DEPARTMENT OF EDUCATION

34 CFR Parts 300, 301 and 303

RIN 1820–AB40

Assistance to States for the Education of Children With Disabilities, Preschool Grants for Children With Disabilities, and Early Intervention Program for Infants and Toddlers With Disabilities

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

ACTION: Notice of proposed rulemaking.

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 the Early Intervention Program for Infants and Toddlers with Disabilities. These amendments are needed to implement changes recently enacted by the Individuals with Disabilities Education Act Amendments of 1997.

DATES: Comments must be received by the Department on or before January 20, 1998.

The Department plans to hold public meetings in conjunction with this NPRM. The dates and times of the meetings are in the section titled *Public Meetings* under Invitation to Comment elsewhere in this preamble.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Thomas Irvin, Office of Special Education and Rehabilitative Services, U.S. Department of Education, Room 3090, Mary E. Switzer Building, 330 C Street., SW., Washington, DC 20202. Comments may also be sent through the Internet to: comment@ed.gov

You must include the term ''Assistance for Education'' in the subject line of your electronic message.

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of those comments may also be sent to the Department representative named in the **ADDRESSES** section.

The Department plans to hold public meetings in conjunction with this NPRM. The locations of the meetings are in the section titled *Public Meetings* under Invitation to Comment elsewhere in this preamble.

FOR FURTHER INFORMATION CONTACT: Thomas Irvin (202) 205–8969 or JoLeta Reynolds (202) 205–5507. Individuals who use a telecommunications device for the deaf (TDD) may call (202) 205–5465.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to Katie Mimcy, Director of the Alternate Formats Center. Telephone: (202) 205–8113.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. To ensure that public comments have maximum effect in developing the final regulations, the Department urges commenters to identify clearly the specific section or sections of the proposed regulations that each comment addresses and to arrange comments in the same order as the proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 3090, Mary E. Switzer Building, 300 C St., SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

On request the Department supplies 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 docket for these proposed regulations. An individual with a disability who wants to schedule an appointment for this type of aid may call (202) 205–8113 or (202) 260–9895. An individual who uses a TDD may call the Federal Information Relay Service at 1–800–877–8339, between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

To assist the Department in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

Public Meetings

In a notice published in the **Federal Register** on September 17, 1997 (62 FR 48923–48925), the Department announced public meetings to obtain public comment on the statutory requirements of the IDEA Amendments of 1997. The Department will use those public meeting dates and times for public comment on this NPRM.

Individuals who wish to make a statement at any of the meetings are encouraged to do so. Time allotted for each individual to testify will be limited and will depend on the number of speakers wishing to testify at each session. It is likely that each participant choosing to comment will be limited to four minutes. Persons interested in making oral public comment will be able to sign-up to make a statement on the day of the meeting at the Department's public meeting on-site registration desk on a first-come-first served basis. If no time slots remain, then the Department will reserve a limited amount of additional time at the end of each hearing to accommodate those individuals. (Every effort will be made to have ample time to hear all individuals who wish to make a statement.) For individuals who want to speak at the public meeting, registration will begin at 1:00 p.m., in all cities except Washington, DC where it will begin at 12:00 Noon, in each hotel or public building at the registration table outside the room where the public meeting will be held. The dates, times, and locations of the meetings are as follows:

October 23, 1997—2:00 p.m.–7:00 p.m.

Region I—Logan Ramada Hotel, 75 Service Road, Logan International Airport, Boston, MA 02128

October 27, 1997—2:00 p.m.–7:00 p.m.

Region IV—Radisson Hotel Atlanta, 165 Courtland and International Blvd., Atlanta, GA 30303

October 28, 1997—2:00 p.m.–7:00 p.m.

Region VI—Radisson Hotel Dallas, 1893 West Mockingbird Lane, Dallas, TX 75235

November 4, 1997—1:00 p.m.–5:00 p.m.

Department of Education, Government Service Administration (GSA), 7th and D Streets, S.W. (Auditorium), Washington, D.C. 20407

November 18, 1997—2:00 p.m.–7:00 p.m.

Region VIII—Four Points, 3535 Quebec Street, Denver, CO 80207

November 21, 1997—2:00 p.m.–7:00 p.m.

Region IX—Holiday Inn Select/ Chinatown, 750 Kearny Street, San Francisco, CA 94108

November 24, 1997—2:00 p.m.–7:00 p.m.

Region V—Sheraton North Shore, 933 Skokie Boulevard, Northbrook, IL 60062

The meeting sites are accessible to individuals with disabilities. An individual with a disability who will need an auxiliary aid or service to participate in the meeting (e.g., interpreting service, assistive listening device, or materials in an alternate format) should consult the notice mentioned in this document for the person to contact at least two weeks before the scheduled meeting date to ensure that accommodations requested will be available. Although the Department will attempt to meet a request received after that date, the requested accommodation may not be available because of insufficient time to arrange it.

Background

On June 4, 1997, the Individuals with Disabilities Education Act (IDEA) Amendments of 1997 were enacted into law as Pub. L. 105–17.

The statute passed by Congress and signed by the President reauthorizes and makes significant changes to IDEA to better accomplish the following purposes: (1) Ensure that all children with disabilities have available a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; (2) ensure that the rights of children with disabilities and parents of those children are protected; (3) assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; (4) assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; (5) ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and (6) assess, and ensure the effectiveness of, efforts to educate children with disabilities.

On June 27, 1997, the Secretary published a notice in the **Federal Register** requesting from the public advice and recommendations on regulatory issues under the IDEA Amendments of 1997. As of the end of August, 1997, 334 comments were received in response to the Notice, including letters from parents and public and private agency personnel, and from parent-advocate and professional organizations. The comments addressed each major provision of the IDEA Amendments of 1997 (such as the new funding provisions, discipline procedures, provisions relating to evaluation of children, individualized education programs, participation of private school children with disabilities, methods of ensuring services from noneducational agencies, and changes in the procedural safeguards). All of these comments were reviewed and considered in developing this Notice of Proposed Rulemaking. The Secretary appreciates the thoughtful attention of the commenters in responding to the June 27th notice.

Proposed Regulatory Changes

The IDEA Amendments of 1997 significantly updated the Assistance to States program under Part B of the Act, as in effect before June 4, 1997. The changes made by those Amendments call for corresponding updates to virtually all of the current regulations under this part, as well as new regulatory provisions to incorporate new statutory requirements such as those relating to performance goals and indicators, procedural safeguards notice, mediation, and discipline.

In addition to incorporating new requirements from the Act, some new provisions and notes are proposed to assist in clarifying the new statutory requirements, or providing guidance with respect to implementing those requirements. Finally, some changes are needed to incorporate longstanding interpretations of the Act that have been addressed in nonregulatory guidance in the past, or to ensure a more meaningful implementation of the Act and its regulations for children with disabilities, parents and public agencies.

To accommodate the reader in understanding these proposed changes, the Secretary has elected to publish the full text of the regulations, as they would be when amended, rather than simply publish an amendatory document that shows only the changes proposed to current regulations. Although this approach increases the length of this NPRM, it provides a more meaningful way for parents, agency officials, and the general public to review the changes within the context of the existing regulations.

The following summary of the proposed regulatory changes describes how the Secretary would incorporate the statutory changes of the IDEA Amendments of 1997 into the applicable subparts of the Department's regulations for the Assistance to States program (34 CFR part 300) and Preschool Grants program (34 CFR part 301) for children with disabilities, along with conforming changes to the Early Intervention program for Infants and Toddlers with Disabilities (34 part 303). The Department plans to publish additional technical amendments to Part 303 at a later date. Those amendments will revise the Part 303 regulations consistent with the changes made by the IDEA Amendments of 1997. This summary identifies changes that are statutory and describes any regulations that the Secretary is proposing in this NPRM to implement these statutory provisions.

Commenters are requested to direct their comments to issues that can be changed through regulation and not to statutory requirements. Commenters also are reminded that, under section 607(b) of the IDEA, the Secretary is not authorized to make regulatory changes to lessen the protections for children with disabilities in the IDEA regulations that were in effect on July 20, 1983, absent statutory changes indicating a Congressional intent to lessen those protections.

Throughout this preamble, issues that the Secretary is proposing to regulate on are introduced by phrases such as, ''The Secretary proposes * * *'' or ''In this proposed section, the Secretary proposes * * *''. Commenters are asked to focus their comments on these parts of the proposed regulation.

Appendix C to the current regulations (Interpretation of IEP program requirements) would be updated and revised consistent with the changes made by the IDEA Amendments of 1997 and these proposed regulations. Revised Appendix C is presented as Appendix C to this NPRM.

To aid readers in referring between this NPRM and current regulations, a distribution table for the part 300 regulations is presented in Appendix D to these proposed regulations. That table identifies each current regulatory section and the comparable proposed regulatory section, if any.

These proposed regulations would implement the new statutory changes relating to the three formula grant programs in the IDEA: (1) the Assistance to States for the Education of Children with Disabilities Program under Part B of the Act (34 CFR part 300); (2) the Preschool Grants Program under section 619 of the Act (34 CFR part 301); and (3) the Early Intervention Program for Infants and Toddlers with Disabilities under Part H of the Act (to be renamed part C on July 1, 1998) (34 CFR part 303).

1. Part 300—Assistance to States for the Education of Children With Disabilities

The new statutory amendments to the IDEA, while retaining (and strengthening) the basic rights and protections included in the Act since 1975, also have redirected the focus of the law as in effect before June 4, 1997, to heighten attention to improving results for children with disabilities. This shift in focus was necessary in order to make needed improvements in the Part B program, based on 20 years of experience and research in the education of children with disabilities. The amendments to the Part B program were the result of over three years of intensive work by stakeholders from all realms of life and at all governmental levels, who have a vested interest in the education of children with disabilities.

Background and Need for Improvements

Before enactment of the 1975 amendments to the IDEA (then known as the Education of the Handicapped Act (EHA)), approximately one million children with disabilities were excluded entirely from the public education system, and more than half of all children with disabilities in the United States did not receive appropriate educational services that would enable them to enjoy full equality of opportunity. The 1975 amendments to the EHA—the Education for All Handicapped Children Act (Pub. L. 94–142)—directly addressed the problems that existed at that time by establishing the right to education for all children with disabilities.

As a result of the Pub. L. 94–142 Amendments to the IDEA, significant progress has been made in addressing the problems that existed in 1975. Today, every State in the nation has laws in effect ensuring the provision of a free appropriate public education (FAPE) to all children with disabilities. The number of young adults with disabilities enrolled in post-secondary education has tripled, and the unemployment rate for individuals with disabilities in their twenties is almost half that of their older counterparts.

Despite the progress that has been made since 1975, the promise of the law has not been fulfilled for many children covered by the Act. Too many students with disabilities are failing courses and dropping out of school. Almost twice as many students with disabilities drop out as compared to students without disabilities. And, when students with disabilities drop out of school, they are less likely to ever return to school and are more likely to be unemployed or have problems with the law. Further, almost half of the students with disabilities do not participate in statewide assessments, and, therefore, schools are not held accountable for results. Students from minority backgrounds continue to be placed disproportionately in separate special education settings.

Over 20 years of experience and research in implementing Part B of the IDEA has demonstrated that the education of children with disabilities can be made more effective by—

(1) Having high expectations of these children and ensuring their access to the general curriculum to the maximum extent possible;

(2) Strengthening the role of parents and fostering partnerships between parents and schools;

(3) Aligning the Part B program with State and local improvement efforts so that students with disabilities can benefit from them;

(4) Providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs;

(5) Focusing resources on teaching and learning, while reducing paperwork and requirements that do not assist in improving educational results; and

(6) Supporting high-quality, intensive professional development for all personnel who work with disabled children to ensure that they have the skills and knowledge necessary to effectively assist these children to be prepared for employment and independent living.

The IDEA Amendments of 1997 are designed to make improvements in the Part B program that address many of the factors based on experience and research that are identified in the preceding paragraphs. A description of some of these improvements is included in the following paragraphs, together with an identification of where the statutory provisions have been incorporated into these proposed regulations:

Improving Results for Children With Disabilities

The focus of the changes in the new amendments is directed at improving results for children with disabilities—by promoting early identification and early provision of services, and ensuring the access of these children to the general curriculum and general educational reforms. The amendments include a number of provisions to address this goal.

A. Early Identification and Provision of Services

The Early Intervention Program for Infants and Toddlers with disabilities and the Preschool Grants program have demonstrated the importance of early intervention. Children who receive services at an early age are often better able to learn once they reach school age. In addition, research on school-aged children who are experiencing significant reading or behavior problems has shown that the common practice of waiting until the third or fourth grade to refer those children to special education only increases these problems. Appropriate interventions need to happen as early as possible in a child's life, when it is clear that the child needs help, and at a time, developmentally, when the child could profit most from receiving services.

The IDEA Amendments of 1997 include provisions that encourage States to reach out to young children who are experiencing learning problems, and allow States and local school districts to utilize ''developmental delay'' eligibility criteria as an alternative to specific disability categories through age 9. Implemented properly, this provision will allow children to receive earlier and more appropriate interventions.

The amendments also allow for more flexible use of IDEA-funded staff who work in general education classrooms or other education-related settings so that they can work with both children who have disabilities and others who may need their help. These provisions are included in §§ 300.7 and 300.235 of this NPRM.

B. IEPs That Focus on Improving Results Through the General Curriculum

The new amendments enhance the participation of disabled children in the general curriculum through improvements to the IEP by—(1) Relating a child's education to what nondisabled children are receiving; (2) providing for the participation of regular education teachers in developing, reviewing, and revising the IEP; and (3) requiring that the IEP team consider the specific needs of each child, as appropriate, such as the need for behavior interventions and assistive technology. These provisions are included in §§ 300.344, and 300.346–300.347 of these proposed regulations.

C. Education With Nondisabled Children

Research data show that for most students with disabilities integration into general education programs with nondisabled children is often associated

with improved results, higher levels of employment and independent living. The data also show that if disabled students are simply placed in general education classrooms without necessary supports and modifications they are more likely to drop out of school than their nondisabled peers. The new amendments address this issue by requiring that the IEP include: (1) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class; and (2) a statement of the specific special education and related services and supplementary aids and services to be provided to the child or on behalf of the child, and a statement of program modifications or supports for school personnel that will be provided for the child. These provisions are incorporated in § 300.347 of these proposed regulations.

D. Higher Expectations for Disabled Students and Agency Accountability

A critical element in improving educational results for disabled children is promoting high expectations for them commensurate with their particular needs, and ensuring meaningful and effective access to the general curriculum. Data and experience show that when schools have high expectations for these children, ensure their access to the general curriculum, whenever appropriate, and provide them the necessary supports and accommodations, many can achieve to higher standards, and all can achieve more than society has historically expected.

Despite the current knowledge base in this regard, the education system often fails to promote such high expectations or to establish meaningful education goals, and about half of all disabled children are excluded from State and district-wide assessments.

The new amendments specifically address these concerns by requiring (1) the development of State performance goals for children with disabilities that must address certain key indicators of the success of educational efforts for these children—including, at a minimum, performance on assessments, dropout rates, and graduation rates, and regular reports to the public on progress toward meeting the goals; (2) that children with disabilities be included in general State and district-wide assessments, with appropriate accommodations, if necessary, and (3) that schools report to parents on the progress of their disabled child as often as such reports are provided to parents of nondisabled children. These provisions are included in §§ 300.137–300.138 and 300.347 of the proposed regulations.

The IDEA Amendments of 1997 also contemplate that State performance goals and indicators will have a crucial role in determining personnel training and development needs, and offer additional funding, through the State Improvement Program authorized under Part D of the Act, to help States meet their goals for children with disabilities. These provisions are addressed in §§ 300.380–300.382. Additionally, States are encouraged to offer funding to school districts to foster capacity building and systemic improvement activities, as addressed in proposed §§ 300.622–300.624. School districts are also authorized to establish school-based improvement programs, as described in §§ 300.234 and 300.245–300.250.

E. Strengthening the Role of Parents and Fostering Partnerships Between Parents and Schools

In order to achieve better results for children with disabilities, it is critical to strengthen the role of parents, and to provide a means for parents and school staff to work together in a constructive manner. The IDEA Amendments of 1997 include several provisions aimed at promoting the involvement of parents, including providing that they: (1) Have an opportunity to participate in meetings with respect to the identification, evaluation, or educational placement of their child or the provision of FAPE to the child; (2) are included in any group that makes decisions on the educational placement of their child; and (3) receive regular reports on their child's progress (by such means as report cards) as often as reports are provided to parents of nondisabled children.

The amendments also require that, at a minimum, parents be offered mediation as a voluntary option whenever a hearing is requested to resolve a dispute between the parents and the agency about any matters specified in the preceding paragraph. These provisions are included in §§ 300.347, 300.501, and 300.506 of this NPRM.

F. Reducing Unnecessary Paperwork and Other Burdens

The IDEA Amendments of 1997 include several provisions that reduce unnecessary paperwork, and direct resources to teaching and learning. For example, the amendments permit initial evaluations and reevaluations to be based on existing evaluation data and reports, and do not require that eligibility be re-established when a triennial evaluation is conducted if the IEP team agrees that the child continues to have a disability. The amendments also eliminate unnecessary paperwork requirements that discourage the use of IDEA funds for teachers who work in regular classrooms, while ensuring that the needs of students with disabilities are met. These provisions are included under §§ 300.234 and 300.533 of this NPRM.

In addition, these amendments permit States and local educational agencies to establish eligibility only once by providing policies and procedures to demonstrate that the eligibility conditions under part B are met. Thereafter, only amendments to those policies and procedures necessitated by identified compliance problems or changes in the law would be required. These provisions are included under §§ 300.110–300.111 and 300.180–300.181.

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

Proposed § 300.1 would retain the statement of the purposes of this part in the existing regulations, except for conforming those purposes to the new statutory changes. Consistent with section 601(d)(1)(A) of the Act, the purpose in proposed § 300.1(a) (relating to ensuring that all children with disabilities have available to them a free appropriate public education designed to meet their unique needs) would be amended to add ''and to prepare them for employment and independent living.'' This change represents a significant shift in the emphasis of the Assistance to States program—to an outcome oriented approach that focuses on better results for children with disabilities rather than on simply ensuring their access to education.

Consistent with section 601(d)(1)(C) of the Act, the purpose in § 300.1(c) (relating to assisting States and localities to provide for the education of children with disabilities) would be amended by adding ''educational service agencies'' and ''Federal agencies'' to the list of entities that would be assisted under this part.

A note would be added following proposed § 300.1 that emphasizes the importance of independent living in promoting the integration and full inclusion of individuals with disabilities into the mainstream of American society, consistent with the new statutory purpose under § 300.1(a) (relating to employment and independent living). The note describes the philosophy of independent living

contained in Section 701 of the Rehabilitation Act of 1973.

Proposed § 300.2 (relating to the applicability of these regulations to State, local, and private agencies) would maintain the current regulatory provisions of this section, except for the following changes to conform the section to the new statutory provisions: First, paragraph (b) would be amended to eliminate the reference to State plans. The newly revised Act (Section 612(a)) no longer requires States to submit State plans. (See Subpart B, ''State Eligibility—General,'' for discussion of the statutory elimination of State plan requirements). Second, consistent with new statutory provisions relating to children with disabilities who are incarcerated, paragraph (b)(4) of § 300.2 would be amended to replace the term ''State correctional facilities'' with the term ''State and local juvenile and adult correctional facilities''.

Proposed § 300.3 would update the list of regulations that apply to this program. Under proposed paragraph (a) of this section, the regulations in 34 CFR part 76 (State Administered Programs) would continue to apply to the Part B program, except for the following sections:

Sections 76.125–76.137 (relating to ''Consolidated Grant Applications for Insular Areas'') no longer apply. A new statutory provision in section 611(b)(4) of the Act expressly prohibits the consolidation of Part B grants provided to the outlying areas (defined in § 300.718) or to the ''freely associated States'' (defined in section 611(b)(6) of the Act).

Sections 76.650–76.662 (relating to ''Participation of Children Enrolled in Private Schools'') would no longer apply because the applicable provisions of these regulations, that have applied to the Part B program for many years, would be incorporated into Subpart D of this part (''Children in Private Schools''), and specifically under the provisions relating to ''Children with Disabilities Enrolled by their Parents in Private Schools'' (§§ 300.450–300.462).

All other regulations identified in § 300.3 of the existing regulations for this part would be retained under proposed § 300.3, except for 34 CFR part 86 (''Drug-Free Schools and Campuses'') because those regulations are no longer applicable to State administered programs, and now apply only to institutions of higher education.

Definitions

The proposed regulations under this part would retain the scheme used in the current regulations relating to defining terms that are used in this part—that is, Subpart A would include definitions of all terms that are used in two or more subparts of the regulations, whereas any term that would be used in only a single section or subpart would only be listed in Subpart A, together with a reference to the specific section in which the term is defined. The list of these terms would be included in an introductory note (Note 1) immediately following the heading ''Definitions'', and would be updated, as follows:

Two terms would be deleted from the list in Note 1 (''first priority children'' (§ 300.320(a)), and ''second priority children'' (§ 300.320(b)). Statutory provisions regarding priorities in the use of funds were deleted by the IDEA Amendments of 1997.

The term ''individualized education program'' (or ''IEP'') that appears in the list in Note 1 of the existing regulations, would be moved to proposed § 300.14, and would be defined along with the other terms of general applicability that are included under Subpart A.

Several terms that were added by the IDEA Amendments of 1997, but are not terms of general applicability, would be added to the list in Note 1. Following is a list showing each new term and the statutory and regulatory citations for that term:

- Base year (Relates to the new funding formula) (Section 611(e)(2)(A); § 300.707).
- Controlled substance (Relates to the discipline provisions) (Section 615(k)(10)(A); § 300.520).
- Excess costs (The term was defined in prior law, but the statutory definition was not included in the current regulations. The definition of the term, as updated by the IDEA Amendments of 1997, would be incorporated into these regulations (Section 602(7); § 300.284).
- Freely associated States (Relates to the Pacific Basin entities that are eligible for assistance under this part) (Section 611(b)(6); § 300.722).
- Indian; Indian Tribe (Relates to the eligibility of the Secretary of the Interior to receive amounts under this part) (Sections 602(9) and 602(10); § 300.264).
- Outlying area (Relates to grant requirements under this part) (Section 602.18; § 300.718).
- Substantial evidence (Relates to discipline provisions) (Section 615(k)(10)(C); § 300.521).
- Weapon (Relates to discipline provisions) (Section 615(k)(10)(D); § 300.520).

The following terms are not defined in the Act, but the Secretary proposes to add them to the list in Note 1 in order to provide additional clarification to certain provisions that would be added:

- Comparable in quality (A definition of this term would be added to § 300.455 to clarify what services must be provided by an LEA to children with disabilities who are enrolled by their parents in religiously affiliated or other private schools).
- Extended school year services (A definition of this term would be added to a new provision under proposed § 300.309 that would require each public agency to consider extended school year services on a case by case basis in ensuring that a free appropriate public education (FAPE) is available to each child with a disability. The definition would clarify that the meaning of the term ''extended school year services'' applies to providing services during the summer months. (A description of this provision is included under Subpart C, § 300.309, in this preamble).
- Meetings (A definition of this term would be added to § 300.501, relating to participation of parents in meetings about their child on matters covered under this part).
- Financial Costs (A definition of this term is included in proposed § 300.142(e) on use of private insurance proceeds).

A second note (Note 2) following the heading ''Definitions'' would maintain the note from the current regulations that lists abbreviations of certain terms that would be used throughout the regulations, but would update that list, as follows: The terms ''Comprehensive system of personnel development'' (''CSPD'') and ''individualized family service plan'' (''IFSP'') would be added; and, consistent with a statutory change (section 602(4)), the term ''educational service agency'' (''ESA'') would replace the term ''intermediate educational unit'' (''IEU'').

Proposed § 300.4 (Definition of ''Act'') would delete the obsolete reference to the Education of the Handicapped Act from the current regulatory definition of this term.

Proposed §§ 300.5 and 300.6 (Definitions of ''assistive technology device'' and ''assistive technology service'') would retain the current regulatory definitions of those terms, with the exception of a minor technical change for consistency in using the singular ''child with a disability.'' The note following the definitions of those terms in the existing regulations (that states that the definitions are substantively identical to the definitions of those terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988) would be retained in abbreviated form.

Proposed § 300.7 would make the following changes to the current regulatory definition of ''children with disabilities'': The term would be restated in the singular (''Child with a disability''), and the definition itself would also be restated in singular rather than plural terms. This change is made because it more appropriately comports with the individualized focus of Part B of the Act. Paragraph (a)(1) of this section would be revised, consistent with section 602(3)(A)(i) of the Act, to clarify that the term ''serious emotional disturbance'' will hereinafter be referred to as ''emotional disturbance''. A corresponding change would be made in the definitions of the individual disability categories under proposed paragraph (b), by changing the term ''serious emotional disturbance'' to ''emotional disturbance'' and moving the definition of that term from paragraph (b)(9) to paragraph (b)(4).

Consistent with section 602(3)(B) of the Act, proposed § 300.7(a)(2) (relating to a State's discretion to use the term ''developmental delay'' for children aged 3 through 5) would be revised, as follows: The age range for using that term would be extended from ages 3 through 5 to ages 3 through 9; and the decision to use the term ''developmental delay'' would be at the discretion of both the State and the local educational agency (LEA). The State's definition of the category may be different under Parts B and H (to become Part C on July 1, 1998).

Note 1 following § 300.7 of the current regulations (relating to children with autism) would be added without change to proposed § 300.7, and four new notes would be added to that section, as follows:

Note 2 would address the statutory change under paragraph (a)(2) of this section relating to use of the term ''developmental delay''. The note would clarify that (1) if a State adopts the term for children aged 3 through 9, or a subset of that age range, LEAs that elect to use the term must conform to the State's definition; (2) LEAs could not otherwise use ''developmental delay'' as a basis for establishing a child's eligibility under this part; and (3) even if a State adopts the term, the State may not require an LEA to use it. This clarification is necessary to avoid confusion and potential compliance problems in implementing this new statutory provision, and to otherwise facilitate its implementation.

Note 3 would further address the use of the term ''developmental delay'' by including a statement from the House Committee Report that emphasizes the value of using ''developmental delay'' in establishing eligibility for young children in order to prevent locking the child into an eligibility category that may be inappropriate or incorrect during a period when it is often difficult to determine the precise nature of the disability.

Note 4 would describe congressional intent in changing the term ''serious emotional disturbance'' to ''emotional disturbance''. The note would include a statement from the House Committee Report that explains that the statutory change (1) is intended to have no substantive or legal significance, and (2) is intended strictly to eliminate the pejorative connotation of the term ''serious.'' The Report further makes clear that this statutory revision does not change the meaning of the definition of ''serious emotional disturbance'' that is included in the existing regulations for this part.

Note 5 would address the conditions under which a child with attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) is eligible under Part B of the Act. The note clarifies that some children with ADD or ADHD who are eligible under this part meet the criteria for ''other health impairments'' if (1) the ADD or ADHD is determined to be a chronic health problem that results in limited alertness that adversely affects educational performance, and (2) special education and related services are needed because of the ADD or ADHD. (The note clarifies that the term ''limited alertness'' includes a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.)

The note further clarifies that (1) some children with ADD or ADHD may be eligible for services under other disability categories in § 300.7(b) if they meet the applicable criteria for those disabilities, and (2) if those children are not eligible under this part, the requirements of section 504 of the Rehabilitation Act of 1973 and its implementing regulations may still be applicable.

Proposed § 300.8 would add a definition of ''day'' to clarify that unless otherwise indicated, the term ''day'' means calendar day. Although the Department has traditionally interpreted ''day'' to mean calendar day, the term has never been defined in the regulations. It is important to include such a definition in these proposed regulations because under the new statutory provisions added by the IDEA Amendments of 1997, the term is applied differently under certain provisions, including the use of ''school days''; ''business days''; and ''business days (including any holidays that fall on business days).''

Proposed § 300.9 would add the definition of ''educational service agency'' that appears in section 602(4) of the Act. That term was added by the IDEA Amendments of 1997 to replace the term ''intermediate educational unit'' that was used in prior law and in the current regulations.

Proposed § 300.10 would add the definition of ''equipment'' that appears in section 602(6) of the Act. That definition is substantively identical to the definition of ''equipment'' in prior law. However, that definition is not included in the current regulations. The Secretary believes that, for the regulations to be most useful to parents, school officials, and members of the general public, the regulations should contain all applicable statutory provisions in one document, rather than simply referencing definitions or other provisions that are contained in other regulations. With very few exceptions, these proposed regulations have been developed to include all applicable provisions of the Act.

Proposed § 300.11 would incorporate the existing regulatory definition of the term ''free appropriate public education,'' except that the reference to the IEP requirements in paragraph (d) of that section would change from §§ 300.340–300.350 to §§ 300.340–300.351, to conform to a proposed change made in those requirements.

The Secretary proposes to add in proposed § 300.12 a definition of ''general curriculum'' to clarify that, for purposes of this part, there is a single curriculum that applies to all children within the jurisdiction of the public agency, including nondisabled children and children with disabilities. The purpose of adding this definition is to eliminate (or significantly reduce) the possibility of misinterpreting the new requirements in the Act relating to the participation of children with disabilities in the general curriculum. Some commenters on the June 27, 1997 **Federal Register** notice have expressed concern that a public agency could assume that there is a ''general curriculum'' for nondisabled and another ''general curriculum'' for certain categories of children with disabilities. If the requirements of this part were implemented based on that assumption this would seriously limit the possibility of accomplishing the purposes of Part B of the Act that are set out in the IDEA Amendments of 1997.

A note would be added following this section to clarify that the term ''general curriculum'' relates to the content of the

curriculum and not to the setting in which it is used. The note further clarifies that the general curriculum could be used in any educational setting along a continuum of alternative placements, as long as the setting is consistent with the least restrictive environment provisions of § 300.550–300.553 and is applicable to an individual child with a disability. A number of comments were received requesting clarification relating to this matter.

Proposed § 300.13 would retain the current regulatory definition of the term ''include''.

Proposed § 300.14 would include a definition of the term ''individualized education program'' (IEP). Because the term ''IEP'' has traditionally been defined under § 300.340 (an introductory section to the IEP requirements of §§ 300.340–300.350) the definition in proposed § 300.14 would simply reference the definition in § 300.340.

Proposed § 300.15 would add a definition of ''individualized education program team'' (or ''IEP team''). The definition states that the term ''IEP team'' means a group of individuals described in § 300.344 that is responsible for developing, reviewing and revising an IEP for a child with a disability. Because the term ''IEP team'' is used throughout these regulations, it is important to include a definition of that term in Subpart A. However, to preserve the structural integrity of the current regulatory provisions on IEPs in §§ 300.340–300.350, the substantive definition of ''IEP team'', which conforms to the statutory definition under section 614(d)(1)(B), would be included in § 300.344.

Proposed § 300.16 would add a definition of ''individualized family service plan'' (or ''IFSP''), because that term is used in several subparts within these regulations. The definition of the term would be a reference to 34 CFR 303.340(b).

Proposed § 300.17 would incorporate the statutory definition of ''local education agency'' from section 602(15) of the Act. This definition, which updates the prior statutory definition of ''LEA'' to conform to the definition of that term in the Improving America's Schools Act, would replace the current regulatory definition of ''LEA.''

A note would be added following proposed § 300.17 to clarify that a public charter school is eligible to receive funds under Part B of the Act if it meets the definition of ''LEA.'' The note further clarifies that if a public charter school receives Part B funds it must comply with the requirements that apply to LEAs. Because of the widespread interest in establishing charter schools as a major part of educational reform, this clarification is necessary in order to ensure that, to the extent applicable, these schools are in full compliance with the requirements of this part.

Proposed § 300.18 would incorporate the statutory definition of ''native language'' from section 602(16) of the Act. The new definition is substantively similar to the current regulatory definition of ''native language.'' The note following the current regulatory definition of ''native language'' would be retained, unchanged, except for clarifying that the term ''native language'' is also used in the procedural safeguards notice under proposed § 300.504(c). (The procedural safeguards notice is a new statutory provision that was added by section 614(d) of the Act.)

Proposed § 300.19 would incorporate the current regulatory definition of ''parent'' (under a new paragraph (a)). A proposed new paragraph (b) would be added to address questions raised by public agencies and other agencies representing children with disabilities about whether foster parents, who have a long-term relationship with a disabled child, could serve as the child's parent, in lieu of requiring the appointment of a surrogate parent to represent the child.

Proposed paragraph (b) of this section would permit State law to provide that a foster parent qualifies as a parent under Part B of the Act if the natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law, and if the foster parent (1) has an ongoing, long-term parental relationship with the child; (2) is willing to participate in making educational decisions in the child's behalf; and (3) has no interest that would conflict with the interest of the child.

The note following the current regulatory definition of ''parent'' (relating to other persons, such as a grandparent, who may act as a parent) would also be incorporated into these proposed regulations. The note would be revised to add conforming language about a foster parent, as described in paragraph (b) of this section.

Proposed § 300.20 would retain the current regulatory definition of ''public agency,'' but would revise that definition to replace the term ''IEUs'' with the term ''ESAs.''

Proposed § 300.21 would incorporate without change the current regulatory definition of the term ''qualified.''

Proposed § 300.22 would retain the current regulatory definition of ''related services,'' except for making the following changes: In proposed paragraph (a), the term ''speech pathology and audiology'' would be replaced by the term ''speech-language pathology and audiology services,'' and the term ''orientation and mobility services'' would be added to the list of related services. These changes would be made to conform to a statutory change in section 602(22) of the Act.

Proposed § 300.22(b) would be amended to add a definition of the term ''orientation and mobility services'' identified in paragraph (a) of this section. The definition (included as a new paragraph (b)(6)) states that the term ''orientation and mobility services'' 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.

In proposed § 300.22(b)(9) (relating to psychological services) and (b)(13) (relating to social work services in schools) the definitions of those terms would be amended to add a reference to assisting in developing positive behavioral intervention strategies to the list of functions performed by these related services providers. These providers could be helpful in ensuring effective implementation of the new statutory provision in section 614(d)(3)(B) (proposed § 300.346) that requires that the IEP team, in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions.

In proposed § 300.22(b)(14), the current regulatory definition of the term ''speech-pathology'' would be retained, but the term would be changed to ''speech-language pathology services,'' to conform to the statutory change identified in paragraph (a) of this section.

The note following the current regulatory definition of ''related services'' would be retained as Note 1 following proposed § 300.22, except for the following changes: The list of other related services in the first paragraph of that note would be amended (1) by adding other important services, including travel training, nutrition services, and independent living services, and (2) to clarify that the services would be provided if necessary for the child to receive FAPE.

Several notes would also be added to proposed § 300.22, as follows:

Note 2 would acknowledge the critical importance of orientation and mobility services for children who are blind or have visual impairments, and

point out that there are children with other disabilities who may also need to be taught the skills they need to navigate their environments (e.g., travel-training). The note includes a statement from the House Committee report on Pub. L. 105–17 that emphasizes the importance of travel training for certain children with disabilities.

Note 3 would clarify that, with respect to various related services defined in this section, nothing would prohibit the use of paraprofessionals to assist in the provision of those services if doing so is consistent with the personnel standards requirements of proposed § 300.136(f).

Note 4 would explain that (1) most children with disabilities should receive the same transportation services as non-disabled children, and (2) for some disabled children, integrated transportation may be achieved by providing needed accommodations such as lifts and other adaptations on regular school transportation vehicles.

Proposed § 300.23 would incorporate the statutory definition of ''secondary school'' from section 602(23) of the Act. This definition updates the prior statutory definition of ''secondary school'' to conform to the definition of that term in the Improving America's Schools Act. The term ''secondary school'' is not defined in the current regulations.

Proposed § 300.24 would retain the current regulatory definition of ''special education,'' except for the following changes:

In § 300.24(a)(2), the term ''speech pathology'' would be changed to ''speech-language pathology services,'' to conform to the terms used in section 602(22) of the Act.

Under a new § 300.24(b)(3), a definition of ''specially designed instruction'' would be added to clarify that the term means adapting the content, methodology, or delivery of instruction to (1) address the unique needs of an eligible child under this part that result from the child's disability, and (2) 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. Although the term is a key component in the definition of ''special education'' in both prior law and the current Act, it has never been defined. With the shift in emphasis of the Part B program toward greater participation of children with disabilities in the general curriculum, this definition should facilitate implementation of the program.

Proposed § 300.24(b)(4) would replace the outdated definition of ''vocational education'' in the current regulations with a new definition that states that the term ''vocational education'' means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

The note following the definition of ''special education'' in the current regulations would be retained under proposed § 300.24, but would be revised to clarify that a related services provider may be a provider of specially designed instruction if, under State law, the person is qualified to provide that instruction.

Proposed § 300.25 would incorporate the statutory definition of ''State'' from section 602(27) of the Act to mean each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas. This definition updates the prior statutory definition of ''State.'' The term is not defined in the current regulations.

