 300.8; and

(ii) To determine the educational needs of the child.

(d) *Exception.* The timeframe described in paragraph (c)(1) of this section shall not apply to a public agency if—

(1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation; or

(2)(i) A child enrolls in a school served by the public agency after the relevant timeframe in paragraph (c)(1) of this section has begun, and prior to a determination by the child's previous

public agency as to whether the child is a child with a disability under § 300.8.

(ii) The exception in paragraph (c)(2)(ii)(A) of this section applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.

(Authority: 20 U.S.C. 1414(a))

### § 300.302 Screening for instructional purposes is not evaluation.

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

(Authority: 20 U.S.C. 1414(a)(1)(E))

### § 300.303 Reevaluations.

(a) *General.* A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation.

(b) *Limitation.* A reevaluation conducted under paragraph (a) of this section—

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

(Authority: 20 U.S.C. 1414(a)(2))

### § 300.304 Evaluation procedures.

(a) *Notice.* The public agency must provide notice to the parents of a child with a disability, in accordance with § 300.503, that describes any evaluation procedures the agency proposes to conduct.

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to

enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single procedure as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same academic year are

coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

(Authority: 20 U.S.C. 1414(b)(1)–(3), 1412(a)(6)(B))

#### **§ 300.305 Additional requirements for evaluations and reevaluations.**

(a) *Review of existing evaluation data.* As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—

(1) Review existing evaluation data on the child, including—

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based local or State assessments, and classroom-based observations; and

(iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

(i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or

(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;

(ii) The present levels of academic achievement and related developmental needs of the child;

(iii)(A) Whether the child needs special education and related services; or

(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

(b) *Conduct of review.* The group described in paragraph (a) of this

section may conduct its review without a meeting.

(c) *Source of data.* The public agency must administer such assessments and other evaluation measures as may be needed to produce the data identified under paragraph (a) of this section.

(d) *Requirements if additional data are not needed.*

(1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of—

(i) That determination and the reasons for the determination; and

(ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.

(2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents.

(e) *Evaluations before change in placement.*

(1) Except as provided in paragraph (e)(2) of this section, a public agency must evaluate a child with a disability in accordance with §§ 300.304 through 300.311 before determining that the child is no longer a child with a disability.

(2) The evaluation described in paragraph (e)(1) of this section is not required before the termination of a child's eligibility under this part due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under State law.

(3) For a child whose eligibility terminates under circumstances described in paragraph (e)(2) of this section, a public agency must provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

(Authority: 20 U.S.C. 1414(c))

#### **§ 300.306 Determination of eligibility.**

(a) *General.* Upon completion of the administration of assessments and other evaluation measures—

(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and

(2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility to the parent.

(b) *Special rule for eligibility determination.* A child must not be determined to be a child with a disability under this part—

(1) If the determinant factor for that determination is—

(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(ii) Lack of instruction in math; or

(iii) Limited English proficiency; and

(2) If the child does not otherwise meet the eligibility criteria under § 300.8(a).

(c) *Procedures for determining eligibility and placement.* (1) In

interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, each public agency must—

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.320 through 300.324.

(Authority: 20 U.S.C. 1414(b)(4) and (5))

### **Additional Procedures for Evaluating Children With Specific Learning Disabilities**

#### **§ 300.307 Specific learning disabilities.**

(a) *General.* A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8. In addition, the criteria adopted by the State—

(1) May prohibit the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability as defined in § 300.8;

(2) May not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability as defined in § 300.8;

(3) Must permit the use of a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures described in § 300.304; and

(4) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability as defined in § 300.8.

(b) *Consistency with State criteria.* A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

#### **§ 300.308 Group members.**

The determination of whether a child suspected of having a specific learning disability is a child with a disability, as defined in § 300.8, is made by the child's parents and the group described under § 300.306(a)(1) that—

(a) Is collectively qualified to—

(1) Conduct, as appropriate, individual diagnostic assessments in the areas of speech and language, academic achievement, intellectual development, and social-emotional development;

(2) Interpret assessment and intervention data, and apply critical analysis to those data;

(3) Develop appropriate educational and transitional recommendations based on the assessment data; and

(4) Deliver, and monitor specifically designed instruction and services to meet the needs of a child with a specific learning disability; and

(b) Includes—(1) A special education teacher;

(2)(i) The child's general education teacher; or

(ii) If the child does not have a general education teacher, a general education teacher qualified to teach a child of the child's age; and

(c) Other professionals, if appropriate, such as a school psychologist, reading teacher, or educational therapist.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

#### **§ 300.309 Determining the existence of a specific learning disability.**

(a) The group described in § 300.308 may determine that a child has a specific learning disability if—

(1) The child does not achieve commensurate with the child's age in one or more of the following areas, when provided with learning experiences appropriate for the child's age:

(i) Oral expression.

(ii) Listening comprehension.

(iii) Written expression.

(iv) Basic reading skill.

(v) Reading fluency skills.

(vi) Reading comprehension.

(vii) Mathematics calculation.

(viii) Mathematics problem solving.

(2)(i) The child fails to achieve a rate of learning to make sufficient progress to meet State-approved results in one or more of the areas identified in paragraph (a)(1) of this section when assessed with a response to scientific, research-based intervention process; or

(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, or a pattern of strengths and weaknesses in performance, achievement, or both, relative to intellectual development, that is determined by the team to be relevant to the identification of a specific learning disability, using appropriate assessments consistent with §§ 300.304 and 300.305; and

(3) The group determines that its findings under paragraph (a)(1) and (2) of this section are not primarily the result of—

(i) A visual, hearing, or motor disability;

(ii) Mental retardation;

(iii) Emotional disturbance;

(iv) Cultural factors; or

(v) Environmental or economic disadvantage.

(b) For a child suspected of having a specific learning disability, the group must consider, as part of the evaluation described in §§ 300.304 through 300.306, data that demonstrates that—

(1) Prior to, or as a part of the referral process, the child was provided appropriate high-quality, research-based instruction in regular education settings, consistent with section 1111(b)(8)(D) and (E) of the ESEA, including that the instruction was delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, was provided to the child's parents.

(c) If the child has not made adequate progress after an appropriate period of time, during which the conditions in paragraphs (b)(1) and (2) of this section have been implemented, a referral for an evaluation to determine if the child needs special education and related services must be made.

(d) Once the child is referred for an evaluation to determine if the child needs special education and related services, the timelines described in §§ 300.301 and 300.303 must be adhered to, unless extended by mutual written agreement of the child's parents and a group of qualified professionals, as described in § 300.308.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

**§ 300.310 Observation.**

(a) At least one member of the group described in § 300.308, other than the child's current teacher, who is trained in observation, shall observe the child, and the learning environment, including the regular classroom setting, to document academic performance and behavior in the areas of difficulty.

(b) In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

**§ 300.311 Written report.**

(a) For a child suspected of having a specific learning disability, the evaluation report and the documentation of the determination of eligibility, as required by § 300.306(a)(2), must include a statement of—

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination, including an assurance that the determination has been made in accordance with § 300.306(c)(1);

(3) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;

(4) The educationally relevant medical findings, if any;

(5) Whether the child does not achieve commensurate with the child's age;

(6) Whether there are strengths and weaknesses in performance or achievement or both, or there are strengths and weaknesses in performance or achievement, or both, relative to intellectual development in one or more of the areas described in § 300.309(a) that require special education and related services; and

(7) The instructional strategies used and the student-centered data collected if a response to scientific, research-based intervention process, as described in § 300.309 was implemented.

(b) Each group member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the group member must submit a separate statement presenting his or her conclusions.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

**Individualized Education Programs****§ 300.320 Definition of individualized education program.**

(a) *General.* As used in this part, the term individualized education program

or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, and that must include—

(1) A statement of the child's present levels of academic achievement and functional performance, including—

(i) How the child's disability affects the child's involvement and progress in the general education curriculum (*i.e.*, the same curriculum as for nondisabled children); or

(ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to—

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability;

(ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(3) A description of—

(i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and

(ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(5) An explanation of the extent, if any, to which the child will not

participate with nondisabled children in the regular education environment and in the activities described in paragraph (a)(4) of this section;

(6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with § 300.160; and

(ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—

(A) The child cannot participate in the regular assessment; and

(B) The particular alternate assessment selected is appropriate for the child; and

(7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

(b) *Transition services.* Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include—

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

(c) *Transfer of rights at age of majority.* Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under § 300.520.

(d) *Construction.* Nothing in this section shall be construed to require—

(1) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act; or

(2) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

(Authority: 20 U.S.C. 1414(d)(1)(A) and (d)(6))

**§ 300.321 IEP Team.**

(a) *General.* The public agency must ensure that the IEP Team for each child with a disability includes—

- (1) The parents of the child;
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who—
  - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (ii) Is knowledgeable about the general education curriculum; and
  - (iii) Is knowledgeable about the availability of resources of the public agency.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (7) Whenever appropriate, the child with a disability.

(b) *Transition services participants.*

(1) In accordance with paragraph (a)(7) of this section, the public agency must invite a child with a disability to attend the child's IEP meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals under § 300.320(b).

(2) If the child does not attend the IEP meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered.

(3) To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

(c) *Determination of knowledge and special expertise.* The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section must be made by the party (parents or public agency) who

invited the individual to be a member of the IEP Team.

(d) *Designating a public agency representative.* A public agency may designate a public agency member of the IEP Team to also serve as the agency representative, if the criteria in paragraph (a)(4) of this section are satisfied.

(e) *IEP Team attendance.*

(1) A member of the IEP Team is not required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(2) A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

- (i) The parent, in writing, and the public agency consent to the excusal; and
- (ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(f) *Initial IEP meeting for child under Part C.* In the case of a child who was previously served under Part C of the Act, an invitation to the initial IEP meeting must, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services.

(Authority: 20 U.S.C. 1401(30), 1414(d)(1)(A)(7), (B))

**§ 300.322 Parent participation.**

(a) *Public agency responsibility—general.* Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including—

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place.

(b) *Information provided to parents.* (1) The notice required under paragraph (a)(1) of this section must—

- (i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and
- (ii) Inform the parents of the provisions in § 300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child).

(2) For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice also must—

- (i) Indicate—
  - (A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with § 300.320(b); and
  - (B) That the agency will invite the student; and
- (ii) Identifies any other agency that will be invited to send a representative.

(c) *Other methods to ensure parent participation.* If neither parent can attend, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with § 300.328 (related to alternative means of meeting participation).

(d) *Conducting an IEP meeting without a parent in attendance.* A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place.

(e) *Parent copy of child's IEP.* The public agency must give the parent a copy of the child's IEP at no cost to the parent.

(Authority: 20 U.S.C. 1414(d)(1)(B)(i))

**§ 300.323 When IEPs must be in effect.**

(a) *General.* At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.

(b) *IEP or IFSP for children aged three through five.*

(1) In the case of a child with a disability aged three through five (or, at the discretion of the SEA, a two-year-old child with a disability who will turn age three during the school year), the IEP Team must consider an IFSP that contains the IFSP content (including the natural environments statement) described in section 636(d) of the Act and its implementing regulations (including an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children with IFSPs under this section who are at least three years of age), and that is developed in accordance with the IEP procedures under this part. The IFSP may serve as the IEP of the child, if using the IFSP as the IEP is—

- (i) Consistent with State policy; and
- (ii) Agreed to by the agency and the child's parents.

(2) In implementing the requirements of paragraph (b)(1) of this section, the public agency must—

(i) Provide to the child's parents a detailed explanation of the differences between an IFSP and an IEP; and

(ii) If the parents choose an IFSP, obtain written informed consent from the parents.

(c) *Initial IEPs; provision of services.* Each public agency must ensure that—

(1) A meeting to develop an IEP for a child is conducted within 30-days of a determination that the child needs special education and related services; and

(2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

(d) *Accessibility of child's IEP to teachers and others.* Each public agency must ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation.

(e) *Program for children who transfer public agencies.* (1)(i) In the case of a child with a disability who transfers public agencies within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the public agency, in consultation with the parents, must provide FAPE to the child, including services comparable to those described in the previously held IEP, until such time as the public agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(ii) In the case of a child with a disability who transfers public agencies within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the public agency, in consultation with the parents, must provide the child with FAPE, including services comparable to those described in the previously held IEP, until such time as the public agency conducts an evaluation pursuant to §§ 300.304 through 300.306, if determined to be necessary by the public agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

(2) To facilitate the transition for a child described in paragraph (e)(1) of this section—

(i) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other

records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(ii) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

(Authority: 20 U.S.C. 1414(d)(2)(A)-(C))

#### Development of IEP

##### § 300.324 Development, review, and revision of IEP.

(a) Development of IEP. (1) *General.* In developing each child's IEP, the IEP Team must consider—

- (i) The strengths of the child;
- (ii) The concerns of the parents for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental, and functional needs of the child.

(2) *Consideration of special factors.* The IEP Team must—

(i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child needs assistive technology devices and services.

(3) *Requirement with respect to regular education teacher.* A regular education teacher of a child with a disability, as a member of the IEP Team,

must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of—

(i) Appropriate positive behavioral interventions and supports and other strategies for the child; and

(ii) Supplementary aids and services, program modifications, and support for school personnel consistent with § 300.320(a)(4).