Proposed § 300.26 would incorporate the definition of ''supplementary aids and services'' from section 602(29) of the Act. Although the term was included in prior law, it was not defined until the enactment of the IDEA Amendments of 1997. The term is defined as 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 the LRE provisions in §§ 300.550–300.556.

Proposed § 300.27 would retain the current regulatory definition of ''transition services,'' except for the following changes: The organizational structure of the definition has been changed to conform to the definition of the term in section 602(30) of the Act. The new definition simply describes what the term means, but does not attempt to regulate under the definition. The current regulatory definition uses the regulatory term ''must'' in defining what services must be provided. Consistent with the new statutory definition, the term ''related services'' is added as one of the services or activities covered by the term.

Proposed § 300.28 would add a list of terms found in the part B regulations that are defined in the Education Department General Administrative Regulations (EDGAR).

Subpart B—State and Local Eligibility

State Eligibility—General

Under the prior statute, States were required both to meet certain eligibility requirements and to submit State plans to the Department, and were subject to periodic resubmission requirements. The newly revised Act replaces that scheme with an eligibility determination based on a demonstration satisfactory to the Secretary that the State has in effect policies and procedures to ensure that it meets each of a list of conditions. (Section 612(a)). A State that already has on file with the Secretary policies and procedures demonstrating that it meets any of these requirements will be considered to have met that requirement for the purpose of receiving a grant under Part B of the Act. (Section 612(c)(1)). A technical change will be made to Part 76 with the publication of the final regulations to reflect the substitution of this demonstration of State eligibility for State plans.

Under section 612(c) (2) and (3), the policies and procedures submitted by a State remain in effect until a State submits modifications that the State decides are necessary or until the Secretary requires modifications based on changes to the Act or its implementing regulations, new interpretations by a Federal court or the State's highest court, or an official finding of noncompliance with Federal law or regulations. The provisions regarding State eligibility apply to modifications in the same manner and to the same extent as they do to a State's original policies and procedures.

Section 612(d) specifies that 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, and that the Secretary shall not make a final determination that a State is not eligible until providing the State reasonable notice and an opportunity for a hearing. These provisions are incorporated in the proposed regulations in §§ 300.110–300.113.

State Eligibility—Specific Conditions

The statutory eligibility conditions that must be addressed by each State in order to receive a grant under Part B of the Act are contained in proposed §§ 300.121–300.156. The IDEA Amendments of 1997 made a number of changes to the eligibility conditions and State plan requirements previously contained in the Act. These proposed regulations incorporate these statutory changes, with appropriate modifications described below, into the regulations

regarding State plan contents. Some changes of a technical nature have been made to preexisting regulatory provisions in order to reflect the fact that States now demonstrate eligibility, rather than submit State plans, as was the case under the prior law. In addition, some reordering and reorganization of current regulatory provisions is done for the sake of coherence.

Proposed § 300.121 would add to the current § 300.121 the new statutory provision, under section 612(a)(1)(A), that the right to a free appropriate public education (FAPE) extends to children with disabilities who have been suspended or expelled from school. The issue of what the right to FAPE means for children who have been suspended or expelled from school has been the subject of numerous comments to the Department in response to the June 27, 1997 notice, many of which raise this issue in the context of lengthy discussions about all of the provisions in the Act concerning discipline for children with disabilities. Proposed § 300.121(c) reflects the Secretary's interpretation that the IDEA Amendments of 1997 take a balanced approach to the issue of discipline for students with disabilities that reflect both the need to protect the rights of children with disabilities to appropriate educational services and the need of schools to be able to ensure that all children, including children with disabilities, have safe schools and orderly learning environments. The positions taken in these proposed regulations on the issue of continued services for children with disabilities who have been properly suspended or expelled and on the other disciplinary provisions of the Act (see proposed §§ 300.520–300.529) reflect this need for a balanced, fair interpretation of these new statutory provisions.

With regard to the issue of the provision of FAPE for children with disabilities who have been suspended or expelled, the Secretary believes that the statute struck a balance between the longstanding interpretation of the Department that schools are not required by the Act to provide services to children with disabilities who are suspended for ten school days or less, and the desire to ensure that children with disabilities not be removed from education for prolonged amounts of time in any school year.

In proposed § 300.121(c)(1), the Secretary proposes to define children with disabilities who have been suspended or expelled from school for purposes of this section to mean children with disabilities who have been removed from their current educational placement for more than 10 school days in a given school year.

In proposed § 300.121(c)(2), the Secretary proposes to clarify that the right to FAPE under these circumstances begins on the eleventh school day from the date of the child's removal from the current educational placement. For example, if a child with a disability who has not previously been suspended in the school year receives a three week suspension, services must be provided by the eleventh school day of that suspension. If a child with a disability who has received two five school day suspensions in the fall term is suspended again in the spring of that school year, services must be provided from the first day of the third suspension.

A second issue regarding the statutory right to FAPE for children with disabilities who have been suspended or expelled is how to reconcile the right to FAPE with the statutory recognition, in sections 612(a)(1)(A) and 615(k)(5)(A), that children with disabilities properly could be subjected to the same disciplinary measures applied to nondisabled children if their behavior was not a manifestation of their disability. The Secretary proposes in § 300.121(c)(2) to address this question by requiring that in providing FAPE to children with disabilities who have been suspended or expelled, a public agency shall meet the requirements for interim alternative educational settings under section 615(k)(3) of the Act. The Secretary believes requiring that education for children who have been suspended or expelled meets the standards in section 615(k)(3) allows accommodation of both the statutory obligation to provide FAPE to these children and recognizes in section 615(k)(5) that, through an appropriate suspension or expulsion, school districts can legitimately remove children from their current educational placement. Under proposed § 300.622, States may elect to use funds available for capacity building and improvement activities to support public agency services to children who have been suspended or expelled.

Two notes would also be added to proposed § 300.121. The first would be added to reflect the Department's longstanding interpretative position that the obligation to make FAPE available to children 3 through 21 begins on each child's third birthday, and an IEP or IFSP must be in effect by that date that specifies the special education and related services that must be provided, consistent with proposed § 300.342, including extended school year services, if appropriate. For children receiving early intervention services under Part C of the Act and who will be participating in a preschool program under Part B of the Act, the transition requirements of proposed § 300.132 would apply.

The second note to follow proposed § 300.121 would recognize that, under the statute, school districts are not relieved of their obligations to provide appropriate special education and related services to individual disabled students who need them even though the students are advancing grade to grade, and that decisions about eligibility under Part B of the Act for these students must be determined on an individual basis.

Proposed § 300.122 revises the current § 300.122 to eliminate an obsolete provision about the provision of FAPE to children with disabilities before September 1, 1980, and incorporates the new statutory limitation to the obligation to make FAPE available to certain individuals in adult correctional facilities. Section 612(a)(1)(B)(ii) provides that the obligation to make FAPE available to all children with disabilities does not apply to individuals 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 educational placement prior to their incarceration in an adult correctional facility, were not actually identified as being a child with a disability or did not have an IEP under Part B of the Act. This provision, with minor modifications for clarity, would be reflected in proposed § 300.122(a)(2). A note, Note 2, would be added following § 300.122 quoting the House Committee Report explaining the statutory change.

The Secretary also proposes to amend § 300.122 to make clear that the right to FAPE does not apply to children with disabilities who have graduated from high school with a regular high school diploma. This reflects the Secretary's understanding that the right to FAPE is ended either by a student successfully finishing a regular secondary education program or reaching an age between 18 and 21 at which, under State law, the right to FAPE has ended. In addition, the changes made by the IDEA Amendments of 1997, particularly as they relate to the content of children's IEPs in section 614(d) of the Act, reinforce the Secretary's belief that FAPE is closely related to enabling children with disabilities to progress in the same general curriculum that is provided nondisabled children. The Secretary also believes that it is

important to clarify that the right to FAPE is not ended if a student with disabilities is awarded some other certificate of completion or attendance instead of a regular high school diploma. This change should not be interpreted as prohibiting the use of Part B funds to provide services to a student with disabilities who has already achieved a regular high school diploma, but who still is in the State's mandated age range if an LEA or SEA wishes to do so.

Note 1 following proposed § 300.122 would explain that graduation is a change of placement under Part B and, as such, would require prior written notice to the parents, and student if appropriate. The note would also explain that under § 300.534(c) a reevaluation is required before graduation. The note would further explain that other documents, such as certificates of attendance or other certificates granted instead of a regular high school diploma, would not end a student's entitlement to FAPE.

Proposed §§ 300.123–300.124 include, with only minor changes reflecting the new State eligibility scheme of the statute, the current regulatory provisions concerning State policies and procedures relating to the full educational opportunity goal and the full educational opportunity timetable. Current regulatory provisions concerning the full educational opportunity goal regarding facilities, personnel, and services, and priorities would be eliminated as these provisions were removed from the statute by the IDEA Amendments Act of 1997. Section 612(a)(2) of the Act requires each State to have established a full educational opportunity goal and timetable.

Proposed § 300.125 incorporates the current regulatory provision, revised as discussed, concerning child find obligations (identification, location, and evaluation of children with disabilities) with the new statutory provision that this obligation includes children with disabilities attending private schools, in accordance with section 612(a)(3)(A) of the Act. The requirement in the current regulation to provide yearly information about child find activities would be eliminated in light of the fact that periodic State plans are no longer required by statute. The provisions requiring data on and the method for determining which children are not receiving special education and related services also would be removed from the regulation, reflecting statutory changes. A new § 300.125(c) would be added that includes the construction clause of section 612(a)(3)(B). That clause clarifies that nothing in the Act requires that children be classified by their disability so long as each child who has a disability and, by reason thereof, needs special education and related services, is regarded as a child with a disability under Part B of the Act. The notes following the current regulatory provision regarding child find would be retained, but shortened and updated as appropriate. Two additional notes would be added to reflect longstanding policy positions of the Department. A new Note 2 would recognize that the services and placement needed by each child with a disability must be based on the child's unique needs and may not be determined or limited based on the child's disability category.

Note 3, which is largely retained from the current regulations, explains the important relationship between child find activities under this part and child find activities under Part 303 for children with disabilities from birth through age 2. The Secretary believes that developing effective child find activities for this age population will provide significant benefits not just for very young children with disabilities but also for schools and other public agencies that may find their responsibilities easier because of early attention to these children's needs.

A Note 4 following this section would reflect that each State's child find obligation under the statute includes highly mobile children, such as migrant and homeless children.

Proposed § 300.126 incorporates the evaluation procedures from sections 612(a)(7) and 612(a)(6)(B), by cross-referencing the provisions of proposed §§ 300.530–300.536, which include all of the statutory evaluation provisions of sections 612(a)(6)(B) and 614(a)–(c) and related evaluation procedures from current regulations. This provision would replace the current regulatory section on State procedures on protection in evaluation procedures.

Proposed § 300.127 includes, with only minor changes reflecting the new statutory State eligibility scheme, the provisions of the current regulation concerning State policies and procedures on the confidentiality of personally identifiable information. This provision reflects section 612(a)(8) of the Act. The note following this section would be updated to reflect current information about the regulations implementing the Family Educational Rights and Privacy Act.

Proposed § 300.128 is the same as the current regulatory provision concerning individualized education programs (IEPs), except as revised to reflect the new statutory State eligibility scheme and the requirements of section 612(a)(4) of the Act.

Proposed § 300.129 incorporates the current regulatory provision concerning procedural safeguards, as revised as discussed, and the statutory provision, in section 612(a)(6)(A), that children and their parents are afforded the procedural safeguards required by section 615.

Proposed § 300.130 would remove from the existing regulatory provision regarding least restrictive environment (LRE) the data collection requirements, and make other conforming revisions, as discussed, in light of the new State eligibility structure of the Act, consistent with section 612(a)(5)(A). (Data on LRE would still be collected under section 618(a)(1)(A) (iii) and (iv) of the Act.) Additionally, the following new statutory requirements regarding a State's funding formula are added as proposed § 300.130(b): (1) If a State uses a funding mechanism to distribute State funds on the basis of the type of setting in which a child is served, the funding mechanism may not result in placements that violate the LRE requirements; and (2) if the State does not have policies and procedures to ensure compliance with this new requirement, 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 LRE. A note would also be added to this provision quoting language from the House Committee Report recognizing that this statutory addition does not eliminate the need for a continuum of alternative placements that is designed to meet the unique needs of each child with a disability.

Proposed § 300.132 adds to the existing regulatory provision concerning the transition of individuals from Part H (to be renamed part C on July 1, 1998) to Part B the new statutory language (from section 612(a)(9)) concerning ''effective'' transitions, and the provision that LEAs will participate in transition planning conferences arranged by the designated lead agency under Part H (to be renamed Part C).

Proposed § 300.133 updates the existing regulatory provision concerning children in private schools to reflect the new statutory structure, and the changes made in subpart D of this proposed regulation, consistent with section 612(a)(10) of the Act.

Proposed § 300.135 reflects the new statutory requirements concerning a comprehensive system of personnel development (CSPD). Section 612(a)(14)

provides that a State's CSPD must meet the requirements for a State improvement plan relating to personnel development. A note following this section would quote the House Committee Report to the effect that the State's CSPD must include procedures for acquiring and disseminating significant knowledge and for adopting appropriate promising practices, materials, and technology. The note would also explain that a State could use the information provided to meet the State eligibility requirement under Part B of the Act as a part of a State improvement program plan under Part D of the Act.

Proposed § 300.136 reflects the existing regulatory provision on personnel standards, revised as discussed, and the requirements of section 612(a)(15) of the Act. A new paragraph (f) adds the new statutory provision from section 612(a)(15)(B)(iii) that allows paraprofessionals and assistants who are appropriately trained and supervised, under State law, regulations or policy to be used to assist in the provision of services under Part B of the Act. Also added is the new provision, from section 612(a)(15)(C), that a State may adopt a policy that includes a requirement that LEAs in the State make an ongoing good-faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services, including, in a geographic area where there is a shortage of those personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meeting State standards within three years. This provision would be incorporated in § 300.136(g). A note following this section would be added explaining that a State may exercise the option in paragraph (g) even though the State has reached its established date for retraining or hiring of personnel to meet appropriate professional requirements under paragraph (c) of this section so as to avoid any unwarranted confusion on this issue. Another note would be added to clarify that if a State has only one entry level degree requirement for a specific profession or discipline, it is not precluded by § 300.136(b)(1) from modifying that standard if necessary to ensure the provision of FAPE to all children with disabilities in the State.

Proposed § 300.137 would add to the regulation the new statutory provision of section 612(a)(16) concerning performance goals and indicators. Basically, this provision requires that States have goals for the performance of children with disabilities, and indicators of progress that at a minimum address the performance of children with disabilities on assessments, drop-out rates, and graduation rates. The provision also requires reporting every two years to the Secretary and the public on the progress of the State, and revisions to a State's improvement plan under Part D of the Act as needed to improve performance, if the State receives a grant under that authority. The current regulatory provision concerning procedures for evaluation of the effectiveness of programs would be removed, reflecting a statutory change.

Proposed § 300.138 would add the new requirement of section 612(a)(17)(A) concerning inclusion of children with disabilities in general State and district-wide assessments, including conducting alternative assessments not later than July 1, 2000 for children who cannot participate in State and district-wide assessment programs. A note following this section would explain that only a small number of children with disabilities should need alternative assessments. The provision of section 612(a)(17)(B) concerning reports related to these assessments are contained in proposed § 300.139.

The Secretary proposes to interpret the statutory requirements to make clear that whenever the SEA reports to the public on student performance on wide-scale assessments, the reports must include aggregated results of all children, including children with disabilities, as well as disaggregated data on the performance of children with disabilities. The Secretary believes that the IDEA Amendments of 1997 were designed to foster consideration of children with disabilities as a part of the student population as a whole. It would not be in keeping with that focus if, in reporting assessment data, results for children with disabilities were not included in reports on the student population as a whole. A note following this section would explain that States would not be precluded from also reporting data in a way that would, for example, allow them to continue trend analysis of student performance, if children with disabilities had not been included in those analyses in the past.

Proposed § 300.141 incorporates the current regulatory provision, revised as discussed, concerning SEA responsibility for all educational programs, consistent with the requirement in section 612(a)(11) of the Act.

Proposed § 300.142 would replace the current regulatory provision concerning interagency agreements with the requirements of section 612(a)(12) regarding methods of ensuring services. This provision requires that the Chief Executive Officer or designee in each State ensure that an interagency agreement or some other mechanism for interagency coordination is in effect between noneducational agencies that are obligated under other law to provide or pay for services that are considered special education or related services under Part B of the Act and the SEA to ensure that those services are provided. In addition to the statutory requirements, a paragraph (e) would reflect the Department's interpretation that it would violate the statutory obligation to provide free services if a public agency required a parent to use private insurance proceeds to pay for services required under the Act. The Department has long taken the position that Part B of the Act and section 504 of the Rehabilitation Act prohibit a public agency from requiring parents to use insurance proceeds to pay for the services that must be provided to an eligible child under the FAPE requirements of those statutes, if they would incur a financial cost to secure those services. (See Notice of Interpretation published on December 30, 1980 (45 FR 66390)). This paragraph also would include a definition of the term ''financial cost,'' so that both parents and school districts will have a common understanding of the term. This definition reflects the Department's longstanding interpretation of the statutory obligation to provide services at no cost as applied to parents' private insurance. A note following this section would explain how this paragraph applies if a family is covered by both private insurance and Medicaid.

The Secretary believes that the same basic principle, that services be available at no cost to parents, would be equally applicable to parents whose children are eligible for public insurance, but that there is no current need to regulate on the public insurance issue because there is no risk of financial loss to parents under current public insurance programs such as Medicaid. The Secretary invites comment on whether a policy on public insurance similar to the proposed section regarding private insurance should be added to the final regulation.

The Secretary also proposes to add a new paragraph (f) to specify that proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR 80.25. That section imposes limitations on how program income can be treated by grantees that would lead to States returning reimbursements from public and private insurance to the Federal

government or requiring that the funds be used under this part, which could discourage States and school districts from using all the resources available in paying for these services. Given the current small percentage that Federal funds under this part are to total funding for services under this part, and the fact that children with disabilities are guaranteed services under this part, the Secretary believes that States and school districts should be given some flexibility in how they use and account for funds received as reimbursements from other sources. A note would be added after this section explaining the consequences, under the Maintenance of Effort (MOE) requirements, of various State and local choices in accounting for these funds.

Two other notes would also be added following proposed § 300.142. One would quote the House Committee Report relating to the methods of insuring services provision. The other would explain that if a public agency cannot get parent consent to use public or private insurance for a service, the agency may use funds under Part B of the Act for that service. In addition, the note would explain that to avoid financial cost to parents who otherwise would consent to the use of private insurance, the public agency may use funds under this part to pay the costs of accessing the insurance, such as deductible or co-pay amounts.

Proposed § 300.143 incorporates, with revisions as described, the existing regulatory provision concerning State procedures for informing each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

Proposed § 300.144 would retain, with revisions as described, the existing regulatory provisions concerning State procedures that the SEA does not make a final determination regarding an LEA's eligibility for assistance under Part B without first giving reasonable notice and an opportunity for a hearing (consistent with section 612(a)(13)). The Secretary also proposes to retain as proposed § 300.145 the existing regulatory provision regarding recovery of funds for misclassified children. The statutory provision regarding recovery of funds for misclassified children was removed by the IDEA Amendments of 1997. In light of the fact that funds under section 611 of the Act will continue to be distributed based on a child count until some time in the future, however, the Secretary believes that prudent administration of Federal funds dictates that States continue to recover funds allocated among districts on the basis of incorrect child counts. The Secretary does not believe that this requirement will impose additional burden on States as all States already have these procedures. When the funding formula changes to the permanent formula under proposed § 300.706, this provision will be removed.

Proposed § 300.146 would add the new requirement of section 612(a)(22) regarding SEA examination of data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among State agencies and LEAs in the State and as compared to the rates for nondisabled children. As provided in the statute, if discrepancies are occurring, the SEA reviews and, if appropriate, revises its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards.

Proposed § 300.147 adds the new statutory requirements of section 612(b) concerning information that is required if an SEA is providing direct services. The Secretary interprets the statutory provision regarding requirements that must be met by an SEA as not including requirements relating to certain use of funds provisions, reflecting the different rules for SEA and LEA use of Part B funds. This regulation would replace the current regulatory provision on SEA provision of direct services.

Proposed § 300.148 adds the new statutory requirement of section 612(a)(20) concerning public participation in the adoption of any policies and procedures needed to comply with Part B of the Act. The proposed regulation would apply the procedures for public participation regarding State plans in the current regulations, with appropriate revisions as described, to the adoption of State policies and procedures in the future. Those procedures are in this NPRM in proposed §§ 300.280–300.284. The Secretary believes that these procedures are necessary to ensure that there is an adequate opportunity for public participation in the development of State policies and procedures related to the provision of special education and related services to children with disabilities. In addition, the Secretary does not see any indication in the IDEA Amendments of 1997 of an intention by Congress to lessen requirements concerning public participation in the development of State policies and procedures. The existing regulatory provision concerning consultation would be deleted, reflecting a statutory change. The existing regulatory provision concerning other Federal programs also would be deleted, in accordance with statutory changes.

Proposed § 300.150 incorporates the statutory requirement of section 612(a)(21)(A) that the State establish and maintain an advisory panel to provide guidance with respect to special education and related services for children with disabilities in the State.

Proposed § 300.152 incorporates the existing regulatory provision, and a note concerning commingling of Part B funds with State funds, with appropriate revisions, reflecting the requirements of section 612(a)(18)(B).

Proposed § 300.153 maintains the existing regulatory provision, regarding State-level nonsupplanting, appropriately revised, consistent with section 612(a)(18)(C). The note in the existing regulatory provision on nonsupplanting would be removed as it would be confusing in light of the new statutory State-level maintenance of effort requirement addressed in proposed § 300.154.

Proposed § 300.154 reflects the new statutory requirement of section 612(a)(19) which prohibits the State from reducing the amount of State financial support for special education and related services below the level of that support for the preceding fiscal year. If the State does reduce State support, the Secretary is directed to reduce funds to the State in the subsequent year by an amount equal to the amount by which the State failed to meet the requirement. The statute also provides that waivers are possible under certain described circumstances, and, if granted, in the year following the waiver the State must meet the level of support it had provided in the year before the waiver.

Proposed §§ 300.155 and 300.156 would simplify, in light of statutory changes, the provision in current regulations regarding policies and procedures for use of Part B funds, and annual descriptions of the use of Part B funds. Proposed § 30.156(b) would incorporate the longstanding Department practice of permitting a State to submit a letter instead of filing a new report when the State's use of funds that are retained by the State has not changed from the prior report submitted.

LEA and State Agency Eligibility—General

Similar to the State eligibility scheme as described, under section 613(a) LEAs and State agencies now also must demonstrate eligibility. Section 613(b)

specifies that if an LEA or State agency has policies and procedures on file with the State that meet a requirement of the new Act, the SEA shall consider the LEA or State agency to have met that requirement. Policies and procedures remain in effect until modified as the LEA or State agency decides necessary, or until required by the SEA because of changes to the Act or its implementing regulations, a new interpretation of the Act by Federal or State courts, or an official finding of noncompliance with Federal or State law or regulations. A provision would be added to clarify that the same rules apply to modifications to LEA or State agency policies and procedures as apply to the original ones consistent with the statutory provision regarding State eligibility. These provisions are in proposed §§ 300.180—300.182.

The excess costs provisions in the current regulations would be condensed and streamlined in these proposed regulations in §§ 300.184–300.185.

Proposed §§ 300.190 and 300.192 reflect the new statutory requirements of section 613(e) concerning joint establishment of eligibility and requirements for education service agencies (formerly intermediate educational units). These provisions eliminate the $7,500 minimum grant requirement of prior law and add an explicit prohibition on an SEA from requiring a charter school that is an LEA to jointly establish eligibility unless the SEA is explicitly permitted to do so under State law.

Proposed § 300.194 reflects the new statutory provision in section 613(i) concerning State agency eligibility. The Secretary proposes, in these regulations, to require that these agencies meet all the conditions of Subpart B of these proposed regulations that apply to LEAs, in keeping with the authorization in section 613(i)(2).

Proposed § 300.196 reflects the statutory provision of section 613(c) that if the SEA determines that an LEA or State agency is not eligible, the SEA notifies the LEA or State agency of that determination, and provides the LEA or State agency with reasonable notice and an opportunity for a hearing.

Proposed § 300.197 adds the statutory requirements concerning SEA actions if an LEA is failing to comply with the requirements of Part B.

LEA Eligibility—Specific Conditions

In accordance with the statutory changes in section 613(a), proposed § 300.220 simplifies the basic eligibility conditions for LEAs. This provision would replace most of the current regulations concerning the content of LEA applications. Under these proposed regulations LEAs must have in effect policies, procedures, and programs that are consistent with State policies and procedures required to demonstrate State eligibility.

With regard to implementation of the State's comprehensive system of personnel development, proposed § 300.221 reflects the requirement in section 613(a)(3) that the LEA demonstrate that all personnel necessary to carry out this part are appropriately and adequately prepared, consistent with State requirements, and that to the extent the LEA determines appropriate, it contributes to and uses the CSPD established by the State.

Proposed § 300.230 reflects the statutory provision of section 613(a)(2)(A) that funds under Part B of the Act must be used in accord with the requirements of Part B, may only be used for the excess costs of providing special education and related services to children with disabilities, and must supplement and not supplant other State, local and Federal funds.

Proposed § 300.231 reflects the new statutory provision that LEAs not reduce the level of expenditure of LEA funds.

Proposed § 300.232 incorporates new statutory exceptions to the local maintenance of effort (MOE) requirement. With regard to the exception relating to the voluntary departure or departure for just cause of special education personnel, the Secretary in these proposed regulations proposes to clarify that the exception only applies if personnel departing are replaced by qualified, lower-salaried personnel. This limitation would not permit a public agency to meet the MOE requirement by removing personnel and failing to replace them. The Secretary does not believe that the statutory provision was intended to permit a reduction in expenditures through attrition unless one of the other exceptions also applied. Other statutory exceptions added include exceptions covering a decrease in enrollment of children with disabilities; the termination of an obligation of the agency to pay for an exceptionally costly program, as determined by the SEA, because the child has left the agency, has reached the age at which the agency no longer has an obligation, or the child no longer needs special education; and the termination of costly expenditures for long-term purchases. A note following this section would quote from the House Committee Report on the issue of exceptions to maintenance of effort for voluntary departure of special education personnel, which provides the basis for the clarification of this exception.

Proposed § 300.233 reflects the new statutory provision in section 613(a)(2)(C) that in years when the Federal appropriation under section 611 is more than $4,100,000,000 an LEA may treat as local funds up to 20 percent of the amount of funds it receives under Part B that exceed the amount it received under Part B in the prior year. Under certain circumstances, an SEA may be authorized under State law to prevent an LEA from exercising this authority.

Proposed § 300.234 incorporates a new statutory provision concerning use of Part B funds in schoolwide project schools under section 1114 of the Elementary and Secondary Education Act of 1965. The amount of Part B funds that may be used in a schoolwide project is limited, by statute, to the amount arrived at by multiplying the per child amount the LEA receives under Part B by the number of children with disabilities participating in the schoolwide project school. The Secretary interprets the statutory provision regarding use of funds to require that these funds may be used without regard to the excess costs requirement, and that in calculating supplement, not supplant and maintenance of effort under Part B, these funds be considered as Federal Part B funds. An explicit statement that except as to the flexibility granted concerning how the Part B funds are used, all other requirements of Part B must be met by an LEA using Part B funds in a schoolwide project school would also be added. This reflects the Secretary's interpretation that this provision cannot be used as a basis for not providing services to children with disabilities in accordance with the other requirements of the Act. A note following this section would caution that children in schoolwide project schools must still receive services in accordance with a properly developed IEP and must still be afforded all of the rights and services guaranteed to children with disabilities under the Act.

Proposed § 300.235 incorporates the provisions of section 613(a)(4) regarding permissive use of Part B funds for special education and related services and supplementary aids and services provided to a child with disabilities that also benefit other children and to develop and implement a coordinated services system. The provision would make clear that an LEA will not be found to violate the commingling, excess costs, supplement not supplant, or maintenance of effort requirements

based on its use of funds in accordance with this provision.

Proposed §§ 300.240–300.250 reflect the new statutory provisions of section 613(a) (5), (6) and (7), (f) and (g) related to treatment of charter schools and their students, information for the SEA to carry out its duties under Part B, public availability of documents related to LEA eligibility, coordinated services systems, and school-based improvement plans. A note following proposed § 300.241 would explain that the provisions of the Part 300 regulations that apply to public schools also apply to children in public charter schools and that children with disabilities in charter schools retain all their rights under these regulations.

Secretary of the Interior—Eligibility

Proposed §§ 300.260—300.267 incorporate the revised statutory provisions concerning the payment to the Secretary of the Interior into the existing regulations on this topic. In proposed § 300.260 references to State eligibility requirements would be updated to reflect the new State eligibility requirements of the Act. In proposed § 300.262 the amount the Secretary of the Interior may use of the payment for administrative costs would be changed to 5 percent of its payment or $500,000 whichever is greater, reflecting the increase in the minimum for State administration in section 611. Provisions in the statute regarding a plan for coordination of services for all Indian children residing on reservations covered by Part B (section 611(i)(4)), definitions of the terms ''Indian'' and ''Indian tribe'' (section 602 (9) and (10)), and provisions regarding the establishment of an advisory board and reports by that board (sections 611(i) (5) and (6)(A)) would also be added.

Public Participation

Proposed §§ 300.280–300.284 incorporate the existing regulatory provisions concerning public participation, revised to reflect the statutory changes from State plans to State eligibility demonstrations. The Secretary believes that these provisions remain necessary to ensure adequate public participation in the development of State policies and procedures regarding the provision of special education and related services to children with disabilities under Part B of the Act, and sees nothing in the changes in the IDEA Amendments of 1997 that indicates a Congressional intent to reduce these requirements.

Subpart C—Services

Free Appropriate Public Education

Proposed § 300.300 is essentially the same as in the current regulation, with minor changes to update and accommodate new statutory provisions. Proposed §§ 300.301–300.308 also are restatements of the current regulatory provisions at these sections.

Reflecting the Secretary's long standing interpretation of the obligation to make FAPE available based on individual needs, a new § 300.309 would be added to address extended school year services. This provision would require that each public agency ensure that extended school year services are available to each child with a disability to the extent necessary to ensure that a free appropriate public education is available to the child, based on an individual determination of the child's needs by the child's IEP team. The term ''extended school year services'' is defined to be special education and related services that are provided to a child with a disability beyond the normal school year, in accordance with the child's IEP, at no cost to the child's parents, and that meet the standards of the SEA. A note following this section would explain that agencies may not limit extended school year services only to children with particular categories of disability or unilaterally limit the duration of services. The note would also explain that nothing in Part B requires that every child with a disability is entitled to, or must receive, extended school year services. A second note would explain that States may establish standards for decisions regarding which children should receive extended school year services and provides examples of acceptable factors that may be considered. These changes reflect the Secretary's policy guidance over the years on this topic, which itself has been informed by a number of Federal court decisions over the last twenty years under Part B of the Act. The Secretary believes that the changes are necessary to ensure that children with disabilities who need extended school year services have appropriate access to those services, and that those services are a part of FAPE.

Proposed § 300.311 reflects new statutory provisions in sections 612(a)(1)(B) and 614(d)(6) concerning students with disabilities who are in adult correctional facilities. Paragraph (a) would specify that the obligation to make FAPE available to all children with disabilities does not apply to students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility, were not actually identified as being a child with a disability and did not have an IEP under Part B. This language is taken from the statute, with minor changes for the sake of clarity. Paragraph (b) would provide that certain requirements of Part B do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons: the provisions relating to participation of children with disabilities in general assessments, and the provisions relating to transition planning and transition services for students whose eligibility under Part B will end, because of their age, before they will be released from prison. The Secretary interprets the provision concerning transition services to require consideration of the student's sentence and eligibility for early release because the required determination must happen before the student actually is released from prison. Reflecting statutory requirements, paragraph (c) would specify that the IEP team of a student with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

Evaluations and Reevaluations

Proposed §§ 300.320 and 300.321 would be added to reflect the basic statutory requirements concerning evaluations and reevaluations contained in section 614 (a) and (b) of the Act. Evaluations and reevaluations would be addressed in greater detail in the discussion of proposed §§ 300.530–300.536.

Individualized Education Programs

Proposed § 300.340 would restate the current regulatory definitions of ''IEP'' and ''participating agency.''

Proposed § 300.341 would restate the current regulatory provision concerning the SEA responsibility for development and implementation of IEPs, with one minor wording change. Throughout these proposed regulations, the Secretary proposes to use the term ''religiously-affiliated'' rather than the term ''parochial'' as the former is more inclusive and accurately reflects the type of schools described. These proposed regulations distinguish between children placed in private schools by public agencies and those

placed in private schools by their parents. Proposed §§ 300.401 and 300.402 address children placed by public agencies in private schools. Proposed § 300.403 concerns placement in private schools when the provision of FAPE is at issue. Proposed §§ 300.450–300.462 concern children placed by their parents in private schools.

Proposed § 300.342 (a) and (b) would restate, with minor nonsubstantive changes, the current regulatory provisions regarding when IEPs must be in effect. A new paragraph (c) would be added regarding the use of IFSPs for children aged 3 through 5 as provided for in the statute at section 614(d)(2)(B), and reflecting the Secretary's interpretation that this provision permits, if State policy provides and the public agency and parent agree, the use of an IFSP that meets the content requirements of section 636(d) of the Act in place of a document meeting the IEP content requirements of section 614(d) of the Act, for children aged 3 through 5. With regard to the requirement for agreement by the parents to using an IFSP instead of an IEP, the Secretary proposes to require written informed consent that is based on an explanation of the differences between an IFSP and an IEP in light of the importance of the IEP as the statutory vehicle for ensuring the provision of FAPE to children with disabilities. For most children who are five-years old, and for many 3- and 4-year olds as well, the use of an IEP that must be tied to the general curriculum provided to nondisabled age peers, is encouraged.

The Secretary proposes to add a new paragraph (d) to this section representing the Secretary's understanding of section 201(a)(2)(C) of Pub. L. 105–17 that IEPs that meet the requirements of section 614(d) (1)–(5) must be in effect as of July 1, 1998. Delaying implementation of these provisions beyond that date would be inconsistent with the right of children with disabilities to an IEP that meets the new requirements as of July 1, 1998. The note following this section from current regulations would be retained with minor changes, and a new note added to clarify that the provisions of section 614(d)(6) of the Act, relating to services to children with disabilities in adult prisons, took effect on June 4, 1997.

Proposed § 300.343(a) restates the current regulatory provision concerning the general standard for conducting IEP meetings. In paragraph (b) of this section, the Secretary would add a new provision on timelines for IEPs that would require that an offer of services based on an IEP must be made within a reasonable period of time from a public agency's receipt of parent consent to an initial evaluation reflecting the Department's longstanding interpretation of the requirements of the statute. A note following this section would be added to explain that for most children it would be reasonable to expect that a public agency would offer services based on an IEP within 60 days of receipt of parent consent for initial evaluation. The Secretary proposes this reasonable time standard in light of the importance of appropriate educational services for children with disabilities to enable them to receive FAPE and the frequent long delays observed between referral for special education evaluation and actual provision of services. Paragraph (b) would retain the current regulatory timeline of 30 days from the determination that the child is a child with a disability to an IEP meeting. A new paragraph (c) would also be added to this section that revises the current regulatory provision concerning review of IEPs to reflect new statutory requirements in section 614(d)(4). The note following this section in current regulations would be deleted as unnecessary and confusing in light of changes proposed to the regulation.

Proposed § 300.344 would revise the current regulatory provision concerning IEP team membership to reflect the requirements of section 614(d)(1)(B). Under this provision the IEP team includes the parents of the child with a disability; at least one regular education teacher (if the child is, or may be, participating in regular education); at least one special education teacher or, if appropriate, at least one special education provider of the child; a representative of the LEA who meets certain specified requirements; an individual who can interpret the instructional implications of evaluation results; at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel; and, if appropriate, the child.

The Secretary proposes to expand the current regulatory provision requiring the agency to invite students to participate in IEP meetings if the meeting will include consideration of the statement of needed transition services to also include meetings that will include consideration of transition service needs, in accordance with § 300.347(b)(1) and note 5 following that section. This reflects the Department's longstanding regulatory position that a student with a disability be involved in the development of an IEP if transition services are being considered. The current regulatory provision regarding taking other steps to ensure consideration of the student's preferences and interest if the student does not attend the IEP meeting would be maintained. This section also would maintain the current regulatory provisions concerning inviting representatives of any other agency that is likely to be responsible for providing or paying for transition services, including taking other steps to obtain participation if a representative invited to a meeting does not attend.

Note 1 following this section would be revised in light of the statutory changes. It would also explain that an LEA may designate one or more regular education teachers of the child to attend the IEP meeting, if the child has more than one. It would further state that if all of the child's teachers are not participating in the IEP meeting, LEAs are encouraged to seek input from teachers who will not be attending, and should ensure that teachers who do not attend the IEP meeting are informed about the results of the meeting, including receiving a copy of the IEP. Finally, the note would explain that LEAs are encouraged, in the case of a child whose behavior impedes the learning of the child or others, to have a person knowledgeable about positive behavior strategies at the meeting. Note 2 following this section in the current regulations would be removed.

Proposed § 300.345 largely would maintain the current regulatory provision concerning parent participation in IEP meetings based on the statutory requirements at section 614(d)(1)(B). It would be revised only by adding to the parent notification provisions that for students of any age, if a purpose of the IEP meeting is either the development of a statement of transition service needs or consideration of needed transition services, the agency's notice to the parent must indicate that purpose, and that the agency must invite the student to attend. This change merely modifies the current regulation to accommodate the new statutory provision requiring a statement of transition service needs for students beginning no later than age 14 contained in proposed § 300.347.

Proposed § 300.346 would add a new provision to the regulations based on the requirements of section 614(d)(3) concerning development of the IEP. That section requires that in developing each child's IEP the IEP team consider the strengths of the child and the concerns of the parents for enhancing the education of their child and the results of the initial or most recent

evaluation of the child. That section requires that the IEP team also consider a number of special factors that may apply to individual children. For example, if a child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. These statutory requirements are included in proposed § 300.346(a). Proposed § 300.346(b) would clarify that IEP teams consider these factors in review and revision of IEPs as well as in their initial development. A paragraph (c) also would be added to clarify that if in considering a factor, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP. It would be an anomalous result if an IEP team determined that a service or device was needed to address one of the statutory special factors, and that service or device were not included in the child's IEP.

Paragraph (d) of this proposed section would add the statutory requirements of section 614(d) (3)(C) and (4)(B) which specify that the regular education teacher, to the extent appropriate, must participate in the development, review, and revision of the IEP of the child, including assisting in the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel. Paragraph (e) of this section would incorporate the new statutory provision of section 614(e) which specifies that IEP teams are not required to include information under one component of a child's IEP that is already included under another. Three notes would also be added following this section. The first would recognize the importance of the consideration of the special factors in development of a child's IEP. As appropriate, consideration of these factors must include a review of valid evaluation data and the observed needs of the child resulting from the evaluation process. The second note would acknowledge the statement in the House Committee Report regarding Pub. L. No. 105–17 that states that for children who are deaf or hard of hearing the IEP team should implement the special consideration provision in a manner consistent with the ''Deaf Students Education Services'' policy guidance from the Department. The third note would explain how the considerations addressed in this section affect the development of an IEP for a child who is limited-English proficient. This is one of several notes addressing the responsibility of public agencies to effectively meet the needs of children with limited English proficiency who have a disability or are suspected of having a disability. The Secretary requests public comment on whether additional clarification would be useful.

Proposed § 300.347 would replace the current regulatory provision on the contents of IEPs with the new statutory requirements from section 614(d)(1)(A) regarding the contents of an IEP. In addition, proposed § 300.347 would maintain the current regulatory provision regarding transition services on a student's IEP which states that if the IEP team determines that services are not needed in one or more of certain of the areas specified in the definition of transition services, the IEP team must include a statement to that effect and the basis upon which the determination was made. In addition, the Secretary would add, as paragraph (d), a statement that special rules concerning the content of IEPs apply for children with disabilities who are in adult prisons, consistent with section 614(d)(6) of the Act. The notes following the current regulatory provision on IEP contents would be shortened and condensed into one note regarding transition services. Notes would be added following this section explaining several issues raised by the new provisions on IEP contents—the emphasis on the general curriculum, the focus of the IEP on enabling children with disabilities to access the general curriculum, the relationship of teaching and related service methodologies or approaches and the content of the IEP, the new reporting to parents requirement and the new statement of transition service needs. A final note would explain that it would not be a violation of Part B of the Act for a public agency to begin planning for transition service needs for students younger than age 14 and transition services for students younger than age 16.

Proposed § 300.348 would maintain the current regulatory provision concerning agency responsibility for transition services, consistent with section 614 (d)(5) and (d)(1)(A)(vii). Current regulatory provisions concerning private school placements by public agencies and children with disabilities in private schools would be retained as proposed §§ 300.349 and 300.350, with minor wording changes. These sections reflect the Secretary's interpretation of how public agencies meet their responsibilities regarding conducting IEP meetings under section 614(d)(1)(B) in light of the requirements of section 612(a)(10) (A) and (B) regarding providing services to children with disabilities in private schools. The current regulatory provision concerning IEP accountability would also be maintained as proposed § 300.351. The Secretary believes that this provision continues to represent the appropriate interpretation of the statutory provisions concerning IEPs. However, the note following this section has been revised in light of the heightened focus in the IDEA Amendments of 1997 on providing children with disabilities the instruction, services and modifications that will enable them to achieve a high standards.

Direct Services by the SEA

Proposed § 300.360(a) would replace the current regulatory provision describing the SEA's use of funds, that otherwise would have gone to an LEA, to provide direct services, with the new statutory requirements on this issue. Paragraphs (b) and (c) would be maintained from the current regulations, reflecting the Secretary's continuing interpretation of how SEAs implement direct services. The note following this section would be retained, with material deleted that has been rendered obsolete by the new statute. Proposed § 300.361 would be retained from the current regulations, consistent with the requirements of section 613(h)(2) of the Act.

Section 611(f)(3) authorizes several new uses of money that the State may retain at the State level, including to establish and implement the mediation process; to assist LEAs in meeting personnel shortages; to develop a State Improvement Plan under subpart 1 of Part D of the Act; to carry out activities at the State and local levels to meet performance goals and to support implementation of the State Improvement Plan; to supplement other amounts used to develop and implement a Statewide coordinated services system (but not more than one percent of the grant under section 611 of the Act); and for capacity building and system improvement subgrants to LEAs. The current regulatory provision would be expanded by adding these new statutory provisions as § 300.370(a) (3)–(8). Proposed § 300.370(a) (1) and (2) reflect statutory provisions that were in the prior law and are retained in section 611(f)(3). The provision in the current regulations concerning State matching would be deleted, reflecting the deletion of this requirement from the statute.

Proposed § 300.372 would replace the current regulatory provision regarding the applicability of the nonsupplanting provision to funds that the State uses with the new requirements from section 611(f)(1)(C) that the SEA may use funds retained without regard to the prohibition on commingling and the prohibition on supplanting other funds.

Comprehensive System of Personnel Development

The regulatory provisions in proposed §§ 300.380–300.382 would be revised to reflect new statutory requirements concerning a State's comprehensive system of personnel development (CSPD). Proposed § 300.380 would require that each State's CSPD be consistent with Part B of the Act and the CSPD provision of Part H (to be renamed Part C); be designed to ensure an adequate supply of qualified special education, regular education and related services personnel; be updated at least every five years; and meet the requirements of §§ 300.381–300.382, which contain the provisions of section 653 (b)(2)(D) and (c)(3)(D), as required by section 612(a)(14). Because the statute makes the CSPD the same as the personnel sections of a State Improvement Plan, the Secretary proposes to add a provision to make clear that a State with a State Improvement grant would be considered to have met the requirements of this section.

Proposed § 300.381 would require a State to include an analysis of State and local needs for professional development of personnel to serve children with disabilities that must include at least certain minimum specified information. Proposed § 300.382 would require States to describe the strategies in a number of specified areas that they will use to address the needs identified under proposed § 300.381, including identified needs for in-service and pre-service preparation to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the needs of children with disabilities.

Subpart D—Children in Private Schools

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

Sections 300.400–300.402 of these proposed rules would incorporate the existing rules regarding children with disabilities placed in private schools by public agencies and children with disabilities placed in private schools by their parents. These proposed rules reflect the unchanged statutory provision in section 612(a)(10)(B) that children with disabilities placed in or referred to private schools or facilities by an SEA or LEA must be provided special education and related services (1) in accordance with an IEP, and (2) at no cost to their parents. Section 612(a)(10)(B) further requires that the SEA must ensure that the private facilities meet State standards and that children placed in those facilities have the same rights they would have if served by a public educational agency. The IDEA Amendments of 1997 added new requirements concerning children placed by their parents in private schools. Section 612(a)(10)(C)(i) provides that an LEA is not required 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 the LEA made FAPE available to the child and the parents elected to place the child in the private school. Parent reimbursement is subject to certain requirements described in the next paragraph of this preamble. This provision would be reflected in proposed § 300.403(a). Proposed § 300.403(b) would be retained from the current regulations to clarify that due process procedures can be used to resolve disagreements about the provision of FAPE and financial responsibility of the public agency.

Section 612(a)(10)(C)(ii) describes the circumstances under which a parent may seek reimbursement from a public agency for a private school placement. This provision states that a court or a hearing officer may require the public agency to reimburse parents for the cost of a private school placement if the court or hearing officer finds that the public agency had not made FAPE available to the child in a timely manner. It also states that reimbursement may be reduced or denied if (1) at the child's most recent IEP meeting the parents did not inform the IEP team that they were rejecting the public agency's proposed placement, including stating their concerns and their intent to enroll their child in a private school at public expense; (2) ten (10) business days (including holidays that occur on a business day) prior to the removal of the child from public school, the parents did not give written notice that they were rejecting the public agency proposal and their intent to enroll their child in a private school at public expense; (3) prior to the parents' removal of the child from a public school, the public agency notified the parents, through the prior written notice required under section 615(b)(7) of the Act, of its intention to evaluate the child, but the parents did not make the child available for evaluation; or (4) upon a judicial finding of unreasonableness regarding the actions of the parents. Reimbursement may not be reduced or denied for failure to provide that notice if: (1) The parent is illiterate and cannot write in English; (2) compliance with an evaluation would likely result in physical or serious emotional harm to the child; (3) the school prevented the parent from providing the notice; or (4) the parents had not received notice, pursuant to section 615 of the Act, of the notice requirement. These provisions would be incorporated in the proposed regulations at § 300.403(c)–(e).

Children With Disabilities Enrolled by their Parents in Private Schools

Proposed § 300.450 would retain the current regulatory definition of ''private school children with disabilities.''

Section 612(a)(10)(A) of the Act provides that to the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for these children special education and related services, by spending a proportionate amount of the Federal funds available under Part B of the Act on services for these children. Those services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law. The statute also requires that the SEA's and LEA's child find activities apply to children with disabilities who are placed by their parents in private, including parochial, schools.

Proposed §§ 300.451–300.462 would incorporate these statutory requirements, and appropriate provisions from existing regulatory requirements (from 34 CFR 76.650–76.662) regarding the participation of private school students with disabilities. The term ''religiously-affiliated'' would be used instead of the statutory term ''parochial'' as the Secretary assumes that all religious schools were intended by Congress to be included, not just those organized on a parish basis. The child find obligation from the statute is reflected in proposed § 300.451. Proposed § 300.452 describes the basic statutory obligation to provide special

education and related services to private school children with disabilities and says that obligation is met by meeting the requirements of §§ 300.453–300.462. In § 300.453, the Secretary interprets the statutory limitation on the amount of funds that LEAs must spend on providing special education and related services to private school children with disabilities as the same proportion of the LEA's total subgrant under sections 611 and 619 of the Act as the number of private school children with disabilities aged 3 through 21 and 3 through 5, respectively, is to the total numbers of children with disabilities in its jurisdiction in each of those age ranges. A note would be added after this section to clarify that SEAs and LEAs are not prohibited from providing more services to private school children with disabilities than is required under the Act.

Proposed § 300.454(a) specifies that no individual private school child with a disability has a right to receive some or all of the special education and related services the child would receive if enrolled in a public school. This provision reflects the Secretary's longstanding regulatory interpretation of the statutory limitations on the obligation to provide services to private school children with disabilities, which now specifically reference the limited amount of funds that LEAs must spend on these services. LEAs should have the authority to decide, after consultation with representatives of private school children with disabilities, how best to provide services to this population. Proposed § 300.454 (b)–(e) specifies that LEAs make decisions about which children to serve and what services to be provided to private school children with disabilities, and how those services will be provided and evaluated after timely and meaningful consultation with appropriate representatives of private school children with disabilities that gives those representatives a genuine opportunity to express their views on these subjects. These rules are similar to requirements governing how decisions are made about services provided to private school children under Title I of the Elementary and Secondary Education Act, and are based on the consultation provisions in 34 CFR 76.652 that have applied to services to private school children with disabilities under the Act for many years.

Proposed § 300.455 specifies that services provided to private school children with disabilities must be comparable in quality to services provided to children with disabilities enrolled in public schools and provides a definition of ''comparable in quality.'' This proposed section also specifies that the IEPs developed for these children must address the services that the LEA has determined that it will provide to the child, in light of the services that the LEA has determined, through the consultation process, that it will make available to private school children with disabilities. (The proposed regulations will maintain the current regulatory provision at § 300.341(b)(2) requiring that IEPs be developed for children enrolled in private schools and receiving special education and related services from a public agency.)

Proposed § 300.456(a) would incorporate the statutory provision that services may be provided on-site at the child's private school, to the extent consistent with law. The term ''religiously-affiliated'' is used instead of the statutory term, ''parochial.'' A note would be included after this section that recognizes that under recent decisions of the U.S. Supreme Court, LEAs may provide special education and related services on-site at religiously-affiliated private schools in a manner that does not violate the Establishment Clause of the First Amendment to the U.S. Constitution.

Proposed § 300.456(b) would specify that transportation to a site other than the child's private school must be provided if necessary for the child to benefit from or participate in the other services offered, based on the Secretary's longstanding position that all children with disabilities must be provided transportation to and from other services provided under the Act, if that transportation is necessary to enable them to benefit from those other services. Paragraph (b)(2) of this section would clarify that the cost of that transportation may be included in calculating whether the LEA has met the requirement of § 300.453. A second note following this section would explain that transportation is not required between the student's home and the private school, but only between the site of the services, if other than the private school, and the student's private school or the student's home, depending on the time of the services.

In proposed § 300.457(a), the Secretary interprets the statutory provision regarding services to private school children with disabilities to mean that the due process procedures of the Act do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.452–300.462, including the provision of services indicated on the child's IEP. This provision is based on the statutory scheme, which does not include any individual right to services for private school students placed by their parents. Proposed § 300.457(b) would clarify that complaints that an SEA or LEA has failed to meet the requirements of §§ 300.451–300.462 may be filed under the State complaint procedures addressed in this NPRM at §§ 300.660–300.662.

Proposed §§ 300.458–300.462 would incorporate, with only minor changes that are not intended to be substantive, the requirements from 34 CFR §§ 76.657–76.662 that have applied to the Part B program of the Act for many years. The Secretary believes that these provisions are necessary to ensure that funds under Part B of the Act are not used to benefit private schools or in ways that could raise questions of inappropriate assistance to religion.

Proposed §§ 300.480–300.487 would repeat, with only minor nonsubstantive changes, the bypass provisions from the current regulations. The bypass provisions in section 612(f) are unchanged from prior law.

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

Proposed § 300.500 would combine in one section two current regulatory provisions that establish the general responsibility of SEAs for establishing and implementing procedural safeguards and define ''consent,'' ''evaluation,'' and ''personally identifiable.'' The provision in proposed § 300.500(a) regarding the general responsibility of SEAs would be updated to include all the procedural safeguards in the proposed regulations, consistent with the requirements of section 615(a) of the Act. Similarly, the definition of ''evaluation'' in proposed § 300.500(b)(2) would be updated to refer to all of the evaluation procedures in Subpart E of the proposed regulation, which are based on the statutory provisions of sections 612(a)(6)(B) and 614 (a)–(c). A new note following this section would be added to clarify that a parent's revocation of consent is not retroactive in effect. For example, if a parent grants consent for an evaluation, and after the evaluation is completed the parent revokes consent for the evaluation, the IEP team would still be able to consider that evaluation in making decisions about the child's program and placement.

Based on the requirements of section 615(b)(1), proposed § 300.501(a) would be revised to address the parents' opportunity to inspect and review all educational records, as in the current regulation, and the new statutory

requirements that parents be given an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. In paragraph (b) of this section the Secretary proposes that the statutory obligation to afford parents the opportunity to participate in meetings means that parents must be given notice of the meeting, including the purpose, time and location, and who will be in attendance, early enough so that they have an opportunity to attend, because these requirements seem essential to giving parents an opportunity to participate in these meetings. In paragraph (b)(2), the Secretary proposes to define ''meeting'' to make clear that only certain conversations about providing educational services to a child are covered, to eliminate potential confusion about the scope of this requirement. Paragraph (c) of this section would incorporate the requirement of section 614(f) that public agencies ensure that parents are members of any group that makes decisions on the educational placement of their child. The Secretary proposes in this paragraph to require that public agencies use procedures like those required for parent involvement in IEP team meetings, to ensure that parents are members of the group that makes decisions on the educational placement of their child, including notice of the meeting as described, using other methods to involve parents in the meeting when parents cannot be physically present, maintaining a record of attempts to ensure the participation of the parents, and taking steps to ensure that parents are able to understand and participate in the meetings. The Secretary would adopt this position as necessary to ensure that parents participate in these meetings, as required by section 614(f), and as these procedures have been used for many years by all public agencies regarding parent participation in IEP meetings. In many, if not most instances, placement decisions will be made as a part of IEP meetings, as is already the case in many jurisdictions.

Proposed § 300.502 (a), (c), and (d) would contain, with minor modifications, the current regulatory provisions setting out the general requirements regarding independent educational evaluations, parent-initiated evaluations, and requests for evaluations by hearing officers, consistent with the statutory provision of section 615(b)(1). Proposed paragraph (b) would restate the current regulatory provision concerning the parent's right to evaluation at public expense to make clear that if a parent requests an independent educational evaluation, the agency, without unnecessary delay, must either initiate a due process hearing to show that its evaluation is appropriate, or insure that an independent educational evaluation is provided at public expense, reflecting the Secretary's interpretation that a public agency must take action to respond to a parent's request for an independent educational evaluation, and may not just refuse to respond. Paragraph (e) of this proposed section would restate, with modifications, the current regulatory provision concerning agency criteria for evaluations. The Secretary proposes to add a new paragraph (e)(2) to clarify that other than the agency's criteria for an agency-initiated evaluation, the public agency may not impose conditions or timelines on a parent's right to obtain an independent educational evaluation at public expense. This proposal reflects the Department's analysis of the statutory provision that an independent educational evaluation must be available if the parent objects to an evaluation that a school district is using. A note following this section would explain that a public agency may not impose conditions on obtaining an independent educational evaluation other than the agency criteria for the agency's own evaluations, but must either timely provide the independent educational evaluation at public expense or initiate a due process hearing. A second note would be added to encourage public agencies to make information about the agency's criteria for evaluations known to the public, so that parents who disagree with an agency evaluation will know what standards an independent evaluation should meet. A third note would explain how agency criteria apply to an independent educational evaluation.

Proposed § 300.503(a)(1) would repeat, unchanged, the current regulatory provision concerning the basic obligation to provide prior written notice, based on the statutory requirements for prior notice. Proposed paragraph (a)(2) would be added to clarify that an agency may provide the prior written notice at the same time that it requests parent consent, if an action proposed by a public agency requires parent consent and prior written notice, reflecting the Secretary's interpretation that these activities are closely related. The new statutory requirements concerning the content of prior written notice from section 615(c) would be addressed in proposed § 300.503(b) (1) through (7). These new content requirements are different from, and would replace, the provision in current regulations on the content of prior written notice. The Secretary proposes to add to this paragraph a requirement that the prior written notice include a statement informing parents about the State complaint procedures, including a description of how to file a complaint and the timelines under those procedures. The Secretary believes that insuring that parents know about these procedures, which are an alternative mechanism to due process, should help, in conjunction with the new statutory provisions regarding mediation that are also contained in these proposed regulations, to reduce the number of disagreements between parents and school districts that go to due process. Based on the requirement of section 615(b) (3) and (4) of the Act, paragraph (c) of proposed § 300.503 would maintain the provision from current regulations concerning providing this notice in language understandable to the general public and in the native language or other mode of communication used by the parent, unless it is clearly not feasible to do so.

Proposed § 300.504 would contain the new statutory provisions concerning procedural safeguards notice, including in paragraph (a) when that notice must be provided, and in paragraph (b) what content it must include, as provided in section 615(d) of the Act. Paragraph (c) of this section would address the statutory requirements, also from section 615(d), that this notice be in language understandable to the general public and in the native language or other mode of communication used by the parent unless clearly not feasible to do so, in the same way as similar requirements would be treated regarding prior written notice.

Changes were made in how the statute addresses parent consent (in sections 614 (a)(1)(C) and (c)(3)), and so the existing regulatory provision would be revised in the following ways at proposed § 300.505. Paragraph (a) would be revised in recognition of the new statutory provision concerning parent consent for reevaluations. The Secretary proposes to read this provision to require parent consent before conducting a new test as a part of a reevaluation. The statute now discusses evaluation and reevaluation as including reviewing existing data and, if appropriate, conducting new assessments or tests when new information is needed. The Secretary does not believe that in adding a parent right to consent to reevaluations that Congress intended to require school

personnel to obtain parent consent before reviewing existing data about a child. Therefore, the proposed regulation would make clear that as to reevaluations, parent consent is needed only before conducting a new test as part of that reevaluation. Paragraph (b) of this section would reflect the statutory requirement of section 641(a)(1)(C)(ii) regarding parent refusals to consent.

Paragraph (c)(1) of this proposed section would reflect the statutory requirement of section 614(c)(3) of the Act that parent consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent, and the parent fails to respond. In paragraph (c)(2) of this section the Secretary proposes to describe the demonstration of ''reasonable measures'' as procedures consistent with those required to demonstrate attempts to involve a parent in an IEP meeting. Those procedures, which are unchanged from the current regulations, would be in proposed § 300.345(d) (1) and (2). Proposed paragraphs (d) and (e) of this section would restate current regulatory provisions concerning additional State consent requirements and a limitation on using parent consent for a Part B service or activity as a condition on other benefits to the parent or child. Note 1 following the consent provision in the current regulations would be removed as unnecessary. Note 2 from current regulations would be shortened and revised consistent with the proposed regulatory changes and renumbered as Note 1. Note 3 in current regulations would be renumbered as Note 2 and a new Note 3 would be added addressing agency choices when a parent refuses to consent to a reevaluation.

Proposed § 300.506 would reflect the new statutory provisions of section 615(e) of the Act concerning mediation in paragraphs (a), (b), and (d)(1), which set forth the general responsibility to establish and implement mediation procedures, specific requirements regarding the mediation process, and the statutory provision concerning requiring parents who elect not to use mediation to meet with a disinterested party who would explain the benefits of mediation and encourage its use. In paragraph (c) the Secretary proposes to clarify the requirement that mediation be conducted by an impartial mediator by specifying that a mediator may not be an employee of an LEA or State agency acting as an LEA or an SEA that is providing direct services to the child who is the subject of the mediation and must not have a personal or professional conflict of interest. This position reflects the explanation of this statutory provision in congressional committees' reports. Given Congress' interest in encouraging the use of mediation, it is unlikely that it would have considered any person not meeting basic standards of impartiality to be an acceptable mediator. The Secretary believes that these standards will encourage the use of mediation by ensuring parties to a dispute the availability of an objective third party to mediate disputes. The Secretary proposes to add, in paragraph (d)(2), a clarification that a public agency may not deny or delay a parent's right to a due process hearing based on a parent's failure to participate in the meeting described in proposed paragraph (d)(1). This proposal is made in recognition of the statutory provision of section 615(e)(2)(A)(ii) which provides that the mediation process not be used to deny or delay a parent's right to due process. A note following this section would quote language from the House Committee Report, noting the Committee's intention that if a mediator is not selected at random from the list maintained by the SEA, both the parents and the agency must be involved in selecting the mediator and in agreement about the selection. A second note would note the discussion of House Committee Report's the confidentiality provisions regarding mediation.

Proposed § 300.507(a)(1) would set out the general provision, from section 615(b)(6) of the Act, regarding the right of parents and public agencies to initiate a due process hearing on any matter relating to the identification, evaluation, educational placement or provision of FAPE to a child. In paragraph (a)(2), the Secretary would interpret the requirement of section 615(e)(1) that mediation be available whenever a hearing is requested, as requiring that parents be notified of the availability of mediation whenever a due process hearing is initiated. Paragraph (a)(3) would restate the requirement from the current regulations that the public agency inform the parent of free or low-cost legal and other relevant services if the parents request it, and whenever a due process hearing is initiated. Paragraph (b) of this proposed section would reflect the statutory requirement of section 615(f)(1) of the Act that the hearing be conducted by the SEA or public agency directly responsible for the education of the child. Paragraph (c) of this proposed section would reflect the new statutory requirements of section 615(b) (7) and (8) concerning the notice that a parent is required to provide to a public agency in a request for a due process hearing, and the model form that must be developed by the SEA to assist parents in filing a request for due process that includes the information required in proposed paragraphs (c) (1) and (2). In paragraph (c)(4) the Secretary proposes to clarify that failure to provide the notice specified in paragraphs (c) (1) and (2) cannot be used to deny or delay a parent's right to a due process hearing, as the Secretary believes that Congress did not intend that failure of a parent to provide this notice would prevent them from using procedures necessary to protect their child's right to FAPE. A note following this section would be added to clarify that a public agency may not deny a parent's request for due process, even if it believes that the issues raised are not new, and that this determination must be made by a hearing officer. A second note would quote the House Committee Report noting that a consequence of failure to provide this notice may be a possible reduction in attorneys' fees, noting that the provision is designed to encourage early resolution of disputes and foster partnerships between parents and school districts.

Proposed § 300.508 would maintain the current regulatory requirements concerning impartial hearing officers, consistent with the requirement of section 615(f)(3).

Proposed § 300.509 would add, to existing regulatory provisions concerning rights of all parties to a due process hearing, the new statutory requirement of section 615(f)(2) of the Act regarding disclosure, at least 5 business days prior to a hearing, of all evaluations and recommendations based on those evaluations that have been completed by that date and that a party intends to introduce at the hearing. This provision would be in addition to the existing regulatory requirement of disclosure of any evidence to be introduced at the hearing at least 5 days before the hearing. The provisions from current regulations concerning the parties' rights to obtain a verbatim record of the hearing and the findings of fact and decisions of the hearing officer would be modified consistent with statutory changes in section 615(h) (3) and (4) of the Act, which give parents the right to choose either a written or electronic version of these documents. Paragraph (c)(1) of this proposed section would maintain the existing regulatory provision concerning parents' rights to have the child who is the subject of the hearing present, and to open the hearing to the public. Paragraph (c)(2) would specify that the record of the hearing and the findings of fact and decisions of

hearings must be provided to parents at no cost. This reflects the Department's longstanding interpretation that parents must have access to copies of records of hearings and findings of fact and decisions at no cost so that the right to appeal due process hearing decisions in order to protect their child's right to FAPE is not foreclosed. Proposed paragraph (d) of this section would maintain the current regulatory provision requiring public agencies, after deleting personally identifiable information, to transmit findings and decisions of due process hearings to the State advisory panel and make them available to the public, consistent with section 615(h)(4).

Proposed § 300.510(a) maintains, with minor changes, the current regulatory provision regarding finality of decisions, consistent with section 615(i)(1)(A). Proposed § 300.510 (b), (c), and (d), reflecting the statutory requirements, maintain current regulatory provisions concerning the State level review procedure, including the reviewing official's duties; the responsibility, after deleting personally identifiable information, to make findings and decisions in reviews available to the public and transmit them to the State advisory panel; and finality of review decisions. The notes following the provision on these subjects in current regulations would be retained.

Proposed §§ 300.511 and 300.512(a) would maintain the current regulatory provisions concerning the timelines for due process hearings and State review proceedings and the right of an aggrieved party to bring a civil action. Proposed § 300.512 (b) and (c) would add the statutory requirements of section 615 (i)(2) and (i)(3)(A) of the Act regarding the duties of the court in reviewing a due process decision or State level review and the jurisdiction of the Federal district courts. Proposed § 300.511(d) would add to the regulation the statutory rule of construction of section 615(l) of the Act regarding the applicability of other laws such as the Constitution, the Americans with Disabilities Act of 1990, and title V of the Rehabilitation Act of 1973, to actions seeking relief that is also available under section 615 of the Act.

Proposed § 300.513(a) would maintain the current regulatory provision concerning attorneys' fees, reflecting the requirements of section 615(i)(3)(B)–(G). The Secretary proposes to add a new paragraph (b) to specify that funds provided under Part B of the Act may not be used to pay attorneys' fees awarded under the Act. The Secretary does not believe that funds awarded under the Act for special education and related services should be used to pay attorneys' fees because it would divert limited Federal resources from direct services. A note would be added following this section to explain that States may permit hearing officers to award attorneys' fees to prevailing parents.

Proposed § 300.514(a) would revise the current regulation consistent with the new statutory provision in section 615(j), which adds, as an explicit exception to the ''pendency'' provision, the provisions of section 615(k)(7) of the Act. Proposed paragraph (b) of this section would retain the current regulatory provision concerning due process complaints involving an initial admission to public school. The Secretary proposes to add a new paragraph (c) to clarify that if a hearing officer in a due process hearing or a review official in a State level review agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and local agency and the parents for purposes of determining the child's current placement during subsequent appeals. The pendency provision is designed as a protection to be used by parents of children with disabilities when there is a dispute between the parents and school district about the identification, evaluation, or placement of the child, or about any matter related to the provision of a free appropriate public education to the child. When parents are in agreement with the decision reached in a due process hearing or appeal, the pendency provision should not be invoked to prevent the implementation of that decision. The note from current regulations concerning children who are endangering themselves or others would be retained.

Proposed § 300.515 would maintain, without change, the current regulatory provisions concerning surrogate parents, consistent with the provisions of section 615(b)(2) of the Act.

Proposed § 300.517 would add the new statutory provision regarding transfer of parent rights at the age of majority from section 615(m) of the Act. The Secretary would interpret this to clarify that whenever an agency transfers rights the agency must notify both the individual and the parents of the transfer, consistent with basic standards of due process. With regard to the permissive transfer of rights to individuals who are in correctional institutions, the reference to Federal correctional facilities would be removed, as States do not have an obligation to provide special education and related services under the Act to individuals in Federal facilities. Minor changes for the sake of clarity, that are not intended to affect the substance, would be made to the provision in paragraph (b) regarding a ''special rule.''

Discipline Procedures

Proposed § 300.520 would incorporate the provisions of section 615(k)(1) of the Act regarding the ability of school personnel to remove a child with a disability from his or her current placement for not more than 10 school days, and the ability of school personnel to place a child with a disability in an interim alternative educational setting for not more than 45 days, if the child carries a weapon to school or a school function or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at school or a school function. These provisions would be incorporated in paragraph (a) of this proposed section.

Section 615(k)(1) also requires an IEP meeting to review a child's behavioral intervention plan or to develop an assessment plan to address that behavior. The Secretary proposes to adopt these requirements in paragraph (b) with the following clarifications: (1) The statute's provision that the IEP team meeting occur within 10 days of taking a disciplinary action would specify that this meeting occur within 10 business days of the disciplinary action rather than 10 calendar days; and (2) if the child does not have a behavioral intervention plan, the purpose of the IEP meeting is to develop an assessment plan and appropriate behavioral interventions to address that behavior. The Secretary believes that the business day interpretation would allow school personnel an adequate amount of time to convene the meeting, while ensuring that it occur within the window of time during which a child may be removed from the regular placement under proposed § 300.520(a)(1). The Secretary believes that the purpose of the IEP meeting should be not just development of an assessment plan, but also development of appropriate behavioral interventions so that some behavioral interventions can be instituted without delay. The Secretary also proposes to specify, in paragraph (c), that if a child with a disability is removed from his or her current educational placement for 10 school days or less in a given school year, and no further removal or disciplinary action is contemplated, the IEP team review of the child's behavioral interventions, or need for them, need not be conducted. In light of the legislative history of the IDEA Amendments of 1997, the Secretary

does not believe that these procedures were contemplated if children with disabilities would only be out of their regular educational placements for short periods of time in a given school year; that is, for less than 10 school days in a school year.

Paragraph (d) of proposed § 300.520 would incorporate the statutory definitions of ''controlled substance,'' ''illegal drug,'' and ''weapon'' from section 615(k)(10) (A), (B), and (D) of the Act. A note following this section would explain the Department's longstanding interpretation that removing a child from his or her current educational placement for no more than 10 school days does not constitute a change in placement under the Part B regulations. However, a series of short-term suspensions totaling more than 10 days could amount to a change of placement based on the circumstances of the individual case. A second note following this section would encourage public agencies whenever removing a child with disabilities from the regular placement to review as soon as possible the circumstances surrounding the child's removal and consider whether the child was receiving services in accordance with the child's IEP and whether the child's behavior could be addressed through minor classroom or program adjustments or whether the child's IEP team should be reconvened to address changes in that document.

Proposed § 300.521 reflects the provisions of section 615(k)(2) of the Act regarding the authority of a hearing officer to place a child with a disability in an interim alternative educational setting for not more than 45 days if the hearing officer determines that the public agency has demonstrated by substantial evidence that maintaining the child in the child's current educational placement is likely to result in injury to the child or to others, and considers the appropriateness of the child's current placement, whether the agency has made reasonable efforts to minimize the risk of harm, including the use of supplementary aids and services, and then determines that the interim alternative educational setting meets certain requirements. The Secretary is proposing to clarify how this determination is made by specifying that the determination is made by a hearing officer in an expedited due process hearing. The Secretary believes that a due process hearing was contemplated by Congress in view of the requirement that the agency demonstrate the likely risk of harm by ''substantial evidence'', which is defined at section 615(k)(10) as beyond a preponderance of the evidence. Paragraph (e) of this section would include the statutory definition of this term.

Proposed § 300.522 would incorporate the section 615(k)(3) requirements that the alternative educational setting be determined by the IEP team and that it be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP, and include services and modifications designed to address the behavior, so that it does not recur. This statutory language would be interpreted only as necessary to make clear that, consistent with proposed §§ 300.520 and 300.121, these requirements would have to be met if a child is removed from his or her current educational placement for more than 10 school days in a school year.

Proposed § 300.523 would reflect the provisions of section 615(k)(4) concerning when and how a manifestation determination review is conducted with the following modifications: (1) a paragraph (b) would include the Secretary's proposal that if a child with disabilities is removed from the child's current educational placement for 10 school days or less in a given school year, and no further disciplinary action is contemplated, the manifestation review need not be conducted; (2) a paragraph (e) would clarify that if the IEP team determines that any of the standards described in the statute are not met, the team must consider the child's behavior to be a manifestation of the child's disability; and (3) a paragraph (f) would make clear that the manifestation review may be conducted at the same meeting in which the behavioral review of proposed § 300.520(b) is done. The interpretation in paragraph (e) on how the manifestation determination is made, using on the standards described in the statute, is based on the explanation of this decision process in the congressional committee reports. A note following this section would quote the language of the House Committee Report on how the manifestation determination is made. A second note would explain that if the decision is that the behavior is a manifestation of the child's disability, the LEA must take steps to remedy any deficiencies found during that review in the child's IEP or placement or in their implementation. Often these steps will enable a child whose behavior is a manifestation of his or her disability to return to the child's current educational placement before the expiration of the 45-day period.

Proposed § 300.524 (a) and (b) would reflect the provisions of section 615(k)(5) regarding behavior that is not a manifestation of a child's disability. Proposed paragraph (c) would clarify that the requirements of the ''pendency'' provision apply if a parent requests a hearing to appeal a decision that a child's behavior is not a manifestation of the child's disability. Section 615(j) of the Act provides that the only exceptions to the ''pendency'' rule are those specified in section 615(k)(7) of the Act, which concerns placement during parent appeals of 45-day interim alternative educational placements. A note following this section would further explain this issue.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability, including disciplining children with disabilities for behavior that is a manifestation of their disability. For example, disciplining a child with a seizure disorder for behavior that results from that disability would violate Section 504. The Secretary invites comment on whether further clarification of this point should be provided in these regulations.

Proposed § 300.525 would reflect the requirements of section 615(k)(6) regarding parent appeals of manifestation determinations or any decision regarding placement, including the requirement for an expedited hearing, and the standards used by the hearing officer in reviewing these decisions.

Proposed § 300.526 would adopt the requirements of section 615(k)(7) involving placement if a parent requests a hearing to challenge the interim alternative educational setting or the manifestation determination, including the requirement that the child remain in the interim alternative educational setting until the decision of the hearing officer or the expiration of the 45-day period, whichever comes first, the requirement that an LEA may request an expedited due process hearing to seek to demonstrate to the hearing officer that it would be dangerous to return the child to his of her current educational placement, and the standards that the hearing officer uses in reaching a decision. Proposed paragraph (c)(3) would clarify that these placements would be for a duration of not more than 45 days, as the 45-day limit is one of the standards in section 615(k)(2) referred to in section 615(k)(7)(C). A note following this section would explain that if the LEA maintains that the child is still dangerous at the

expiration of the 45 days and the issue has not been resolved through due process, the LEA could seek a subsequent expedited hearing on the issue of dangerousness.