(4) *Agreement.* In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.

(5) *Consolidation of IEP Team meetings.* To the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(6) *Amendments.* Changes to the IEP may be made either by the entire IEP Team or, as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

(b) *Review and revision of IEPs.*

(1) *General.* Each public agency must ensure that, subject to paragraph (b)(2) of this section, the IEP Team—

(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under § 300.303;

(C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

(2) *Requirement with respect to regular education teacher.* A regular education teacher of the child, as a member of the IEP Team, must, consistent with paragraph (a)(3) of this section, participate in the review and revision of the IEP of the child.

(c) *Failure to meet transition objectives.*

(1) *Participating agency failure.* If a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with § 300.320(b), the

public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(2) *Construction.* Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency.

(d) *Children with disabilities in adult prisons.*

(1) *Requirements that do not apply.*

The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in § 300.160 and § 300.320(a)(6) (relating to participation of children with disabilities in general assessments).

(ii) The requirements in § 300.320(b) (relating to transition planning and transition services), do not apply with respect to the children whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

(2) *Modifications of IEP or placement.*

(i) Subject to paragraph (c)(2)(ii) of this section, the IEP Team of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(ii) The requirements of §§ 300.320 (relating to IEPs), and 300.112 (relating to LRE), do not apply with respect to the modifications described in paragraph (c)(1) of this section.

(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(12)(A)(i), 1414(d)(3), (4)(B), and (7); and 1414(e))

### **§ 300.325 Private school placements by public agencies.**

(a) *Developing IEPs.* (1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child in accordance with §§ 300.320 and 300.324.

(2) The agency must ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency must use other methods to ensure participation by the private school or

facility, including individual or conference telephone calls.

(b) *Reviewing and revising IEPs.* (1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency must ensure that the parents and an agency representative—

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the IEP before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

(Authority: 20 U.S.C. 1412(a)(10)(B))

### **§ 300.326 [Reserved]**

### **§ 300.327 Educational placements.**

Consistent with § 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

(Authority: 20 U.S.C. 1414(e))

### **§ 300.328 Alternative means of meeting participation.**

When conducting IEP Team meetings and placement meetings pursuant to this subpart, and Subpart E, and carrying out administrative matters under section 615 of the Act (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a public agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(Authority: 20 U.S.C. 1414(f))

## **Subpart E—Procedural Safeguards**

### **Due Process Procedures for Parents and Children**

#### **§ 300.500 Responsibility of SEA and other public agencies.**

Each SEA must ensure that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of §§ 300.500 through 300.536.

(Authority: 20 U.S.C. 1415(a))

#### **§ 300.501 Opportunity to examine records; parent participation in meetings.**

(a) *Opportunity to examine records.* The parents of a child with a disability must be afforded, in accordance with

the procedures of §§ 300.610 through 300.628, an opportunity to inspect and review all education records with respect to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(b) *Parent participation in meetings.*

(1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

(2) Each public agency must provide notice consistent with § 300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.

(3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) *Parent involvement in placement decisions.* (1) Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency must use procedures consistent with the procedures described in § 300.322(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.

(Authority: 20 U.S.C. 1414(e), 1415(b)(1))

**§ 300.502 Independent educational evaluation.**

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart—  
(i) *Independent educational evaluation* means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) *Public expense* means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.

(b) *Parent right to evaluation at public expense.*

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at

public expense or requesting a due process hearing to defend the public evaluation.

(c) *Parent-initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation—

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1) and (d)(2)(A))

**§ 300.503 Prior notice by the public agency; content of notice.**

(a) *Notice.* Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) *Content of notice.* The notice required under paragraph (a) of this section must include—

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection

under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the agency's proposal or refusal.

(c) *Notice in understandable language.* (1) The notice required under paragraph (a) of this section must be—

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure—

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met.

(Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1))

**§ 300.504 Procedural safeguards notice.**

(a) *General.* A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a year, except that a copy also must be given to the parents—

(1) Upon initial referral or parent request for evaluation;

(2) Upon receipt of the first State complaint under §§ 300.151 through 300.153 or a due process complaint under § 300.507 in that school year; and

(3) Upon request by a parent.

(b) *Internet Web site.* A public agency may place a current copy of the procedural safeguards notice on its Internet Web site if a Web site exists.

(c) *Contents.* The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under § 300.148, §§ 300.151 through 300.153, §§ 300.500 through 300.536, and §§ 300.610 through 300.627 relating to—

(1) Independent educational evaluations;

(2) Prior written notice;  
 (3) Parental consent;  
 (4) Access to educational records;  
 (5) Opportunity to present and resolve complaints through the due process complaint or State complaint procedures, including—

(i) The time period in which to file a complaint;

(ii) The opportunity for the agency to resolve the complaint; and

(iii) The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;

(6) The availability of mediation;

(7) The child's placement during pendency of hearings on due process complaints;

(8) Procedures for students who are subject to placement in an interim alternative educational setting;

(9) Requirements for unilateral placement by parents of children in private schools at public expense;

(10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;

(11) State-level appeals (if applicable in that State);

(12) Civil actions, including the time period in which to file those actions; and

(13) Attorneys' fees.

(d) *Notice in understandable language.* The notice required under paragraph (a) of this section must meet the requirements of § 300.503(c).

(Authority: 20 U.S.C. 1415(d)(1) and (2))

#### § 300.505 Electronic mail.

A parent of a child with a disability may elect to receive notices required by §§ 300.503, 300.504, and 300.508 by an electronic mail communication, if the public agency makes that option available.

(Authority: 20 U.S.C. 1415(n))

#### § 300.506 Mediation.

(a) *General.* Each public agency must ensure that procedures are established and implemented to allow parties to disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process.

(b) *Requirements.* The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process—

(i) Is voluntary on the part of the parties;

(ii) Is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and

(iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2) A public agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party—

(i) Who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State established under section 671 or 672 of the Act; and

(ii) Who would explain the benefits of, and encourage the use of, the mediation process to the parents.

(3)(i) The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(ii) The SEA must select mediators on a random, rotational, or other impartial basis.

(4) The State must bear the cost of the mediation process, including the costs of meetings described in paragraph (b)(2) of this section.

(5) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(6) If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that—

(i) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding arising from that dispute; and

(ii) Is signed by both the parent and a representative of the agency who has the authority to bind such agency.

(7) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(8) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceedings arising from that dispute.

(9) The parties to mediation may be required to sign a confidentiality pledge prior to the commencement of the

mediation to ensure that all discussions that occur during mediation remain confidential.

(c) *Impartiality of mediator.* (1) An individual who serves as a mediator under this part—

(i) May not be an employee of the SEA or the LEA that is involved in the education or care of the child; and

(ii) Must not have a personal or professional interest that conflicts with the person's objectivity.

(2) A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency described under § 300.228 solely because he or she is paid by the agency to serve as a mediator.

(Authority: 20 U.S.C. 1415(e))

#### § 300.507 Filing a due process complaint.

(a) *General.* (1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in § 300.511(f) apply to the timeline in this section.

(b) *Information for parents.* The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if—

(1) The parent requests the information; or

(2) The parent or the agency requests a hearing under this section.

(Authority: 20 U.S.C. 1415(b)(6))

#### § 300.508 Due process complaint.

(a) *General.* (1) The public agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential).

(2) The party filing a due process complaint must forward a copy of the due process complaint to the SEA.

(b) *Content of complaint.* The due process complaint required in paragraph (a)(1) of this section must include—

(1) The name of the child;

(2) The address of the residence of the child;

(3) The name of the school the child is attending;

(4) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;

(5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) *Notice required before a hearing on a due process complaint.* A party may not have a hearing on a due process complaint or engage in a resolution session until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (b) of this section.

(d) *Sufficiency of complaint.* (1) The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in paragraph (b) of this section.

(2) Within five days of receipt of notification under paragraph (d)(1) of this section, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of paragraph (b) of this section, and must immediately notify the parties in writing of that determination.

(3) A party may amend its due process complaint only if—

(i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to § 300.510; or

(ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(4) If a party files an amended due process complaint, the timelines for the resolution meeting in § 300.510(a) and the time period to resolve in § 300.510(b) begin again with the filing of the amended due process complaint.

(e) *LEA response to a due process complaint.* (1) If the LEA has not sent

a prior written notice under § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes—

(i) An explanation of why the agency proposed or refused to take the action raised in the due process complaint;

(ii) A description of other options that the IEP Team considered and the reasons why those options were rejected;

(iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(iv) A description of the other factors that are relevant to the agency's proposed or refused action.

(2) A response by an LEA under paragraph (1) of this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient, where appropriate.

(f) *Other party response to a due process complaint.* Except as provided in paragraph (e) of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

(Authority: 20 U.S.C. 1415(b)(7), 1415(c)(2))

#### § 300.509 Model forms.

Each SEA must develop model forms to assist parents in filing a due process complaint in accordance with §§ 300.507(a) and 300.508(a) through (c) and in filing a State complaint under §§ 300.151 through 300.153.

(Authority: 20 U.S.C. 1415(b)(8))

#### § 300.510 Resolution process.

(a) *Resolution meeting.* (1) Within 15 days of receiving notice of the parents' due process complaint, and prior to the initiation of a due process hearing under § 300.511, the LEA must convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that—

(i) Includes a representative of the public agency who has decision-making authority on behalf of that agency; and

(ii) May not include an attorney of the LEA unless the parent is accompanied by an attorney.

(2) The purpose of the meeting is for the parents of the child to discuss their due process complaint, and the facts that form the basis of the due process

complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraph (a)(1) and (2) of this section need not be held if—

(i) The parents and the LEA agree in writing to waive the meeting; or

(ii) The parents and the LEA agree to use the mediation process described in § 300.506.

(4) The parents and the LEA determine the relevant members of the IEP Team to attend the meeting.

(b) *Resolution period.* (1) If the LEA has not resolved the due process complaint to the satisfaction of the parents within 30 days of the receipt of the due process complaint, the due process hearing must occur.

(2) The timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of a parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(c) *Written settlement agreement.* If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (2) of this section, the parties must execute a legally binding agreement that is—

(1) Signed by both the parent and a representative of the agency who has the authority to bind the agency; and

(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States.

(d) *Agreement review period.* If the parties execute an agreement pursuant to paragraph (c) of this section, a party may void the agreement within 3 business days of the agreement's execution.

(Authority: 20 U.S.C. 1415(f)(1)(B))

#### § 300.511 Impartial due process hearing.

(a) *General.* Whenever a due process complaint is filed under § 300.507, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in §§ 300.507 through 300.508, and § 300.510.

(b) *Agency responsible for conducting the due process hearing.* The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the

child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) *Impartial hearing officer.* (1) At a minimum, a hearing officer—

(i) Must not be—

(A) An employee of the SEA or the LEA that is involved in the education or care of the child; or

(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(3) Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(d) *Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise.

(e) *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

(f) *Exceptions to the timeline.* The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to—

(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or

(2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

(Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)–(D))

#### § 300.512 Hearing rights.

(a) *General.* Any party to a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534, or an appeal conducted pursuant to § 300.514, has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) *Additional disclosure of information.* (1) At least five business days prior to a hearing conducted pursuant to § 300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) Parental rights at hearings. Parents involved in hearings must be given the right to—

(1) Have the child who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents.

(Authority: 20 U.S.C. 1415(f)(2), 1415(h))

#### § 300.513 Hearing decisions.

(a) *Decision of hearing officer.* (1) Subject to paragraph (a)(2) of this section, a hearing officer must make a decision on substantive grounds based on a determination of whether the child received a FAPE.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or

(iii) Caused a deprivation of educational benefit.

(3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§ 300.500 through 300.536.

(b) *Construction clause.* Nothing in §§ 300.507 through 300.513 shall be construed to affect the right of a parent to file an appeal of the due process hearing decision with the SEA under § 300.514(b), if a State level appeal is available.

(c) *Separate request for a due process hearing.* Nothing in §§ 300.500 through 300.536 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(d) *Findings and decision to advisory panel and general public.* The public agency, after deleting any personally identifiable information, must—

(1) Transmit the findings and decisions referred to in § 300.512(a)(5) to the State advisory panel established under § 300.167; and

(2) Make those findings and decisions available to the public.

(Authority: 20 U.S.C. 1415(f)(3)(E) and (F), 1415(h)(4), 1415(o))

#### § 300.514 Finality of decision; appeal; impartial review.

(a) *Finality of hearing decision.* A decision made in a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and § 300.516.

(b) *Appeal of decisions; impartial review.* (1) If the hearing required by § 300.511 is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(2) If there is an appeal, the SEA must conduct an impartial review of the findings and decision appealed. The official conducting the review must—

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 300.512 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties.

(c) *Findings and decision to advisory panel and general public.* The SEA, after deleting any personally identifiable information, must—

(1) Transmit the findings and decisions referred to in paragraph (b)(2)(vi) of this section to the State advisory panel established under § 300.167; and

(2) Make those findings and decisions available to the public.

(d) *Finality of review decision.* The decision made by the reviewing official is final unless a party brings a civil action under § 300.516.