Proposed § 300.527 would incorporate the statutory requirements of section 615(k)(8) regarding the application of these rules to children not yet determined eligible for special education and related services, with certain clarifications. Paragraph (b)(1) would clarify that oral communication from the child's parents would constitute a basis for knowledge only if the parent is illiterate in English or has a disability that prevents a written statement. Proposed paragraphs (c)(2)(ii) and (iii) would clarify that if the parents have requested an evaluation, the child remains in the educational placement determined by school authorities until the evaluation is completed, and that if the result of the evaluation is that the child is a child with a disability, the agency must provide special education and related services in accordance with the provisions of Part B, including the requirements of proposed §§ 300.520–300.529 and section 612(a)(1)(A) of the Act.

In proposed § 300.528, the Secretary proposes to specify what an expedited due process hearing must entail, including time frames and hearing procedures, the qualifications of hearing officers, and appeal rights. These provisions are based on the Secretary's belief that all expedited hearings under these discipline procedures should result in decisions within a very short period of time in order to protect the interests of both schools and children with disabilities, and that a 10-business-day limit would allow these hearings to result in decisions before the expiration of a potential 10-school-day removal of a child from the regular placement. The Secretary believes that requiring that due process hearing officers under these procedures meet the same requirements that apply to hearing officers under other due process procedures under the Act and that the hearings meet the same basic standards that apply to other due process hearings will ensure that these proceeding meet basic standards of due process, and are perceived as fair, while allowing some flexibility by allowing States to adjust their own procedural rules to accommodate these very swift hearings.

Proposed § 300.529 incorporates the provisions of section 615(k)(9) of the Act regarding reporting crimes committed by a child with a disability to appropriate authorities and transmitting copies of the special education and disciplinary records of the child to the authorities to whom the agency reports the crime.

Procedures for Evaluation and Determinations of Eligibility

Proposed § 300.530 would reflect section 612(a)(7), which gives general responsibility to the SEA to ensure that each public agency establishes and implements evaluation procedures that meet the requirements of the Act. Proposed § 300.531 incorporates the requirement of section 614(a)(1) that each public agency conduct a full and complete initial evaluation before initiating the provision of special education and related services to a child with a disability. Proposed § 300.532 incorporates the requirements of section 614(b) (2) and (3) and section 612(a)(6)(B) with the requirements of current regulations that a variety of assessment tools and strategies must be used to gather information about the child; that evaluation materials include those tailored to assess specific areas of educational need and not merely designed to provide a single general intelligence quotient; and that tests must be selected and administered so as to best insure that the test results accurately reflect the child's aptitude or achievement level or whatever the test purports to measure, rather than the child's impaired sensory, manual, or speaking skills. Three notes following proposed § 300.532 would explain how a public agency meets its obligation to properly evaluate a child who is limited English proficient and suspected of having a disability.

Proposed § 300.533 would reflect the provisions of section 614(c) (1), (2), and (4) of the Act regarding review of existing evaluation data and determinations of whether more data is needed. Proposed § 300.534 would incorporate the requirements of section 614 (b) (4) and (5) and (c)(5) of the Act regarding determinations of eligibility.

Proposed § 300.535 would maintain from the current regulations the procedures for determining eligibility.

Proposed § 300.536 would reflect the statutory provisions of section 614(a)(2) concerning reevaluation and the existing regulatory provision regarding review of IEPs, with minor modifications.

Additional Procedures for Evaluating Children with Specific Learning Disabilities

Proposed § 300.540 would be changed from the current regulation only as necessary to reflect the new requirements as described, concerning the composition of the teams of individuals who make determinations about eligibility. Proposed §§ 300.541 and 300.542, regarding the criteria for determining the existence of a specific learning disability and observation of a child suspected of having a specific learning disability, would be unchanged from current regulations. Proposed § 300.543, concerning the written report, would be changed from current regulations only to make clear that for a child suspected of having a specific learning disability, this report satisfies the requirement for documentation of the determination of eligibility as described with reference to proposed § 300.534(a).

The Secretary intends to review carefully over the next several years the additional procedures for evaluating children suspected of having a specific learning disability contained in proposed §§ 300.540–300.543 in light of research, expert opinion and practical knowledge of identifying children with a specific learning disability with the purpose of considering whether legislative proposals should be advanced for revising these procedures.

Least Restrictive Environment

Proposed §§ 300.550–300.556 are taken from current regulations, with the exceptions noted. These provisions interpret the statutory provision regarding placement in the least restrictive environment in Section 612(a)(5)(A), which is substantively the same as prior law. A minor change to proposed § 300.550(a) would be made to reflect the new organization of the statute around State eligibility requirements, and a conforming change to the note following proposed § 300.552 to update a reference to another section of this regulation. A note following proposed § 300.551 would be added explaining that home instruction is generally only appropriate for children who are medically fragile and those who are unable to participate with nondisabled children in any activities. Section 300.552 from current regulations would be revised to incorporate the provisions of current regulations in § 300.533(a) (3) and (4) regarding how the placement decision is made. A note following this section would be added to explain that the group of persons making the placement decision may also serve as the child's IEP team, as long as all appropriate IEP team members are included. Another note would be added suggesting that if IEP teams appropriately consider and include in IEPs positive behavioral interventions and supplementary aids and services many children who would otherwise be disruptive will be able to

participate in regular education classrooms.

Confidentiality of Information

With the following exceptions, proposed §§ 300.560–300.575 and § 300.577 retain the provisions of current regulations on confidentiality of information, with only very minor, nonsubstantive changes. These provisions interpret the statutory provision regarding confidentiality in sections 612(a)(8) and 617(c). A new note would be added as Note 2 following proposed § 300.574 explaining the relationship between these procedures and the new requirements concerning transfer of rights to students at the age of majority, as discussed under proposed § 300.517. A new regulation would be added (proposed § 300.576) reflecting the statutory authority from section 613(j) of the Act for SEAs to require LEAs to include in records of a child with a disability a statement of current or previous disciplinary action, and transmit that statement to the same extent that disciplinary information is included in, and transmitted with, records of nondisabled children, including a description of information relevant to the discipline. The statute also requires that if a State adopts such a policy and the child transfers from one school to another, any transmission of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action taken against the child.

Department Procedures

Proposed §§ 300.580–300.586 largely restate existing regulatory provisions concerning Department procedures for State plan disapproval as Department procedures for determinations of State ineligibility, in light of the restructuring of the Act to eliminate the State plan. Reflecting the requirement in section 612(d) of the Act, a new proposed § 300.580 would state that if the Secretary determines a State is eligible to receive a grant, the Secretary notifies the State.

A new § 300.587 would be added to incorporate the statutory provisions of section 616(a) of the Act regarding enforcement by the Department if a SEA or LEA fails to comply with Part B of the Act or its regulations. This section would incorporate the types of enforcement actions available to the Department—withholding payments in whole or in part, and referral to the Department of Justice, mentioned in section 616(a), and taking any other enforcement action authorized by law, such as other actions authorized under 20 U.S.C. 1234. The Secretary proposes to regulate to clarify the type of notice and hearing provided before withholding and referral for enforcement action because the type of hearing appropriate before announcement of an enforcement action that itself involves an adversarial hearing logically will be different than the adversarial hearing before a withholding or eligibility decision. Proposed paragraph (e) of this section would address enforcement in situations in which a State has assigned responsibility for children with disabilities who are convicted as adults under State law and incarcerated in adult prisons to an agency other than the SEA.

In proposed § 300.589, the Secretary proposes to revise the current regulatory provision regarding the statutory requirement in section 612(a)(18)(C) permitting a waiver, in whole or in part, of the supplement, not supplant rule for use of funds provided under Part B if the State demonstrates by clear and convincing evidence that all children with disabilities in the State have FAPE available to them, and the Secretary concurs with the evidence provided by the State. Section 612(a)(19)(C)(ii) now also provides that the Secretary may waive the new maintenance of State financial support requirement of section 612(a)(19)(A) if the Secretary determines that the State meets the standard described in section 612(a)(18)(C). Section 612(a)(19)(E) directs the Secretary to issue proposed regulations establishing procedures, including objective criteria and consideration of the results of compliance reviews of the State conducted by the Department, within 6 months of the enactment of the IDEA Amendments of 1997 (or December 4, 1997) and final regulations on this topic within one year of enactment (or June 4, 1998). The Secretary proposes to implement these requirements by providing that a State wishing to request a waiver must submit: (1) an assurance that FAPE is and will remain available to all children with disabilities in the State; (2) the evidence that the State wishes the Secretary to consider that details the basis on which the State has concluded that FAPE is available to all children with disabilities in the State and State procedures regarding child find, monitoring, State complaint handling and due process hearings; (3) a summary of all State and Federal monitoring reports and hearing decisions for the prior three years that include any finding that FAPE was not available and evidence that FAPE is now available to all children addressed in those reports and decisions; and (4) evidence that the State in reaching its conclusion that FAPE is available to all children with disabilities in the State consulted with interested organizations and parents in the State and a summary of that input. If the Secretary determines that the State has made a prima facie showing that FAPE is available to all children with disabilities in the State, the Secretary conducts a public hearing on whether FAPE is and will be available to all children with disabilities in the State. If the Secretary concludes that the evidence clearly and convincingly demonstrates that FAPE is and will be available to all children with disabilities in the State, the Secretary provides a waiver for a one-year period. The Secretary also proposes that a State use these same procedures to obtain a waiver in subsequent years. The Secretary believes that these procedures would appropriately allow States to demonstrate that all children with disabilities in the State are, and will be, appropriately served so that a waiver could be granted without violating the rights of children with disabilities.

Subpart F—State Administration

General

Proposed § 300.600 (a) through (c) would retain, with minor nonsubstantive changes, the provisions of current regulations concerning SEA responsibility for all educational programs for children with disabilities in the State, consistent with section 612(a)(11). Paragraph (d) of this section would add the new provision from section 612(a)(11)(C) of the Act which permits the Governor (or other authorized individual under State law), consistent with State law, to assign to another public agency of the State the responsibility of 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. The note following this section in current regulations would be maintained.

Proposed § 300.601 would retain, with only minor, nonsubstantive revisions, the current regulation specifying that Part B of the Act not be construed to permit a State to reduce medical and other assistance available to children with disabilities or alter the eligibility of a child with a disability to receive services that are also part of FAPE, based on the statutory provision at section 612(e).

Proposed § 300.602 would reflect the new statutory cap on the amount of funds that States can retain for administration and other State-level activities. Section 611(f)(1) provides that each year the Secretary will determine and report to each State an amount that is 25 percent of the amount the State received under section 611 for fiscal year 1997 cumulatively adjusted annually by the lesser of the percentage increase of the State's allocation from the prior year's allocation or the rate of inflation, which will be the maximum amount that the State can retain for these purposes.

Use of Funds

Section 611(f)(2) specifies that a State can use for State administration of the Part B program, including section 619, not more than twenty percent of the amount that the State may retain, or $500,000 adjusted cumulatively for inflation, whichever is greater, and that each outlying area can retain $35,000 for that purpose. This provision is reflected in proposed § 300.620.

Proposed § 300.621 would maintain the requirements of current regulations on the allowable uses of funds retained by the State for State administration, reflecting the Secretary's interpretation of section 611(f)(2) of the Act. The Secretary believes that these provisions adequately address the statutory purpose of these funds while giving States reasonable flexibility in how they use these funds.

Section 611(f)(4) of the Act creates a new category of subgrants that SEAs, under certain circumstances, will make to LEAs for capacity building and improvement.

Proposed § 300.622 would reflect this new authority, including the statutorily prescribed purposes of these subgrants to LEAs.

Proposed § 300.623 would describe the amount reserved for capacity-building and improvement subgrants to LEAs, consistent with the requirement of section 611(f)(4)(B) of the Act. A note would be added following this section that would explain that the amount of funds available for these capacity-building and improvement subgrants to LEAs will vary year to year, and that in each year following a year in which these subgrants are made, these funds become part of the required flow-through subgrants to all LEAs.

In proposed § 300.624, the Secretary proposes to provide clear authority for States to establish priorities to award capacity building and improvement subgrants competitively or on a targeted basis because the Secretary believes that this flexibility is necessary to enable States to design these subgrants to suit State needs. A note following this provision would recognize that the purpose of these subgrants is to address particular needs that are not readily addressed through formula assistance, and that SEAs can use these subgrants to promote innovation, capacity building, and systemic improvement.

State Advisory Panel

Proposed § 300.650 would retain the provisions of current regulation concerning establishment of State advisory panels, consistent with section 612(a)(21)(A) of the Act. A note would be added to follow this section making clear that the State advisory panel advises the State regarding the education of all children with disabilities in the State, including in situations where the State has divided State responsibility for eligible children with disabilities who have been convicted as adults and are incarcerated in adult prisons.

Proposed § 300.651 would reflect the new statutory membership requirements for the State advisory panel, as provided in section 612(a)(21) (B) and (C), including a new statutory requirement that a majority of the members of the panel must be individuals with disabilities or parents of children with disabilities.

Proposed § 300.652 would reflect the duties of the advisory panel, as specified in section 612(a)(21)(D) of the Act.

Proposed § 300.653 would maintain from the current regulations the advisory panel procedures, representing the Secretary's interpretation of reasonable rules for the operations of an advisory panel under the Act.

State Complaint Procedures

The current Part 300 regulations establish a State complaint mechanism that individuals, organizations, and other interested parties can use to bring to the SEA's attention, for resolution, allegations that a public agency is violating a requirement of Part B or its implementing regulations. The Secretary views these State complaint procedures as an important, less costly, less time consuming, and less formal alternative to due process hearings and other dispute resolution mechanisms through which disagreements under Part B and its regulations may be resolved. Proposed §§ 300.660–300.662 would retain these State complaint procedures with the changes described.

The Secretary proposes in proposed § 300.660(b) to revise the current regulation to require that States widely disseminate to parents and others information about the State's complaint procedures. The Secretary intends, through this requirement, in conjunction with the provision in proposed § 300.503(b)(8) that would require that prior written notice to parents of children with disabilities include a description of the State complaint procedures and how to file a complaint, to ensure that persons interested in special education in a State know that there are alternatives to resorting to due process hearings that can be used to resolve disputes. A new note would be added following this section that would explain that in resolving an alleged denial of FAPE, an SEA may award compensatory education if appropriate.

Proposed § 300.661 would retain from current regulation the minimum State complaint procedures in current regulations, with one exception. In this proposed regulation the Secretary proposes to delete the provision regarding Secretarial review. This change reflects a recommendation of the Department's Inspector General in his report of August, 1997 on the utility and efficiency of the Secretarial review process under the IDEA. In that report the Inspector General noted that in the Secretarial review process the Department's limited resources for implementation of the IDEA are being diverted to an activity that is providing minimal benefits to children with disabilities or to the program. The Secretary expects that removing the Secretarial review provision will allow the Department to spend more of its time and attention on evaluating States' systems for ensuring compliance with program requirements, which will have benefit for all parties interested in special education.

Two new notes would be added following proposed § 300.661. The first would clarify that if a complaint is received that raises an issue that is also the subject of a due process hearing, or multiple issues, some of which are also the subject of a due process hearing, the SEA must set aside the issues in due process until the end of the hearing, but resolve the remaining issues in the complaint within the 60-day complaint time line. The second proposed note would explain that if an issue raised in a complaint previously had been the subject of a due process hearing, the hearing decision would be binding, and the SEA would satisfy its obligation under these procedures by informing the complainant that the hearing decision is binding as to that issue. The note would also explain that the SEA would have to resolve an alleged failure

to implement a due process hearing decision.

The Secretary proposes in proposed § 300.662 to maintain the provisions of current regulation regarding filing a complaint, and add a new paragraph (c) that would specify that complaints must be received within one year of the alleged violation, unless a longer period is reasonable because the violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received by the SEA. The Secretary believes that SEAs should not be required in the future to use their resources to resolve complaints that do not involve issues that are relevant to the current operation of the State's special education program and that do not involve the possibility of educational remedy for particular children. A note following this section would be added to explain that SEAs must resolve complaints that meet the complaint requirements, even if filed by an organization or individual from another State.

Subpart G—Allocation of Funds; Reports

Allocations

Proposed § 300.700 would adopt the special definition of ''State'' from section 611(h)(2) of the Act with regard to distribution of funds provided under section 611 of the Act.

Proposed § 300.701 would describe the purpose of the grants under section 611 of the Act and the maximum amount of those grants, as provided in section 611(a) of the Act.

Proposed § 300.702 would incorporate the statutory definition of ''average per-pupil expenditure in public elementary and secondary schools in the United States'' from section 611(h)(1) of the Act.

The IDEA Amendments of 1997 create a new formula for distribution of funds under section 611 of the Act that is first applied when the appropriation for section 611 of the Act is more than a certain trigger amount—$4,924,672,200. Until that time, funds under section 611 will continue to be distributed based on the formula under section 611 before enactment of the IDEA Amendments of 1997, with certain minor changes stipulated in the statute.

Proposed § 300.703(a) would incorporate the general order of distribution of funds, consistent with section 611(d)(1) of the Act, which applies to both the interim and new formula distribution.

Proposed § 300.703(b) would incorporate the interim formula for distribution among States, including the new statutory provision permitting States to count the number of children receiving special education and related services as of the last Friday in October or December 1, at the State's discretion, as specified in section 611(d)(2) of the Act.

Proposed § 300.706 reflects the section 611(e) (1) and (2) requirements for when the permanent formula takes effect, and calculation of the ''base year'' amount for purposes of that new formula.

Proposed § 300.707 would include the requirements of the new formula from section 611(e)(3) of the Act, which specifies that funds in excess of those distributed to a State in the base year are allocated 85 percent on relative 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 and 15 percent on the basis of relative populations of children of those ages who are living in poverty, based on the most recent data available and satisfactory to the Secretary.

Proposed § 300.708 would specify the statutory floors and a cap in the size of any State's increased allocation, as provided in section 611(e)(3) (B) and (C) of the Act. The requirements of section 611(e)(4), regarding what happens if the section 611 appropriation decreases, would be incorporated in proposed § 300.709.

Proposed § 300.710 would retain, with minor modifications, the provisions of current regulations regarding allocations to a State in which a bypass is implemented for private school children with disabilities, consistent with section 612(f)(2) of the Act.

Under section 611(g) of the Act, States will use a mechanism for distributing the formula subgrant funds to LEAs that parallels the distribution among States. This will include an interim formula, based on the formula in the Act prior to the enactment of the IDEA Amendments of 1997, and, after the 611 appropriation is greater than $4,924,674,200, a new permanent procedure that, like the one at the State level, allocates new funds 85 percent based on the relative numbers of children enrolled in public and private elementary and secondary schools in the agency's jurisdiction, and 15 percent in accordance with the relative numbers of children living in poverty, as determined by the SEA.

Proposed § 300.711 would reflect the requirement of section 611(g)(1) that funds not retained at the State level for State administration and other State purposes, or distributed to LEAs as capacity building and improvement subgrants, must be distributed to LEAs and State agencies under the statutory formula that applies in that year. Proposed § 300.712 would set forth the statutory interim formula and permanent procedure for distribution of funds to LEAs and State agencies, reflecting section 611(g)(2) of the Act. A note following this section would explain that States should use the best data that is available to them on enrollment in public and private schools, and that States have discretion in determining what data to use regarding children living in poverty, and suggests some options for poverty data. Proposed § 300.713 would reflect the statutory requirements of section 611(g)(3) concerning treatment of former Chapter 1 State agencies in the distribution of funds. The Secretary proposes minor adjustments to make the count date for children in these agencies compatible with the count date used by the State for LEA reporting because requiring a different count date in a State that chooses to count in LEAs on the last Friday in October could result in double counting.

Proposed § 300.714 would retain with minor nonsubstantive changes the current regulatory provision concerning reallocation of LEA funds to other LEAs. This provision reflects the requirements of section 611(g)(4) of the Act.

Proposed §§ 300.715 and 300.716 reflect the statutory provisions of sections 611(c) and 611(i) (1) (A) and (B) and (3) regarding payments to the Secretary of the Interior for the education of Indian children and for Indian children aged 3 through 5. The new statutory provisions concerning grants to the outlying areas and freely associated States of section 611(b) would be incorporated in proposed §§ 300.717 through 300.722.

Reports

Proposed §§ 300.750 through 300.754 would retain, from the current regulation, the provisions concerning report requirements for the annual report of children served, the information required in the report, certification, criteria for counting children, and other responsibilities of the SEA regarding these reports. These provisions are consistent with the statutory requirement in section 611(d) that directs that funds appropriated for section 611 of the Act continue to be allocated based on a child count as in effect before enactment of the IDEA Amendments of 1997 for some time into the future. Minor changes would be

made to reflect the fact that a child count for distribution of funds will not be required under the permanent funding formula, and to reflect the new State option on when the count will be conducted. A reference to the old Chapter 1 handicapped program would be eliminated, as that program no longer exists.

Proposed § 300.755 would incorporate the new statutory requirements regarding State collection and examination of data to determine if significant disproportionality based on race is occurring in the State regarding the identification and placement of children with disabilities.

Proposed § 300.756 would reflect new rules specified in section 605 of the Act regarding use of funds provided under Part B of the Act for the acquisition of equipment or construction.

2. Part 301—Preschool Grants for Children With Disabilities

Subpart A—General

Proposed § 301.1 in the proposed regulations would conform the regulatory purpose for the Preschool Grants for Children with Disabilities Program with the provisions of section 619(a) of the Act, to provide grants to States to assist them in providing special education and related services to children with disabilities aged three through five years, and, at a State's discretion, to two-year-old children with disabilities who will turn three during the school year.

Proposed § 301.4 would list regulations found in parts other than Part 301 that also apply to the Preschool Grants program. The proposed regulations would be consistent with the existing regulations, with three exceptions. First, the proposed regulations would specify that the provisions of 34 CFR 76.125–76.137 do not apply to the program, consistent with the requirements of section 611(b)(4) providing that consolidation of grants is no longer possible for the outlying areas. Second, the proposed regulations would specify that the requirements of 34 CFR 76.650–76.662 do not apply, in light of the changes proposed under Part 300 regarding the provision of services to children placed by their parents in private schools. Third, the reference to Part 86 would be removed, as that part no longer applies to SEAs and LEAs.

Proposed § 301.5 would specify the definitions that apply to certain terms used in Part 301. The section would be unchanged from the existing regulations, with the following exceptions: Consistent with the IDEA Amendments of 1997, proposed § 301.5(a) would replace the term ''intermediate educational unit'' with ''educational service agency,'' and proposed § 301.5(c) would add a definition of ''State'' and delete definitions of ''comprehensive service delivery system'' and ''excess appropriation.''

Subpart B—State Eligibility for a Grant

Proposed § 301.10 would be conformed with section 619(b) of the Act, and provide that a State is eligible to receive a grant under the program if the State is eligible under 34 CFR Part 300 and the State demonstrates to the satisfaction of the Secretary that it has in effect policies and procedures that assure the provision of FAPE to all children with disabilities aged three through five years in accordance with the requirements of 34 CFR Part 300, and for any two-year-old children who are provided services by the State or by an LEA. Proposed § 301.12 would restate the current regulation concerning sanctions if a State does not make FAPE available to all preschool children with disabilities to conform to the changes made by the IDEA Amendments of 1997 and other law.

Subpart C—Allocation of Funds to States

Proposed § 301.20 would be conformed with section 619(c)(1) of the Act, and provide that, after reserving funds for studies and evaluations under section 674(e) of the Act, the Secretary will allocate the remaining amount among the States in accordance with §§ 301.21–301.23.

Proposed § 301.21 would incorporate the requirements of section 619(c)(2)(A) of the Act which sets forth the basis on which, subject to certain limitations (described in this NPRM under § 301.22), allocations to States under the Preschool Grants program would be calculated if the amount available to States were equal to or greater than the amount allocated to States for the preceding fiscal year. Consistent with this statutory provision, proposed § 301.21(a) would provide that, except as provided in § 301.22, the Secretary will first allocate to each State the amount it received for fiscal year 1997, and then allocate 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 5 and allocate 15 percent of those remaining funds to States on the basis of their relative populations of all children aged 3 through 5 who are living in poverty. Also reflecting the statutory requirements, proposed § 301.21(b) would further provide that in making these calculations, the Secretary will use the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

Consistent with section 619(c)(2)(B) of the Act, proposed § 301.22 (a) and (b) would set forth floors and caps for calculating the allocations to States under the Preschool Grants program in fiscal years in which the amount available to States under § 301.20 were equal to or greater than the amount allocated to States for the preceding fiscal year. Proposed § 301.22(c) would also be conformed to section 619(c)(2)(C) of the Act and provide for ratable reductions if available funds are insufficient to make allocations to the States consistent with the provisions of § 301.22 (a) and (b).

Proposed § 301.23 would, consistent with the requirements of section 619(c)(3) of the Act, set forth the basis on which allocations to States under the Preschool Grants program would be calculated if the amount available to States under § 301.20 were less than the amount allocated to States for the preceding fiscal year. Proposed § 301.23(a) would provide that if the amount available for allocations were greater than the amount allocated to the States for fiscal year 1997, each State would be allocated the sum of the amount it received for fiscal year 1997 plus an amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over fiscal year 1997 bears to the total of all of those increases for all States. Proposed § 301.23(b) would provide that if the amount available for allocations is equal to or less than the amount allocated to the States for fiscal year 1997, each State would be allocated the amount it received for that year, ratably reduced, if necessary.

Consistent with section 619(d) of the Act, proposed § 301.24 would provide that for each fiscal year a State may retain for administration and other State-level activities, in accordance with §§ 301.25 and 301.26, not more, as calculated by the Secretary, than 25 percent of the amount the State received under the 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.

Consistent with section 619(e) of the Act, proposed § 301.25 would provide that a State may use not more than 20 percent of the maximum amount it may retain under § 301.24 for any fiscal year for (a) 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); or for the administration of Part C of the Act, or both, if the SEA is the lead agency for the State under that part.

Consistent with section 619(f) of the Act, proposed § 301.26 would provide that a State must use any funds that it retains under § 301.24 and does not use for administration under § 301.25 for any of the following: (1) 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 3 or older than 5 as long as those services also benefit children with disabilities aged 3 through 5; (2) direct services for children eligible for services under section 619 of the Act; (3) developing a State improvement plan under subpart 1 of part D of the Act; (4) activities at the State and local levels to meet the performance goals established by the State under section 612(a)(16) of the Act and to support implementation of the State improvement plan under subpart 1 of part D of the Act if the State receives funds under that subpart; or (5) supplementing 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 to exceed one percent of the amount received by the State under section 619 of the Act for a fiscal year. A note following this section would provide an example of an authorized use of these funds.

Subpart D—Allocation of Funds to Local Educational Agencies

Proposed § 301.30 would provide that a State must distribute any funds that it does not retain under § 301.24 to LEAs that have established their eligibility under section 613 of the Act, consistent with the requirements of section 619(g)(1) of the Act.

Proposed § 301.31 would, in conformity with section 619(g)(1), set forth the basis on which a State must distribute the funds described in § 301.30 to LEAs that have established their eligibility under section 613 of the Act. Proposed § 301.31(a) would require that the State first award to each of those agencies the amount it 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 then in effect. Proposed § 301.31(b) would further require that, after making the base payment allocations required by § 301.28(a), the State allocate 85 percent of any remaining funds to each LEA on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction, and 15 percent of those remaining funds in accordance with their relative numbers of children living in poverty, as determined by the SEA. A note following this section would explain that States should use the best data that is available to them on enrollment in public and private schools, and that States have discretion in determining what data to use regarding children living in poverty, and proposes some options for poverty data.

Proposed § 301.32(a) would, in conformity with section 619(g)(2) of the Act, provide that: (a) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged 3 through 5 residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that the LEA does not need in order to provide FAPE to other LEAs that are not adequately providing special education and related services to all children with disabilities aged 3 through 5 residing in the areas they serve.

Proposed § 301.32(b) would provide that if a State provides services to preschool children with disabilities because some or all LEAs are unable or unwilling to provide appropriate programs, the SEA may use payments that would have been available to those LEAs to provide special education and related services to children with disabilities aged 3 through 5 years, and to two-year-old children with disabilities, residing in the areas served by those LEAs and ESAs.

3. Part 303—Early Intervention Program for Infants and Toddlers With Disabilities

A few changes would be made to the Part 303 regulations to conform to similar changes proposed for the Part 300 regulations. As indicated, other changes to incorporate statutory changes made by the IDEA Amendments of 1997 with regard to the Early Intervention Program for Infants and Toddlers with Disabilities will be made at a later date as technical changes.

In § 303.18, the Secretary proposes to add a new paragraph (b) specifying that a State may provide that a foster parent qualifies as a parent under Part 303 if certain specified standards are met. The note following this section would be revised, consistent with the change to the regulation. These changes would be consistent with changes proposed in proposed § 300.19.

In § 303.403, the Secretary proposes to add a new subparagraph (b)(4) to provide that prior notice to parents under this part includes information about the State complaint procedures required by §§ 303.510—303.512, including how to file a complaint and the timelines under the State complaint procedures. This change would conform to proposed § 300.503, concerning the content of prior notice under Part 300. The Secretary believes that if parents know about these procedures, they may use them as an alternative to the more costly and formal mechanisms of due process and mediation.

In § 303.510, the Secretary proposes to amend paragraph (b) to specify that the lead agency's State complaint procedures must include procedures for widely disseminating to parents and others the State's complaint procedures. The Secretary intends, through this requirement and the change proposed in § 303.403, to insure that persons interested in early intervention services for infants and toddlers with disabilities in the State know that there are alternatives to resorting to due process hearings that can be used to resolve disputes. A note would be added following this section to explain that in resolving a complaint alleging a failure to provide services in accordance with an IFSP, a lead agency may award compensatory services as a remedy. These changes would be consistent with changes proposed to § 300.660.

In § 303.511, the Secretary proposes to add a new paragraph (c) that would specify that complaints must be received by the public agency within one year of the alleged violation, unless a longer period is reasonable because the violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received. The Secretary believes that public agencies should not be required in the future to use their resources to resolve complaints that do not involve issues that are relevant to the current operation of the State's program and that do not involve the possibility of remedy for particular

children. A note would be added following this section to explain that the lead agency must resolve any complaint that meets the requirements of this section, even if it has been filed by an organization or individual from another State. These changes would conform to changes in proposed § 300.662.

In § 303.512, the Secretary proposes to delete the provision from the current regulation regarding Secretarial review. This change reflects a recommendation of the Department's Inspector General in his report of August 1997 on the utility and efficiency of the Secretarial review process under the IDEA. In that report, the Inspector General noted that the Secretarial review process is diverting the Department's limited resources to an activity that is providing minimal benefits to children with disabilities and the program. The Secretary expects that removing the Secretarial review provision will allow the Department to spend more of its time and attention on evaluating States' systems for ensuring compliance with program requirements, which will have benefit for all parties interested in these programs. Two notes would be added following this section. Note 1 would clarify that if a complaint raises an issue that is also the subject of a due process hearing, or multiple issues, some of which are also the subject of a due process hearing, the State must set aside the issues in due process until the end of the hearing, but resolve the remaining issues in the complaint within the 60-day complaint timeline. Note 2 would explain that if an issue raised in a complaint previously had been the subject of a due process hearing, the hearing decision would be binding, and the State would satisfy its obligation under these procedures by informing the complainant that the hearing decision is binding as to that issue. The note would also explain that the State would have to resolve an alleged failure to implement a due process hearing decision. These changes would conform to changes in proposed § 300.661.

In § 303.520, a new paragraph (d) would be added that would provide that a lead agency may not require parents, if they would incur a financial cost, to use private insurance proceeds to pay for the services that must be provided to an eligible child under this part. The Department recognizes the important policy underlying this program that requires States to use all available sources of funding for providing services. Therefore, this new provision would permit States to require families to use private insurance if the families would incur no financial cost. Proposed paragraph (d) would incorporate the Department's interpretation that requiring parents to use their private insurance if that would result in a financial cost to the family is not compatible with the statutory requirement that early intervention services be at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees. It would also identify what is meant by the term ''financial cost.'' A note would be added following this section to explain how this applies if families are covered by both private insurance and Medicaid.

As noted in the section of this preamble discussing the Part 300 regulations, the Secretary believes that the same basic principle would be equally applicable to parents who are eligible for public insurance, but that there is no current need to regulate on the public insurance issue because there is no risk of financial loss to parents under current public insurance programs such as Medicaid. The Secretary invites comment on whether a policy on public insurance similar to the proposed section on private insurance should be added to the final regulation. A second note would be added to explain that if a State cannot get parent consent to use public or private insurance for a service, the agency may use funds under this part to pay for that service. In addition, the note would explain that to avoid financial cost to parents who otherwise would consent to the use of private insurance, the lead agency may use funds under this part to pay the costs of accessing the insurance, such as deductible or co-pay amounts.

In addition, the Secretary proposes to add a new paragraph (e) to specify that proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR § 80.25. That section imposes limitations on how program income can be spent that could lead to States returning reimbursements from public and private insurance to the Federal government or requiring those funds be used under this part, which could discourage States from using all the resources available in paying for services under this part. Given the current small percentage that Federal funds under this part are of total funding for this program, and the fact that eligible infants and toddlers with disabilities are guaranteed services under this part, the Secretary believes that States should be given some flexibility in how they use and account for funds received as reimbursements from other sources. A note would be added after this section explaining the consequences, under the nonsupplanting requirement, of various State choices in accounting for these funds. These changes would be similar to provisions in proposed § 300.142.

Goals 2000: Educate America Act

The Goals 2000: Educate America Act (Goals 2000) focuses the Nation's education reform efforts on the eight National Education Goals and provides a framework for meeting them. Goals 2000 promotes new partnerships to strengthen schools and expands the Department's capacities for helping communities to exchange ideas and obtain information needed to achieve the goals.

These proposed regulations would address the following National Education Goals:

- All children in America will start school ready to learn.
- The high school graduation rate will increase to at least 90 percent.
- All students will leave grades 4, 8, and 12 having demonstrated competency in challenging subject matter, including English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography; and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our Nation's modern economy.
- United States students will be first in the world in mathematics and science achievement.
- Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.
- Every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning.
- The Nation's teaching force will have access to programs for the continued improvement of their professional skills and the opportunity to acquire the knowledge and skills needed to instruct and prepare all American students for the next century.
- Every school will promote partnerships that will increase parental involvement and participation in promoting the social, emotional, and academic growth of children.

Executive Order 12866

1. Potential Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive

Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

These proposed regulations implement changes made to the Individuals with Disabilities Education Act by the IDEA Amendments of 1997 and make other changes determined by the Secretary as necessary for administering this program effectively and efficiently.

The IDEA Amendments of 1997 made a number of significant changes to the law. While retaining the basic rights and protections that have been in the law since 1975, the amendments strengthened the focus of the law on improving results for children with disabilities. The amendments accomplished this through changes that promote the early identification of and provision of services to children with disabilities, the development of individualized education programs that enhance the participation of children with disabilities in the general curriculum, the education of children with disabilities with nondisabled children, higher expectations for children with disabilities and accountability for their educational results, the involvement of parents in their children's education, and reducing unnecessary paperwork and other burdens to better direct resources to improved teaching and learning.

All of these objectives are reflected in the proposed regulations, which largely reflect the changes to the statute made by IDEA Amendments of 1997.

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed regulations, the Secretary has determined that the benefits of the proposed regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Burdens specifically associated with information collection requirements are identified and explained elsewhere in this preamble under the heading Paperwork Reduction Act of 1995.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the program.

This is a significant regulatory action under section 3(f)(1) of Executive Order 12866, and an economic analysis was conducted consistent with section 6(a)(3)(C) of the Executive Order. Due to the lack of data, the Secretary particularly request public comments to assist in determining whether these regulations are economically significant under the Executive Order.

Summary of Potential Benefits and Costs

Benefits and Costs 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 IDEA Amendments of 1997 that are incorporated into the IDEA regulations. Based on this analysis, the Secretary has concluded that the statutory changes included in this regulation will not, in total, impose significant costs in any one year, and may result in savings to State and local educational agencies. An analysis of specific provisions follows:

Participation in Assessments

Proposed § 300.138 incorporates statutory requirements relating to the inclusion of children with disabilities in general State and district-wide assessments and the conduct of alternate assessments for children who cannot be appropriately included in general assessments.

Although children with disabilities have not been routinely included in State and district-wide assessments, the requirement to include children with disabilities in assessment programs in which they can be appropriately included, with or without accommodations, does not constitute a change in Federal law. Because the Secretary regards this statutory change as a clarification, not a change, in the law, no cost impact is assigned to this requirement, which is incorporated in § 300.138(a) requiring the participation of children with disabilities in general assessments.

However, States were not previously required to conduct alternate assessments for children who could not participate in the general assessments. The statutory requirement to develop and conduct alternate assessments beginning July 1, 2000, therefore, imposes a new cost for States and districts.

The impact of this change will depend on the extent to which States and districts administer general assessments, the number of children who cannot appropriately participate in those assessments, the cost of developing and administering alternate assessments, and the extent to which children with disabilities are already participating in alternate assessments.