(Authority: 20 U.S.C. 1415(g) and (h)(4), 1415(i)(1)(A), 1415(i)(2))

#### **§ 300.515 Timelines and convenience of hearings and reviews.**

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b)—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA must ensure that not later than 30 days after the receipt of a request for a review—

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1))

#### **§ 300.516 Civil action.**

(a) *General.* Any party aggrieved by the findings and decision made under §§ 300.507 through 300.513 or §§ 300.530 through 300.534 who does not have the right to an appeal under § 300.514(b), and any party aggrieved by the findings and decision under § 300.514(b), has the right to bring a civil action with respect to the request for a due process hearing under § 300.507 or §§ 300.530 through

300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) *Time limitation.* The party bringing the action shall have 90 days from the date of the decision of the hearing officer to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.

(c) *Additional requirements.* In any action brought under paragraph (a) of this section, the court—

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) *Jurisdiction of district courts.* The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(e) *Rule of construction.* Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under §§ 300.507 and 300.514 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(2) and (3)(A), 1415(l))

#### **§ 300.517 Attorneys' fees.**

(a) *In general.* (1) In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to—

(i) The prevailing party who is the parent of a child with a disability;

(ii) To a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(iii) To a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent

cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(2) Nothing in this subsection shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(b) *Prohibition on use of funds.* (1) Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of this part.

(2) Paragraph (b)(1) of this section does not preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.

(c) *Award of fees.* A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:

(1) Fees awarded under section 615(i)(3) of the Act must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.

(2)(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if—

(A) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(B) The offer is not accepted within 10 days; and

(C) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in § 300.506 that is conducted prior to the filing of a request for due process under §§ 300.507 through 300.513 or §§ 300.530 through 300.534.

(iii) A meeting conducted pursuant to § 300.510 shall not be considered—

(A) A meeting convened as a result of an administrative hearing or judicial action; or

(B) An administrative hearing or judicial action for purposes of this section.

(3) Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(4) Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that—

(i) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with § 300.508.

(5) The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(3)(B)–(G))

#### **§ 300.518 Child's status during proceedings.**

(a) Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a request for a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an

agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(j))

#### **§ 300.519 Surrogate parents.**

(a) *General.* Each public agency must ensure that the rights of a child are protected when—

(1) No parent (as defined in § 300.30) can be identified;

(2) The public agency, after reasonable efforts, cannot locate a parent;

(3) The child is a ward of the State under the laws of that State; or

(4) The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).

(b) *Duties of public agency.* The duties of a public agency under paragraph (a) of this section include the assignment of an individual to act as a surrogate for the parents. This must include a method—

(1) For determining whether a child needs a surrogate parent; and

(2) For assigning a surrogate parent to the child.

(c) *Wards of the State.* In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the child's case, provided that the surrogate meets the requirements in paragraphs (d)(2)(i) and (e) of this section.

(d) *Criteria for selection of surrogate parents.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies must ensure that a person selected as a surrogate parent—

(i) Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;

(ii) Has no personal or professional interest that conflicts with the interest of the child he or she represents; and

(iii) Has knowledge and skills that ensure adequate representation of the child.

(e) *Non-employee requirement; compensation.* A person otherwise qualified to be a surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(f) *Unaccompanied homeless youth.* In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogates without regard to paragraph (d)(2)(i) of this section, until a surrogate

can be appointed that meets all of the requirements of paragraph (d) of this section.

(g) *Surrogate parent responsibilities.* The surrogate parent may represent the child in all matters relating to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(h) *SEA responsibility.* The SEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate.

(Authority: 20 U.S.C. 1415(b)(2))

#### **§ 300.520 Transfer of parental rights at age of majority.**

(a) *General.* A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)—

(1)(i) The public agency must provide any notice required by this part to both the individual and the parents; and

(ii) All other rights accorded to parents under Part B of the Act transfer to the child;

(2) All rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution; and

(3) Whenever a State transfers rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency must notify the individual and the parents of the transfer of rights.

(b) *Special rule.* If, under State law, a State has a mechanism to determine that a child with a disability who has reached the age of majority under State law that applies to all children and has not been determined incompetent under State law, does not have the ability to provide informed consent with respect to his or her educational program, the State must establish procedures for appointing the parent, or, if the parent is not available another appropriate individual, to represent the educational interests of the student throughout the student's eligibility under Part B of the Act.

(Authority: 20 U.S.C. 1415(m))

#### **§§ 300.521–300.529 [Reserved]**

#### **Discipline Procedures**

#### **§ 300.530 Authority of school personnel.**

(a) *Case-by-case determination.* School personnel may consider any unique circumstances on a case-by-case

basis when determining whether a change in placement, consistent with the requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) *General.* (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) *Additional authority.* For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) *Services.* (1) Except as provided in paragraphs (d)(3) and (d)(4) of this section, a child with a disability who is removed from the child's current placement pursuant to paragraphs (b), (c), or (g) of this section must—

(i) Continue to receive educational services, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1) of this section may be provided in an interim alternative educational setting.

(3) A public agency need not provide services during periods of removal

under paragraph (b) of this section to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed under paragraph (d)(1) of this section, if any, and the location in which services, if any, will be provided.

(5) If the removal is for more than 10 consecutive school days or is a change of placement under § 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section and the location in which services will be provided.

(e) *Manifestation determination.* (1) Except for removals that will be for not more than 10 consecutive school days and will not constitute a change of placement under § 300.536, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(f) *Determination that behavior was a manifestation.* If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—

(1) Either—

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that

resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) *Special circumstances.* School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) *Notification.* Not later than the date on which the decision to take disciplinary action is made, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504.

(i) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Controlled substance* means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) *Illegal drug* means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) *Serious bodily injury* has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) *Weapon* has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g)

of section 930 of title 18, United States Code.

(Authority: 20 U.S.C. 1415(k)(1) and (7))

**§ 300.531 Determination of setting.**

The interim alternative educational setting referred to in § 300.530(c) and (g) is determined by the IEP Team.

(Authority: 20 U.S.C. 1415(k)(2))

**§ 300.532 Appeal.**

(a) *General.* The parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may request a hearing.

(b) *Authority of hearing officer.* (1) A hearing officer under § 300.511 hears, and makes a determination regarding, an appeal requested under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes the child would be dangerous if returned to the original placement.

(c) *Expedited hearing.* (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§ 300.510 through 300.514, except as provided in paragraph (c)(2) through (5) of this section.

(2) The SEA or LEA must arrange for an expedited hearing, which must occur within 20 school days of the date the hearing is requested and must result in a determination within 10 school days after the hearing.

(3) Except as provided in § 300.510(a)(3)—

(i) A resolution session meeting must occur within seven days of the date the hearing is requested, and

(ii) The hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of receipt of the hearing request.

(4) For an expedited hearing, a State may provide that the time periods identified in § 300.512(a)(3) and (b) are not less than two business days.

(5) A State may establish different procedural rules for expedited hearings under this section than it has established for due process hearings under §§ 300.511 through 300.513.

(6) The decisions on expedited due process hearings are appealable consistent with § 300.514.

(Authority: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A))

**§ 300.533 Placement during appeals.**

When an appeal under § 300.532 has been requested by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in § 300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

(Authority: 20 U.S.C. 1415(k)(4)(A))

**§ 300.534 Protections for children not yet eligible for special education and related services.**

(a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the LEA had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) *Basis of knowledge.* An LEA must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior

demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency in accordance with the agency's established child find or special education referral system.

(c) *Exception.* A public agency would not be deemed to have knowledge under paragraph (b) of this section if—

(1) The parent of the child—

(i) Has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(ii) Has refused services under this part; or

(2) The child has been evaluated and determined to not be a child with a disability under this part.

(d) *Conditions that apply if no basis of knowledge.* (1) If an LEA does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with paragraph (d)(2) of this section.

(2)(i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under § 300.530, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

(iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with this part, including the requirements of §§ 300.530 through 300.536 and section 612(a)(1)(A) of the Act.

(Authority: 20 U.S.C. 1415(k)(5))

**§ 300.535 Referral to and action by law enforcement and judicial authorities.**

(a) *Rule of construction.* Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(b) *Transmittal of records.* (1) An agency reporting a crime committed by a child with a disability must ensure

that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

(Authority: 20 U.S.C. 1415(k)(6))

**§ 300.536 Change of placement because of disciplinary removals.**

For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—

(a) The removal is for more than 10 consecutive school days; or

(b) The child has been subjected to a series of removals that constitute a pattern—

(1) Because the series of removals total more than 10 school days in a school year;

(2) Because the child's behavior is substantially similar to the child's behavior in the incidents that resulted in the series of removals, taken cumulatively, is determined, under § 300.530(f), to have been a manifestation of the child's disability; and

(3) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(Authority: 20 U.S.C. 1415(k))

**§§ 300.537–300.599 [Reserved]**

**Subpart F—Monitoring-Enforcement, Confidentiality, and Program Information**

**Monitoring, Technical Assistance, and Enforcement**

**§ 300.600 State monitoring and enforcement.**

(a) The State must monitor the implementation of this part, enforce this part in accordance with section 616(e) of the Act, and annually report on performance under this part.

(b) The primary focus of the State's monitoring activities must be on—

(1) Improving educational results and functional outcomes for all children with disabilities; and

(2) Ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most

closely related to improving educational results for children with disabilities.

(c) As a part of its responsibilities under paragraph (a) of this section, the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in section 616(a)(3) of the Act, and the indicators established by the Secretary pursuant to State performance plans.

(Authority: 20 U.S.C. 1416(a))

**§ 300.601 State performance plans and data collection.**

(a) *General.* Not later than December 3, 2005, each State must have in place a performance plan that evaluates the State's efforts to implement the requirements and purposes of Part B of the Act, and describes how the State will improve such implementation.

(1) Each State must submit the State's performance plan to the Secretary for approval in accordance with the approval process described in section 616(c) of the Act.

(2) Each State must review its State performance plan at least once every six years, and submit any amendments to the Secretary.

(3) As part of the State performance plan, each State must establish measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in section 616(a)(3) of the Act.

(b) *Data collection.* (1) Each State must collect valid and reliable information as needed to report annually to the Secretary on the indicators established by the Secretary for the State performance plans.

(2) Nothing in Part B of the Act shall be construed to authorize the development of a nationwide database of personally identifiable information on individuals involved in studies or other collections of data under Part B of the Act.

(Authority: 20 U.S.C. 1416(b))

**§ 300.602 State use of targets and reporting.**

(a) *General.* Each State must use the targets established in the State's performance plan under § 300.601 and the priority areas described in section 616(a)(3) of the Act to analyze the performance of each LEA.

(b) *Public reporting and privacy.*

(1) *Public report.* (i) Subject to paragraph (b)(1)(ii) of this section, the State must—

(A) Report annually to the public on the performance of each LEA located in the State on the targets in the State's performance plan; and

(B) Make the State's performance plan available through public means, including by posting on the Web site of the SEA, distribution to the media, and distribution through public agencies.

(ii) If the State, in meeting the requirements of paragraph (b)(1)(i) of this section, collects performance data through State monitoring or sampling, the State must include in its report the most recently available performance data on each LEA, and the date the data were obtained.

(2) *State performance report.* The State must report annually to the Secretary on the performance of the State under the State's performance plan.

(3) *Privacy.* The State must not report to the public or the Secretary any information on performance that would result in the disclosure of personally identifiable information about individual children, or where the available data are insufficient to yield statistically reliable information.

(Authority: 20 U.S.C. 1416(b)(2)(C))

**§ 300.603 Secretary's review and determination regarding State performance.**

(a) *Review.* The Secretary annually reviews the State's performance report submitted pursuant to § 300.602(b)(2).

(b) *Determination.* (1) *General.* Based on the information provided by the State in the State's annual performance report, information obtained through monitoring visits, and any other public information made available, the Secretary determines if the State—

(i) Meets the requirements and purposes of Part B of the Act;

(ii) Needs assistance in implementing the requirements of Part B of the Act;

(iii) Needs intervention in implementing the requirements of Part B of the Act; or

(iv) Needs substantial intervention in implementing the requirements of Part B of the Act.

(2) *Notice and opportunity for a hearing.* (i) For determinations made under paragraphs (b)(1)(iii) and (b)(1)(iv) of this section, the Secretary provides reasonable notice and an opportunity for a hearing on those determinations.

(ii) The hearing described in paragraph (b)(2) of this section consists of an opportunity to meet with the Assistant Secretary for the Office of Special Education and Rehabilitative Services to demonstrate why the Department should not make the determination described in paragraph (b)(1) of this section.

(Authority: 20 U.S.C. 1416(d))

**§ 300.604 Enforcement.**

(a) *Needs assistance.* If the Secretary determines, for two consecutive years, that a State needs assistance under § 300.603(b)(1)(ii) in implementing the requirements of Part B of the Act, the Secretary takes one or more of the following actions:

(1) Advise the State of available sources of technical assistance that may help the State address the areas in which the State needs assistance, which may include assistance from the Office of Special Education Programs, other offices of the Department of Education, other Federal agencies, technical assistance providers approved by the Secretary, and other federally funded nonprofit agencies, and require the State to work with appropriate entities. Such technical assistance may include—

(i) The provision of advice by experts to address the areas in which the State needs assistance, including explicit plans for addressing the area for concern within a specified period of time;

(ii) Assistance in identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research;

(iii) Designating and using distinguished superintendents, principals, special education administrators, special education teachers, and other teachers to provide advice, technical assistance, and support; and

(iv) Devising additional approaches to providing technical assistance, such as collaborating with institutions of higher education, educational service agencies, national centers of technical assistance supported under part D of the Act, and private providers of scientifically based technical assistance.