In analyzing the impact of this requirement, the Secretary assumes that alternate tests would be administered to children with disabilities on roughly the same schedule as general assessments. This schedule will vary considerably from State to State and within States, depending on their assessment policy. In most States, this kind of testing does not begin before the third grade. In many States and districts, general assessments are not administered to children in all grades, but rather at key transition points (typically grades 4, 8, and 11).

The extent to which States and districts will need to provide for alternate assessments will also vary depending on how the general assessments are structured. Based on the experience of States that have implemented alternate assessments for children with disabilities, the Secretary estimates that about one to two percent of the children in any age cohort will be taking alternate assessments.

Based on this information, the Secretary predicts that about 18 to 36 million of the children who are expected to be enrolled in public schools in school year 2000–2001 will be candidates for general assessments. Of these, the Secretary estimates that approximately 200,000 to 700,000 will be children with disabilities who may require alternate assessments.

The costs of developing and administering these assessments are also difficult to gauge. In its report *Educating One and All,* the National Research Council states that the estimated costs of performance-based assessments programs range from less than $2 per child to over $100 per student tested. The State of Maryland has reported start-up costs of $191 per child for testing a child with a disability and $31 per child for the ongoing costs of administering an alternate assessment.

The cost impact of requiring alternate assessments will be reduced to the extent that children with disabilities are already participating in alternate assessments. Many children with disabilities are already being assessed outside the regular assessment program in order to determine their progress in meeting the objectives in their IEPs. In many cases, these assessments might be adequate to meet the new statutory requirement.

Based on all of this information, the Secretary has concluded that the cost impact of this statutory change is not likely to be significant, and will be

justified by the benefits of including all children in accountability systems.

Incidental Benefits

The change made by section 613(a)(4) of the IDEA, incorporated in proposed § 300.235, generates savings by reducing the time that would have been spent by special education personnel on maintaining records on how their time is allocated in regular classrooms among children with and without disabilities.

To calculate the impact of this change, one needs to estimate the number of special education personnel who will be providing services to children with and without disabilities in regular classrooms and the amount and value of time that would have been required to document their allocation of time between disabled and nondisabled children.

Based on State-reported data on placement, it appears that about 4 million children will spend part of their day in a regular classroom this school year. It is difficult to predict the extent to which these children will be receiving services in the regular classroom from a special education teacher or related services provider. However, the Secretary believes that this statutory change will not only eliminate unnecessary paperwork in situations in which special education personnel have been working in the regular classroom and documenting their allocation of time, but will encourage the provision of special education services in the regular classroom—a change that will benefit children with disabilities.

Individualized Education Programs

The proposed regulations incorporate a number of statutory changes in section 614(d) that relate to the IEP process and the content of the IEP. With the exception of one requirement (the requirement to include a regular education teacher in IEP meetings), the Secretary has determined that, on balance, these changes will not increase the cost of developing IEPs. Moreover, all the changes will produce significant benefits for children and families. Key changes include:

Clarifying that the team must consider a number of special factors to the extent they are applicable to the individual child. The Secretary does not regard the statutory changes that are incorporated in § 300.346 as imposing a new burden on school districts because the factors that are listed should have been considered, as appropriate, under the IDEA before the enactment of IDEA Amendments of 1997. These include: behavioral interventions for a child whose behavior impedes learning, language needs for a child with limited English proficiency, Braille for a blind or visually impaired child, the communication needs of the child, and the child's need for assistive technology.

Strengthening the focus of the IEP on access to the general curriculum in statements about the child's levels of performance and services to be provided. The Secretary does not regard the statutory changes that are incorporated in § 300.347 relating to the general curriculum as burdensome because the changes merely refocus the content of statements that were already required to be included in the IEP on enabling the child to be involved in and progress in the general curriculum.

Requiring an explanation of the extent to which a child will not be participating with nondisabled children. This statutory requirement, which is incorporated in § 300.347(a)(4), does not impose a burden because it replaces the requirement for a statement of the extent to which the child will be able to participate in regular educational programs.

Requiring the IEP to include a statement of any needed modifications to enable a child to participate in an assessment, and, in cases in which a child will not be participating in a State or districtwide assessment, to include a statement regarding why the assessment is not appropriate and how the child will be assessed. The Secretary does not believe the inclusion of these statements, required statute and incorporated in § 300.447(a)(5), will be unduly burdensome. Many school districts already include statements in the IEP regarding assessments, including information about needed accommodations.

Allowing the IEP team to establish benchmarks rather than short-term objectives in each child's IEP. There is considerable variation across States, districts, schools, and children in the amount of time spent on developing and describing short-term objectives in each child's IEP. While it would be difficult to estimate the impact of this statutory change, contained in § 300.347(a)(2), it clearly affords schools greater flexibility and an opportunity to reduce paperwork in those cases in which the team has previously included unnecessarily detailed curriculum objectives in the IEP document.

Prior to the enactment of the IDEA Amendments of 1997, IDEA required the participation of the ''child's teacher,'' typically read as the child's special education teacher, but it did not explicitly require a regular education teacher. The IDEA Amendments of 1997, incorporated in § 300.344(a)(2) of this proposed regulation require the participation of the child's special education teacher and a regular education teacher if the child is or may be participating in the regular education classroom.

The impact of this change will be determined by the number of children with disabilities who are or who may be participating in the regular classroom in a given year, the number and length of IEP meetings, the opportunity cost of the regular education teacher's participation, and the extent to which regular education teachers are already attending IEP meetings.

State-reported data for school year 1994–95 indicates that about 3.8 million children with disabilities aged 3 through 21 spend at least 40 percent of their day in a regular classroom (children reported as placed in regular classes and resource rooms). The participation of the regular education teacher would be required for all of these children since these children are spending at least part of their day in the regular classroom.

State data also show that an additional 1.2 million children were served in separate classrooms. A regular education teacher's participation will clearly be required for those children in separate classes who are spending part of their school day in regular classes (less than 40 percent of their day). Other children may be participating with nondisabled children in some activities in the same building. While a child's individual needs and prospects will determine whether a regular education teacher would need to attend a child's IEP meeting in those cases, the Secretary believes that some proportion of these children are children for whom participation in regular classrooms is a possibility, therefore requiring the participating of a regular education teacher.

Although the prior statute did not require the participation of a regular education teacher, it is not uncommon for States or school districts to require a child's regular education teacher to attend IEP meetings.

Based on all of this information, the Secretary estimates that the participation of a regular education teacher may be required in an additional 3.7 to 5.2 million IEP meetings in the next school year.

While the opportunity costs of including a regular education teacher in these meetings will be significant because of the number of meetings involved, the Secretary believes these costs will be more than justified by the benefits to be realized by teachers,

schools, children, and families. Involving the regular education teacher in the development of the IEP will not only provide the regular education teacher with needed information about the child's disability, performance, and educational needs, but will help ensure that a child receives the supports the child needs in the regular classroom, including services and modifications that will enable the child to progress in the general curriculum.

Parentally-Placed Students in Private Schools

This statutory change, which is incorporated in § 300.453, would require school districts to spend a proportionate amount of the funds received under Part B of the IDEA on services to children with disabilities who are enrolled by their parents in private elementary and secondary schools.

The change does not have an impact on most States because the statute does not represent a change in the Department's interpretation of the law as it was in effect prior to the enactment of IDEA Amendments of 1997. However, prior to the change in the law in three Federal circuits, the courts concluded that school districts generally were responsible for paying for the total costs of special education and related services needed by students with disabilities who have been parentally placed in private schools. Therefore, this change does produce potential savings for school districts in those 12 States affected by these court decisions. The States are: Colorado, Connecticut, Kansas, Louisiana, Mississippi, New Mexico, New York, Oklahoma, Texas, Utah, Vermont, and Wyoming.

To determine the impact of the change, one needs to estimate the number of parentally placed children with disabilities that LEAs would have been required to serve, but for this change. Using private school enrollment data for school year 1993–94 and projected growth rates, the Secretary estimates that approximately 1.2 million students will be enrolled in private schools in these 12 States in this school year.

There is no reliable data on the number of children with disabilities who are parentally placed in private schools. However, if one assumes that children with disabilities are found in private schools in the same proportion as they are found in public schools in these States, or at least in the same proportion that children with speech impairments and learning disabilities are found in public schools, one would estimate that there are between 60,000 and 89,000 children with disabilities who are parentally placed in private schools.

If one assumes that, on average, the cost of providing a free appropriate education to these students would be approximately equal to the average excess costs for educating students with disabilities—$6,797 per child for school year 1997–98, the costs of providing FAPE to these children would be significant.

Under the statutory change, public schools would still be required to provide services to parentally-placed children in an amount proportionate to their share of the total population of children with disabilities. Therefore, in estimating the impact of this statutory change, one needs to subtract the cost of the public school obligation from the total projected savings. This amount will vary with the proportion of children attending private schools and the size of the Federal appropriation. While the precise amount of this obligation is indeterminate, the Secretary has concluded that the total net savings to the public sector attributable to the change in the law for these 12 States will be very significant.

Mediation

Proposed § 300.506 reflects the new statutory provisions in section 615(e) of the IDEA, which require States to establish and implement mediation procedures that would make mediation available to the parties whenever a due process hearing is requested. The Act specifies how mediation is to be conducted.

The impact of this change will depend on the following factors: the number of due process hearings that will be requested, the extent to which the parties to those hearings will agree to participate in mediation, the cost of mediation, the extent to which mediation would have been used in the absence of this requirement to resolve complaints, and the extent to which mediation obviates the need for a due process hearing.

Data for previous years suggests one can expect about one complaint for every 1000 children served or about 5,800 requests for due process hearings during the next year. This projection probably overstates the number of complaints because it does not take into account the effect of IDEA Amendments of 1997, which, on balance, can be expected to result in better implementation of the law and higher parental satisfaction with the quality of services and compliance with the IDEA.

Many of these complaints would have been resolved through mediation even without the statutory change. Over 39 States had mediation systems in place prior to the enactment of IDEA Amendments of 1997. Data for 1992 indicate that, on average, States with mediation systems held mediations in about 60 percent of the cases in which hearings were requested. Nevertheless, the Secretary expects the number of mediations to increase even in States that already have mediation systems. Although most States report using mediation as a method of resolving disputes, there have been considerable differences in its implementation and use. In general, the extent to which mediation has been used in States probably depends on the extent to which parents and others were informed of its availability and possible benefits in resolving their complaints and the extent to which the mediator was perceived as a neutral third-party. The Secretary believes that the changes made by IDEA Amendments of 1997 will eliminate some of the differences in State mediation systems that have accounted for its variable use and effectiveness.

The benefits of making mediation more widely available are expected to be substantial, especially in relation to the costs. States with well-established mediation systems conduct considerably fewer due process hearings. For example, in California hearings were held in only 5 and 7 percent of the cases in which they were requested in 1994 and 1995, respectively. The average mediation appears to cost between $350 and $1,000, while a due process hearing can cost tens of thousands of dollars. Based on the experience that many different States have had with mediation, the Secretary estimates that hundreds of additional complaints will be resolved through mediation. The benefits to school districts and benefits to families are expected to be substantial.

Discipline

The proposed regulations (§§ 300.121, 300.122, 300.520, and 300.521) incorporate a number of significant changes to the IDEA that relate to the procedures for disciplining children with disabilities.

Some of the key changes contained in section 615(k) afford school districts additional tools for responding to serious behavioral problems, and in that regard, do not impose any burdens on schools or districts.

The statutory change reflected in proposed § 300.520 would give school officials the authority to remove children who engaged in misconduct involving weapons or illegal drugs.

Under prior law, school officials had the authority to remove children who brought guns, but could not remove children who engaged in misconduct involving other weapons or illegal drugs over the objection of their parents unless they prevailed in a due process proceeding or obtained a temporary restraining order from a court. The statutory change reflected in proposed § 300.521 would give school officials the option of seeking relief from a hearing officer rather than a court in the case of a child the school is seeking to remove because the child poses a risk of injury to the child or others. In both cases, the child would continue to receive services in an alternative educational setting that is required to meet certain standards. It is difficult to assess the impact of either of these statutory changes on schools because there is virtually no information available on the extent to which parents disagree with districts that propose to remove these children. This new authority would only be used in those cases. Nevertheless, the Secretary believes the benefits of this authority to be substantial insofar as the changes help schools provide for a safe environment for all children, while ensuring that any children with disabilities who are moved to an alternative setting continue to receive the services they need.

The statutory change reflected in proposed § 300.520(b) will require school officials to convene the IEP team in cases in which removal for more than 10 school days is contemplated to develop an assessment plan and behavioral interventions (or to review the child's behavioral intervention plan if there is one). These would include all cases in which a school is proposing to suspend a child for more than 10 days in a given year or to expel a child.

Because of the dearth of data on the number and length of suspensions, it is difficult to estimate the impact of this change. However, based on data collected by the Office for Civil Rights on the number of children suspended each year, the Secretary estimates about 300,000 children with disabilities will be suspended for at least one school day this year. Based on an analysis of data from selected States, the Secretary estimates that this review may have to be conducted for only a portion of these children since most of the children who are suspended receive only short-term suspensions. Although there will be a cost associated with convening the IEP team, in many cases, this review will be conducted at the same time as the required manifestation determination and much of the information needed for that determination could be used in conducting this review. Moreover, the benefits of this review are expected to be substantial. The Secretary believes that the development and implementation of appropriate behavioral interventions for children with disabilities will reduce the need for disciplinary actions and all the concomitant costs.

The requirement in section 612(a)(1)(A), incorporated in proposed § 300.121, that all children aged 3 through 21 must have made available to them a free appropriate public education, including children who have been suspended or expelled from school, does not represent a change in the law as the law was interpreted by the Department prior to the enactment of the IDEA Amendments of 1997. It clarifies the Department's long-standing position that the IDEA requires the continuation of special education and related services even to children who have been expelled from school for conduct that has been determined not to be a manifestation of their disability.

However, this statutory change does represent a change in the law in two circuits in which Federal Circuit courts disagreed with the Department's interpretation of the law—the 4th and 7th Circuits. The affected States are: Virginia, Maryland, North Carolina, South Carolina, West Virginia, Illinois, Indiana, and Wisconsin.

To assess the impact of this change, one needs to estimate the extent to which students would have been excluded from education, but for this change in the statute, and the cost of providing the required services to these students during the period they are expected to be excluded from their regular school due to a long-term suspension or expulsion.

There is a paucity of data available on disciplinary actions, and very little for the States in the 4th and 7th circuits. Using data collected by the Office for Civil Rights for school year 1994, the Secretary estimates that approximately 60,000 students aged 6 through 21 will be suspended during this school year. But to determine the impact of the prohibition on ceasing services in these States, one needs to know the number of suspensions each student received and their duration—information that is not provided by OCR data. However, more detailed data compiled by a few States would suggest that a relatively small percentage of students who are suspended receive suspensions of greater than 10 days at a time and a much smaller number of students are expelled.

No information is available on the cost of providing services in an alternative setting for a student who has been suspended temporarily or expelled from school. However, it is reasonable to assume that the cost probably would be no greater than the average daily *total* costs of serving children with disabilities and no less than the cost of providing instruction in a Home or Hospital setting, or between $29 and $70 per day.

While this statutory change will have a cost impact on the States in the fourth and seventh circuits, the Secretary believes the costs for these States will be justified by the benefits of continuing educational services for children who are the least likely to succeed without the help they need.

The statutory change reflected in proposed § 300.122 could generate potential savings for all States by removing the obligation to provide educational services to individuals 18 years old or older who were incarcerated in adult prisons and who were not previously identified as disabled. We have no information on the number of prisoners with disabilities who were not previously identified.

Triennial Evaluation

The existing regulations require a school district to conduct an evaluation of each child served under the IDEA every three years to determine, among other things, whether the child is still eligible for special education. The IDEA Amendments of 1997 change this requirement to reduce unnecessary testing and therefore reduce costs. Specifically, section 614(c) of the IDEA, incorporated in proposed § 300.533, allows the evaluation team to dispense with tests to determine the child's continued eligibility if the team concludes this information is not needed. However, these tests must be conducted if the parents so request.

The savings resulting from this change will depend on the following factors: the number of children for whom an evaluation is conducted each year to comply with the requirement for a triennial evaluation, the cost of the evaluation, and an estimate of the extent to which testing will be reduced because it is determined by the IEP team to be unnecessary and is not requested by the parents.

Based on an analysis of State-reported data, the Secretary estimates that approximately 1.4 million children will be eligible for triennial evaluations in school year 1997–98 or roughly 25 percent of the children to be served.

The IDEA Amendments of 1997 make it clear that districts no longer need to conduct testing to determine whether a

child still has a disability, if the evaluation team determines this information is not needed and the parent agrees. However, while the regulation permits the team to dispense with unneeded testing to determine whether the child still has a disability, the team still has an obligation to meet to review any existing evaluation data and to identify what additional data are needed to determine whether the child is still eligible for special education and related services, the present levels of performance of the child, and whether any modifications in the services are needed. In view of these requirements, the Secretary assumes that there will be some cost associated with conducting the triennial evaluation even in those cases in which both the team and the parents agree to dispense with testing. The Secretary estimates that the elimination of unnecessary testing could reduce the personnel costs by as much as 25 to 75 percent. While there is no national data on the average cost of conducting a triennial evaluation under the current regulations, the Secretary believes that a triennial evaluation has typically required the participation of several professionals for several hours and has cost as much as $1000.

If one assumes, for purposes of this analysis, that savings are achievable in roughly half of the triennial evaluations that will be conducted and that elimination of unnecessary testing could reduce personnel costs by at least 25 percent, one would project substantial savings for LEAs that are attributable to this change.

Benefits and Costs of Proposed Non-statutory Regulatory Changes: The following is an analysis of the benefits and costs of the nonstatutory proposed regulatory changes that includes consideration of the special effects these proposals may have for small entities.

The proposed regulations primarily affect State and local educational agencies, which are responsible for carrying out the requirements of Part B of the IDEA as a condition of receiving Federal financial assistance under that Act. Some of the proposed changes 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 local educational agencies because these proposed regulations most directly affect local school districts. The Secretary proposes to use a definition of small school district developed by the National Center for Education Statistics for purposes of its recent publication, ''Characteristics of Small and Rural School Districts.'' In that publication, NCES defines a small 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 34 percent of the Nation's school districts would be considered small and serve about 2.5 percent of the Nation's students. NCES reports that approximately 12 percent of these students have IEPs.

Both small and large districts will experience economic impacts from this proposed rule. Little data are available that would permit a separate analysis of how the proposed changes affect small districts in particular. Therefore, the Secretary specifically invites comments on the differential effects of the proposed regulations on small districts.

For purposes of this analysis, the Secretary 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 1997–98, we estimate that approximately 50 million children will be enrolled in public elementary and secondary schools. Using the NCES definition and assuming all districts grew at the same rate between school year 1993–94 and 1997–98, the Secretary estimates that approximately 1.25 million children are enrolled in small districts. Applying the NCES estimate of 12 percent, we estimate that these districts serve approximately 150,000 children with disabilities of the 5.806 million children with disabilities served nationwide.

There are many changes in the proposed regulations that are expected to result in economic impacts—both positive and negative. For purposes of this analysis, we estimated the impact of those non-statutory changes that were not required by changes that were made in the statute by the IDEA amendments.

The following is a summary of the estimated economic and non-economic impact of the key changes in this proposed regulation:

Section 300.12—Definition of ''General Curriculum''—This proposed regulation does not limit flexibility or impose any burden. Its inclusion helps to clarify what is intended by this term.

Sections 300.19(b) and 303.18(b)—Definition of ''Parent''—Proposed paragraph (b), which defines the circumstances under which a State may treat a foster parent as a parent for purposes of IDEA, does not impose any burden on State or local agencies. The proposed definition is intended to promote the appropriate involvement of foster parents consistent with the best interests of the child by ensuring that those who best know the child are involved in decisions about the child's education. To the extent there is any economic impact of this proposal, it should reduce costs on States and local agencies that they would otherwise incur for training and appointing surrogate parents for children whose educational interests under this proposal could appropriately be represented by their foster parents.

Section 300.24(b)(3)—Definition of ''Specially-designed instruction''—Proposed paragraph (b)(3) defines ''specially-designed instruction'' in order to give more definition to the term ''special education,'' which is defined in this section as ''specially-designed instruction.'' The definition is intended to clarify that the purpose of adapting the content, methodology or delivery of instruction is to address the child's unique needs and to ensure access to the general curriculum. This provision increases the potential of children with disabilities to participate more effectively in the general curriculum.

Section 300.121—Continuation of Services—Proposed section 300.121 would add the statutory provision that the right to a free appropriate public education extends to children with disabilities who have been suspended or expelled from school. Proposed paragraph (c)(1) would define children who have been suspended or expelled from school to mean children who have been removed from their current educational placement for more than 10 school days in a given school year. Proposed paragraph (c) would clarify that in providing FAPE to these children an agency shall meet the requirements provided in the statute for interim alternative educational settings for children removed for possessing weapons or drugs or if they are likely to injure themselves or others if they remain in their current placement.

In determining whether and how to regulate on this issue, the Secretary considered the impact of various alternatives on small and large school districts and children with disabilities and their families, and tried to strike an appropriate balance between the educational needs of students and the burden on schools.

Many of the comments received in response to the Department's notice published in July expressed concern that the statute may be read to require school districts to continue to provide services to a child who has been suspended regardless of the duration of the suspension. School districts argue

that if the statute is interpreted to require these services, this will impose a significant burden on schools and interfere with their ability to ensure a safe and orderly environment for all children.

Some will argue that the statute could and should be read to give schools the flexibility they had under IDEA before it was amended not to provide services to children suspended for fewer than 10 school days at a time, regardless of the cumulative effect, as long as there is no pattern of exclusion that warrants treating an accumulation that exceeds 10 school days as a change in placement.

While it is difficult to quantify the cost of requiring schools to provide services to all children who are suspended for one or more school days, the Secretary agrees that the burden for schools districts could be substantial. Based on data collected by the Office for Civil Rights for school year 1992 and data on the number of children who are currently being served under the IDEA, the Secretary estimates that approximately 300,000 children with disabilities will be suspended for at least one school day during the next school year. Many of these children will be suspended on more than one occasion for one or more days. Because of the differences among the children who are expected to be suspended and the range of their service needs, the costs of and the burden associated with providing individualized services in an alternative setting to every child who is suspended for one or more school days could be substantial, especially for small districts, who are expected to suspend about 8,000 children with disabilities during this school year.

At the same time, the Secretary is concerned about the adverse educational impact on a child who has been suspended for more than a few days and on more than one occasion. In balancing these concerns, the Secretary proposes an alternative that takes into account both impacts. Schools will be relieved of the potential obligation to provide services for a significant population of children who are briefly suspended a few times during the course of the school year, and required to anticipate possible service needs of children with chronic or more serious behavioral problems who are repeatedly excluded from school.

Section 300.122(a)(3)—Exception to right to FAPE (Graduation)—Proposed paragraph (a)(3) provides that a student's right to FAPE ends when the student has graduated with a regular high school diploma, but not if the student graduates with some other certificate, such as a certificate of attendance, or a certificate of completion. Given the importance of a regular high school diploma for a student's post-school experiences, including work and further education, the Secretary believes that there is a significant benefit to children protected by the Act to make clear that the expectation for children with disabilities is the same as for nondisabled children. The impact of this proposal, however, is difficult to assess. Many States, including most of those that report a high number of children with disabilities leaving school with a certificate of completion or some other certificate that is not a regular high school diploma, indicate that students with disabilities have the right to continue to work to earn a regular high school diploma after receiving that certificate. Little information is available to evaluate how many students who now can return to school after receiving some other certificate of completion do so, or how many would return to school under this proposal, although several State directors of special education indicated that relatively few students who now can return, do so. The Secretary anticipates that there may be some small impact on small districts, but does not expect it to be substantial, because of the likely small number of students who would return and could not do so now.

Section 300.139—Reporting on Assessments—Proposed 300.139 would require SEA reports on wide-scale assessments to include children with disabilities in aggregated results for all children to better ensure accountability for results for all children. This proposed regulation is expected to have a minimal impact on the cost of reporting assessment results. It could increase the number of data elements reported depending on whether States continue to report trend data for a student population that does not include children with disabilities to the extent required by section 300.138. There will be no impact on small (or large) school districts since this requirement applies to reports that are prepared by the State educational agency.

Sections 300.142(f) and 303.520(e)—Program Income—These provisions would specify that proceeds from public and private insurance will not be treated by the Department as ''program income'' under other regulations that limit how program income can be used. Therefore, this proposal increases flexibility for State and local agencies in using the proceeds from insurance.

Section 300.156(b)—Annual Description of Part B Set-aside Funds—Proposed paragraph (b) provides that if a State's plans for the use of its State level or State agency funds do not differ from those for the prior year the State may submit a letter to that effect instead of submitting a description of how the funds would be used. The effect of this proposed regulation is inconsequential because it implements the Department's long-standing interpretation that a letter is sufficient in this case.

Section 300.232(a)—Exception to the LEA Maintenance of Effort—Proposed paragraph (a) makes it clear that an LEA may only reduce expenditures associated with departing personnel if those personnel are replaced by qualified, lower-salaried personnel. Congress made its intent clear in this regard in the Committee Report, which is quoted, in part, in a Note following this proposed regulation. Allowing LEAs to reduce their expenditures by not replacing departing personnel would violate congressional intent and diminish special education services in those districts.

Section 300.342(c)—Use of IFSP—Proposed paragraph (c) would require school districts to obtain written informed consent from parents before using an IFSP instead of an IEP, which is based on an explanation of the differences between the two documents. The proposed regulation would impose a cost burden on districts in those States that elect to allow parents to opt for the use of an IFSP instead of an IEP. However, once a form is developed that explains the differences between an IFSP and an IEP, the cost of providing this form to parents and obtaining written consent are probably minimal, and are justified by the benefits of ensuring that parents understand the role of the IEP in providing access to the general education curriculum.

Section 300.342(d)—Effective Date of IEP Requirements—Proposed paragraph (d) would provide that IEPs are to meet the requirements of the statute by July 1, 1998, which is the statutory effective date for the new IEP requirements. Given the potential benefits to families and schools of complying with these requirements, the Secretary believes that implementation of these requirements should not depend on parents exercising their rights or vary within and across districts and States. The impact of this proposal is difficult to estimate because the cost of complying includes both the one-time cost of providing all affected parties with the information, training, and materials needed to implement the new requirements appropriately and the

annual costs of complying with new IEP requirements such as including the regular education teacher on the IEP team. The impact of these costs on State and local agencies is increased the sooner these costs are incurred.

The Secretary anticipates some impact on small districts, but does not expect it to be substantial because of the number of children involved—about 150,000 children with disabilities in total.

Section 300.344(b)—Including the Child in the IEP Meeting—Proposed paragraph (b) would require the school to invite students to participate in IEP meetings if the meeting will include consideration of transition services needs or transition services. The effect of this provision is to give 14- and 15-year-olds, and in some cases, younger students the opportunity to participate. The existing regulations have required schools to invite students to meetings in which transition services were to be discussed. These would include all students aged 16 years and older, and in some cases, younger students. The law has also given other children when appropriate the opportunity to participate in the IEP meeting. Therefore, in some cases, 14- and 15-year-olds may be already participating. The Secretary believes that the costs of notifying students about a meeting or trying to ensure that the students' interests and preferences are accommodated are more than justified by the benefits of including students in a discussion of their own transition needs, including their planned course of study in secondary school.

Section 300.501(b)—Parental Access to Meetings—Proposed paragraph (b) of section 300.501 would define when and how to provide notice to parents of meetings in which they are entitled to participate. It would further define what is meant by the term ''meeting.'' The Secretary believes these proposed regulations impose the minimal requirements necessary to implement the statute. The language in paragraph (b)(1) helps to clarify what is required to provide parents with a meaningful opportunity to attend meetings while the language in (b)(2) is designed to reduce unnecessary burden by clarifying what constitutes a ''meeting.''

Section 300.501(c)—Placement Meetings—Paragraph (c) of 300.501 specifies that the procedures used to be to meet the new statutory requirement of parental involvement in placement decisions. It provides that the procedures used for parental involvement in IEP meetings also be used for placement meetings. These include specific requirements relating to notice, methods for involving parents in the meeting, and recordkeeping of attempts to ensure their participation. Because in many cases placement decisions will be made as part of IEP meetings, as is already the case in most jurisdictions, the Secretary believes the impact of this proposed regulation will be minimal. In those cases in which placement meetings are conducted separately from the IEP meetings, the Secretary believes the benefits of making substantial efforts to secure the involvement of parents and provide for their meaningful participation in any meeting to discuss their child's placement more than justify the costs.

Section 300.502(b) and (c)—Right to an Independent Evaluation—Proposed paragraph (b) would clarify language from the current regulations that make it clear that if a parent requests an independent educational evaluation (IEE), the agency must either initiate a due process hearing to show that its evaluation is appropriate or provide for an IEE at public expense. The Secretary interprets the provision permitting parents to request an IEE to require the agency to take action. This requirement at most represents a small burden for school districts because if the agency did not take action, parents would be free to request due process to compel action.

Proposed paragraph (c) provides that a public agency may not impose conditions or timelines related to obtaining an independent evaluation. The Secretary believes that this requirement, which arguably limits the flexibility of school districts, is critical to ensuring that school districts do not find ways to circumvent the right provided by the IDEA to parents to obtain an independent evaluation.

Sections 300.503(b)(8) and 303.403(b)(4)—Notice to Parents Regarding Complaint Procedures—These provisions require that the required prior written notice to parents include information about how to file a complaint under State complaint procedures. Because districts are already required to provide a written notice to parents, the Secretary estimates that the additional cost of adding this information will be one-time and minimal. The burden on small districts could be minimized if each SEA were to provide its LEAs with appropriate language describing the State procedures for inclusion in the parental notices. Making parents award of a low cost and less adversarial mechanism that they can use to resolve disputes with school districts should result in cost savings and more cooperative relationships between parents and districts.

Section 300.505 (a)(1)(iii) and (c)(2)—Parental Consent for Reevaluation—Proposed paragraph (a)(1)(iii) would clarify that the new statutory right of parents to consent to a reevaluation of their child means parental consent prior to the administration of any test that is needed as a part of a reevaluation. The Secretary does not believe that the intent of this change was to require school districts to obtain parental consent before reviewing existing data about the child and the child's performance, an activity that school districts, as a matter of good practice, should be engaged in on an on-going basis. That interpretation would impose a significant burden on school districts with little discernable benefit to the children served under these regulations.

Proposed paragraph (c)(2) would use the procedures that are in current regulations dealing with inviting parents to IEP meetings as a basis for defining what it means to undertake ''reasonable measures'' in obtaining parental consent. The intent of the proposal is to meaningfully operationalize the statutory right of parents to consent to a reevaluation of their child. Given the importance of parental involvement in all parts of the process, the Secretary believes that any burden imposed by the proposed recordkeeping requirements is justified by the benefits of securing parental consent to the reevaluation.

Section 300.506(c)—Impartial Mediation—Proposed paragraph (c) would interpret the statutory requirement that mediation be conducted by an impartial mediator to mean that a mediator may not be an employee of an LEA or a State agency that is providing direct services to the child and must not have a personal or professional conflict of interest. The Secretary believes that, by definition, parents would not regard an employee of the other party to the dispute to be impartial or a person who has a personal or professional conflict of interest. The Secretary believes providing for impartiality would help promote the use of mediation, which is voluntary, and improve its overall effectiveness in resolving disagreements. The impact of disallowing these individuals from serving as mediators is not likely to have a significant impact on States, given current practices. Many States contract with private organizations to conduct their mediations. Others use employees of the State educational agency, which, in most cases, is not the agency providing direct services. Given

the significant benefits to children, families, and school districts of expeditiously resolving disagreements without resort to litigation, the Secretary concluded that benefits of this proposal easily justify any cost or inconvenience to States.

Section 300.506(d)(2)—Failure to Participate in Meeting—Proposed paragraph (d)(2) would specify that a parent's failure to participate in a meeting at which a disinterested person explains the benefits of and encourages the use of mediation could not be used as a reason to deny or delay the parent's right to a due process hearing. This change is not likely to limit the benefits to school districts of mediation as the Secretary believes that it is extremely unlikely that parents who are unwilling to participate in such a meeting with a disinterested person would be willing to engage in the voluntary mediation provided for in the statute.

Section 300.507(c)(4)—Failure to Provide Notice—Proposed paragraph (c)(4) makes it clear that failure by parents to provide the notice required by the statute cannot be used by a school district to delay or deny the parents' right to due process. This proposed regulation would eliminate the possibility that public agencies will delay a due process hearing pending receipt of a notice that they deem to be acceptable. This regulation does not impose any cost on school districts and would help ensure that parents are afforded appropriate and timely access to due process.

Section 300.513(b)—Attorneys' Fees—Proposed paragraph (b) would provide that funds provided under Part B of IDEA could not be used to pay attorneys' fees. This proposal does not increase the burden on school districts or otherwise substantially affect the ability of school districts to pay attorneys' fees that are awarded under the Act or to pay for their own attorneys. It merely establishes that attorneys' fees must be paid by a source of funding other than Part B based on the Department's position that limited Federal resources not be used for these costs. The Secretary does not expect this proposal to have a cost impact on small (or large) districts because all districts have non-Federal sources of funding that are significantly greater than the funding provided under IDEA. Currently, funds provided to States under the IDEA represent about eight percent of special education expenditures.

Section 300.514(c)—Hearing Officer Decisions—Proposed 300.514(c) would clarify that if a hearing officer in a due process hearing or a review official in a State level review agrees with the parents that a change in placement is appropriate, the child's placement must be treated in accordance with that agreement. It is difficult to assess the impact of this proposal because the statutory language is ambiguous. If paragraph (c) were not included in the regulation. In some cases, parents can be expected to successfully argue, as they have in the past, that the hearing officer's decision to change the placement of a child be implemented. In other cases, as was the case in *Board of Education Sacramento Unified School District* v. *Holland* (9th Cir., 1994), a change to the placement initially sought by the parents and approved by the hearing officer may not occur until all appeals have been exhausted. The cost impact of this proposal is also indeterminate because in some cases implementation of the hearing officer's decision will result in moving children to more costly placements and, in other cases, to less costly placements. In either case, the Secretary concluded that the benefits to the child of securing an appropriate placement justify any potential increase in costs or other burdens to the school district.

The Secretary estimates that the effect of this proposal on small districts will be minimal. The Secretary estimates that no more than 2000 due process hearings will be conducted during the next school year, of which only a small proportion are expected to involve small districts (fewer than 60). Not all of these will involve disputes about placement and the hearing officer or State review official can be expected to agree with the parents in only a portion of the cases.

Section 300.520 (b) and (c)—Behavioral Interventions—Proposed paragraph (b) of this section would specify that the IEP team meeting to consider behavioral interventions occur within 10 business days of the behavior that leads to discipline rather than 10 calendar days, and would clarify that, if the child does not have a behavior intervention plan, the purpose of the meeting is to develop an assessment plan and appropriate behavioral interventions to address that behavior. In proposing the business day alternative, the Secretary determined that it would minimize the burden on school districts and would not have a significant impact on children with disabilities, in light of other regulatory proposals in the discipline area. The change to clarify that the IEP meeting develop appropriate behavioral interventions to address the child's behavior may impose some additional burden on school districts, but the Secretary determined that burden was justified by the benefit to the child, the child's teacher, and the educational process as a whole if appropriate behavioral intervention strategies are implemented without delay to address the behavior that led to discipline.

Proposed paragraph (c) of section 300.520 makes it clear that if a child is removed from his or her current placement for 10 school days or fewer in a given year, the school is not required to convene the IEP team to develop an assessment plan and behavioral interventions. (A school would be required to do so if a child were suspended for more than 10 school days in a given school year.) In determining whether to regulate on this issue, the Secretary considered the potential benefits of providing behavioral interventions to children who need them and the impact on school districts of convening the IEP team to develop behavioral interventions if children are suspended.

Based on consideration of the costs and benefits to children and schools, the Secretary concluded that the IEP team should not be required to meet and develop or review behavioral interventions for a child unless the child was engaged in repeated or significant misconduct. The Secretary determined that the costs and burden of convening the team the first time a child is suspended outweigh any potential benefits to the child if the child is receiving a short-term suspension for an infraction. However, the Secretary also considered the significant benefits that early intervention can produce for students and schools by effectively addressing behavioral problems. The Secretary concluded that if a child is engaged in behavior that warrants removal for more than 10 school days in a given year, intervention is in order.

The Secretary believes that this proposal may reduce costs for school districts because, in the absence of a regulation on this issue, the statute will be read by some to require that the IEP team be convened to develop an assessment plan the first time a child is suspended, regardless of the duration of the suspension or the child's disciplinary record. Alternatively, the statute could be read, in the absence of regulation, to require the IEP team to be convened only for suspensions that exceed 10 school days at a time.