(2) Direct the use of State-level funds under section 611(e) of the Act on the area or areas in which the State needs assistance.

(3) Identify the State as a high-risk grantee and impose special conditions on the State's grant under Part B of the Act.

(b) *Needs intervention.* If the Secretary determines, for three or more consecutive years, that a State needs intervention under § 300.603(b)(1)(iii) in implementing the requirements of Part B of the Act, the following shall apply:

(1) The Secretary may take any of the actions described in paragraph (a) of this section.

(2) The Secretary takes one or more of the following actions:

(i) Requires the State to prepare a corrective action plan or improvement plan if the Secretary determines that the

State should be able to correct the problem within one year.

(ii) Requires the State to enter into a compliance agreement under section 457 of the General Education Provisions Act as amended, 20 U.S.C. 1221 *et seq.* (GEPAA), if the Secretary has reason to believe that the State cannot correct the problem within one year.

(iii) For each year of the determination, withhold not less than 20 percent and not more than 50 percent of the State's funds under section 611(e) of the Act, until the Secretary determines the State has sufficiently addressed the areas in which the State needs intervention.

(iv) Seeks to recover funds under section 452 of GEPAA.

(v) Withholds, in whole or in part, any further payments to the State under Part B of the Act pursuant to paragraph (d) of this section.

(vi) Refers the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(c) *Needs substantial intervention.* Notwithstanding paragraph (a) or (b) of this section, at any time that the Secretary determines that a State needs substantial intervention in implementing the requirements of Part B of the Act or that there is a substantial failure to comply with any condition of an SEA's or LEA's eligibility under Part B of the Act, the Secretary shall take one or more of the following actions:

(1) Recover funds under section 452 of GEPAA.

(2) Withhold, in whole or in part, any further payments to the State under Part B of the Act.

(3) Refer the case to the Office of the Inspector General at the Department of Education.

(4) Refer the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(d) *Report to Congress.* The Secretary reports to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate within 30 days of taking enforcement action pursuant to paragraph (a), (b), or (c) of this section, on the specific action taken and the reasons why enforcement action was taken.

(Authority: 20 U.S.C. 1416(e)(1)–(e)(3), (e)(5))

**§ 300.605 Withholding funds.**

(a) *Opportunity for hearing.* Prior to withholding any funds under Part B of the Act, the Secretary provides reasonable notice and an opportunity for a hearing to the SEA involved, pursuant to the procedures in §§ 300.180 through 300.183.

(b) *Suspension.* Pending the outcome of any hearing to withhold payments under paragraph (a) of this section, the Secretary may suspend payments to a recipient, suspend the authority of the recipient to obligate funds under Part B of the Act, or both, after the recipient has been given reasonable notice and an opportunity to show cause why future payments or authority to obligate funds under Part B of the Act should not be suspended.

(c) *Nature of withholding.* (1) If the Secretary determines that it is appropriate to withhold further payments under section 616(e)(2) or (e)(3) of the Act, the Secretary may determine—

(i) That the withholding will be limited to programs or projects, or portions of programs or projects that affected the Secretary's determination under § 300.603(b)(1); or

(ii) That the SEA must not make further payments under Part B of the Act to specified State agencies or LEAs that caused or were involved in the Secretary's determination under § 300.603(b)(1).

(2) *Withholding until rectified.* Until the Secretary is satisfied that the condition that caused the initial withholding has been substantially rectified—

(i) Payments to the State under Part B of the Act must be withheld in whole or in part; and

(ii) Payments by the SEA under Part B of the Act must be limited to State agencies and LEAs whose actions did not cause or were not involved in the Secretary's determination under § 300.603(b)(1), as the case may be.

(Authority: 20 U.S.C. 1416(e)(4), (e)(6))

**§ 300.606 Public attention.**

Any State that has received notice under §§ 300.603(b)(1)(ii) through (iv) must, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to section 616(e) of the Act to the attention of the public within the State.

(Authority: 20 U.S.C. 1416(e)(7))

**§ 300.607 Divided State agency responsibility.**

For purposes of this subpart, if responsibility for ensuring that the requirements of Part B of the Act are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons is assigned to a public agency other than the SEA pursuant to section 612(a)(11)(C) of the Act, and if the Secretary finds that the failure to comply substantially with the

provisions of Part B of the Act are related to a failure by the public agency, the Secretary takes appropriate corrective action to ensure compliance with Part B of the Act, except that—

(a) Any reduction or withholding of payments to the State under § 300.604 must be proportionate to the total funds allotted under section 611 of the Act to the State as the number of eligible children with disabilities in adult prisons under the supervision of the other public agency is proportionate to the number of eligible individuals with disabilities in the State under the supervision of the SEA; and

(b) Any withholding of funds under § 300.604 must be limited to the specific agency responsible for the failure to comply with Part B of the Act.

(Authority: 20 U.S.C. 1416(h))

#### § 300.608 State enforcement.

If an SEA determines that an LEA is not meeting the requirements of Part B of the Act, including the targets in the State's performance plan, the SEA must prohibit the LEA from reducing the LEA's maintenance of effort under section 613(a)(2)(C) of the Act for any fiscal year.

(Authority: 20 U.S.C. 1416(f))

#### § 300.609 Rule of construction.

Nothing in this subpart shall be construed to restrict the Secretary from utilizing any authority under GEPA to monitor and enforce the requirements of the Act.

(Authority: 20 U.S.C. 1416(g))

#### Confidentiality of Information

##### § 300.610 Confidentiality.

The Secretary takes appropriate action, in accordance with section 444 of GEPA, to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by SEAs and LEAs pursuant to Part B of the Act, and consistent with §§ 300.611 through 300.628.

(Authority: 20 U.S.C. 1417(c))

##### § 300.611 Definitions.

As used in §§ 300.610 through 300.628—

(a) *Destruction* means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

(b) *Education records* means the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the

Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA)).

(c) *Participating agency* means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the Act.

(Authority: 20 U.S.C. 1221e-3, 1412(a)(8), 1417(c))

#### § 300.612 Notice to parents.

(a) The SEA must give notice that is adequate to fully inform parents about the requirements of § 300.121, including—

(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under FERPA and implementing regulations in 34 CFR part 99.

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### § 300.613 Access rights.

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### § 300.614 Record of access.

Each participating agency must keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the Act (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### § 300.615 Records on more than one child.

If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### § 300.616 List of types and locations of information.

Each participating agency must provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### § 300.617 Fees.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### § 300.618 Amendment of records at parent's request.

(a) A parent who believes that information in the education records collected, maintained, or used under

this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency must decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it must inform the parent of the refusal and advise the parent of the right to a hearing under § 300.619.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **§ 300.619 Opportunity for a hearing.**

The agency must, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **§ 300.620 Result of hearing.**

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it must amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it must inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must—

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **§ 300.621 Hearing procedures.**

A hearing held under § 300.619 must be conducted according to the procedures under 34 CFR 99.22.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **§ 300.622 Consent.**

(a) Except as to disclosures addressed in § 300.535(b) for which parental

consent is not required by 34 CFR part 99, parental consent must be obtained before personally identifiable information is—

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) An educational agency or institution subject to 34 CFR part 99 may not release information from education records to participating agencies without parental consent unless authorized to do so under 34 CFR part 99.

(c) The SEA must provide policies and procedures that are used in the event that a parent refuses to provide consent under this section.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **§ 300.623 Safeguards.**

(a) Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 300.121 and 34 CFR part 99.

(d) Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **§ 300.624 Destruction of information.**

(a) The public agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **§ 300.625 Children's rights.**

(a) The SEA must have in effect policies and procedures regarding the extent to which children are afforded

rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(b) Under the regulations for FERPA at 34 CFR 99.5(a), the rights of parents regarding education records are transferred to the student at age 18.

(c) If the rights accorded to parents under Part B of the Act are transferred to a student who reaches the age of majority, consistent with § 300.520, the rights regarding educational records in §§ 300.613 through 300.624 must also be transferred to the student. However, the public agency must provide any notice required under section 615 of the Act to the student and the parents.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **§ 300.626 Enforcement.**

The SEA must have in effect the policies and procedures, including sanctions that the State uses to ensure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **§ 300.627 Department use of personally identifiable information.**

If the Department or its authorized representatives collect any personally identifiable information regarding children with disabilities that is not subject to the Privacy Act of 1974, 5 U.S.C. 552a, the Secretary applies the requirements of 5 U.S.C. 552a(b)(1) and (b)(2), 552a(b)(4) through (b)(11); 552a(c) through 552a(e)(3)(B); 552a(e)(3)(D); 552a(e)(5) through (e)(10); 552a(h); 552a(m); and 552a(n); and the regulations implementing those provisions in 34 CFR part 5b.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

#### **Reports—Program Information**

##### **§ 300.640 Annual report of children served—report requirement.**

(a) The SEA must annually report to the Secretary on the information required by section 618 of the Act at the times specified by the Secretary.

(b) The SEA must submit the report on forms provided by the Secretary.

(Authority: 20 U.S.C. 1418(a))

##### **§ 300.641 Annual report of children served—information required in the report.**

(a) For purposes of the annual report required by section 618 of the Act, the State and the Secretary of the Interior must count and report the number of children with disabilities receiving special education and related services on any date between October 1 and December 1 of each year.

(b) For the purpose of this reporting provision, a child's age is the child's actual age on the date of the child count.

(c) The SEA may not report a child under more than one disability category.

(d) If a child with a disability has more than one disability, the SEA must report that child in accordance with the following procedure:

(1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness."

(2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities."

(Authority: 20 U.S.C. 1418(a), (b))

#### **§ 300.642 Data reporting.**

(a) *Protection of identifiable data.* The data described in section 618(a) of the Act and in § 300.641 must be publicly reported by each State in a manner that does not result in disclosure of data identifiable to individual children.

(b) *Sampling.* The Secretary may permit States and the Secretary of the Interior to obtain data in section 618(a) of the Act through sampling.

(Authority: 20 U.S.C. 1418(b))

#### **§ 300.643 Annual report of children served—certification.**

The SEA must include in its report a certification signed by an authorized official of the agency that the information provided under § 300.640 is an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question.

(Authority: 20 U.S.C. 1418(a)(3))

#### **§ 300.644 Annual report of children served—criteria for counting children.**

The SEA may include in its report children with disabilities who are enrolled in a school or program that is operated or supported by a public agency, and that—

(a) Provides them with both special education and related services that meet State standards;

(b) Provides them only with special education, if a related service is not required, that meets State standards; or

(c) In the case of children with disabilities enrolled by their parents in private schools, counts those children who are eligible under the Act and receive special education or related services that meet State standards under §§ 300.132 through 300.144.

(Authority: 20 U.S.C. 1418(a))

#### **§ 300.645 Annual report of children served—other responsibilities of the SEA.**

In addition to meeting the other requirements of §§ 300.640 through 300.644, the SEA must—

(a) Establish procedures to be used by LEAs and other educational institutions in counting the number of children with disabilities receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the SEA to ensure that the State complies with § 300.640(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under §§ 300.640 through 300.644; and

(e) Ensure that documentation is maintained that enables the State and the Secretary to audit the accuracy of the count.

(Authority: 20 U.S.C. 1418(a))

#### **§ 300.646 Disproportionality.**

(a) *General.* Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to—

(1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act;

(2) The placement in particular educational settings of these children; and

(3) The incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

(b) *Review and revision of policies, practices, and procedures.* In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with paragraph (a) of this section, the State or the Secretary of the Interior must—

(1) Provide for the review and, if appropriate revision of the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of the Act.

(2) Require any LEA identified under paragraph (a) of this section to reserve the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly overidentified under paragraph (a) of this section; and

(3) Require the LEA to publicly report on the revision of policies, practices, and procedures described under paragraph (b)(1) of this section.

(Authority: 20 U.S.C. 1418(d))

### **Subpart G—Authorization; Allotment; Use of Funds; and Authorization of Appropriations**

#### **§ 300.700 Grants to States.**

(a) *Purpose of grants.* The Secretary makes grants to States, outlying areas, and freely associated States (as defined in § 300.717), and provides funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with Part B of the Act.

(b) *Maximum amount.* The maximum amount of the grant a State may receive under section 611 of the Act is—

(1) For fiscal years 2005 and 2006—

(i) The number of children with disabilities in the State who are receiving special education and related services—

(A) Aged three through five, if the State is eligible for a grant under section 619 of the Act; and

(B) Aged 6 through 21; multiplied by—

(ii) Forty (40) percent of the average per-pupil expenditure in public elementary schools and secondary schools in the United States (as defined in § 300.717); and

(2) For fiscal year 2007 and subsequent fiscal years—(i) The number of children with disabilities in the 2004–2005 school year in the State who received special education and related services—

(A) Aged three through five if the State is eligible for a grant under section 619 of the Act; and

(B) Aged 6 through 21; multiplied by

(ii) Forty (40) percent of the average per-pupil expenditure in public elementary schools and secondary schools in the United States (as defined in § 300.717);

(iii) Adjusted by the rate of annual change in the sum of—

(A) Eighty-five (85) percent of the State's population of children aged 3 through 21 who are of the same age as children with disabilities for whom the

State ensures the availability of FAPE under Part B of the Act; and

(B) Fifteen (15) percent of the State's population of children described in paragraph (b)(2)(iii)(A) of this section who are living in poverty.

(Authority: 20 U.S.C. 1411(a) and (d))

**§ 300.701 Outlying areas and freely associated States and the Secretary of the Interior.**

(a) *Outlying areas and freely associated States.* (1) *Funds reserved.* From the amount appropriated for any fiscal year under section 611(i) of the Act, the Secretary reserves not more than one percent, which must be used—

(i) To provide assistance to the outlying areas in accordance with their respective populations of individuals aged 3 through 21; and

(ii) To provide each freely associated State a grant in the amount that the freely associated State received for fiscal year 2003 under Part B of the Act, but only if the freely associated State—

(A) Meets the applicable requirements of Part B of the Act, including—

(1) The requirements in section 612(a)(1), (3) through (9), (10)(B) through (C), (11) through (12), (14) through (16), (19), and (21) through (25) of the Act (including monitoring and evaluation activities);

(2) The requirements in section 612(b) and (e) of the Act;

(3) The requirements in section 613(a)(1), (2)(A)(i), (7) through (9), and section 613(i) of the Act;

(4) The requirements in section 616 of the Act that apply to States; and

(5) The requirements of this part that implement the sections of the Act listed in paragraphs (a)(1)(ii)(A)(1) through (A)(4) of this section; and

(B) Meets the requirements in paragraph (a)(1)(iii) of this section.

(iii) Any freely associated State that wishes to receive funds under Part B of the Act must include, in its application for assistance—

(A) Information demonstrating that it will meet all conditions that apply to States under Part B of the Act, including the requirements described in paragraph (a)(1)(ii)(A) of this section;

(B) An assurance that, notwithstanding any other provision of Part B of the Act, it will use those funds only for the direct provision of special education and related services to children with disabilities and to enhance its capacity to make FAPE available to all children with disabilities;

(C) The identity of the source and amount of funds, in addition to funds under Part B of the Act, that it will make available to ensure that FAPE is

available to all children with disabilities within its jurisdiction; and

(D) Such other information and assurances as the Secretary may require.

(2) *Special rule.* The provisions of Public Law 95-134, permitting the consolidation of grants by the outlying areas, do not apply to funds provided to the outlying areas or to the freely associated States under Part B of the Act.

(b) *Secretary of the Interior.* From the amount appropriated for any fiscal year under section 611(i) of the Act, the Secretary reserves 1.226 percent to provide assistance to the Secretary of the Interior in accordance with §§ 300.707 through 300.716.

(Authority: 20 U.S.C. 1411(b))

**§ 300.702 Technical assistance.**

(a) *In general.* The Secretary may reserve not more than one-half of one percent of the amounts appropriated under Part B of the Act for each fiscal year to support technical assistance activities authorized under section 616(i) of the Act.

(b) *Maximum amount.* The maximum amount the Secretary may reserve under paragraph (a) of this section for any fiscal year is \$25,000,000, cumulatively adjusted by the rate of inflation as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(Authority: 20 U.S.C. 1411(c))

**§ 300.703 Allocations to States.**

(a) *General.* After reserving funds for technical assistance under § 300.702, and for payments to the outlying areas, the freely associated States, and the Secretary of the Interior under § 300.701 (a) and (b) for a fiscal year, the Secretary allocates the remaining amount among the States in accordance with paragraphs (b), (c), and (d) of this section.

(b) *Special rule for use of fiscal year 1999 amount.* If a State received any funds under section 611 of the Act for fiscal year 1999 on the basis of children aged three through five, but does not make FAPE available to all children with disabilities aged three through five in the State in any subsequent fiscal year, the Secretary computes the State's amount for fiscal year 1999, solely for the purpose of calculating the State's allocation in that subsequent year under paragraph (c) or (d) of this section, by subtracting the amount allocated to the State for fiscal year 1999 on the basis of those children.

(c) *Increase in funds.* If the amount available for allocations to States under paragraph (a) of this section for a fiscal year is equal to or greater than the amount allocated to the States under section 611 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(1) *Allocation of increase.* (i) *General.* Except as provided in paragraph (c)(2) of this section, the Secretary allocates for the fiscal year—

(A) To each State the amount the State received under this section for fiscal year 1999;

(B) Eighty-five (85) percent of any remaining funds to States on the basis of the States' relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of FAPE under Part B of the Act; and

(C) Fifteen (15) percent of those remaining funds to States on the basis of the States' relative populations of children described in paragraph (c)(1)(i) (B) of this section who are living in poverty.

(ii) *Data.* For the purpose of making grants under this section, the Secretary uses the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

(2) *Limitations.* Notwithstanding paragraph (c)(1) of this section, allocations under this section are subject to the following:

(i) *Preceding year allocation.* No State's allocation may be less than its allocation under section 611 of the Act for the preceding fiscal year.

(ii) *Minimum.* No State's allocation may be less than the greatest of—

(A) The sum of—

(1) The amount the State received under section 611 of the Act for fiscal year 1999; and

(2) One third of one percent of the amount by which the amount appropriated under section 611(i) of the Act for the fiscal year exceeds the amount appropriated for section 611 of the Act for fiscal year 1999;

(B) The sum of—

(1) The amount the State received under section 611 of the Act for the preceding fiscal year; and

(2) That amount multiplied by the percentage by which the increase in the funds appropriated for section 611 of the Act from the preceding fiscal year exceeds 1.5 percent; or

(C) The sum of—

(1) The amount the State received under section 611 of the Act for the preceding fiscal year; and

(2) That amount multiplied by 90 percent of the percentage increase in the

amount appropriated for section 611 of the Act from the preceding fiscal year.

(iii) *Maximum*. Notwithstanding paragraph (c)(2)(ii) of this section, no State's allocation under paragraph (a) of this section may exceed the sum of—

(A) The amount the State received under section 611 of the Act for the preceding fiscal year; and

(B) That amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated under section 611 of the Act from the preceding fiscal year.

(3) *Ratable reduction*. If the amount available for allocations to States under paragraph (c) of this section is insufficient to pay those allocations in full, those allocations are ratably reduced, subject to paragraph (c)(2)(i) of this section.

(d) *Decrease in funds*. If the amount available for allocations to States under paragraph (a) of this section for a fiscal year is less than the amount allocated to the States under section 611 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(1) *Amounts greater than fiscal year 1999 allocations*. If the amount available for allocations under paragraph (a) of this section is greater than the amount allocated to the States for fiscal year 1999, each State is allocated the sum of—

(i) The amount the State received under section 611 of the Act for fiscal year 1999; and

(ii) An amount that bears the same relation to any remaining funds as the increase the State received under section 611 of the Act for the preceding fiscal year over fiscal year 1999 bears to the total of all such increases for all States.

(2) *Amounts equal to or less than fiscal year 1999 allocations*. (i) *General*. If the amount available for allocations under paragraph (a) of this section is equal to or less than the amount allocated to the States for fiscal year 1999, each State is allocated the amount it received for fiscal year 1999.

(ii) *Ratable reduction*. If the amount available for allocations under paragraph (d) of this section is insufficient to make the allocations described in paragraph (d)(2)(i) of this section, those allocations are ratably reduced.

(Authority: 20 U.S.C. 1411(d))

#### **§ 300.704 State-level activities.**

(a) *State administration*. (1) For the purpose of administering Part B of the Act, including paragraph (c) of this section, section 619 of the Act, and the coordination of activities under Part B of the Act with, and providing technical

assistance to, other programs that provide services to children with disabilities—

(i) Each State may reserve for each fiscal year not more than the maximum amount the State was eligible to reserve for State administration under section 611 of the Act for fiscal year 2004 or \$800,000 (adjusted in accordance with paragraph (a)(2) of this section), whichever is greater; and

(ii) Each outlying area may reserve for each fiscal year not more than five percent of the amount the outlying area receives under § 300.701(a) for the fiscal year or \$35,000, whichever is greater.

(2) For each fiscal year, beginning with fiscal year 2005, the Secretary cumulatively adjusts—

(i) The maximum amount the State was eligible to reserve for State administration under section 611 of the Act for fiscal year 2004; and

(ii) \$800,000, by the rate of inflation as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(3) Prior to expenditure of funds under paragraph (a) of this section, the State must certify to the Secretary that the arrangements to establish responsibility for services pursuant to section 612(a)(12)(A) of the Act are current.

(4) Funds reserved under paragraph (a)(1) of this section may be used for the administration of Part C of the Act, if the SEA is the lead agency for the State under that Part.

(b) *Other State-level activities*. (1) States may reserve a portion of their allocations for other State-level activities. The maximum amount that a State may reserve for other State-level activities is as follows:

(i) If the amount that the State sets aside for State administration under paragraph (a) of this section is greater than \$850,000 and the State opts to finance a high cost fund under paragraph (c) of this section:

(A) For fiscal years 2005 and 2006, 10 percent of the State's allocation under § 300.703.

(B) For fiscal year 2007 and subsequent fiscal years, an amount equal to 10 percent of the State's allocation for fiscal year 2006 under § 300.703 adjusted cumulatively for inflation.

(ii) If the amount that the State sets aside for State administration under paragraph (a) of this section is greater than \$850,000 and the State opts not to finance a high cost fund under paragraph (c) of this section—

(A) For fiscal years 2005 and 2006, nine percent of the State's allocation under § 300.703.

(B) For fiscal year 2007 and subsequent fiscal years, an amount equal to nine percent of the State's allocation for fiscal year 2006 adjusted cumulatively for inflation.

(iii) If the amount that the State sets aside for State administration under paragraph (a) of this section is less than or equal to \$850,000 and the State opts to finance a high cost fund under paragraph (c) of this section:

(A) For fiscal years 2005 and 2006, 10.5 percent of the State's allocation under § 300.703.

(B) For fiscal year 2007 and subsequent fiscal years, an amount equal to 10.5 percent of the State's allocation for fiscal year 2006 under § 300.703 adjusted cumulatively for inflation.

(iv) If the amount that the State sets aside for State administration under paragraph (a) of this section is equal to or less than \$850,000 and the State opts not to finance a high cost fund under paragraph (c) of this section:

(A) For fiscal years 2005 and 2006, nine and one-half percent of the State's allocation under § 300.703.

(B) For fiscal year 2007 and subsequent fiscal years, an amount equal to nine and one-half percent of the State's allocation for fiscal year 2006 under § 300.703 adjusted cumulatively for inflation.

(2) The adjustment for inflation is the rate of inflation as measured by the percentage of increase, if any, from the preceding fiscal year in the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(3) Some portion of the funds reserved under paragraph (b)(1) of this section must be used to carry out the following activities:

(i) For monitoring, enforcement, and complaint investigation; and

(ii) To establish and implement the mediation process required by section 615(e) of the Act, including providing for the costs of mediators and support personnel;

(4) Funds reserved under paragraph (b)(1) of this section may be used to carry out the following activities:

(i) For support and direct services, including technical assistance, personnel preparation, and professional development and training;

(ii) To support paperwork reduction activities, including expanding the use of technology in the IEP process;

(iii) To assist LEAs in providing positive behavioral interventions and

supports and mental health services for children with disabilities;

(iv) To improve the use of technology in the classroom by children with disabilities to enhance learning;

(v) To support the use of technology, including technology with universal design principles and assistive technology devices, to maximize accessibility to the general education curriculum for children with disabilities;

(vi) Development and implementation of transition programs, including coordination of services with agencies involved in supporting the transition of students with disabilities to postsecondary activities;

(vii) To assist LEAs in meeting personnel shortages;

(viii) To support capacity building activities and improve the delivery of services by LEAs to improve results for children with disabilities;

(ix) Alternative programming for children with disabilities who have been expelled from school, and services for children with disabilities in correctional facilities, children enrolled in State-operated or State-supported schools, and children with disabilities in charter schools;

(x) To support the development and provision of appropriate accommodations for children with disabilities, or the development and provision of alternate assessments that are valid and reliable for assessing the performance of children with disabilities, in accordance with sections 1111(b) and 6111 of the ESEA; and

(xi) To provide technical assistance to schools and LEAs, and direct services, including supplemental educational services as defined in section 1116(e) of the ESEA to children with disabilities, in schools or LEAs identified for improvement under section 1116 of the ESEA on the sole basis of the assessment results of the disaggregated subgroup of children with disabilities, including providing professional development to special and regular education teachers, who teach children with disabilities, based on scientifically based research to improve educational instruction, in order to improve academic achievement to meet or exceed the objectives established by the State under section 1111(b)(2)(G) of the ESEA.

(c) *Local educational agency high cost fund.* (1) In general—

(i) For the purpose of assisting LEAs (including a charter school that is an LEA or a consortium of LEAs) in addressing the needs of high need children with disabilities, each State has the option to reserve for each fiscal year

10 percent of the amount of funds the State reserves for other State-level activities under paragraph (b)(1) of this section—

(A) To finance and make disbursements from the high cost fund to LEAs in accordance with paragraph (c) of this section during the first and succeeding fiscal years of the high cost fund; and

(B) To support innovative and effective ways of cost sharing by the State, by an LEA, or among a consortium of LEAs, as determined by the State in coordination with representatives from LEAs, subject to paragraph (c)(2)(ii) of this section.