Little data are available that would permit the Secretary to assess the economic impact of this proposal on school districts or the number of children who will benefit. Based on data collected by the Office for Civil Rights, the Secretary estimates that

approximately 300,000 children with disabilities will be suspended during the next school year for at least one school day. Based on an analysis of State-reported data from selected States, we estimate that most of the children who are suspended receive only short-term suspensions, but we have no information on the length or frequency of individual suspensions.

Section 300.521—Due Process Hearing for Removal—Proposed 300.521 specifies that a hearing officer is to make the determination authorized by section 615(k)(2) of the IDEA (regarding whether a child's current educational placement is substantially likely to result in injury to self or others) in a due process hearing.

The Secretary concluded that a hearing that meets the requirement for a due process hearing is the most appropriate forum for expeditiously and fairly determining whether the district has demonstrated by substantial evidence (defined by statute as ''beyond a preponderance of the evidence'') that maintaining the current placement is substantially likely to result in injury and to consider the appropriateness of the child's current placement and the efforts of the district to minimize the risk of harm.

The Secretary believes that the cost impact of this proposed regulation on large and small districts will be minimal because of the limited number of cases in which school districts and parents will disagree about the proposed removal of a dangerous child. (If the parents agree to removing a child, a school district may do so without the approval of a hearing officer.) In those few cases in which there is disagreement, the Secretary believes that the benefits of conducting a due process hearing justify the costs.

Section 300.523—Manifestation Determination—Proposed paragraph (b) would make it clear that if a child was removed for 10 or fewer school days in a given school year, and no further disciplinary action is contemplated, the school is not required to conduct a manifestation review. As was the case in considering section 300.520(c), the Secretary considered the potential benefits to the child and impact on districts of convening the IEP team if children are suspended.

The Secretary similarly concluded that the IEP team should not be required to meet and determine whether the child's behavior was a manifestation of the disability unless the child was engaged in repeated or significant misconduct. The cost of convening the team, whether to develop a behavioral assessment or to conduct a manifestation review, outweigh the potential benefits to a child who has been briefly suspended a few times. However, in proposing this regulation, the Secretary also considered the adverse impact on the child if the child is repeatedly suspended without any effort to determine whether the child should be punished for his or her behavior. One of the primary purposes of the manifestation review is to determine whether the child's disability has impaired his or her ability to understand the impact and consequences of his or her behavior and whether the child's disability has impaired the child's ability to control the behavior subject to discipline. Conducting this review, along with the behavioral assessment, will help ensure that the district responds appropriately to the child's behavior.

The Secretary believes that this proposal may reduce costs for school districts to the extent the statute is being read by some to require a manifestation review every time a child is suspended. Alternatively, this proposal may limit flexibility to the extent the statute could be read not to require a review for any single suspension that is fewer than 10 school days.

Section 300.528—Procedures for an Expedited Due Process Hearing—Proposed 300.528 defines what an expedited due process hearing to remove a dangerous child must entail. As discussed, the Secretary does not believe the requirement for the hearing officer to conduct a due process hearing to have a substantial cost impact because of the small number of cases involved. In proposing this regulation, the Secretary attempted to provide some flexibility to the States in establishing timelines and procedures in order to accommodate the interests of school officials in obtaining an expeditious decision. However, the Secretary has little basis for projecting the cost of hearings conducted in accordance with the proposed regulations in comparison to other appropriate procedures.

Section 300.587—Procedures for Enforcement—This proposal would clarify the types of notice and hearing that the Department would provide before taking an enforcement action under Part B of the IDEA. Providing clarity about the applicable procedures for the various types of enforcement actions will benefit potential subjects of enforcement actions and the Department by ensuring that time and resources are not spent on unnecessary disputes about procedures or needless process.

Section 300.589—Waiver Procedures—This proposal describes the procedures to be used by the Secretary in considering a request from an SEA of a waiver of the supplement, not supplant and maintenance of effort requirements in IDEA. This proposed regulation does not impose any cost on local school districts. The proposed procedures will affect any State requesting a waiver under Part B. While the Secretary believes the benefits of the proposed process to children with disabilities justify any possible cost or burden for State educational agencies, the Secretary welcomes public comment on the impact of this proposal and alternative ways for the Secretary to implement these statutory provisions.

Section 300.624—Capacity-building Subgrants—This proposal would make it clear that States could establish priorities in awarding these subgrants. This proposal, which provides permissive authority to be used at the discretion of each State, clarifies the intent of the statutory change and imposes no burden on State agencies. Allowing States to use these funds to foster State-specific improvements should lead to improving educational results for children with disabilities.

Sections 300.660(b) and 303.510(b)—Information about State Complaint Procedures—Proposed paragraph (b) would require States to widely disseminate their complaint procedures. While this proposed requirement would increase costs for those State educational agencies that have not established procedures for widely disseminating this information, the Secretary could have prescribed specific mechanisms for this dissemination but chooses not to, in order to give SEAs flexibility in determining how to accomplish this. The requirement would not have any direct impact on small districts and would benefit parents who believe that a public agency is violating a requirement of these regulations, by providing them the information they would need to get an official resolution of their issue without having to resort to a more formal, and generally more costly, dispute resolution mechanism.

Sections 300.661 and 303.512—Secretarial Review—This proposal would delete the provision providing for Secretarial review of complaints filed under State complaint procedures. The effect of this proposal on small (and large) districts would be inconsequential because of the small number of requests for these reviews. This proposal was developed in recognition of the report of the Department's Inspector General of August 1997, that noted that this procedure provides very limited benefits to children with disabilities or

to the IDEA programs and involves a considerable expenditure of the resources of the Office of Special Education Programs and other offices of the Department. The Inspector General's report concluded that greater benefit to the programs and individuals covered by the IDEA would be achieved if the Department eliminated the Secretarial review process and focused on improving State procedures for resolving complaints and implementing the IDEA programs. This change, and the changes proposed in §§ 300.660(b) and 300.503(b)(8) and §§ 303.510(b) and 303.403(b)(4) that would require greater public notice about the State complaint procedures, would implement those recommendations.

Sections 300.662 and 303.511—State Reviews—This proposal would relieve States of the requirement to review complaints about violations that occurred more than three years before the complaint. This proposed limitation on the age of the complaints is expected to reduce the cost to SEAs of investigating and reviewing complaints. There is no reason to believe this proposal would adversely affect small districts. There is also no reason to expect that this proposal would have a significant negative impact on individuals or entities submitting complaints under these procedures as it is unlikely that complaints alleging a violation that occurred more than three years in the past and that do not allege a continuing violation or request compensatory services would result in an outcome that puts the protected individuals under these regulations in a better position than they would have been in if no complaint had been filed. On the other hand, allowing States to focus their complaint resolution procedures on issues that are relevant to the current operation of the State's special education program may serve to improve services for these children.

2. Clarity of the Regulations

Executive Order 12866 requires 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: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the proposed regulations contain technical terms or other wording that interfere with their clarity? (3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the proposed regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§'' and a numbered heading; for example, § 300.2 *Applicability to State, local, and private agencies.*) (4) Is the description of the proposed regulations in the ''Supplementary Information'' section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to make the proposed regulations easier to understand?

A copy of any comments that concern how the Department could make these proposed regulations easier to understand should be sent to Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue, SW. (room 5121, FB–10), Washington, DC 20202–2241.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these proposed regulations are small local educational agencies (LEAs) receiving Federal funds under this program. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

Paperwork Reduction Act of 1995

Sections 300.110, 300.121, 300.123–300.130, 300.133, 300.135–300.137, 300.141–300.145, 300.155–300.156, 300.180, 300.192, 300.220–300.221, 300.240, 300.280–300.281, 300.284, 300.341, 300.343, 300.345, 300.347, 300.380–300.382, 300.402, 300.482–300.483, 300.503–300.504, 300.506, 300.508, 300.510–300.511, 300.532, 300.535, 300.543, 300.561–300.563, 300.565, 300.569, 300.571–300.572, 300.574–300.575, 300.589, 300.600, 300.653, 300.660–300.662, 300.750–300.751, 300.754, 303.403, 303.510–303.512, and 303.520 contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of Information: Assistance for Education of All Children with Disabilities: Complaint Procedures, §§ 300.600–300.662 and 303.510–303.512. 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. There is an estimated average annual total of 1079 complaints submitted for processing. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 10,790 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: State Eligibility, §§ 300.110, 300.121, 300.123–300.130, 300.133, 300.135–300.137, 300.141–300.145, 300.155–300.156, 300.280–300.281, 300.284, 300.380–300.382, 300.402, 300.482–300.483, 300.510–300.511, 300.589, 300.600, 300.653, 303.403, and 303.520. Each State must have on file with the Secretary policies and procedures to demonstrate to the satisfaction of the Secretary that the State meets the specified conditions for assistance under this part. In the past, States were required to submit State plans every three years with one-third of the entities submitting plans to the Secretary each year. With the new statute, States will no longer be required to submit State plans. Rather, the policies and procedures currently approved by, and on file with, the Secretary that are not inconsistent with the IDEA Amendments of 1997 will remain in effect unless amended.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 30 hours for each response for 58 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 this collection is estimated to be 1740 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: LEA Eligibility, §§ 300.180, 300.192, 300.220–300.221, 300.240, 300.341, 300.343, 300.345, 300.347, 500.503–300.504, 300.532, 300.535, 300.543, 300.561–300.563, 300.565, 300.569, 300.571–300.572, and 300.574–300.575. Each local educational agency (LEA) and each State agency must have on file with the State educational agency (SEA) information to demonstrate that the agency meets the specified requirements for assistance under this part. In the past, each LEA

was required to submit a periodic application to the SEA in order to establish its eligibility for assistance under this part. Under the new statutory changes, LEAs are no longer required to submit such applications. Rather, the policies and procedures currently approved by, and on file with, the SEA that are not inconsistent with the IDEA Amendments of 1997 will remain in effect unless amended.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 2 hours for each response for 15,376 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 this collection is estimated to be 30,752 hours. The Secretary invites comment on the estimated time it wills take for LEAs to meet this reporting and recordkeeping requirement.

Collection of Information: Assistance for Education of All Children with Disabilities: List of Hearing Officers and Mediators, §§ 300.506 and 300.508. 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.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 25 hours for each response for 58 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 this collection is estimated to be 3050 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: Report of Children and Youth with Disabilities Receiving Special Education, §§ 300.750–300.751, and 300.754. Each SEA must submit an annual report of children served.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 262 hours for each response for 58 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 this collection is estimated to be 15,196 hours.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on these proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through 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.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective 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.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Anyone may also view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (pdf) on the World Wide Web at either of the following sites:

http://gcs.ed.gov/fedreg.htm

http://www.ed.gov/news.html

To use the pdf you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the pdf, call the U.S. Government Printing Office toll free at 1–888–293–6498.

Anyone may also view these documents in text copy only on an electronic bulletin board of the Department. Telephone: (202) 219–1511 or, toll free, 1–800–222–4922. The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

Note: The official version of this document is the document published in the **Federal Register**.

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

34 CFR Part 303

Education of individuals with disabilities, Grant programs—education, Infants and children, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Number: 84.027 Assistance for the Education of All Children with Disabilities, 84.173 Preschool Grants for Children with Disabilities, and 84.181 Early Intervention Program for Infants and Toddlers with Disabilities)

Dated: October 6, 1997.

Richard W. Riley,

Secretary of Education.

The Secretary proposes to amend Title 34 of the Code of Federal Regulations by revising parts 300, 301, and 303 as follows:

1. Part 300 is revised to read as follows:

PART 300—ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

Subpart B—State and Local Eligibility—General

State Eligibility—General

State Eligibility—Specific Conditions

LEA and State Agency Eligibility—General

LEA Eligibility—Specific Conditions

Secretary of the Interior—Eligibility

Public Participation

Subpart C—Services

Free Appropriate Public Education

Evaluations and Reevaluations 300.320 Initial evaluations.

Individualized Education Programs

Direct Services by SEA

Authority: 20 U.S.C. 1411–1420, unless otherwise noted.

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

§ 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 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 note)

Note: With respect to paragraph (a) of this section (related to preparing children with disabilities for employment and independent living, section 701 of the Rehabilitation Act of 1973 describes the philosophy of independent living as including a philosophy of consumer control, peer support, self-help, self-determination, equal access, and individual and system advocacy, in order to maximize the leadership, empowerment, independence, and productivity of individuals with disabilities, and the integration and full inclusion of individuals with disabilities into the mainstream of American society.

§ 300.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State that receives payments under Part B of the Act.

(b) *Public agencies within the State.* The provisions of this part apply to all political subdivisions of the State that are involved in the education of children with disabilities. These political subdivisions include—

(1) The State educational agency;

(2) LEAs and educational service agencies;

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for students with deafness or students with blindness); and

(4) State and local juvenile and adult correctional facilities.

(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 § 300.403(c).

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

Note: The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 300.3 Regulations that apply.

The following regulations apply to this program:

(a) 34 CFR part 76 (State-Administered Programs) except for §§ 76.125–76.137 and 76.650–76.662.

(b) 34 CFR part 77 (Definitions).

(c) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(d) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(e) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(f) 34 CFR part 82 (New Restrictions on Lobbying).

(g) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(h) The regulations in this part—34 CFR part 300 (Assistance for Education of Children with Disabilities).

(Authority: 20 U.S.C. 1221e–3(a)(1))

Definitions

Note 1: Definitions of terms that are used throughout these regulations are included in this Subpart. Other terms are defined in the specific subparts in which they are used. A list of those terms and the specific sections in which they are defined:

Appropriate professional requirements in the State (§ 300.136(a)(1))
Average per-pupil expenditure in public elementary and secondary schools in the United States (§ 300.702)
Base year (§ 300.706(b)(1))
Comparable quality (§ 300.455(c))
Consent (§ 300.500(b)(1))
Controlled Substance (§ 300.520(d)(1))
Destruction (§ 300.560)
Direct services (§ 300.370(b)(1))
Education records (§ 300.560)
Evaluation (§ 300.500(b)(2))
Excess costs (§ 300.184(b))
Extended school year services (§ 300.309(b))
Financial costs (§ 300.142(e)(2))
Freely associated States (§ 300.722)
Highest requirements in the State applicable to a specific profession or discipline (§ 300.136(a)(2))
Illegal drug (§ 300.520(d)(2))
Independent educational evaluation (§ 300.503(a)(3)(i))
Indian (§ 300.264(a))
Indian tribe (§ 300.264(b))
Outlying area (§ 300.718)
Participating agency, as used in the IEP requirements in §§ 300.347 and 300.348 (§ 300.340(b))
Participating agency, as used in the confidentiality requirements in §§ 300.560–300.576(§ 300.340(b))
Party or parties (§ 300.583(a))
Personally identifiable (§ 300.500(b)(3))
Private school children with disabilities (§ 300.450)
Profession or discipline (§ 300.136(a)(3))
Public expense (§ 300.502(a)(3)(ii))
Revoke consent at any time (§ 300.500 note)
State, special definition (§ 300.700)
State-approved or recognized certification, licensing, registration, or other comparable requirements (§ 300.136(a)(4))
Substantial evidence (§ 300.521(e))
Support services (§ 300.370(b)(2))
Weapon (§ 300.520(d)(3))

Note 2: The following abbreviations for selected terms are used throughout these regulations: ''CSPD'' means ''comprehensive system of personnel development.''

''ESA'' means ''education service agency.''
''FAPE'' means ''free appropriate public education.''
''IDEA'' means ''Individuals with Disabilities Education Act.''
''IEP'' means ''individualized education program.''
''IFSP'' means ''individualized family service plan.''
''LEA'' means ''Local educational agency.''

''LRE'' means ''least restrictive environment.''
''SEA'' means ''State educational agency.''

Each abbreviation is used interchangeably with its nonabbreviated term.

§ 300.4 Act.

As used in this part, *Act* means the Individuals with Disabilities Education Act, as amended (IDEA).

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

§ 300.5 Assistive technology device.

As used in this part, *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.

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

§ 300.6 Assistive technology service.

As used in this part, *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))

Note: The Act's definitions of ''Assistive technology device'' and ''Assistive technology service'' are substantially identical to the definitions of these terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988.

§ 300.7 Child with a disability.

(a) (1) As used in this part, the term *child with a disability* means a child evaluated in accordance with §§ 300.530–300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or a multiple disability, and who because of that impairment needs special education and related services.

(2) The term *child with a disability* for children aged 3 through 9 may include a child—

(i) 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;

(ii) Who, for that reason, needs special education and related services; and

(iii) If the State adopts the term for children of this age range (or a subset of that range) and the LEA chooses to use the term.

(b) The terms used in this definition are defined as follows:

(1) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, 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. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (b)(4) of this section.

(2) *Deaf-blindness* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems 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) *Emotional disturbance* is defined as follows:

(i) The term 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) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

(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 disability* means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational problems that the problems cannot be accommodated in special education programs solely for one of the impairments. The term 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 congenital anomaly (e.g., clubfoot, absence of some member, etc.), 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, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia,

epilepsy, lead poisoning, leukemia, or diabetes, that adversely affects a child's educational performance.

(10) *Specific learning disability* is defined as follows:

(i) *General.* The term 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 an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) *Disorders not included.* The term 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. The term 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. The term 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) (A) and (B); 1401(26))

Note 1: If a child manifests characteristics of the disability category ''autism'' after age 3, that child still could be diagnosed as having ''autism'' if the criteria in paragraph (b)(1) of this section are satisfied.

Note 2: As used in paragraph (a)(2) of this section, the phrase ''at the discretion of the State and LEA'' means that if the State adopts the term ''developmental delay'' for children aged 3 through 9, or for a subset of that age range (e.g., children aged 3 through 5, etc.), LEAs that choose to use ''developmental delay,'' rather than identify these children as being in a particular disability category, must conform to the State's definition of the term. However, a State may not require an LEA to use ''developmental delay'' for this age range. LEAs in a State that does not adopt the term ''developmental delay'' for children in this age range, or for a sub-set of this age range, cannot independently use ''developmental delay'' as a basis for establishing a child's eligibility.

Note 3: With respect to paragraph (a)(2) of this section (relating to ''developmental delay''), the House Committee Report on Pub. L. 105–17 includes the following statement:

The Committee believes that, in the early years of a child's development, it is often difficult to determine the precise nature of the disability. Use of ''developmental delay'' as part of a unified approach will allow the special education and related services to be directly related to the child's needs and prevent locking the child into an eligibility category which may be inappropriate or incorrect, and could actually reduce later referrals of children with disabilities to special education. (H. Rep. No. 105–95, p. 86 (1997))

Note 4: With respect to paragraph (b)(4) of this section (relating to using the term ''emotional disturbance'' instead of ''serious emotional disturbance''), the House Committee Report on Pub. L. 105–17 includes the following statement:

The committee wants to make clear that changing the terminology from ''serious emotional disturbance'' to ''serious emotional disturbance (hereinafter referred to as 'emotional disturbance')'' in the definition of a ''child with a disability'' is intended to have no substantive or legal significance. It is intended strictly to eliminate the pejorative connotation of the term ''serious.'' It should in no circumstances be construed to change the existing meaning of the term under 34 CFR 300.7(b)(9) as promulgated September 29, 1992 (H. Rep. No. 105–95, p. 86 (1997))

Note 5: A child with attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) may be eligible under Part B of the Act if the child's condition meets one of the disability categories described in § 300.7, and because of that disability the child needs special education and related services. Some children with ADD or ADHD who are eligible under Part B of the Act meet the criteria for ''other health impairments'' (see paragraph (b)(9) of this section). Those children would be classified as eligible for services under the ''other health impairments'' category if (1) the ADD or ADHD is determined to be a chronic health problem that results in limited alertness, that adversely affects educational performance, and (2) special education and related services are needed because of the ADD or ADHD. The term ''limited alertness'' includes a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.

Other children with ADD or ADHD may be eligible under Part B of the Act because they satisfy the criteria applicable to other disability categories in § 300.7(b). For example, children with ADD or ADHD would be eligible for services under the ''specific learning disability category'' if they meet the criteria in paragraph (b)(10) of this section, or under the ''emotional disturbance'' category if they meet the criteria in paragraph (b)(4). Even if a child with ADD or ADHD is found to be not eligible for services under Part B of the Act, the requirements of Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 34 CFR Part 104 may still be applicable.

§ 300.8 Day.

As used in this part, the term *day* means calendar day unless otherwise indicated as school day or business day.

(Authority: 20 U.S.C. 1221e–3)

§ 300.9 Educational service agency.

As used in this part, the term *educational service agency*—

(a) Means a regional public multiservice agency—

(1) Authorized by State law to develop, manage, and provide services or programs to LEAs; and

(2) Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary and secondary schools of the State; and

(b) Includes any other public institution or agency having administrative control and direction over a public elementary or secondary school.

(Authority: 20 U.S.C. 1401(4))

§ 300.10 Equipment.

As used in this part, the term *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(6))

§ 300.11 Free appropriate public education.

As used in this part, the term *free appropriate public education* 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 preschool, elementary school, or secondary school education in the State; and

(d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340–300.351.

(Authority: 20 U.S.C. 1401(8))

§ 300.12 General curriculum.

As used in this part, the term *general curriculum* means the curriculum adopted by an LEA, schools within the LEA, or where applicable, the SEA for all children from preschool through secondary school.

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

Note: The term ''general curriculum'', as defined in this section, relates to the content of the curriculum and not to the setting in which it is used. Thus, to the extent applicable to an individual child with a disability and consistent with the LRE provisions under §§ 300.500—300.553, the general curriculum could be used in any educational environment along a continuum of alternative placements described under § 300.551.

§ 300.13 Include.

As used in this part, the term *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)

§ 300.14 Individualized education program.

As used in this part, the term *individualized education program or IEP* has the meaning given the term in § 300.340.

(Authority: 20 U.S.C. 1401(11))

§ 300.15 Individualized education program team.

As used in this part, the term *individualized education program team* or *IEP team* means a group of individuals described in § 300.344 that is responsible for developing, reviewing, or revising an IEP for a child with a disability.

(Authority: 20 U.S.C. 1221e–3)

Note: The IEP team may also serve as the placement team.

§ 300.16 Individualized family service plan.

As used in this part, the term *individualized family service plan* or *IFSP* has the meaning given the term in 34 CFR 303.340(b).

(Authority: 20 U.S.C. 1401(12))

§ 300.17 Local educational agency.

(a) As used in this part, the term *local educational agency* 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 or secondary schools.

(b) The term includes—

(1) An educational service agency, as defined in § 300.9; and

(2) Any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(c) The term includes an elementary or secondary school funded by 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 this Act with the smallest student population, except that the school may not be subject to the jurisdiction of any SEA other than the Bureau of Indian Affairs.

(Authority: 20 U.S.C. 1401(15))

Note: A public charter school that meets the definition of ''LEA'' is eligible to receive Part B funds as an LEA. If a public charter school receives Part B funds it must comply with the requirements of this part that apply to LEAs.

§ 300.18 Native language.

As used in this part, the term *native language*, if used with reference to an individual of limited English proficiency, means the language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child.

(Authority: 20 U.S.C. 1401(16))

Note: The term ''native language'' is used in the prior notice, procedural safeguards notice, and evaluation sections: § 300.503(c), § 300.504(c) and § 300.532(a)(2). In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) For individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual (such as sign language, braille, or oral communication).

§ 300.19 Parent.

(a) As used in this part, the term *parent* means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 300.515. The term does not include the State if the child is a ward of the State.

(b) State law may provide that a foster parent qualifies as a parent under Part B of the Act if—

(1) The natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law;

(2) The foster parent has an ongoing, long-term parental relationship with the child;

(3) The foster parent is willing to participate in making educational decisions in the child's behalf; and

(4) The foster parent has no interest that would conflict with the interests of the child.

(Authority: 20 U.S.C. 1401(19))

Note: The term ''parent'' is defined to include persons acting in the place of a parent, such as a grandparent or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare, and at the discretion of the State, a foster parent who meets the requirements in paragraph (b) of this section.

§ 300.20 Public agency.

As used in this part, the term *public agency* includes the SEA, LEAs, 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)(1)(A), (a)(11))

§ 300.21 Qualified.

As used in this part, the term *qualified* means that a person has met SEA-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. 1221e–3)

§ 300.22 Related services.

(a) As used in this part, the term *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, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early

identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) 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 pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need 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) *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.

(5) *Occupational therapy* includes —

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) *Orientation and mobility services* 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, including —

(i) Teaching students 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 (for example, using sound at a traffic light to cross the street);

(ii) Teaching students to use the long cane, as appropriate, to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;

(iii) Teaching students to understand and use remaining vision and distance low vision aids, as appropriate; and

(iv) Other concepts, techniques, and tools, as determined appropriate.

(7) *Parent counseling and training* means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(8) *Physical therapy* means services provided by a qualified physical therapist.

(9) *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 needs of children as indicated by psychological tests, interviews, 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.

(10) *Recreation* includes —

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(11) *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 disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(12) *School health services* means services provided by a qualified school nurse or other qualified person.

(13) *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 with 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.

(14) *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.

(15) *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(22))

Note 1: All related services may not be required for each individual child. The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, art, music, and dance therapy, travel training, nutrition services, and independent living services), if they are required to assist a child with a disability to benefit from special education in order for the child to receive FAPE.

There are certain kinds of services that might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under Part B of the Act may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

Note 2: While ''orientation and mobility services'' was added to the list of examples of related services in recognition of its critical importance to children who are blind or have visual impairments, children with other disabilities may also need to be taught the skills they need to navigate their environments (e.g. ''travel training''). The House Committee Report on Public Law 105–17 states:

* * *it is important to keep in mind that children with other disabilities may also need instruction in traveling around their school, or to and from school. A high school aged child with a mental disability, for example, might need to be taught how to get from class to class so that he can participate in his inclusive program. The addition of orientation and mobility services to the list of identified related services is not intended to result in the denial of appropriate services for children with disabilities who do not have visual impairments or blindness. (H. Rep. No. 105–95, p.86 (1997))

In addition, travel training is important to enable students to attain systematic orientation to and safe movement within their environment in school, home, at work, and in the community.

Note 3: With respect to paragraph (b) of this section, nothing in this part prohibits the use of paraprofessionals to assist in the provision of services described under this section, if doing so is consistent with § 300.136(f).

Note 4: It should be assumed that most children with disabilities receive the same transportation services as nondisabled children. For some children with disabilities, integrated transportation may be achieved by providing needed accommodations such as lifts and other equipment adaptations on regular school transportation vehicles.

§ 300.23 Secondary school.

As used in this part, the term *secondary school* means a nonprofit institutional day or residential 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(23))

§ 300.24 Special education.

(a) (1) As used in this part, the term *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) The term includes speech-language pathology services, or any other related service, if the service consists of specially-designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, and is considered special education rather than a related service under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(b) 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* is defined as follows:

(i) The term 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).

(ii) The term includes special physical education, adaptive physical education, movement education, and motor development.

(3) *Specially-designed instruction* means adapting content, methodology or delivery of instruction—

(i) To address the unique needs of an eligible child under this part 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) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(Authority: 20 U.S.C. 1401(25))

Note: The definition of special education is a particularly important one under these regulations, since a child does not have a disability under Part B of the Act unless he or she needs special education. (See the definition of child with a disability in § 300.7). The definition of related services (§ 300.22) also depends on this definition, since to be a related service, a service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act. A related services provider may be a provider of specially-designed instruction if under State law the person is qualified to provide such instruction.

§ 300.25 State.

As used in this part, the term *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(27))

§ 300.26 Supplementary aids and services.

As used in this part, the term *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 §§ 300.550–300.556.

(Authority: 20 U.S.C. 1401(29))

§ 300.27 Transition services.

As used in this part, *transition services* means a coordinated set of activities for a student with a disability that—

(a) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(b) Is based on the individual student's needs, taking into account the student's preferences and interests; and

(c) Includes—

(1) Instruction;

(2) Related services;

(3) Community experiences;

(4) The development of employment and other post-school adult living objectives; and

(5) If appropriate, acquisition of daily living skills and functional vocational evaluation.

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

Note: Transition services for students with disabilities may be special education, if they are provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education. The list of activities in paragraph (c) of this section is not intended to be exhaustive.

§ 300.28 Definitions in EDGAR.

The following terms used in this part are defined in 34 CFR 77.1:

Application
Award
Contract
Department
EDGAR
Fiscal year
Grant
Project
Secretary
Subgrant

(Authority: 20 U.S.C. 1221e–3(a)(1))

Subpart B—State and Local Eligibility—General State Eligibility—General

§ 300.110 Condition of assistance.

A State is eligible for assistance under Part B of the Act for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets the conditions in §§ 300.121–300.156.

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

§ 300.111 Exception for prior State policies and procedures on file with the Secretary.

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 § 300.110, including any policies and procedures filed under Part B of the Act as in effect before June 4, 1997, the Secretary considers the State to have met the requirement for purposes of receiving a grant under Part B of the Act.

(Authority: 20 U.S.C. 1412(c)(1))

§ 300.112 Amendments to State policies and procedures.

(a) *Modifications made by a State.* (1) Subject to paragraph (b) 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 decides are necessary.

(2) The provisions of this subpart apply to a modification to a State's policies and procedures in the same manner and to the same extent that they apply to the State's original policies and procedures.

(b) *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 June 4, 1997, the provisions of the Act or the regulations in this part are amended;

(2) There is a new interpretation of this Act or regulations 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))

§ 300.113 Approval by the Secretary.

(a) *General.* 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.

(b) *Notice and hearing before determining a State is not eligible.* 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 after providing the State reasonable notice and an opportunity for a hearing in accordance with the procedures in §§ 300.581–300.587.

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

§§ 300.114–300.120 [Reserved]

State Eligibility—Specific Conditions

§ 300.121 Free appropriate public education.

(a) *General.* Each State must have on file with the Secretary information that shows that, subject to § 300.122, the State has in effect a policy that ensures that all children with disabilities aged 3 through 21 residing in the State have the right to FAPE, including children with disabilities who have been suspended or expelled from school.

(b) *Required information.* The information described in paragraph (a) of this section must—

(1) Include a copy of each State statute, court order, State Attorney General opinion, and other State documents that show the source of the State's policy relating to FAPE; and

(2) Show that the policy—

(i) Applies to all public agencies in the State; and

(ii) Applies to all children with disabilities, including children who have been suspended or expelled from school.

(c) *FAPE for children suspended or expelled from school.*

(1) For the purposes of this section, the term ''children with disabilities who have been suspended or expelled from school'' means children with disabilities who have been removed from their current educational placement for more than 10 school days in a given school year.

(2) The right to FAPE for children with disabilities who have been suspended or expelled from school begins on the eleventh school day in a school year that they are removed from their current educational placement.

(3) In providing FAPE to children with disabilities who have been suspended or expelled from school, a public agency shall meet the requirements of § 300.522.

(Authority: 20 U.S.C. 1412(a)(1))

Note 1: With respect to paragraph (a) of this section, a public agency's obligation to make FAPE available to each eligible child means that the obligation begins no later than the child's third birthday. Thus, an IEP or an IFSP must be in effect for the child by that date, in accordance with § 300.342. The IEP would specify the special education and related services that are needed in order to ensure that the child receives FAPE, including any extended school year services, if appropriate. If a child who is receiving early intervention services under Part C of the Act will be participating in a preschool program under Part B of the Act, the transition requirements of § 300.132 would apply.

Note 2: School districts are not relieved of their obligation to provide appropriate special education and related services to individual disabled students who need them even though they are advancing from grade to grade. The decision whether a student with a disability who is advancing from grade to grade is eligible for services under this part must be determined on an individual basis by the child's IEP team.

§ 300.122 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—

(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 in one or more of those age groups;

(2) Students 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—

(i) Were not actually identified as being a child with a disability under § 300.7; and

(ii) Did not have an IEP under Part B of the Act.

(3)(i) Students 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.

(b) *Documents relating to exceptions.* The State must have on file with the Secretary—

(1)(i) Information that describes in detail the extent that the exception in paragraph (a)(1) of this section applies to the State; and

(ii) A copy of each State law, court order, and other documents that provide a basis for the exception; and

(2) With respect to paragraph (a)(2) of this section, a copy of the State law that excludes from service under Part B of the Act certain students who are

incarcerated in an adult correctional facility.

(Authority: 20 U.S.C. 1412(a)(1)(B))

Note 1: Under paragraph (a)(3) of this section, a student's eligibility for FAPE ceases upon graduation from high school with a regular high school diploma. Under Part B of the Act, graduation is considered to be a change in placement, and would require that prior written notice, in accordance with § 300.503, be given to the parents and the student, if appropriate. The notice would inform the parents and the student of this fact and of their right to challenge the student's pending graduation (through the due process procedures in § 300.507), if they believe that the student has not met the requirements for graduation with a regular high school diploma. Since graduation changes a student's eligibility status, a reevaluation would be required under § 300.534(c).

In a small number of cases, a school district may be awarding a special certificate to some children with disabilities. If a high school awards a student with a disability certificate of attendance or other certificate of graduation instead of a regular high school diploma, the student would still be entitled to FAPE until the student reaches the age at which eligibility ceases under the age requirements within the State or has earned a regular high school diploma.

Note 2: With respect to paragraph (a)(2) of this section, (relating to certain students with disabilities in adult prisons), the House Committee Report on Pub. L. 105–17 includes the following statement:

The bill provides that a State may also opt not to serve individuals who, in the educational placement prior to their incarceration in adult correctional facilities, were not actually identified as a child with a disability under section 602(3) or did not have an IEP under Part B of the Act. The Committee means to * * * make clear that services need not be provided to all children who were at one time determined to be eligible under Part B of the Act. The Committee does not intend to permit the exclusion from services under part B of children who had been identified as children with disabilities and had received services under an IEP, but who had left school prior to their incarceration. In other words, if a child had an IEP in his or her last educational placement, the child has an IEP for purposes of this provision. The Committee added language to make clear that children with disabilities aged 18 through 21, who did not have an IEP in their last educational setting but who had actually been identified should not be excluded from services.(H. Rep. No. 105–95, p. 91 (1997))

§ 300.123 Full educational opportunity goal.

The State must have on file with the Secretary detailed policies and procedures through which the State has established a goal of providing full educational opportunity to all children with disabilities aged birth through 21.

(Authority: 20 U.S.C. 1412(a)(2))

§ 300.124 FEOG—timetable.

The State must have on file with the Secretary a detailed timetable for accomplishing the goal of providing full educational opportunity for all children with disabilities.

(Authority: 20 U.S.C. 1412(a)(2))

§ 300.125 Child find.

(a) *General requirement.* The State must have in effect policies and procedures to ensure that—

(1) All children with disabilities residing in the State, including 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

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(b) *Documents relating to child find.* The State must have on file with the Secretary the policies and procedures described in paragraph (a) of this section, including—

(1) The name of the State agency (if other than the SEA) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) The name of each agency that participates in the planning and implementation of the child find activities and a description of the nature and extent of its participation;

(3) A description of how the policies and procedures under paragraph (a) of this section will be monitored to ensure that the SEA obtains—

(i) The number of children with disabilities within each disability category that have been identified, located, and evaluated; and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(4) A description of the method the State uses to determine which children are currently receiving special education and related services.

(c) *Construction.* Nothing in the Act requires that children be classified by their disability so long as each child who has a disability listed in § 300.7 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. 1412 (a)(3) (A) and (B))

Note 1: Collection and use of data are subject to the confidentiality requirements of §§ 300.560–300.577.

Note 2: The services and placement needed by each child with a disability to receive FAPE must be based upon the child's unique needs and may not be determined or limited based upon a category of disability.

Note 3: Under both Parts B and C of the Act, States are responsible for identifying, locating, and evaluating infants and toddlers from birth through 2 years of age who have disabilities or who are suspected of having disabilities. In States where the SEA and the State's lead agency for the Part C program are different and the Part C lead agency will be participating in the child find activities described in paragraph (a) of this section, the nature and extent of the Part C lead agency's participation must, under paragraph (b)(2) of this section, be provided. With the SEA's agreement, the Part C lead agency's participation may include the actual implementation of child find activities for infants and toddlers. The use of an interagency agreement or other mechanism for providing for the Part C lead agency's participation would not alter or diminish the responsibility of the SEA to ensure compliance with all child find requirements, including the requirement in paragraph (a)(1) of this section that all children with disabilities who are in need of special education and related services are evaluated.

Note 4: Each State has an obligation to ensure that State and local child find responsibilities under Part B of the Act extend to highly mobile children (such as migrant and homeless children).

§ 300.126 Procedures for evaluation and determination of eligibility.

The State must have on file with the Secretary policies and procedures that ensure that the requirements of §§ 300.530–300.536 are met.

(Authority: 20 U.S.C. 1412(a) (6)(B), (7))

§ 300.127 Confidentiality of personally identifiable information.

(a) The State must have on file in detail the policies and procedures that the State has undertaken in order to ensure the protection of the confidentiality of any personally identifiable information, collected, used, or maintained under Part B of the Act.

(b) The Secretary uses the criteria in §§ 300.560–300.577 to evaluate the policies and procedures of the State under paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(8))

Note: The regulations implementing the Family Educational Rights and Privacy Act are in 34 CFR Part 99. Those regulations are incorporated in §§ 300.560–300.577.

§ 300.128 Individualized education programs.

(a) *General.* The State must have on file with the Secretary information that shows that an IEP, or 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 §§ 300.340–300.351.

(b) *Required information.* The information described in paragraph (a) of this section must include—

(1) A copy of each State statute, policy, and standard that regulates the manner in which IEPs are developed, implemented, reviewed, and revised; and

(2) The procedures that the SEA follows in monitoring and evaluating those programs.

(Authority: 20 U.S.C. 1412(a)(4))

§ 300.129 Procedural safeguards.

(a) The State must have on file with the Secretary procedural safeguards that ensure that the requirements of §§ 300.500–300.529 are met.

(b) 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))

§ 300.130 Least restrictive environment.

(a) *General.* The State must have on file with the Secretary procedures that ensure that the requirements of §§ 300.550–300.556 are met.

(b) *Additional requirement.*

(1) If the State uses a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, the funding mechanism may not result in placements that violate the requirements of paragraph (a) of this section.

(2) 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))

Note: With respect to the LRE requirement of this section, and the continuum of alternative educational placements described in § 300.551, the House Committee Report on Pub. L. 105–17 states:

The committee supports the longstanding policy of a continuum of alternative placements designed to meet the unique needs of each child with a disability. Placement options available include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. For disabled children placed in regular classes, supplementary aids and services and resource room services or itinerant instruction must also be offered as needed. (H. Rep. 105–95, p. 91 (1997))

§ 300.131 [Reserved]

§ 300.132 Transition of children from Part C to preschool programs.

The State must have on file with the Secretary 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)(8) of the Act;

(b) By the third birthday of a child described in paragraph (a) of this section, an IEP or, if consistent with § 300.342(c) and section 636(d) of the Act, an IFSP, has been developed and must be implemented for the child; and

(c) Each LEA will participate in transition planning conferences arranged by the designated lead agency under section 637(a)(8) of the Act.

(Authority: 20 U.S.C. 1412(a)(9))

§ 300.133 Private schools.

The State must have on file with the Secretary policies and procedures that ensure that the requirements of §§ 300.400–300.403 and §§ 300.450–300.462 are met.

(Authority: 20 U.S.C. 1413(a)(4))

§ 300.134 [Reserved]

§ 300.135 Comprehensive system of personnel development.

(a) *General.* The State must have in effect, consistent with the purposes of this part and with section 635(a)(8) of the Act, a comprehensive system of personnel development that —

(1) Is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel; and

(2) Meets the requirements for a State improvement plan relating to personnel development in section 653 (b)(2)(B) and (c)(3)(D) of the Act.

(b) *Information.* The State must have on file with the Secretary information that shows that the requirements of paragraph (a) of this section are met.

(Authority: 20 U.S.C. 1412(a)(14))

Note: With respect to meeting the CSPD requirement of this section, the House Committee Report on Pub. L. 105–17 states:

Section 612, as [in] current law, requires that a State have in effect a Comprehensive System of Personnel Development (CSPD) that is designed to ensure an adequate supply of qualified personnel, including the establishment of procedures for acquiring and disseminating significant knowledge derived from educational research and for adopting, where appropriate, promising practices, materials, and technology. (H. Rep. 105–95, p. 93 (1997))

States will be able to use the information provided to meet the requirement in § 300.135(a)(2) as a part of their State Improvement Plan under section 653 of the Act, if they choose to do so.

§ 300.136 Personnel standards.

(a) As used in this part —

(1) *Appropriate professional requirements in the State* means entry level requirements that—

(i) Are based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services; and

(ii) Establish suitable qualifications for personnel providing special education and related services under Part B of the Act to children and youth with disabilities who are served by State, local, and private agencies (see § 300.2);

(2) *Highest requirements in the State applicable to a specific profession or discipline* means the highest entry-level academic degree needed for any State-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline;

(3) *Profession or discipline* means a specific occupational category that —

(i) Provides special education and related services to children with disabilities under Part B of the Act;

(ii) Has been established or designated by the State; and

(iii) Has a required scope of responsibility and degree of supervision; and

(4) *State-approved or -recognized certification, licensing, registration, or other comparable requirements* means the requirements that a State legislature either has enacted or has authorized a State agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.

(b) (1) The State must have on file with the Secretary policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(2) The policies and procedures required in paragraph (b)(1) of this section must provide for the establishment and maintenance of standards that are consistent with any State-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

(c) To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State must provide the steps the State is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the State.

(d) (1) In meeting the requirements in paragraphs (b) and (c) of this section, a determination must be made about the status of personnel standards in the State. That determination must be based on current information that accurately describes, for each profession or discipline in which personnel are providing special education or related services, whether the applicable standards are consistent with the highest requirements in the State for that profession or discipline.

(2) The information required in paragraph (d)(1) of this section must be on file in the SEA and available to the public.

(e) In identifying the highest requirements in the State for purposes of this section, the requirements of all State statutes and the rules of all State agencies applicable to serving children and youth with disabilities must be considered.

(f) A State may allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulations, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services to children with disabilities under Part B of the Act.

(g) In implementing this section, a State may adopt a policy that includes a requirement that LEAs in the State make an ongoing good faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services to children with disabilities, including, in a geographic area of the State where there is a shortage of personnel that meet these qualifications, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards described in paragraph (b)(2) of this section, consistent with State law and the steps described in paragraph (c) of this section, within three years.

(Authority: 20 U.S.C. 1412(a)(15))

Note 1: The regulations require that the State use its own existing highest requirements to determine the standards appropriate to personnel who provide special education and related services under Part B of the Act. The regulations do not require States to set any specified training standard, such as a master's degree, for employment of personnel who provide services under Part B of the Act. In some instances, States are required under paragraph (c) of this section to show that they are taking steps to retrain or to hire personnel to meet the standards adopted by the SEA that are based on requirements for practice in a specific profession or discipline that were established by other State agencies. States in this position need not, however, require personnel providing services under Part B of the Act to apply for and obtain the license, registration, or other comparable credential required by other agencies of individuals in that profession or discipline. The regulations permit each State to determine the specific occupational categories required to provide special education and related services and to revise or expand these categories as needed. The professions or disciplines defined by the State need not be limited to traditional occupational categories.

Note 2: A State may exercise the option under paragraph (g) of this section even though the State has reached its established date, under paragraph (c) of this section, for training or hiring all personnel in a specific profession or discipline to meet appropriate professional requirements in the State. As a practical matter, it is essential that a State have a mechanism for serving students if instructional needs exceed available personnel who meet appropriate professional requirements in the State for a specific profession or discipline. A State that continues to have shortages of personnel meeting appropriate professional requirements in the State must address those shortages in its comprehensive system of personnel development under § 300.135.

Note 3: If a State has established only one entry-level academic degree for employment of personnel in a specific profession, modification of that standard as necessary to ensure the provision of FAPE to all children in the State would not violate the provisions of § 300.136(b) and (c).

§ 300.137 Performance goals and indicators.

The State must have on file with the Secretary information to demonstrate that the State—

(a) Has established goals for the performance of children with disabilities in the State that—

(1) Will promote the purposes of this part, as stated in § 300.1; and

(2) Are consistent, to the maximum extent appropriate, with other goals and standards for all children established by the State;

(b) Has established performance indicators that the State will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, drop-out rates, and graduation rates;

(c) Every two years, will 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; and

(d) Based on its assessment of that progress, will revise its State improvement plan under subpart 1 of Part D of the Act as may be needed to improve its performance, if the State receives assistance under that subpart.

(Authority: 20 U.S.C. 1412(a)(16))

§ 300.138 Participation in assessments.

The State must have on file with the Secretary information to demonstrate that—

(a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations if necessary;

(b) As appropriate, the State or LEA—

(1) Develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs;

(2) Develops alternate assessments in accordance with paragraph (b)(1) of this section; and

(3) Beginning not later than, July 1, 2000, conducts the alternate assessments described in paragraph (b)(2) of this section.

(Authority: 20 U.S.C. 1412(a)(17)(A))

Note: With respect to paragraph (b) of this section, it is assumed that only a small percentage of children with disabilities will need alternative assessments.

§ 300.139 Reports relating to assessments.

(a) *General.* In implementing the requirements of § 300.138, the SEA shall 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 information:

(1) The number of children with disabilities participating—

(i) In regular assessments; and

(ii) The number of those children participating in alternate assessments.

(2) The performance results of the children described in paragraph (a)(1) of this section—

(i) On regular assessments (beginning not later than July 1, 1998); and

(ii) On alternate assessments (not later than July 1, 2000), if doing so would be statistically sound and would not result in the disclosure of performance results identifiable to individual children.

(b) *Combined reports.* Reports to the public under paragraph (a) of this section must include—

(1) Aggregated data that include the performance of children with disabilities together with all other children; and

(2) Disaggregated data on the performance of children with disabilities.

(c) *Disaggregation of data.* Data relating to the performance of children described under paragraph (a)(2) of this section must be disaggregated—

(1) For assessments conducted after July 1, 1998; and

(2) For assessments conducted before July 1, 1998, if the State is required to disaggregate the data prior to July 1, 1998.

(Authority: 20 U.S.C. 612(a)(17)(B))

Note: Paragraph (b) of this section requires a public agency to report aggregated data that include children with disabilities. However, a public agency is not precluded from also analyzing and reporting data in other ways (such as, maintaining a trendline that was established prior to including children with disabilities in those assessments).

§ 300.140 [Reserved]

§ 300.141 SEA responsibility for general supervision.

(a) The State must have on file with the Secretary information that shows that the requirements of § 300.600 are met.

(b) The information described under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other documents that show compliance with that paragraph.

(Authority: 20 U.S.C. 1412(a)(11))

§ 300.142 Methods of ensuring services.

(a) *Establishing responsibility for services.* The Chief Executive Officer or designee of that officer shall 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 is 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) *Agency financial responsibility.* 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 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) *Conditions and terms of reimbursement.* The conditions, terms, and procedures under which an LEA must be reimbursed by other agencies.

(3) *Interagency disputes.* 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) *Coordination of services procedures.* 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) *General.* 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, § 300.22 relating to related services, § 300.26 relating to supplementary aids and services, and § 300.27 relating to transition services) that are necessary for ensuring FAPE to children with disabilities within the State, the public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement.

(2) *Reimbursement for services by noneducational public agency.* 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) shall provide or pay for these services to the child. The LEA or State agency may then claim reimbursement for the services from the noneducational public agency that failed to provide or pay for these services and that agency shall reimburse the LEA or State agency in accordance with the terms of the interagency agreement or other mechanism described in paragraph (a)(1) of this section, and the agreement described in paragraph (a)(2) 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.

(d) *Information.* The State must have on file with the Secretary information to demonstrate that the requirements of paragraphs (a) through (c) of this section are met.

(e) *Children with disabilities who are covered by private insurance.*

(1) A public agency may not require parents of children with disabilities, if they would incur a financial cost, to use private insurance proceeds to pay for the services that must be provided to an eligible child under this part.

(2) For the purposes of this section, the term *financial costs* includes —

(i) An out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim, but not including incidental costs such as the time needed to file an insurance claim or the postage needed to mail the claim;

(ii) A decrease in available lifetime coverage or any other benefit under an insurance policy; and

(iii) An increase in premiums or the discontinuation of the policy.

(f) *Proceeds from public or private insurance.* Proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR 80.25.

(Authority: 20 U.S.C. 1412(a)(12) (A), (B), and (C); 1401(8))

Note 1: The House Committee Report on Pub. L. 105–17 related to methods of ensuring services states:

A provision is added to the Act to strengthen the obligation to ensure that all services necessary to ensure a free appropriate public education are provided through the coordination of public educational and non-educational programs. This subsection is meant to reinforce two important principles: (1) That the State agency or LEA responsible for developing a child's IEP can look to noneducational agencies such as Medicaid to provide those services they (the non-educational agencies) are otherwise responsible for; and (2) that the State agency or LEA remains responsible for

ensuring that children receive all the services described in their IEPs in a timely fashion, regardless of whether another agency will ultimately pay for the services.

The Committee places particular emphasis in the bill on the relationship between schools and the State Medicaid Agency in order to clarify that health services provided to children with disabilities who are Medicaid-eligible and meet the standards applicable to Medicaid, are not disqualified for reimbursement by Medicaid agencies because they are provided services in a school context in accordance with the child's IEP. (H. Rep. 105-95, p. 92 (1997))

Note 2: The intent of paragraph (e) of this section is to make clear that services required under Part B of the Act must be provided at no cost to the child's parents, whether they have public or private insurance. The Department, in a Notice of Interpretation published Dec. 30, 1980 at 45 FR 66390 noted that both Part B of the Act and Section 504 of the Rehabilitation Act of 1973 prohibit a public agency from requiring parents, where they would incur a financial cost, to use insurance proceeds to pay for services that are required to be provided to a child with a disability under the FAPE requirements of those statutes. The use of parents' insurance proceeds to pay for services in these circumstances must be voluntary. For example, a family could not be required to access private insurance that is required to enable a child to receive Medicaid services, where that insurance use results in financial costs to the family.

Note 3: If the public agency cannot get parent consent to use private insurance, the public agency may use funds under this part to pay for the service. In addition, in order to avoid financial costs to parents who otherwise would consent to use private insurance, the public agency may use funds under this part to pay the costs of accessing the insurance, e.g., deductible or co-pay amounts.

Note 4: Paragraph (f) clarifies that, if a public agency receives funds from public or private insurance for services under this part, the public agency is not required to return those funds to the Department or to dedicate those funds for use in this program, although a public agency retains the option of using those funds in this program. 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 §§ 300.154 and 300.231. This is because the expenditure that is reimbursed is considered to be an expenditure of funds from the source that provides the reimbursement.

§ 300.143 SEA implementation of safeguards.

The State must have on file with the Secretary the procedures that the SEA (and any agency assigned responsibility pursuant to § 300.600(d)) follows 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))

§ 300.144 Hearing relating to LEA eligibility.

The State must have on file with the Secretary procedures to ensure that the SEA does 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))

§ 300.145 Recovery of funds for misclassified children.

The State must have on file with the Secretary policies and procedures that ensure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611 (a) or (d) of the Act.

(Authority: 20 U.S.C. 1221e–3(a)(1))

§ 300.146 Suspension and expulsion rates.

The State must have on file with the Secretary information to demonstrate that the following requirements are met:

(a) *General.* The SEA examines data 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 the 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 behavioral interventions, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

(Authority: 20 U.S.C. 612(a)(22))

§ 300.147 Additional information if SEA provides direct services.

(a) If the SEA provides FAPE to children with disabilities, or provides direct services to these children, the agency—

(1) Shall comply with any additional requirements of §§ 300.220–300.230(a) and 300.234–300.250 as if the agency were an LEA; and

(2) May use amounts that are otherwise available to the agency under Part B of the Act to serve those children without regard to § 300.184 (relating to excess costs).

(b) The SEA must have on file with the Secretary information to demonstrate that it meets the requirements of paragraph (a)(1) of this section.

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

§ 300.148 Public participation.

(a) The State must ensure that, prior to the adoption of any policies and procedures needed to comply with this part, 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 consistent with §§ 300.280–300.284.

(b) The State must have on file with the Secretary information to demonstrate that the requirements of paragraph (a) of this section are met.

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

§ 300.149 [Reserved]

§ 300.150 State advisory panel.

The State must have on file with the Secretary information to demonstrate that the State has established and maintains 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 in accordance with the requirements of §§ 300.650–300.653.

(Authority: 20 U.S.C. 1412(a)(21)(A))

§ 300.151 [Reserved]

§ 300.152 Prohibition against commingling.

The State must have on file with the Secretary an assurance satisfactory to the Secretary that the funds under Part B of the Act are not commingled with State funds.

(Authority: 20 U.S.C. 1412(a)(18)(B))

Note: This assurance is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of the Part B funds. Separate bank accounts are not required. (See 34 CFR 76.702 (Fiscal control and fund accounting procedures).)

§ 300.153 State-level nonsupplanting.

(a) *General.* (1) Except as provided in § 300.230, 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 these Federal, State, and local funds.

(2) The State must have on file with the Secretary information to demonstrate to the satisfaction of the Secretary that the requirements of paragraph (a)(1) of this section are met.

(b) *Waiver.* 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 (a) of this section if the Secretary concurs with the evidence provided by the State under § 300.589.

(Authority: 20 U.S.C. 1412(a)(18)(c))

§ 300.154 Maintenance of State financial support.

(a) *General.* The State must have on file with the Secretary information to demonstrate that the State will 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 § 300.589 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 must 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. 612(a)(19))

§ 300.155 Policies and procedures for use of Part B funds.

The State must have on file with the Secretary policies and procedures designed to ensure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B.

(Authority: 20 U.S.C. 1412(a)(18)(A))

§ 300.156 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 under § 300.602 will be used to meet the requirements of this part;

(2) How those amounts will be allocated among the activities described in §§ 300.621 and 300.370 to meet State priorities based on input from LEAs; and

(3) The percentage of those amounts, if any, that will be distributed to LEAs by formula.

(b) If a State's plans for use of its funds under §§ 300.370 and 300.620 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.

(Authority: 20 U.S.C. 1411(f)(5))

LEA and State Agency Eligibility—General

§ 300.180 Condition of assistance.

An LEA or State agency is eligible for assistance under Part B of the Act for a fiscal year if the agency demonstrates to the satisfaction of the SEA that it meets the conditions in §§ 300.220–300.250.

(Authority: 20 U.S.C. 1413(a))

§ 300.181 Exception for prior LEA or State agency policies and procedures on file with the SEA.

If an LEA or State agency described in § 300.194 has on file with the SEA policies and procedures that demonstrate that the LEA or State agency meets any requirement of § 300.180, including any policies and procedures filed under Part B of the Act as in effect before June 4, 1997, the SEA shall consider the LEA or State agency to have met the requirement for purposes of receiving assistance under Part B of the Act.

(Authority: 20 U.S.C. 1413(b)(1))

§ 300.182 Amendments to LEA policies and procedures.

(a) *Modification made by an LEA or a State agency.* (1) Subject to paragraph (b) of this section, policies and procedures submitted by an LEA or a State agency in accordance with this subpart remain in effect until it submits to the SEA the modifications that the LEA or State agency decides are necessary.

(2) The provisions of this subpart apply to a modification to an LEA's or State agency's policies and procedures in the same manner and to the same extent that they apply to the LEA's or State agency's original policies and procedures.

(b) *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 this part, if—

(1) After June 4, 1997, the provisions of the Act or the regulations in this part are amended;

(2) There is a new interpretation 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))

§ 300.183 [Reserved]

§ 300.184 Excess cost requirement.

(a) *General.* Amounts provided to an LEA under Part B of the Act may be used only to pay the excess costs of providing special education and related services to children with disabilities.

(b) *Definition.* As used in this part, the term *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 or secondary school student, as may be appropriate. Excess costs must be computed after deducting—

(1) Amounts received—

(i) Under Part B of the Act;

(ii) Under Part A of title I of the Elementary and Secondary Education Act of 1965; or

(iii) Under Part A of title VII of that Act; and

(2) Any State or local funds expended for programs that would qualify for assistance under any of those parts.

(c) *Limitation on use of Part B funds.* (1) 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 (c)(2) of this section.

(2) 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 in that age range. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(Authority: 20 U.S.C. 1401(7), 1413(a)(2)(A))

§ 300.185 Meeting the excess cost requirement.

(a)(1) *General.* 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.

(2) The amount described in paragraph (a)(1) of this section is determined using the formula in § 300.184(b). This amount may not include capital outlay or debt service.

(b) *Joint establishment of eligibility.* If two or more LEAs jointly establish eligibility in accordance with § 300.190, the minimum average amount is the average of the combined minimum average amounts determined under § 300.184 in those agencies for elementary or secondary school students, as the case may be.

(Authority: 20 U.S.C. 1413(a)(2)(A))

Note: The excess cost requirement means that the LEA must spend a certain minimum amount for the education of its children with disabilities before Part B funds are used. This ensures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district in elementary or secondary school as the case may be.

Excess costs are those costs of special education and related services that exceed the minimum amount. Therefore, if an LEA can show that it has (on the average) spent the minimum amount for the education of each of its children with disabilities, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs.

§§ 300.186–300.189 [Reserved]

§ 300.190 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 would be ineligible under this section because the agency would 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 it 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 §§ 300.711–300.714 if the agencies were eligible for these payments.

(Authority: 20 U.S.C. 1413(e) (1), and (2))

§ 300.191 [Reserved]

§ 300.192 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 §§ 300.121–300.156; 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 §§ 300.190–300.192, an educational service agency shall provide for the education of children with disabilities in the least restrictive environment, as required by § 300.130.

(Authority: 20 U.S.C. 1413(e) (3), and (4))

§ 300.193 [Reserved]

§ 300.194 State agency eligibility.

Any State agency that desires to receive a subgrant for any fiscal year under §§ 300.711–300.714 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(i))

§ 300.195 [Reserved]

§ 300.196 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, the SEA shall—

(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))

§ 300.197 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 section is failing to comply with any requirement described in §§ 300.220–300.250, the SEA shall reduce or may 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 shall, 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) In carrying out its functions under this section, each SEA shall consider any decision resulting from a hearing under §§ 300.507–300.528 that is adverse to the LEA or State agency involved in the decision.

(Authority: 20 U.S.C. 1413(d))

LEA Eligibility—Specific Conditions

§ 300.220 Consistency with State policies.

(a) *General.* 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 §§ 300.121–300.156.

(b) *Policies on file with SEA.* The LEA must have on file with the SEA the policies and procedures described in paragraph (a) of this section.

(Authority: 20 U.S.C. 1413(a)(1))

§ 300.221 LEA and State agency implementation of CSPD.

The LEA must have on file with the SEA information to demonstrate that—

(a) All personnel necessary to carry out Part B of the Act within the jurisdiction of the agency are appropriately and adequately prepared, consistent with the requirements of §§ 300.380–300.382; and

(b) To the extent the LEA determines appropriate, it shall contribute to and use the comprehensive system of personnel development of the State established under § 300.135.

(Authority: 20 U.S.C. 1413(a)(3))

§ 300.222–300.229 [Reserved]

§ 300.230 Use of amounts.

The LEA must have on file with the SEA information to demonstrate that amounts provided to the LEA under Part B of the Act—

(a) Will be expended in accordance with the applicable provisions of this part;

(b) Will be used only to pay the excess costs of providing special education and related services to children with disabilities, consistent with §§ 300.184–300.185; and

(c) Will be used to supplement State, local, and other Federal funds and not to supplant those funds.

(Authority: 20 U.S.C. 1413(a)(2)(A))

§ 300.231 Maintenance of effort.

(a) *General.* Except as provided in § 300.232 and § 300.233, funds provided to the LEA under Part B of the Act may 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) *Information.* The LEA must have on file with the SEA information to demonstrate that the requirements of paragraph (a) of this section are met.

(Authority: 20 U.S.C. 1413(a)(2)(A))

§ 300.232 Exception to maintenance of effort.

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—

(a) The voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel, who are replaced by qualified, lower-salaried staff;

(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; or

(d) The termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities.

(Authority: 20 U.S.C. 1413(a)(2)(B))

Note: With respect to the voluntary departure of special education personnel described in paragraph (a) of this section, the House Committee Report on Pub. L. 105–17 (1) clarifies that the intended focus of this exception is on special education personnel who are paid at or near the top of the salary schedule, and (2) sets out guidelines under which this exception may be invoked by an LEA:

This exception is included in recognition that, in some situations, when higher-salaried personnel depart from their positions in special education, they are replaced by qualified, lower-salaried staff. In such situations, as long as certain safeguards are in effect, the LEA should not be required to maintain the level of the higher-salaried personnel. In order for the LEA to invoke this exception, the agency must ensure that such voluntary retirement or resignation and replacement are in full conformity with existing school board policies in the agency, with the applicable collective bargaining agreement in effect at that time, and with applicable State statutes. (H. Rep. 105–95, p. 96 (1997))

§ 300.233 Treatment of federal funds in certain fiscal years.

(a)(1) Subject to paragraphs (a)(2) and (b) of this section, for any fiscal year for which amounts appropriated to carry out section 611 of the Act exceeds $4,100,000,000, an LEA may treat as local funds up to 20 percent of the amount of funds it receives under Part B of the Act that exceeds the amount it received under Part B of the Act for the previous fiscal year.

(2) The requirements of §§ 300.230(c) and 300.231 do not apply with respect to the amount that may be treated as local funds under paragraph (a)(1) of this section.

(b) If an SEA determines that an LEA is not meeting the requirements of this part, the SEA may prohibit the LEA from treating funds received under Part B of the Act as local funds under paragraph (a)(1) of this section for any fiscal year, but only if it is authorized to do so by the State constitution or a State statute.

(Authority: 20 U.S.C. 1413(a)(2)(C))

§ 300.234 Schoolwide programs under title I of the ESEA.

(a) 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 Elementary and Secondary Education Act of 1965, except that the amount used in any program may not exceed—

(1)(i) The amount received by the LEA under Part B for that fiscal year; divided by

(ii) The number of children with disabilities in the jurisdiction of the LEA; multiplied by

(2) The number of children with disabilities participating in the schoolwide program.

(b) The funds described in paragraph (a) of this section may be used without regard to the requirements of § 300.230(a).

(c) The funds described in paragraph (a) of this section must be considered as Federal Part B funds for purposes of the calculations required by §§ 300.230 (b) and (c).

(d) Except as provided in paragraphs (b) and (c) of this section, all other requirements of Part B must be met by an LEA using Part B funds in accordance with paragraph (a) of this section.

Note: Although IDEA funds may be combined in a schoolwide project, and thus used for services that are not special education and related services, all other requirements of the IDEA must still be met for children with disabilities in schoolwide project schools that combine IDEA funds in a schoolwide project. Thus, children with disabilities in schoolwide project schools must still receive services in accordance with a properly developed IEP and must still be afforded all of the rights and services guaranteed to children with disabilities under the IDEA.

(Authority: 20 U.S.C. 1413(a)(2)(D))

§ 300.235 Permissive use of funds.

(a) *General.* Subject to paragraph (b) of this section, 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) *Integrated and coordinated services system.* To develop and implement a fully integrated and coordinated services system in accordance with § 300.244.

(b) *Application for certain use of funds.* An LEA does not violate §§ 300.152, 300.230, and 300.231 based on its use of funds provided under Part B of the Act in accordance with

paragraphs (a)(1) and (a)(2) of this section.

(Authority: 20 U.S.C. 1413(a)(4))

§ 300.236–300.239 [Reserved]

§ 300.240 Information for SEA.

(a) The LEA shall 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 §§ 300.137 and 300.138, information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act.

(b) The LEA must have on file with the SEA an assurance satisfactory to the SEA that the LEA will comply with the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1413(a)(6))

§ 300.241 Treatment of charter schools and their students.

The LEA must have on file with the SEA information to demonstrate that in carrying out this part with respect to charter schools that are public schools of the LEA, the LEA will—

(a) Serve children with disabilities attending those schools in the same manner as it serves children with disabilities in its other schools; and

(b) Provide funds under Part B of the Act to those schools in the same manner as it provides those funds to its other schools.

(Authority: 20 U.S.C. 1413(a)(5))

Note: The provisions of this part that apply to other public schools also apply to public charter schools. Therefore, children with disabilities who attend public charter schools and their parents retain all rights under this part. With respect to this provision, the House Committee Report on Pub. L. 105–17 states:

''The Committee expects that charter schools will be in full compliance with Part B.'' (H. Rep. 105–95, p. 97 (1997))

§ 300.242 Public information.

The LEA must have on file with the SEA information to demonstrate to the satisfaction of the SEA that it will 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)(7))

§ 300.243 [Reserved]

§ 300.244 Coordinated services system.

(a) *General.* An LEA may not use more than 5 percent of the amount the agency receives under Part B of the Act for any fiscal year, in combination with other amounts (which must include amounts other than education funds), to develop and implement a coordinated services system designed to improve results for children and families, including children with disabilities and their families.

(b) *Activities.* In implementing a coordinated services system under this section, an LEA may carry out activities that include—

(1) Improving the effectiveness and efficiency of service delivery, including developing strategies that promote accountability for results;

(2) Service coordination and case management that facilitate the linkage of IEPs under Part B of the Act and IFSPs under Part C of the Act with individualized service plans under multiple Federal and State programs, such as title I of the Rehabilitation Act of 1973 (vocational rehabilitation), title XIX of the Social Security Act (Medicaid), and title XVI of the Social Security Act (supplemental security income);

(3) Developing and implementing interagency financing strategies for the provision of education, health, mental health, and social services, including transition services and related services under the Act; and

(4) Interagency personnel development for individuals working on coordinated services.

(c) *Coordination with certain projects under Elementary and Secondary Education Act of 1965.* If an LEA is carrying out a coordinated services project under title XI of the Elementary and Secondary Education Act of 1965 and a coordinated services project under Part B of the Act in the same schools, the agency shall use the amounts under §§ 300.244 in accordance with the requirements of that title.

(Authority: 20 U.S.C. 1413(f))

§ 300.245 School-based improvement plan.

(a) *General.* Each LEA may, in accordance with paragraph (b) of this section, use funds made available under Part B of the Act to permit a public school within the jurisdiction of the LEA to design, implement, and evaluate a school-based improvement plan that is consistent with the purposes described in section 651(b) of the Act and that is designed to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with § 300.235 (a) and (b) in that public school.

(b) *Authority.*

(1) *General.* A SEA may grant authority to an LEA to permit a public school described in § 300.245 (through a school-based standing panel established under § 300.247(b)) to design, implement, and evaluate a school-based improvement plan described in § 300.245 for a period not to exceed 3 years.

(2) *Responsibility of LEA.* If a SEA grants the authority described in paragraph (b)(1) of this section, an LEA that is granted this authority must have the sole responsibility of oversight of all activities relating to the design, implementation, and evaluation of any school-based improvement plan that a public school is permitted to design under this section.

(Authority: 20 U.S.C. 1413 (g)(1) and (g)(2)).

§ 300.246 Plan requirements.

A school-based improvement plan described in § 300.245 must—

(a) Be designed to be consistent with the purposes described in section 651(b) of the Act and to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with § 300.235 (a) and (b), who attend the school for which the plan is designed and implemented;

(b) Be designed, evaluated, and, as appropriate, implemented by a school-based standing panel established in accordance with § 300.247(b);

(c) Include goals and measurable indicators to assess the progress of the public school in meeting these goals; and

(d) Ensure that all children with disabilities receive the services described in their IEPs.

(Authority: 20 U.S.C. 1413(g)(3))

§ 300.247 Responsibilities of the LEA.

An LEA that is granted authority under § 300.245(b) to permit a public school to design, implement, and evaluate a school-based improvement plan shall—

(a) Select each school under the jurisdiction of the agency that is eligible to design, implement, and evaluate the plan;

(b) Require each school selected under paragraph (a) of this section, in accordance with criteria established by the LEA under paragraph (c) of this section, to establish a school-based standing panel to carry out the duties described in § 300.246(b);

(c) Establish—

(1) Criteria that must be used by the LEA in the selection of an eligible school under paragraph (a) of this section;

(2) Criteria that must be used by a public school selected under paragraph (a) of this section in the establishment of a school-based standing panel to carry out the duties described in

§ 300.246(b) and that ensure that the membership of the panel reflects the diversity of the community in which the public school is located and includes, at a minimum—

(i) Parents of children with disabilities who attend a public school, including parents of children with disabilities from unserved and underserved populations, as appropriate;

(ii) Special education and general education teachers of public schools;

(iii) Special education and general education administrators, or the designee of those administrators, of those public schools; and

(iv) Related services providers who are responsible for providing services to the children with disabilities who attend those public schools; and

(3) Criteria that must be used by the LEA with respect to the distribution of funds under Part B of the Act to carry out this section;

(d) Disseminate the criteria established under paragraph (c) of this section to local school district personnel and local parent organizations within the jurisdiction of the LEA;

(e) Require a public school that desires to design, implement, and evaluate a school-based improvement plan to submit an application at the time, in the manner and accompanied by the information, that the LEA shall reasonably require; and

(f) Establish procedures for approval by the LEA of a school-based improvement plan designed under Part B of the Act.

(Authority: 20 U.S.C. 1413(g)(4))

§ 300.248 Limitation.

A school-based improvement plan described in § 300.245(a) may be submitted to an LEA for approval only if a consensus with respect to any matter relating to the design, implementation, or evaluation of the goals of the plan is reached by the school-based standing panel that designed the plan.

(Authority: 20 U.S.C. 1413(g)(5))

§ 300.249 Additional requirements.

(a) *Parental involvement.* In carrying out the requirements of §§ 300.245–300.250, an LEA shall ensure that the parents of children with disabilities are involved in the design, evaluation, and, if appropriate, implementation of school-based improvement plans in accordance with this section.

(b) *Plan approval.* An LEA may approve a school-based improvement plan of a public school within the jurisdiction of the agency for a period of 3 years, if—

(1) The approval is consistent with the policies, procedures, and practices established by the LEA and in accordance with §§ 300.245–300.250; and

(2) A majority of parents of children who are members of the school-based standing panel, and a majority of other members of the school-based standing panel that designed the plan, agree in writing to the plan.

(Authority: 20 U.S.C. 1413(g)(6))

§ 300.250 Extension of plan.

If a public school within the jurisdiction of an LEA meets the applicable requirements and criteria described in §§ 300.246 and 300.247 at the expiration of the 3-year approval period described § 300.249(b), the agency may approve a school-based improvement plan of the school for an additional 3-year period.

(Authority: 20 U.S.C. 1413(g)(7))

Secretary of the Interior— Eligibility

§ 300.260 Submission of information.

The Secretary may provide the Secretary of the Interior amounts under § 300.715 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)–(9), (10) (B), (C), (11)–(12), (14)–(17), (20), (21) and (22) 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), (6) and (7) of the Act;

(d) Meets the requirements of this part that implement the sections of the Act listed in paragraphs (a)–(c) of this section;

(e) 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;

(f) 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 described in paragraph (a) of this section;

(g) Includes an assurance that the Secretary of the Interior will provide the information that the Secretary may require to comply with section 618 of the Act, including data on the number of children and youth with disabilities served and the types and amounts of services provided and needed;

(h) 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 State and LEAs and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations (the agreement must provide for the apportionment of responsibilities and costs including, but not limited to, child find, evaluation, diagnosis, remediation or therapeutic measures, and (if appropriate) equipment and medical or personal supplies as needed for a child to remain in school or a program).

(i) Includes an assurance that the Department of the Interior will cooperate with the Department in its exercise of monitoring and oversight of this application, 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. Section 616(a) of the Act applies to the information described in this section.

(Authority: 20 U.S.C. 1411(i)(2))

§ 300.261 Public participation.

In fulfilling the requirements of § 300.260 the Secretary of the Interior shall provide for public participation consistent with §§ 300.280–300.284.

(Authority: 20 U.S.C. 1411(i))

§ 300.262 Use of Part B funds.

(a) The Department of the Interior may use five percent of its payment under § 300.715 in any fiscal year, or $500,000, whichever is greater, for administrative costs in carrying out the provisions of this part.

(b) Payments to the Secretary of the Interior under § 300.716 must be used in accordance with that section.

(Authority: 20 U.S.C. 1411(i))

§ 300.263 Plan for coordination of services.

(a) The Secretary of the Interior shall 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 these 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 shall 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, State and 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(i)(4))

§ 300.264 Definitions.

(a) *Indian.* As used in this part, the term *Indian* means an individual who is a member of an Indian tribe.

(b) *Indian tribe.* As used in this part, the term *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).

(Authority: 20 U.S.C. 1401(9) and (10))

§ 300.265 Establishment of advisory board.

(a) To meet the requirements of section 612(a)(21) of the Act, the Secretary of the Interior shall establish, not later than December 4, 1997 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 the 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 shall—

(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's responsibilities described in section 611(i) 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 educational programming for Indian infants, toddlers, and children with disabilities; and

(5) Provide assistance in the preparation of information required under § 300.260(g).

(Authority: 20 U.S.C. 1411(i)(5))

§ 300.266 Annual reports.

The advisory board established under § 300.265 shall prepare and submit to the Secretary of the Interior and to the Congress an annual report containing a description of the activities of the advisory board for the preceding year.

(Authority: 20 U.S.C. 1411(i)(6)(A))

§ 300.267 Applicable regulations.

The Secretary of the Interior shall comply with the requirements of §§ 300.301–300.303, 300.305–300.309, 300.340–300.348, 300.351, 300.360–300.382, 300.400–300.402, 300.500–300.586, 300.600–300.621, and 300.660–300.662.

(Authority: 20 U.S.C. 1411(i)(2)(A))

Public Participation

§ 300.280 Public hearings before adopting State policies and procedures.

Prior to its adoption of State policies and procedures related to this part, the SEA shall—

(a) Make the policies and procedures available to the general public;

(b) Hold public hearings; and

(c) Provide an opportunity for comment by the general public on the policies and procedures.

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

§ 300.281 Notice.