(ii) For purposes of paragraph (c) of this section, *local educational agency* includes a charter school that is an LEA, or a consortium of LEAs.

(2) (i) A State must not use any of the funds the State reserves pursuant to paragraph (c)(1)(i) of this section, which are solely for disbursement to LEAs, for costs associated with establishing, supporting, and otherwise administering the fund. The State may use funds the State reserves under paragraph (a) of this section for those administrative costs.

(ii) A State must not use more than 5 percent of the funds the State reserves pursuant to paragraph (c)(1)(i) of this section for each fiscal year to support innovative and effective ways of cost sharing among consortia of LEAs.

(3) (i) The SEA must develop, not later than 90 days after the State reserves funds under paragraph (c)(1)(i) of this section, annually review, and amend as necessary, a State plan for the high cost fund. Such State plan must—

(A) Establish, in consultation and coordination with representatives from LEAs, a definition of a high need child with a disability that, at a minimum—

(1) Addresses the financial impact a high need child with a disability has on the budget of the child's LEA; and

(2) Ensures that the cost of the high need child with a disability is greater than 3 times the average per pupil expenditure (as defined in section 9101 of the ESEA) in that State;

(B) Establish eligibility criteria for the participation of an LEA that, at a minimum, take into account the number and percentage of high need children with disabilities served by an LEA;

(C) Establish criteria to ensure that placements supported by the fund are consistent with the requirements of §§ 300.114 through 300.118;

(D) Develop a funding mechanism that provides distributions each fiscal year to LEAs that meet the criteria developed by the State under paragraph (c)(3)(i)(B) of this section; and

(E) Establish an annual schedule by which the SEA must make its distributions from the high cost fund each fiscal year.

(ii) The State must make its final State plan available to the public not less than 30 days before the beginning of the school year, including dissemination of such information on the State Web site.

(4)(i) Each SEA must make all annual disbursements from the high cost fund established under paragraph (c)(1)(i) of this section in accordance with the State plan published pursuant to paragraph (c)(3) of this section.

(ii) The costs associated with educating a high need child with a disability, as defined under paragraph (c)(3)(i)(A) of this section, are only those costs associated with providing direct special education and related services to the child that are identified in that child's IEP, including the cost of room and board for a residential placement determined necessary, consistent with § 300.114, to implement a child's IEP.

(iii) The funds in the high cost fund remain under the control of the State until disbursed to an LEA to support a specific child who qualifies under the State plan for the high cost funds or distributed to LEAs, consistent with paragraph (c)(9) of this section.

(5) The disbursements under paragraph (c)(4) of this section must not be used to support legal fees, court costs, or other costs associated with a cause of action brought on behalf of a child with a disability to ensure FAPE for such child.

(6) Nothing in paragraph (c) of this section —

(i) Limits or conditions the right of a child with a disability who is assisted under Part B of the Act to receive FAPE pursuant to section 612(a)(1) of the Act in the least restrictive environment pursuant to section 612(a)(5) of the Act; or

(ii) Authorizes an SEA or LEA to establish a limit on what may be spent on the education of a child with a disability.

(7) Notwithstanding the provisions of paragraphs (c)(1) through (6) of this section, a State may use funds reserved pursuant to paragraph (c)(1)(i) of this section for implementing a placement neutral cost sharing and reimbursement program of high need, low incidence, catastrophic, or extraordinary aid to LEAs that provides services to high need students based on eligibility criteria for such programs that were created not later than January 1, 2004, and are currently in operation, if such program serves children that meet the requirement of the definition of a high

need child with a disability as described in paragraph (c)(3)(i)(A) of this section.

(8) Disbursements provided under paragraph (c) of this section must not be used to pay costs that otherwise would be reimbursed as medical assistance for a child with a disability under the State Medicaid program under Title XIX of the Social Security Act.

(9) Funds reserved under paragraph (c)(1)(i) of this section from the appropriation for any fiscal year, but not expended pursuant to paragraph (c)(4) of this section before the beginning of their last year of availability for obligation, must be allocated to LEAs in the same manner as other funds from the appropriation for that fiscal year are allocated to LEAs under § 300.705 during their final year of availability.

(d) *Inapplicability of certain prohibitions.* A State may use funds the State reserves under paragraphs (a) and (b) of this section without regard to—

(1) The prohibition on commingling of funds in § 300.162(b).

(2) The prohibition on supplanting other funds in § 300.162(c).

(e) *Special rule for increasing funds.* A State may use funds the State reserves under paragraph (a)(1) of this section as a result of inflationary increases under paragraph (a)(2) of this section to carry out activities authorized under paragraph (b)(4)(i), (iii), (vii), or (viii) of this section.

(f) *Flexibility in using funds for Part C.* Any State eligible to receive a grant under section 619 of the Act may use funds made available under paragraph (a)(1) of this section, § 300.705(c), or § 300.814(e) to develop and implement a State policy jointly with the lead agency under Part C of the Act and the SEA to provide early intervention services (which must include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills) in accordance with Part C of the Act to children with disabilities who are eligible for services under section 619 of the Act and who previously received services under Part C of the Act until the children enter, or are eligible under State law to enter, kindergarten, or elementary school as appropriate.

(Authority: 20 U.S.C. 1411(e))

**§ 300.705 Subgrants to local educational agencies.**

(a) *Subgrants required.* Each State that receives a grant under section 611 of the Act for any fiscal year must distribute any funds the State does not reserve under § 300.704 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the

Act for use in accordance with Part B of the Act.

(b) *Allocations to LEAs.* For each fiscal year for which funds are allocated to States under § 300.703, each State shall allocate funds as follows:

(1) *Base payments.* The State first must award each LEA described in paragraph (a) of this section the amount the LEA would have received under section 611 of the Act for fiscal year 1999, if the State had distributed 75 percent of its grant for that year under section 611(d) of the Act, as that section was then in effect.

(2) *Base payment adjustments.* For any fiscal year after 1999—

(i) If a new LEA is created, the State must divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 if a State has had its payment reduced under § 300.703(b), currently provided special education by each of the LEAs;

(ii) If one or more LEAs are combined into a single new LEA, the State must combine the base allocations of the merged LEAs; and

(iii) If, for two or more LEAs, geographic boundaries or administrative responsibility for providing services to children with disabilities ages 3 through 21 change, the base allocations of affected LEAs must be redistributed among affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 if a State has had its payment reduced under § 300.703(b), currently provided special education by each affected LEA.

(3) *Allocation of remaining funds.* After making allocations under paragraph (b)(1) of this section, as adjusted by paragraph (b)(2) of this section, the State must—

(i) Allocate 85 percent of any remaining funds to those LEAs on the basis of the relative numbers of children enrolled in public and private elementary schools and secondary schools within the LEA's jurisdiction; and

(ii) Allocate 15 percent of those remaining funds to those LEAs in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(c) *Reallocation of funds.* If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served

by that agency with State and local funds, the SEA may reallocate any portion of the funds under this part that are not needed by that LEA to provide FAPE to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs.

(Authority: 20 U.S.C. 1411(f))

**§ 300.706 Allocation for State in which by-pass is implemented for parentally-placed private school children with disabilities.**

In determining the allocation under §§ 300.700 through 300.703 for a State, outlying area, or freely associated State in which the Secretary will implement a by-pass for parentally-placed private school children with disabilities under §§ 300.190 through 300.198, the Secretary includes in the State's child count—

(a) For the first year of a by-pass, the actual or estimated number of private school children with disabilities (as defined in §§ 300.8(a) and 300.130) in the State, as of the preceding December 1; and

(b) For succeeding years of a by-pass, the number of private school children with disabilities who received special education and related services under the by-pass in the preceding year.

(Authority: 20 U.S.C. 1412(f)(2))

**§ 300.707 Use of Amounts by Secretary of the Interior.**

(a) *Definitions.* For purposes of §§ 300.707 through 300.716, the following definitions apply:

(1) *Reservation* means Indian Country as defined in 18 U.S.C. 1151.

(2) *Tribal governing body of a school* means the body or bodies that are recognized governing bodies of the Indian tribe involved and that represent at least 90 percent of the students served by the school. 25 U.S.C. 2021(19) and 25 U.S.C. 2511(7).

(b) *Provision of amounts for assistance.* The Secretary provides amounts to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. The amount of the payment for any fiscal year is equal to 80 percent of the amount allotted under section 611(b)(2) of the Act for that fiscal year. Of the amount described in the preceding sentence, after the Secretary of the Interior reserves funds for administration under § 300.710, 80 percent must be allocated to such schools by July 1 of that fiscal year and

20 percent must be allocated to such schools by September 30 of that fiscal year.

(c) *Additional requirement.* With respect to all other children aged 3 to 21, inclusive, on reservations, the SEA must ensure that all of the requirements of Part B of the Act are implemented.

(Authority: 20 U.S.C. 1411(h)(1))

**§ 300.708 Submission of information.**

The Secretary may provide the Secretary of the Interior amounts under § 300.707 for a fiscal year only if the Secretary of the Interior submits to the Secretary information that—

(a) Meets the requirements of section 612(a)(1), (3) through (9), (10)(B) through (C), (11) through (12), (14) through (16), (19), and (21) through (25) of the Act (including monitoring and evaluation activities);

(b) Meets the requirements of section 612(b) and (e) of the Act;

(c) Meets the requirements of section 613(a)(1), (2)(A)(i), (7) through (9) and section 613(i) of the Act (references to LEAs in these sections must be read as references to elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior);

(d) Meets the requirements of section 616 of the Act that apply to States (references to LEAs in section 616 of the Act must be read as references to elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior).

(e) Meets the requirements of this part that implement the sections of the Act listed in paragraphs (a) through (d) of this section;

(f) Includes a description of how the Secretary of the Interior will coordinate the provision of services under Part B of the Act with LEAs, tribes and tribal organizations, and other private and Federal service providers;

(g) Includes an assurance that there are public hearings, adequate notice of the hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and affected local school boards before the adoption of the policies, programs, and procedures related to the requirements described in paragraphs (a) through (d) of this section;

(h) Includes an assurance that the Secretary of the Interior provides the information that the Secretary may require to comply with section 618 of the Act;

(i)(1) Includes an assurance that the Secretary of the Interior and the Secretary of Health and Human Services have entered into a memorandum of agreement, to be provided to the

Secretary, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with the SEAs and LEAs and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations.

(2) The agreement must provide for the apportionment of responsibilities and costs, including child find, evaluation, diagnosis, remediation or therapeutic measures, and (where appropriate) equipment and medical or personal supplies, as needed for a child with a disability to remain in a school or program; and

(j) Includes an assurance that the Department of the Interior will cooperate with the Department in its exercise of monitoring and oversight of the requirements in this section and §§ 300.709 through 300.711 and §§ 300.713 through 300.716, and any agreements entered into between the Secretary of the Interior and other entities under Part B of the Act, and will fulfill its duties under Part B of the Act. The Secretary withholds payments under § 300.707 with respect to the requirements described in this section in the same manner as the Secretary withholds payments under section 616(e)(6) of the Act.

(Authority: 20 U.S.C. 1411(h)(2) and (3))

**§ 300.709 Public participation.**

In fulfilling the requirements of § 300.708 the Secretary of the Interior must provide for public participation consistent with § 300.165.

(Authority: 20 U.S.C. 1411(h))

**§ 300.710 Use of funds under Part B of the Act.**

(a) The Secretary of the Interior may reserve five percent of its payment under § 300.707(a) in any fiscal year, or \$500,000, whichever is greater, for administrative costs in carrying out the provisions of §§ 300.707 through 300.709, 300.711, and 300.713 through 300.716.

(b) Payments to the Secretary of the Interior under § 300.712 must be used in accordance with that section.

(Authority: 20 U.S.C. 1411(h)(1)(A))

**§ 300.711 Early intervening services.**

(a) The Secretary of the Interior may allow each elementary school and secondary school for Indian children operated or funded by the Secretary of the Interior to use not more than 15 percent of the amount the school receives under 34 CFR 300.707(a) for any fiscal year, in combination with other amounts (which may include

amounts other than education funds), to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment, in accordance with section 613(f) of the Act.

(b) Each elementary school and secondary school for Indian children operated or funded by the Secretary of the Interior that develops and maintains coordinated early intervening services in accordance with section 613(f) of the Act and § 300.226 must annually report to the Secretary of the Interior in accordance with section 613(f) of the Act.

(Authority: 20 U.S.C. 1411(h) and 1413(f))

**§ 300.712 Payments for education and services for Indian children with disabilities aged three through five.**

(a) *General.* With funds appropriated under section 611(i) of the Act, the Secretary makes payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act) or consortia of tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities aged three through five on reservations served by elementary schools and secondary schools for Indian children operated or funded by the Department of the Interior. The amount of the payments under paragraph (b) of this section for any fiscal year is equal to 20 percent of the amount allotted under § 300.701(b).

(b) *Distribution of funds.* The Secretary of the Interior must distribute the total amount of the payment under paragraph (a) of this section by allocating to each tribe, tribal organization, or consortium an amount based on the number of children with disabilities aged three through five residing on reservations as reported annually, divided by the total of those children served by all tribes or tribal organizations.

(c) *Submission of information.* To receive a payment under this section, the tribe or tribal organization must submit the figures to the Secretary of the Interior as required to determine the amounts to be allocated under paragraph (b) of this section. This

information must be compiled and submitted to the Secretary.

(d) *Use of funds.* (1) The funds received by a tribe or tribal organization must be used to assist in child find, screening, and other procedures for the early identification of children aged three through five, parent training, and the provision of direct services. These activities may be carried out directly or through contracts or cooperative agreements with the BIA, LEAs, and other public or private nonprofit organizations. The tribe or tribal organization is encouraged to involve Indian parents in the development and implementation of these activities.

(2) The tribe or tribal organization, as appropriate, must make referrals to local, State, or Federal entities for the provision of services or further diagnosis.

(e) *Biennial report.* To be eligible to receive a grant pursuant to paragraph (a) of this section, the tribe or tribal organization must provide to the Secretary of the Interior a biennial report of activities undertaken under this section, including the number of contracts and cooperative agreements entered into, the number of children contacted and receiving services for each year, and the estimated number of children needing services during the two years following the year in which the report is made. The Secretary of the Interior must include a summary of this information on a biennial basis in the report to the Secretary required under section 611(h) of the Act. The Secretary may require any additional information from the Secretary of the Interior.

(f) *Prohibitions.* None of the funds allocated under this section may be used by the Secretary of the Interior for administrative purposes, including child count and the provision of technical assistance.

(Authority: 20 U.S.C. 1411(h)(4))

**§ 300.713 Plan for coordination of services.**

(a) The Secretary of the Interior must develop and implement a plan for the coordination of services for all Indian children with disabilities residing on reservations covered under Part B of the Act.

(b) The plan must provide for the coordination of services benefiting those children from whatever source, including tribes, the Indian Health Service, other BIA divisions, and other Federal agencies.

(c) In developing the plan, the Secretary of the Interior must consult with all interested and involved parties.

(d) The plan must be based on the needs of the children and the system

best suited for meeting those needs, and may involve the establishment of cooperative agreements between the BIA, other Federal agencies, and other entities.

(e) The plan also must be distributed upon request to States; to SEAs, LEAs, and other agencies providing services to infants, toddlers, and children with disabilities; to tribes; and to other interested parties.

(Authority: 20 U.S.C. 1411(h)(5))

**§ 300.714 Establishment of advisory board.**

(a) To meet the requirements of section 612(a)(21) of the Act, the Secretary of the Interior must establish, under the BIA, an advisory board composed of individuals involved in or concerned with the education and provision of services to Indian infants, toddlers, children, and youth with disabilities, including Indians with disabilities, Indian parents or guardians of such children, teachers, service providers, State and local educational officials, representatives of tribes or tribal organizations, representatives from State Interagency Coordinating Councils under section 641 of the Act in States having reservations, and other members representing the various divisions and entities of the BIA. The chairperson must be selected by the Secretary of the Interior.

(b) The advisory board must—

(1) Assist in the coordination of services within the BIA and with other local, State, and Federal agencies in the provision of education for infants, toddlers, and children with disabilities;

(2) Advise and assist the Secretary of the Interior in the performance of the Secretary of the Interior's responsibilities described in section 611(h) of the Act;

(3) Develop and recommend policies concerning effective inter- and intra-agency collaboration, including modifications to regulations, and the elimination of barriers to inter- and intra-agency programs and activities;

(4) Provide assistance and disseminate information on best practices, effective program coordination strategies, and recommendations for improved early intervention services or educational programming for Indian infants, toddlers, and children with disabilities; and

(5) Provide assistance in the preparation of information required under § 300.708(h).

(Authority: 20 U.S.C. 1411(h)(6))

**§ 300.715 Annual reports.**

(a) *In general.* The advisory board established under § 300.714 must prepare and submit to the Secretary of the Interior and to Congress an annual report containing a description of the activities of the advisory board for the preceding year.

(b) *Availability.* The Secretary of the Interior must make available to the Secretary the report described in paragraph (a) of this section.

(Authority: 20 U.S.C. 1411(h)(7))

**§ 300.716 Applicable regulations.**

The Secretary of the Interior must comply with the requirements of §§ 300.103 through 300.108, 300.110 through 300.124, 300.145 through 300.154, 300.156 through 300.160, 300.165, 300.170 through 300.186, 300.226, 300.300 through 300.606, 300.610 through 300.646, and 300.707 through 300.716.

(Authority: 20 U.S.C. 1411(h)(2)(A))

**§ 300.717 Definitions.**

As used in this subpart:

(a) *Freely associated States* means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau;

(b) *Outlying areas* means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands;

(c) *State* means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico; and

(d) *Average per-pupil expenditure in public elementary schools and secondary schools in the United States* means—

(1) Without regard to the source of funds—

(i) The aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the determination is made (or, if satisfactory data for that year are not available, during the most recent preceding fiscal year for which satisfactory data are available) of all LEAs in the 50 States and the District of Columbia); plus

(ii) Any direct expenditures by the State for the operation of those agencies; divided by

(2) The aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(Authority: 20 U.S.C. 1401(22), 1411(b)(1)(C) and (g))

**§ 300.718 Acquisition of equipment and construction or alteration of facilities.**

(a) *General.* If the Secretary determines that a program authorized

under Part B of the Act will be improved by permitting program funds to be used to acquire appropriate equipment, or to construct new facilities or alter existing facilities, the Secretary may allow the use of those funds for those purposes.

(b) *Compliance with certain regulations.* Any construction of new facilities or alteration of existing facilities under paragraph (a) of this section must comply with the requirements of—

(1) Appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the “Americans with Disabilities Accessibility Standards for Buildings and Facilities”); or

(2) Appendix A of subpart 101–19.6 of title 41, Code of Federal Regulations (commonly known as the “Uniform Federal Accessibility Standards”).

(Authority: 20 U.S.C. 1404)

#### Subpart H—Preschool Grants for Children With Disabilities

##### § 300.800 In general.

The Secretary provides grants under section 619 of the Act to assist States to provide special education and related services in accordance with Part B of the Act—

(a) To children with disabilities aged three through five years; and

(b) At a State’s discretion, to two-year-old children with disabilities who will turn three during the school year.

(Authority: 20 U.S.C. 1419(a))

##### §§ 300.801–300.802 [Reserved]

##### § 300.803 Definition of State.

As used in this subpart, *State* means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 1419(i))

##### § 300.804 Eligibility.

A State is eligible for a grant under section 619 of the Act if the State—

(a) Is eligible under section 612 of the Act to receive a grant under Part B of the Act; and

(b) Makes FAPE available to all children with disabilities, aged three through five, residing in the State.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1419(b))

##### § 300.805 [Reserved]

##### § 300.806 Eligibility for financial assistance.

No State or LEA, or other public institution or agency, may receive a

grant or enter into a contract or cooperative agreement under subpart 2 or 3 of Part D of the Act that relates exclusively to programs, projects, and activities pertaining to children aged three through five years, unless the State is eligible to receive a grant under section 619(b) of the Act.

(Authority: 20 U.S.C. 1481(e))

##### § 300.807 Allocations to States.

The Secretary allocates the amount made available to carry out section 619 of the Act for a fiscal year among the States in accordance with §§ 300.808 through 300.810.

(Authority: 20 U.S.C. 1419(c)(1))

##### § 300.808 Increase in funds.

If the amount available for allocation to States under § 300.807 for a fiscal year is equal to or greater than the amount allocated to the States under section 619 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(a) Except as provided in § 300.809, the Secretary—

(1) Allocates to each State the amount the State received under section 619 of the Act for fiscal year 1997;

(2) Allocates 85 percent of any remaining funds to States on the basis of the States’ relative populations of children aged three through five; and

(3) Allocates 15 percent of those remaining funds to States on the basis of the States’ relative populations of all children aged three through five who are living in poverty.

(b) For the purpose of making grants under this section, the Secretary uses the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

(Authority: 20 U.S.C. 1419(c)(2)(A))

##### § 300.809 Limitations.

(a) Notwithstanding § 300.808, allocations under that section are subject to the following:

(1) No State’s allocation may be less than its allocation under section 619 of the Act for the preceding fiscal year.

(2) No State’s allocation may be less than the greatest of—

(i) The sum of—

(A) The amount the State received under section 619 of the Act for fiscal year 1997; and

(B) One-third of one percent of the amount by which the amount appropriated under section 619(j) of the Act for the fiscal year exceeds the amount appropriated for section 619 of the Act for fiscal year 1997;

(ii) The sum of—

(A) The amount the State received under section 619 of the Act for the preceding fiscal year; and

(B) That amount multiplied by the percentage by which the increase in the funds appropriated under section 619 of the Act from the preceding fiscal year exceeds 1.5 percent; or

(iii) The sum of—

(A) The amount the State received under section 619 of the Act for the preceding fiscal year; and

(B) That amount multiplied by 90 percent of the percentage increase in the amount appropriated under section 619 of the Act from the preceding fiscal year.

(b) Notwithstanding paragraph (a)(2) of this section, no State’s allocation under § 300.808 may exceed the sum of—

(1) The amount the State received under section 619 of the Act for the preceding fiscal year; and

(2) That amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated under section 619 of the Act from the preceding fiscal year.

(c) If the amount available for allocation to States under § 300.808 and paragraphs (a) and (b) of this section is insufficient to pay those allocations in full, those allocations are ratably reduced, subject to paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 1419(c)(2)(B) and (c)(2)(C))

##### § 300.810 Decrease in funds.

If the amount available for allocations to States under § 300.807 for a fiscal year is less than the amount allocated to the States under section 619 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(a) If the amount available for allocations is greater than the amount allocated to the States for fiscal year 1997, each State is allocated the sum of—

(1) The amount the State received under section 619 of the Act for fiscal year 1997; and

(2) An amount that bears the same relation to any remaining funds as the increase the State received under section 619 of the Act for the preceding fiscal year over fiscal year 1997 bears to the total of all such increases for all States.

(b) If the amount available for allocations is equal to or less than the amount allocated to the States for fiscal year 1997, each State is allocated the amount the State received for fiscal year 1997, ratably reduced, if necessary.

(Authority: 20 U.S.C. 1419(c)(3))

**§ 300.811 Allocation for State in which by-pass is implemented for parentally-placed private school children with disabilities.**

In determining the allocation under §§ 300.808 through 300.810 for a State in which the Secretary will implement a by-pass for parentally-placed private school children with disabilities under §§ 300.190 through 300.198, the Secretary includes in the State's child count—

(a) For the first year of a by-pass, the actual or estimated number of private school children aged three through five years, with disabilities (as defined in §§ 300.8(a) and 300.130) in the State, as of the preceding December 1; and

(b) For succeeding years of a by-pass, the number of private school children with disabilities aged three through five years, who received special education and related services under the by-pass in the preceding year.

(Authority: 20 U.S.C. 1412(f)(2))

**§ 300.812 Reservation for State activities.**

(a) Each State may reserve not more than the amount described in paragraph (b) of this section for administration and other State-level activities in accordance with §§ 300.813 and 300.814.

(b) For each fiscal year, the Secretary determines and reports to the SEA an amount that is 25 percent of the amount the State received under section 619 of the Act for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—

(1) The percentage increase, if any, from the preceding fiscal year in the State's allocation under section 619 of the Act; or

(2) The rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(Authority: 20 U.S.C. 1419(d))

**§ 300.813 State administration.**

(a) For the purpose of administering section 619 of the Act (including the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children with disabilities), a State may use not more than 20 percent of the maximum amount the State may reserve under § 300.812 for any fiscal year.

(b) Funds described in paragraph (a) of this section may also be used for the administration of Part C of the Act.

(Authority: 20 U.S.C. 1419(e))

**§ 300.814 Other State-level activities.**

Each State must use any funds the State reserves under § 300.812 and does not use for administration under § 300.813:

(a) For support services (including establishing and implementing the mediation process required by section 615(e) of the Act), which may benefit children with disabilities younger than three or older than five as long as those services also benefit children with disabilities aged three through five.

(b) For direct services for children eligible for services under section 619 of the Act.

(c) For activities at the State and local levels to meet the performance goals established by the State under section 612(a)(15) of the Act.

(d) To supplement other funds used to develop and implement a statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not more than one percent of the amount received by the State under section 619 of the Act for a fiscal year.

(e) To provide early intervention services (which must include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills) in accordance with Part C of the Act to children with disabilities who are eligible for services under section 619 of the Act and who previously received services under Part C of the Act until such children enter, or are eligible under State law to enter, kindergarten; or

(f) At the State's discretion, to continue service coordination or case management for families who receive services under Part C of the Act, consistent with § 300.814(e).

(Authority: 20 U.S.C. 1419(f))

**§ 300.815 Subgrants to local educational agencies.**

Each State that receives a grant under section 619 of the Act for any fiscal year must distribute all of the grant funds that the State does not reserve under § 300.812 to LEAs in the State that have established their eligibility under section 613 of the Act.

(Authority: 20 U.S.C. 1419(g)(1))

**§ 300.816 Allocations to local educational agencies.**

(a) *Base payments.* The State must first award each LEA described in § 300.815 the amount that agency would have received under section 619 of the Act for fiscal year 1997 if the State had distributed 75 percent of its grant for

that year under section 619(c)(3), as such section was then in effect.

(b) *Base payment adjustments.* For fiscal year 1998 and beyond—

(1) If a new LEA is created, the State must divide the base allocation determined under paragraph (a) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs based on the relative numbers of children with disabilities ages three through five currently provided special education by each of the LEAs;

(2) If one or more LEAs are combined into a single new LEA, the State must combine the base allocations of the merged LEAs; and

(3) If for two or more LEAs, geographic boundaries or administrative responsibility for providing services to children with disabilities ages three through five changes, the base allocations of affected LEAs must be redistributed among affected LEAs based on the relative numbers of children with disabilities ages three through five currently provided special education by each affected LEA.

(c) *Allocation of remaining funds.* After making allocations under paragraph (a) of this section, the State must—

(1) Allocate 85 percent of any remaining funds to those LEAs on the basis of the relative numbers of children enrolled in public and private elementary schools and secondary schools within the LEA's jurisdiction; and

(2) Allocate 15 percent of those remaining funds to those LEAs in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(3) For the purpose of making grants under this section, States must apply on a uniform basis across all LEAs the best data that are available to them on the numbers of children enrolled in public and private elementary and secondary schools and the numbers of children living in poverty.

(Authority: 20 U.S.C. 1419(g)(1))

**§ 300.817 Reallocation of local educational agency funds.**

If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged three through five residing in the area served by the LEA with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that are not needed by that LEA to provide FAPE to other LEAs in the State that are not adequately providing

special education and related services to all children with disabilities aged three through five residing in the areas the other LEAs serve.

(Authority: 20 U.S.C. 1419(g)(2))

**§ 300.818 Part C of the Act inapplicable.**

Part C of the Act does not apply to any child with a disability receiving FAPE, in accordance with Part B of the Act, with funds received under section 619 of the Act.

(Authority: 20 U.S.C. 1419(h))

**PART 301 [REMOVED]**

2. Remove part 301.

3. Revise part 304 to read as follows:

**PART 304—SERVICE OBLIGATIONS UNDER SPECIAL EDUCATION—PERSONNEL DEVELOPMENT TO IMPROVE SERVICES AND RESULTS FOR CHILDREN WITH DISABILITIES**

**Subpart A—General**

Sec.

304.1 Purpose.

304.3 Definitions.

**Subpart B—Conditions That Must Be Met by Grantee**

304.21 Allowable costs.

304.22 Requirements for grantees in disbursing scholarships.

304.23 Assurances that must be provided by grantee.

**Subpart C—Conditions That Must Be Met by Scholar**

304.30 Requirements for scholar.

304.31 Requirements for obtaining an exception or deferral to performance or repayment under an agreement.

**Authority:** 20 U.S.C. 1462(h), unless otherwise noted.

**Subpart A—General**

**§ 304.1 Purpose.**

Individuals who receive scholarship assistance from projects funded under the Special Education—Personnel Development to Improve Services and Results for Children with Disabilities program are required to complete a service obligation, or repay all or part of the costs of such assistance, in accordance with section 662(h) of the Act and the regulations of this part.

(Authority: 20 U.S.C. 1462(h))

**§ 304.3 Definitions.**

The following definitions apply to this program:

(a) *Academic year* means—

(1) A full-time course of study—

(i) Taken for a period totaling at least nine months; or

(ii) Taken for the equivalent of at least two semesters, two trimesters, or three quarters; or

(2) For a part-time student, the accumulation of periods of part-time courses of study that is equivalent to an “academic year” under paragraph (a)(1) of this definition.

(b) *Act* means the Individuals with Disabilities Education Act, as amended, 20 U.S.C. 1400 *et seq.*

(c) *Early intervention services* means early intervention services as defined in section 632(4) of the Act and includes early intervention services to infants and toddlers with disabilities, and as applicable, to infants and toddlers at risk for disabilities under sections 632(1) and 632(5)(b) of the Act.

(d) *Full-time*, for purposes of determining whether an individual is employed full-time in accordance with § 304.30 means a full-time position as defined by the individual’s employer or by the agencies served by the individual.

(e) *Related services* means related services as defined in section 602(26) of the Act.

(f) *Repayment* means monetary reimbursement of scholarship assistance in lieu of completion of a service obligation.

(g) *Scholar* means an individual who is pursuing a degree, license, endorsement, or certification related to special education, related services, or early intervention services and who receives scholarship assistance under section 662 of the Act.

(h) *Scholarship* means financial assistance to a scholar for training under the program and includes all disbursements or credits for tuition, fees, student stipends, books, and travel in conjunction with training assignments.

(i) *Service obligation* means a scholar’s employment obligation, as described in section 662(h) of the Act and § 304.30.

(j) *Special education* means special education as defined in section 602(29) of the Act.

(Authority: 20 U.S.C. 1462(h))

**Subpart B—Conditions That Must be Met by Grantee**

**§ 304.21 Allowable costs.**

In addition to the allowable costs established in the Education Department General Administrative Regulations in 34 CFR 75.530 through 75.562, the following items are allowable expenditures by projects funded under the program:

(a) Cost of attendance, as defined in Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. 108711 (HEA), including the following:

(1) Tuition and fees.

(2) An allowance for books, supplies, transportation, and miscellaneous personal expenses.

(3) An allowance for room and board.

(b) Student stipends.

(c) Travel in conjunction with training assignments.

(Authority: 20 U.S.C. 1462(h))

**§ 304.22 Requirements for grantees in disbursing scholarships.**

Before disbursement of scholarship assistance to an individual, a grantee must—

(a) Ensure that the scholar—

(1) Is a citizen or national of the United States;

(2) Is a permanent resident of—

(i) Puerto Rico, the United States Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands; or

(ii) The Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau (during the period in which these entities are eligible to receive an award under the program); or

(3) Provides evidence from the U.S. Department of Homeland Security that the individual is—

(i) A lawful permanent resident of the United States; or

(ii) In the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident;

(b) Limit the cost of attendance portion of the scholarship assistance (as discussed in § 304.21(a)) to the amount by which the individual’s cost of attendance at the institution exceeds the amount of grant assistance the scholar is to receive for the same academic year under title IV of the HEA; and

(c) Obtain a Certification of Eligibility for Federal Assistance from each scholar, as prescribed in 34 CFR 75.60, 75.61, and 75.62.

(Authority: 20 U.S.C. 1462(h))

**§ 304.23 Assurances that must be provided by grantee.**

Before receiving an award, a grantee that intends to grant scholarships under the program must include in its application an assurance that the following requirements will be satisfied:

(a) *Requirement for agreement.* Prior to granting a scholarship, the grantee will require each scholar to enter into a written agreement in which the scholar agrees to the terms and conditions set forth in § 304.30. This agreement must explain the Secretary’s authority to grant deferrals and exceptions to the service obligation pursuant to § 304.31 and include the current Department address for purposes of the scholar’s compliance with § 304.30(i).

(b) *Standards for satisfactory progress.* The grantee must establish, notify students of, and apply reasonable standards for measuring whether a scholar is maintaining satisfactory progress in the scholar's course of study.

(c) *Exit certification.* The grantee must establish policies and procedures for receiving and maintaining records of written certification from scholars at the time of exit from the program that identifies—

(1) The number of years the scholar needs to work to satisfy the work requirements in § 304.30(d);

(2) The total amount of scholarship assistance received subject to § 304.30;

(3) The time period, consistent with § 304.30(f)(1), during which the scholar must satisfy the work requirements; and

(4) As applicable, all other obligations of the scholar under § 304.30.

(d) *Information.* The grantee must provide the Secretary information, including records maintained under paragraph (c) of this section, that is necessary to carry out the Secretary's functions under section 662 of the Act and this part.

(e) *Notification to the Secretary.* If the grantee is aware that the scholar has chosen not to fulfill or will be unable to fulfill the obligation under § 304.30(d), the grantee must notify the Secretary when the scholar exits the program.

(Authority: 20 U.S.C. 1462(h))

### Subpart C—Conditions That Must Be Met by Scholar

#### § 304.30 Requirements for scholar.

Individuals who receive scholarship assistance from grantees funded under section 662 of the Act must—

(a) *Training.* Receive the training at the educational institution or agency designated in the scholarship;

(b) *Educational allowances.* Not accept payment of educational allowances from any other entity if that allowance conflicts with the scholar's obligation under section 662 of the Act and this part;

(c) *Satisfactory progress.* Maintain satisfactory progress toward the degree, certificate, endorsement, or license as determined by the grantee;

(d) *Service obligation.* Upon exiting the training program under paragraph (a) of this section, subsequently maintain employment—

(1) On a full-time or full-time equivalent basis; and

(2) For a period of at least two years for every academic year for which assistance was received;

(e) *Eligible employment.* In order to meet the requirements of paragraph (d) of this section for any project funded

under section 662 of the Act, be employed in a position in which—

(1) A majority of the children to whom the individual provides services are receiving special education, related services, or early intervention services from the individual;

(2) The individual spends a majority of his or her time providing special education, related services, or early intervention services;

(3) If the position is supervisory, including in the capacity of a principal, the individual spends a majority of his or her time performing work related to the individual's preparation under section 662 of the Act by providing one or both of the following:

(i) Special education, related services, or early intervention services.

(ii) Supervision to others on issues directly related to special education, related services, or early intervention services.

(4) If the position is postsecondary faculty, the individual spends a majority of his or her time performing work related to the individual's preparation under section 662 of the Act by preparing special education teachers, related services personnel, or early intervention services personnel to provide services; or

(5) If the position is in research, the individual spends a majority of his or her time performing research related to the individual's preparation under section 662 of the Act that focuses on special education, related services, or early intervention services;

(f) *Time period.* Meet the service obligation under paragraph (d) of this section as follows:

(1) A scholar must complete the service obligation within the period ending not more than the sum of the number of years required in paragraph (d)(2) of this section, as appropriate, plus three additional years, from the date the scholar completes the training for which the scholarship assistance was awarded.

(2) A scholar may begin eligible employment subsequent to the completion of one academic year of the training for which the scholarship assistance was received that otherwise meets the requirements of paragraph (1);

(g) *Part-time scholars.* If the scholar is a part-time student, meet the service obligation in this section based on the accumulated academic years of training for which the scholarship is received;

(h) *Information upon exit.* Provide the grantee all requested information necessary for the grantee to meet the exit certification requirements under § 304.23(c);

(i) *Information after exit.* Within 60 days after exiting the program, and as necessary thereafter for any changes, provide the Department, via U.S. mail, all information that the Secretary needs to monitor the scholar's service obligation under this section, including social security number, address, employment setting, and employment status;

(j) *Repayment.* If not fulfilling the requirements in this section, subject to the provisions in § 304.31 regarding an exception or deferral, repay any scholarship received, plus interest, in an amount proportional to the service obligation not completed as follows:

(1) The Secretary charges the scholar interest on the unpaid balance owed in accordance with the Debt Collection Act of 1982, as amended, 31 U.S.C. 3717.

(2)(i) Interest on the unpaid balance accrues from the date the scholar is determined to have entered repayment status under paragraph (4) of this section.

(ii) Any accrued interest is capitalized at the time the scholar's repayment schedule is established.

(iii) No interest is charged for the period of time during which repayment has been deferred under § 304.31.

(3) Under the authority of the Debt Collection Act of 1982, as amended, the Secretary may impose reasonable collection costs.

(4) A scholar enters repayment status on the first day of the first calendar month after the earliest of the following dates, as applicable:

(i) The date the scholar informs the grantee or the Secretary that the scholar does not plan to fulfill the service obligation under the agreement.

(ii) Any date when the scholar's failure to begin or maintain employment makes it impossible for that individual to complete the service obligation within the number of years required in § 304.30(f).

(iii) Any date on which the scholar discontinues enrollment in the course of study under § 304.30(a).

(5) The scholar must make payments to the Secretary that cover principal, interest, and collection costs according to a schedule established by the Secretary.

(6) Any amount of the scholarship that has not been repaid pursuant to paragraphs (j)(1) through (j)(5) of this section will constitute a debt owed to the United States that may be collected by the Secretary in accordance with 34 CFR part 30.

(Authority: 20 U.S.C. 1462(h))

**§ 304.31 Requirements for obtaining an exception or deferral to performance or repayment under an agreement.**

(a) Based upon sufficient evidence to substantiate the grounds, the Secretary may grant an exception to the repayment requirement in § 304.30(j), in whole or part, if the scholar—

(1) Is unable to continue the course of study in § 304.30(j) or perform the service obligation because of a permanent disability; or

(2) Has died.

(b) Based upon sufficient evidence to substantiate the grounds, the Secretary may grant a deferral of the repayment requirement in § 304.30(j) during the time the scholar—

(1) Is engaging in a full-time course of study at an institution of higher education;

(2) Is serving on active duty as a member of the armed services of the United States;

(3) Is serving as a volunteer under the Peace Corps Act; or

(4) Is serving as a full-time volunteer under title I of the Domestic Volunteer Service Act of 1973.

(Authority: 20 U.S.C. 1462(h))

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