(a) The SEA shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the general public about—

(1) The purpose and scope of the State policies and procedures and their relation to Part B of the Act;

(2) The availability of the State policies and procedures;

(3) The date, time, and location of each public hearing;

(4) The procedures for submitting written comments about the policies and procedures; and

(5) The timetable for submitting the policies and procedures to the Secretary for approval.

(c) The notice must be published or announced—

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings; and

(2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

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

§ 300.282 Opportunity to participate; comment period.

(a) The SEA shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The policies and procedures must be available for comment for a period of at least 30 days following the date of the notice under § 300.281.

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

§ 300.283 Review of public comments before adopting policies and procedures.

Before adopting the policies and procedures, the SEA shall—

(a) Review and consider all public comments; and

(b) Make any necessary modifications in those policies and procedures.

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

§ 300.284 Publication and availability of approved policies and procedures.

After the Secretary approves a State's policies and procedures, the SEA shall give notice in newspapers or other media, or both, that the policies and procedures are approved. The notice must name places throughout the State where the policies and procedures are available for access by any interested person.

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

Subpart C—Services

Free Appropriate Public Education.

§ 300.300 Provision of FAPE.

(a) *General.* Subject to paragraphs (b) and (c) of this section and § 300.311, each State receiving assistance under this part shall ensure that FAPE is available to all children with disabilities, aged 3 through 21, residing in the State, including children with disabilities who have been suspended or expelled from school.

(b) *Exception for age ranges 3–5 and 18–21.* (1) This paragraph provides the rules for applying the requirements in paragraph (a) of this section to children with disabilities aged 3, 4, 5, 18, 19, 20 and 21 within the State:

(2) If State law or a court order requires the State to provide education

for children with disabilities in any disability category in any of these age groups, the State must make FAPE available to all children with disabilities of the same age who have that disability.

(3) If a public agency provides education to nondisabled children in any of these age groups, it must make FAPE available to at least a proportionate number of children with disabilities of the same age.

(4) If a public agency provides education to 50 percent or more of its children with disabilities in any disability category in any of these age groups, it must make FAPE available to all its children with disabilities of the same age who have that disability. This provision does not apply to children aged 3 through 5 for any fiscal year for which the State receives a grant under section 619(a)(1) of the Act.

(5) If a public agency provides education to a child with a disability in any of these age groups, it must make FAPE available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(6) A State is not required to make FAPE available to a child with a disability in one of these age groups if—

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nondisabled children in that age group; or

(ii) The requirement is inconsistent with a court order that governs the provision of free public education to children with disabilities in that State.

(c) *Children aged 3 through 21 on Indian reservations.* With the exception of children identified in § 300.715(b) and (c), the SEA shall ensure that all of the requirements of Part B are implemented for all children aged 3 through 21 on reservations.

(Authority: 20 U.S.C. 1412(a)(1), 1411(i)(1)(C), S. Rep. No. 94–168, p. 19 (1975))

Note 1: The requirement to make FAPE available applies to all children with disabilities within the State who are in the age ranges required under § 300.300 and who need special education and related services. This includes children with disabilities already in school and children with less severe disabilities.

Note 2: In order to be in compliance with § 300.300, each State must ensure that the requirement to identify, locate, and evaluate all children with disabilities is fully implemented by public agencies throughout the State.

Note 3: Under the Act, the age range for the child find requirement (birth through 21) is greater than the mandated age range for providing FAPE. One reason for the broader age requirement under ''child find'' is to enable States to be aware of and plan for younger children who will require special education and related services, especially in any case in which infants and toddlers with disabilities are not participating in the early intervention program under Part C of the Act. It also ties in with the full educational opportunity goal requirement that has the same age range as child find. Moreover, while a State is not required to provide FAPE to children with disabilities below the age ranges mandated under § 300.300, the State may, at its discretion, extend services to those children. (See note 3 following § 300.125 regarding the relationship between the child find requirements under Part B of the Act and those under Part C of the Act.)

§ 300.301 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.

(Authority: 20 U.S.C. 1401(8), 1412(a)(1))

§ 300.302 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))

Note: This requirement applies to placements that are made by public agencies for educational purposes, and includes placements in State-operated schools for children with disabilities, such as a State school for students with deafness or students with blindness.

§ 300.303 Proper functioning of hearing aids.

Each public agency shall ensure that the hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

(Authority: 20 U.S.C. 1412(a)(1))

Note: The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services. H. R. Rep. No. 95–381, p. 67 (1977)

§ 300.304 Full educational opportunity goal.

Each SEA shall ensure that each public agency establishes and implements a goal of providing full educational opportunity to all children with disabilities in the area served by the public agency.

(Authority: 20 U.S.C. 1412(a)(2))

Note: In meeting the full educational opportunity goal, the Congress also encouraged LEAs to include artistic and cultural activities in programs supported under Part B of the Act. This point is addressed in the following statements from the Senate Report on Pub. L. 94–142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that LEAs include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in federally supported education programs enunciated in the Education Amendments of 1974, the Committee also urges LEAs to include museums in programs for the handicapped funded under this Act. (S. Rep. No. 94–168, p. 13 (1975))

§ 300.305 Program options.

Each public agency shall take 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))

Note: The list of program options is not exhaustive, and could include any program or activity in which nondisabled students participate.

§ 300.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and

extracurricular services and activities in the manner as is 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))

§ 300.307 Physical education.

(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 shall 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 shall 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)(25), 1412(a)(5)(A))

Note: The Report of the House of Representatives on Public Law 94–142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * * * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child. (H.R. Rep. No. 94–332, p. 9 (1975))

§ 300.308 Assistive technology.

Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5–300.6, are made available to a child with a disability if required as a part of the child's—

(a) Special education under § 300.24;

(b) Related services under § 300.22; or

(c) Supplementary aids and services under §§ 300.26 and 300.550(b)(2).

(Authority: 20 U.S.C. 1412(a)(12)(B)(i))

§ 300.309 Extended school year services.

(a) *General.* (1) Subject to paragraph (a)(2) of this section, each public agency shall ensure that extended school year services are available to each child with a disability to the extent necessary to ensure that FAPE is available to the child.

(2) The determination of whether a child with a disability needs extended school year services must be made on an individual basis by the child's IEP team, in accordance with §§ 300.340–300.351.

(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))

Note 1: In implementing the requirements of this section, an LEA may not limit extended school year services to particular categories of disability or unilaterally limit the duration of services. Imposing those limitations would violate the individually-oriented focus of Part B of the Act. However, with respect to paragraph (b) of this section, nothing in this part requires that every child with a disability is entitled to, or must receive, extended school year services.

Note 2: States may establish standards for use in determining on an individual basis, whether a child with a disability needs extended school year services so long as those standards are not inconsistent with the requirements of Part B of the Act. Factors that States may wish to consider include: likelihood of regression, slow recoupment, and predictive data based on the opinion of professionals.

§ 300.310 [Reserved]

§ 300.311 FAPE requirements for students with disabilities in adult prisons.

(a) *Exception to FAPE for certain students.* The obligation to make FAPE available to all children with disabilities does not apply with respect to students 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—

(1) Were not actually identified as being a child with a disability under § 300.7; and

(2) Did not have an IEP under Part B of the Act.

(b) *Requirements that do not apply.* The following requirements do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(1) The requirements contained in § 300.138 and § 300.347(a)(5)(i) (relating to participation of children with disabilities in general assessments).

(2) The requirements in § 300.347(b) (relating to transition planning and transition services), with respect to the students 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.

(c) *Modifications of IEP or placement.* (1) Subject to paragraph (c)(2) of this section, the IEP team of a student with a disability, who is convicted as an adult under State law and incarcerated in an adult prison, may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(2) The requirements of §§ 300.340(a), 300.347(a) relating to IEPs, and 300.550(b) 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), 1414(d)(6))

Evaluations and Reevaluations

§ 300.320 Initial evaluations.

(a) Each public agency shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services under Part B of the Act—

(1) To determine if the child is a ''child with a disability'' under § 300.7; and

(2) To determine the educational needs of the child.

(b) In implementing the requirements of paragraph (a) of this section, the public agency shall ensure that—

(1) The evaluation is conducted in accordance with the procedures described in §§ 300.530—300.535; and

(2) The results of the evaluation are used by the child's IEP team in meeting the requirements of §§ 300.340—300.351.

(Authority: 20 U.S.C. 1414 (a) and (b))

§ 300.321 Reevaluations.

Each public agency shall ensure that—

(a) A reevaluation of each child with a disability is conducted in accordance with the requirements of §§ 300.530—330.536; and

(b) The results of any reevaluations are used by the child's IEP team under §§ 300.340–300.350 in reviewing and, as appropriate, revising the child's IEP.

(Authority: 20 U.S.C. 1414(a)(2))

§ 300.322–300.324 [Reserved]

Individualized Education Programs

§ 300.340 Definitions.

(a) As used in this part, the term *individualized education program* means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with §§ 300.341–300.351.

(b) As used in §§ 300.347 and 300.348, *participating agency* means a State or local agency, other than the public agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student.

(Authority: 20 U.S.C. 1401(11))

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The SEA shall ensure that each public agency develops and implements an IEP for each child with a disability served by that agency.

(b) *Private schools and facilities.* The SEA shall ensure that an IEP is developed and implemented for each child with a disability who—

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a religiously-affiliated school or other private school and receives special education or related services from a public agency.

(Authority: 20 U.S.C. 1412(a)(4), (a) (10) (A) and (B))

Note: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare) that provide special education to a child with a disability either directly, by contract, or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a child with a disability, that agency would be responsible for ensuring that an IEP is developed for the child.

§ 300.342 When IEPs must be in effect.

(a) At the beginning of each school year, each LEA, SEA, or other State agency, shall have in effect, for each child with a disability within its jurisdiction, an individualized education program, as defined in § 300.340.

(b) An IEP must—

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings described under § 300.343.

(c)(1) In the case of a child with a disability aged 3 through 5 (or, at the discretion of the SEA a 2-year-old child with a disability who will turn age 3 during the school year), an IFSP that contains the material described in section 636 of the Act, and that is developed in accordance with §§ 300.340–300.346 and 300.349–300.351, may serve as the IEP of the child if using that plan 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 (c)(1) of this section, the public agency shall—

(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.

(d)(1) All IEPs in effect on July 1, 1998 must meet the requirements of §§ 300.340–300.351.

(2) The provisions of §§ 300.340—300.350 that were in effect on June 3, 1997 remain in effect until July 1, 1998.

(Authority: 20 U.S.C. 1414(d)(2) (A) and (B), Pub. L. 105–17, sec. 201(a)(1)(C))

Note 1: It is expected that the IEP of a child with a disability will be implemented immediately following the meetings under § 300.343. Exceptions to this would be if (1) the meetings occur during the summer or a vacation period, unless the child requires services during that period, or (2) there are circumstances that require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

Note 2: Certain requirements regarding IEPs for students who are incarcerated in adult prisons apply as of June 4, 1997.

Note 3: At the time that a child with a disability moves from an early intervention program under Part C of the Act to a preschool program under this part, the parent, if the agency agrees, has the option, under paragraph (c) of this section, to allow the child to continue receiving early intervention services under an IFSP, or to begin receiving special education and related services in accordance with an IEP. Because of the importance of the IEP as the statutory vehicle for ensuring FAPE to a child with a disability, paragraph (c)(2) of this section provides that the parents' agreement to use an IFSP for the child instead of an IEP requires written informed consent by the parents that is based on an explanation of the differences between an IFSP and an IEP.

§ 300.343 IEP meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an IFSP described in section 636 of the Act for each child with a disability, aged 3 through 5).

(b) *Timelines.* (1) Each public agency shall ensure that an offer of services in accordance with an IEP is made to parents within a reasonable period of time from the agency's receipt of parent consent to an initial evaluation.

(2) In meeting the timeline in paragraph (b)(1) of this section, a meeting to develop an IEP for the child must be conducted within 30-days of a determination that the child needs special education and related services.

(c) *Review and revision of IEP.* Each public agency shall ensure that the IEP team—

(1) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(2) Revises the IEP as appropriate to address—

(i) Any lack of expected progress toward the annual goals described in § 300.347(a), and in the general curriculum, if appropriate;

(ii) The results of any reevaluation conducted under this section;

(iii) Information about the child provided to, or by, the parents, as described in § 300.533(a)(1);

(iv) The child's anticipated needs; or

(v) Other matters.

(Authority: 20 U.S.C. 1414(d)(3))

Note: For most children, it would be reasonable to expect that a public agency offer services in accordance with an IEP within 60 days of receipt of parent consent to initial evaluation.

§ 300.344 IEP team.

(a) *General.* The public agency shall ensure that the IEP team for each child with a disability includes—

(1) The parents of the child;

(2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(3) At least one special education teacher, or if appropriate, at least one special education provider of the child;

(4) A representative of the LEA 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 curriculum; and

(iii) Is knowledgeable about the availability of resources of the LEA;

(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 (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) If appropriate, the child.

(b) *Transition services participants.* (1) Under paragraph (a)(7) of this section, the public agency shall invite a student with a disability of any age if a purpose of the meeting will be the consideration of the statement of transition services needs or statement of needed transition services for the student under § 300.347(b)(1).

(2) If the student does not attend the IEP meeting, the public agency shall take other steps to ensure that the student's preferences and interests are considered.

(3)(i) In implementing the requirements of paragraph (b)(1) of this section, the public agency also shall invite a representative of any other agency that is likely to be responsible for providing or paying for transition services.

(ii) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain participation of the other agency in the planning of any transition services.

(Authority: 20 U.S.C. 1414(d)(1)(B))

Note: The regular education teacher participating in a child's IEP meeting should be the teacher who is, or may be, responsible for implementing the IEP, so that the teacher can participate in discussions about how best to teach the child.

If the child has more than one teacher, the LEA may designate which teacher or teachers will participate. In a situation in which all of the child's teachers do not participate in the IEP meeting, the LEA is encouraged to seek input from teachers who will not be attending, and should ensure that any teacher not attending the meeting is informed about the results of the meeting (including receiving a copy of the IEP). In the case of a child whose behavior impedes the learning of the child or others, the LEA is encouraged to have a person knowledgeable about positive behavior strategies at the IEP meeting.

Similarly, the special education teacher or provider participating in a child's IEP meeting should be the person who is, or will be, responsible for implementing the IEP. If, for example, the child's disability is a speech impairment, the teacher could be the speech-language pathologist.

§ 300.345 Parent participation.

(a) Each public agency shall 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)(1) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance.

(2) For a student with a disability beginning at age 14, or younger, if appropriate, the notice must also—

(i) Indicate that a purpose of the meeting will be the development of a statement of the transition services needs of the student required in § 300.347(b)(1)(i); and

(ii) Indicate that the agency will invite the student.

(3) For a student with a disability beginning at age 16, or younger, if appropriate, the notice must—

(i) Indicate that a purpose of the meeting is the consideration of needed transition services for the student required in § 300.347(b)(1)(ii);

(ii) Indicate that the agency will invite the student; and

(iii) Identify any other agency that will be invited to send a representative.

(c) If neither parent can attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

(d) 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 have a record of its attempts to arrange a mutually agreed on time and place, such as—

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the IEP.

(Authority: 20 U.S.C. 1414(d)(1)(B)(i))

Note: The notice in paragraph (a) of this section could also inform parents that they may bring other people to the meeting consistent with § 300.344(a)(6). As indicated in paragraph (d) of this section, the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 300.346 Development, review, and revision of IEP.

(a) *Development of IEP.*

(1) *General.* In developing each child's IEP, the IEP team, shall consider—

(i) The strengths of the child and the concerns of the parents for enhancing the education of their child; and

(ii) The results of the initial or most recent evaluation of the child.

(2) *Consideration of special factors.* The IEP team also shall—

(i) In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as these 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 requires assistive technology devices and services.

(b) *Review and Revision of IEP*. In conducting a meeting to review, and, if appropriate, revise a child's IEP, the IEP team shall consider the factors described in paragraph (a) of this section.

(c) *Statement in IEP*. If, in considering the special factors described in paragraph (a) (1) and (2) of this section, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP.

(d) *Requirement with respect to regular education teacher*. The 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, review, and revision of the child's IEP, including assisting in—

(1) The determination of appropriate positive behavioral interventions and strategies for the child; and

(2) The determination of supplementary aids and services, program modifications, and supports for school personnel, consistent with § 300.347(a)(3).

(e) *Construction*. Nothing in this section shall be construed to require 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) (3) and (4)(B) and (e))

Note 1: The requirements of paragraph (a)(2) of this section (relating to consideration of special factors) were added by Pub. L. 105–17. These considerations are essential in assisting the IEP team to develop meaningful goals and other components of a child's IEP, if the considerations point to factors that could impede learning. The results of considering these special factors must, if appropriate, be reflected in the IEP goals, services, and provider responsibilities. As appropriate, consideration of these factors must include a review of valid evaluation data and the observed needs of the child resulting from the evaluation process.

Note 2: With respect to paragraph (a)(2)(iv) of this section (relating to special considerations for a child who is deaf or hard of hearing), the House Committee Report on Pub. L. 105–17 states that the IEP team should implement the provision in a manner consistent with the policy guidance entitled ''Deaf Students Education Services,'' published in the **Federal Register** (57 FR 49274, October 30, 1992) by the Department (H. Rep. No. 105–95, p–104 (1997))

Note 3: In developing an IEP for a child with limited English proficiency (LEP), the IEP team must consider how the child's level of English language proficiency affects special education and related services that the child needs in order to receive FAPE. Under Title VI of the Civil Rights Act of 1964, school districts are required to provide LEP students with alternative language services to enable the student to acquire proficiency in English and to provide the student with meaningful access to the content of the educational curriculum that is available to all students, including special education and related services. A LEP student with a disability may require special education and related services for those aspects of the educational program which address the development of English language skills and other aspects of the student's educational program. For a LEP student with a disability, under paragraph (c) of this section, the IEP must address whether the special education and related services that the child needs will be provided in a language other than English.

§ 300.347 Content of IEP.

(a) *General*. The IEP for each child must include—

(1) A statement of the child's present levels of educational performance, including—

(i) How the child's disability affects the child's involvement and progress in the general curriculum; or

(ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(2) A statement of measurable annual goals, including benchmarks or short-term objectives, related to—

(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(ii) Meeting each of the child's other educational needs that result from the child's disability;

(3) A statement of the special education and related services and supplementary aids and services 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 for the child—

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved and progress in the general 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 paragraph;

(4) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(3) of this section;

(5)(i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and

(ii) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of—

(A) Why that assessment is not appropriate for the child; and

(B) How the child will be assessed;

(6) The projected date for the beginning of the services and modifications described in paragraph (a)(3) of this section, and the anticipated frequency, location, and duration of those services and modifications; and

(7) A statement of—

(i) How the child's progress toward the annual goals described in paragraph (a)(2) of this section will be measured; and

(ii) How the child's parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of—

(A) Their child's progress toward the annual goals; and

(B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(b) *Transition services*. (1) The IEP must include—

(i) For each student beginning at age 14 and younger if appropriate, and updated annually, a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education program); and

(ii) For each student beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

(2) If the IEP team determines that services are not needed in one or more of the areas specified in § 300.27(c)(1) through (c)(4), the IEP must include a

statement to that effect and the basis upon which the determination was made.

(c) *Transfer of rights.* Beginning at least one year before a student reaches the age of majority under State law, the student's IEP must include a statement that the student has been informed of his or her rights under Part B of the Act, if any, that will transfer to the student on reaching the age of majority, consistent with § 300.517.

(d) *Students with disabilities convicted as adults and incarcerated in adult prisons.* Special rules concerning the content of IEPs for students with disabilities convicted as adults and incarcerated in adult prisons are contained in § 300.311(b) and (c).

(Authority: 20 U.S.C. 1414(d)(1)(A) and (d)(6)(A)(ii))

Note 1: Although the statute does not mandate transition services for all students below the age of 16, the provision of these services could have a significantly positive effect on the employment and independent living outcomes for many of these students in the future, especially for students who are likely to drop out before age 16.

Note 2: The IEP provisions added by Pub. L. 105–17 are intended to provide greater access by children with disabilities to the general curriculum and to educational reforms, as an effective means of ensuring better results for these children in preparing them for employment and independent living.

With respect to increased emphasis on the general curriculum, the House Committee Report on Pub. L. 105–17 includes the following statement:

The Committee wishes to emphasize that, once a child has been identified as being eligible for special education, the connection between special education and related services and the child's opportunity to experience and benefit from the general education curriculum should be strengthened. The majority of children identified as eligible for special education and related services are capable of participating in the general education curriculum to varying degrees with some adaptations and modifications. This provision is intended to ensure that children's special education and related services are in addition to and are affected by the general education curriculum, not separate from it. (H. Rep. No. 105–95, p-99 (1997))

Note 3: With respect to the impact on States and LEAs in implementing the new IEP provisions relating to accessing the general curriculum, the House Committee Report on Pub. L. 105–17 includes the following statement:

The new emphasis on participation in the general education curriculum is not intended by the Committee to result in major expansions in the size of the IEP of dozens of pages of detailed goals and benchmarks or objectives in every curricular content standard skill. The new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general education curriculum and the special services which may be necessary for the appropriate participation in particular areas of the curriculum due to the nature of the disability.

Note 4: With respect to paragraph (a) of this section, the House Committee Report on Pub. L. 105–17 includes the following statement:

The Committee intends that, while teaching and related services methodologies or approaches are an appropriate topic for discussion and consideration by the IEP team during IEP development or annual review, they are not expected to be written into the IEP. Furthermore, the Committee does not intend that changing particular methods or approaches necessitates an additional meeting of the IEP team.

Specific day to day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP team. However, if changes are contemplated in the child's measurable annual goals, benchmarks, or short-term objectives, or in any of the services or program modifications, or other components described in the child's IEP, the LEA must ensure that the child's IEP team is reconvened in a timely manner to address those changes. (H. Rep. No. 105–95, pp-100–101 (1997))

Note 5: The provision in paragraph (a)(7)(ii) of this section concerning regularly informing parents of their child's progress toward annual goals and the extent to which this progress is sufficient to enable the child to achieve the goals by the end of the year is intended to be in addition to, rather than in place of, regular reporting to the parents (as for nondisabled children) of the child's progress in subjects or curricular areas for which the child is not receiving special education.

Note 6: With respect to paragraph (b)(1) of this section (relating to transition service needs beginning at age 14), the House Committee report on Pub. L. 105–17 includes the following statement:

The purpose of this requirement is to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school. This provision is designed to augment, and not replace, the separate transition services requirement, under which children with disabilities beginning no later than age sixteen receive transition services, including instruction, community experiences, the development of employment and other post-school objectives, and, when appropriate, independent living skills and functional vocational evaluation. For example, for a child whose transition goal is a job, a transition service could be teaching the child how to get to the job site on public transportation. (H. Rep. No. 105–95, p. 101 (1997))

Note 7: Each State must, at a minimum, ensure compliance with the transition services requirements in paragraph (b) of this section. However, it would not be a violation of this part for a public agency to begin planning for transition services needs and needed transition services for students younger than age 14 and age 16, respectively.

§ 300.348 Agency responsibilities for transition services.

(a) If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with § 300.347(b)(1)(ii), the local educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(b) 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 students with disabilities who meet the eligibility criteria of that agency.

(Authority: 20 U.S.C. 1414(d)(5); 1414(d)(1)(A)(vii))

§ 300.349 Private school placements by public agencies.

(a) *Developing individualized education programs.* (1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child in accordance with § 300.347.

(2) The agency shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(b) *Reviewing and revising individualized education programs.* (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 shall 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 program 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))

§ 300.350 Children with disabilities in religiously-affiliated or other private schools.

If a child with a disability is enrolled in a religiously-affiliated or other private school and receives special education or related services from a public agency, the public agency shall—

(a) Initiate and conduct meetings to develop, review, and revise an IEP for the child, in accordance with § 300.347; and

(b) Ensure that a representative of the religiously-affiliated or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school, including individual or conference telephone calls.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.351 Individualized education program—accountability.

Each public agency must provide special education and related services to a child with a disability in accordance with an IEP. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks or objectives.

(Authority: 20 U.S.C. 1414(d)); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Note: This section is intended to relieve concerns that the IEP constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the goals and objectives or benchmarks listed in the IEP. Part B is premised on children receiving the instruction, services and modifications that they need to enable them to make progress in their education. Further, the section does not limit a parent's right to complain and ask for revisions of the child's IEP, or to invoke due process procedures (§ 300.507), if the parent feels that these efforts are not being made. This section does not prohibit a State or public agency from establishing its own accountability systems regarding teacher, school or agency performance.

Direct Service by the SEA

§ 300.360 Use of LEA allocation for direct services.

(a) *General.* An SEA shall 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 local agency, or for whom that State agency is responsible, if the SEA determines that the LEA or State agency—

(1) Has not provided the information needed to establish the eligibility of the agency under Part B of the Act;

(2) Is unable to establish and maintain programs of FAPE that meet the requirements of this part;

(3) Is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain the programs; or

(4) 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.

(b) In meeting the requirements in paragraph (a) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements of §§ 300.184 and 300.185 do not apply to the SEA.

(Authority: 20 U.S.C. 1413(h)(1))

Note: The SEA, as a recipient of Part B funds, is responsible for ensuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If an LEA elects not to apply for its Part B allotment, the State would be required to use those funds to ensure that FAPE is made available to children residing in the area served by that local agency. However, if the local allotment is not sufficient for this purpose, additional State or local funds would have to be expended in order to ensure that FAPE and the other requirements of the Act are met.

Moreover, if the LEA is the recipient of any other Federal funds, it would have to be in compliance with 34 CFR 104.31–104.39 of the regulations implementing Section 504 of the Rehabilitation Act of 1973. It should be noted that the term ''FAPE'' has different meanings under Part B and Section 504. For example, under Part B, FAPE is a statutory term that requires special education and related services to be provided in accordance with an IEP. However, under Section 504, each recipient must provide an education that includes services that are ''designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *''. (34 CFR 104.33(b)). Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the FAPE requirement under section 504.

§ 300.361 Nature and location of services.

The SEA may provide special education and related services under § 300.360(a) in the manner and at the location it considers appropriate (including regional and State centers). However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions of §§ 300.550–300.556).

(Authority: 20 U.S.C. 1413(h)(2))

§§ 300.362–300.369 [Reserved]

§ 300.370 Use of State agency allocations.

(a) Each State shall use any funds it retains under § 300.602 and does not use for administration under § 300.620 for any of the following:

(1) Support and direct services, including technical assistance and personnel development and training.

(2) Administrative costs of monitoring and complaint investigation, but only to the extent that those costs exceed the costs incurred for those activities during fiscal year 1985.

(3) To establish and implement the mediation process required by § 300.506, including providing for the costs of mediators and support personnel.

(4) To assist LEAs in meeting personnel shortages.

(5) To develop a State Improvement Plan under subpart 1 of Part D of the Act.

(6) Activities at the State and local levels to meet the performance goals established by the State under § 300.137 and to support implementation of the State Improvement Plan under subpart 1 of Part D of the Act if the State receives funds under that subpart.

(7) To supplement other amounts 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 to exceed one percent of the amount received by the State under section 611 of the Act. This system must be coordinated with and, to the extent appropriate, build on the system of coordinated services developed by the State under Part C of the Act.

(8) For subgrants to LEAs for the purposes described in § 300.622.

(b) For the purposes of paragraph (a) of this section—

(1) *Direct services* means services provided to a child with a disability by the State directly, by contract, or through other arrangements; and

(2) *Support services* includes implementing the comprehensive system of personnel development under §§ 300.380–300.382, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to FAPE for children with disabilities.

(Authority: 20 U.S.C. 1411(f)(3))

§ 300.371 [Reserved]

§ 300.372 Applicability of nonsupplanting requirement.

A State may use funds it retains under § 300.602 without regard to—

(a) The prohibition on commingling of funds in § 300.152; and

(b) The prohibition on supplanting other funds in § 300.153.

(Authority: 20 U.S.C. 1411(f)(1)(C))

Comprehensive System of Personnel Development

§ 300.380 General.

(a) Each State shall develop and implement a comprehensive system of personnel development that—

(1) Is consistent with the purposes of this part and with section 635(a)(8) of the Act;

(2) Is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel;

(3) Meets the requirements of §§ 300.381 and 300.382; and

(4) Is updated at least every five years.

(b) A State that has a State improvement grant has met the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(14))

§ 300.381 Adequate supply of qualified personnel.

Each State must include, at least, an analysis of State and local needs for professional development for personnel to serve children with disabilities that includes, at a minimum—

(a) The number of personnel providing special education and related services; and

(b) Relevant information on current and anticipated personnel vacancies and shortages (including the number of individuals described in paragraph (a) of this section with temporary certification), and on the extent of certification or retraining necessary to eliminate these shortages, that is based, to the maximum extent possible, on existing assessments of personnel needs.

(Authority: 20 U.S.C. 1453(b)(2)(B))

§ 300.382 Improvement strategies.

Each State must describe the strategies the State will use to address the needs identified under § 300.381. These strategies must include how the State will address the identified needs for in-service and pre-service preparation to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the needs of children with disabilities. The plan must include a description of how—

(a) The State will prepare general and special education personnel with the content knowledge and collaborative skills needed to meet the needs of children with disabilities including how the State will work with other States on common certification criteria;

(b) The State will prepare professionals and paraprofessionals in the area of early intervention with the content knowledge and collaborative skills needed to meet the needs of infants and toddlers with disabilities;

(c) The State will work with institutions of higher education and other entities that (on both a pre-service and an in-service basis) prepare personnel who work with children with disabilities to ensure that those institutions and entities develop the capacity to support quality professional development programs that meet State and local needs;

(d) The State will work to develop collaborative agreements with other States for the joint support and development of programs to prepare personnel for which there is not sufficient demand within a single State to justify support or development of such a program of preparation;

(e) The State will work in collaboration with other States, particularly neighboring States, to address the lack of uniformity and reciprocity in credentialing of teachers and other personnel;

(f) The State will enhance the ability of teachers and others to use strategies, such as behavioral interventions, to address the conduct of children with disabilities that impedes the learning of children with disabilities and others;

(g) The State will acquire and disseminate, to teachers, administrators, school board members, and related services personnel, significant knowledge derived from educational research and other sources, and how the State will, if appropriate, adopt promising practices, materials, and technology;

(h) The State will recruit, prepare, and retain qualified personnel, including personnel with disabilities and personnel from groups that are under-represented in the fields of regular education, special education, and related services;

(i) The plan is integrated, to the maximum extent possible, with other professional development plans and activities, including plans and activities developed and carried out under other Federal and State laws that address personnel recruitment and training; and

(j) The State will provide for the joint training of parents and special education, related services, and general education personnel.

(Authority: 20 U.S.C. 1453 (c)(3)(D))

§ 300.383—300.387 [Reserved]

Subpart D—Children in Private Schools

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

§ 300.400 Applicability of §§ 300.400—300.402.

Sections §§ 300.401—300.402 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))

§ 300.401 Responsibility of SEA.

Each SEA shall 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 §§ 300.340—300.350;

(2) At no cost to the parents; and

(3) At a school or facility that meets the standards that apply to the SEA and LEAs (including the requirements of this part); and

(b) 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))

§ 300.402 Implementation by SEA.

In implementing § 300.401, the SEA shall—

(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))

§ 300.403 Placement of children by parent s if FAPE is at issue.

(a) *General.* Subject to § 300.451, 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.

(b) *Disagreements about FAPE.* Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of §§ 300.500—300.515.

(c) *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 elementary 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.

(d) *Limitation on reimbursement.* The cost of reimbursement described in paragraph (c) 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 (d)(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.

(e) *Exception.* Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide the notice if—

(1) The parent is illiterate and cannot write in English;

(2) Compliance with paragraph (d)(1) of this section would likely result in physical or serious emotional harm to the child;

(3) The school prevented the parent from providing the notice; or

(4) The parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1412(a)(10)(C))

Children With Disabilities Enrolled by Their Parents in Private Schools

§ 300.450 Definition of "private school children with disabilities."

As used in this part, *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 §§ 300.400–300.402.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.451 Child find for private school children with disabilities.

Each public agency must locate, identify and evaluate all private school children, including religiously-affiliated school children, who have disabilities residing in the jurisdiction of the agency in accordance with §§ 300.125 and 300.220.

(Authority: 20 U.S.C. 1412(a)(10)(A)(ii))

§ 300.452 Basic requirement—services.

To the extent consistent with their number and location in the State, provision must be made for the participation of private school children with disabilities in the program assisted or carried out under Part B of the Act by providing them with special education and related services in accordance with §§ 300.453–300.462.

(Authority: 20 U.S.C. 1412(a)(10)(A)(i))

§ 300.453 Expenditures.

To meet the requirement of § 300.452, each LEA must spend on providing special education and related services to private school children with disabilities—

(a) For children aged 3 through 21, an amount that is the same proportion of the LEA's total subgrant under sections 611(g) of the Act as the number of private school children with disabilities aged 3 through 21 residing in its jurisdiction is to the total number of children with disabilities in its jurisdiction aged 3 through 21; and

(b) For children aged 3 through 5, an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as the number of private school children with disabilities aged 3 through 5 residing in its jurisdiction is to the total number of children with disabilities in its jurisdiction aged 3 through 5.

(Authority: 20 U.S.C. 1412(a)(10)(A))

Note: SEAs and LEAs are not prohibited from providing services to private school children with disabilities in excess of those required by this part, consistent with State law or local policy.

§ 300.454 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. Decisions about the services that will be provided to private school children with disabilities under §§ 300.452–300.462, must be made in accordance with paragraphs (b), (c) and (d) of this section.

(b) *Consultation with representatives of private school children with disabilities.* Each LEA shall consult, in a timely and meaningful way, with appropriate representatives of private school children with disabilities in light of the funding under § 300.453, the number of private school children with disabilities, the needs of private school children with disabilities, and their location to decide—

(1) Which children will receive services under § 300.452;

(2) What services will be provided;

(3) How the services will be provided; and

(4) How the services provided will be evaluated.

(c) *Genuine opportunity.* Each LEA shall give appropriate representatives of private school children with disabilities a genuine opportunity to express their views regarding each matter that is subject to the consultation requirements in this section.

(d) *Timing.* The consultation required by paragraph (b) of this section must occur before the LEA makes any decision that affects the opportunities of private school children with disabilities to participate in services under §§ 300.452–300.462.

(e) *Decisions.* The LEA shall make the final decisions with respect to the services to be provided to eligible private school children.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.455 Services provided.

(a) *Comparable services.* The services provided private school children with disabilities must be comparable in

quality to services provided to children with disabilities enrolled in public schools.

(b) *Services provided in accordance with an IEP.* The IEP for each private school child with a disability who receives services under § 300.452 must address the services that the LEA has determined that it will provide the child in light of the services that the LEA has determined, through the process described in §§ 300.453–300.454, it will make available to private school children with disabilities.

(c) *Definition.* As used in this section, *comparable in quality*—

(1) Means that services provided private school children with disabilities must be provided by similarly qualified personnel;

(2) Does not require the same amount of service for private school children with disabilities as for children with disabilities in public schools; and

(3) Does not require that any particular child receive service or receive the same amount of service the child would receive in a public school.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.456 Location of services.

(a) *On-site.* Services provided to private school children with disabilities may be provided on-site at a child's private school, including a religiously-affiliated school, to the extent consistent with law.

(b) *Transportation.* (1) Transportation of private school children with disabilities to a site other than a child's private school must be provided if necessary for a child to benefit from or participate in the other services offered.

(2) The cost of that transportation may be included in calculating whether the LEA has met the requirement of § 300.453.

(Authority: 20 U.S.C. 1412(a)(10)(A))

Note 1: The decisions of the Supreme Court in *Zobrest v. Catalina Foothills School Dist.* (1993) and *Agostini v. Felton* (1997) make clear that LEAs may provide special education and related services on-site at religiously-affiliated private schools in a manner that does not violate the Establishment Clause of the First Amendment to the U. S. Constitution.

Note 2: With regard to transportation services, school districts are not required to provide transportation from the student's home to the private school, but only to the site where the services are offered, and either return the student to the private school or to the student's home, depending on the timing of the services.

§ 300.457 Complaints.

(a) *Due process inapplicable.* The procedures in §§ 300.504–300.515 do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.452–300.462, including the provision of services indicated on the child's IEP.

(b) *State complaints.* Complaints that an SEA or LEA has failed to meet requirements of §§ 300.451–300.462 may be filed under the procedures in §§ 300.660–300.662.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.458 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))

§ 300.459 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 shall use funds provided under Part B of the Act to meet the special educational needs of students enrolled in private schools, 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))

§ 300.460 Use of public school personnel.

An LEA may use funds available under sections 611 and 619 of the Act to make public personnel available in other than public facilities—

(a) To the extent necessary to provide services under §§ 300.450–300.462 for private school children with disabilities; and

(b) If those services are not normally provided by the private school.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.461 Use of private school personnel.

An LEA may use funds available under sections 611 or 619 of the Act to pay for the services of an employee of a private school if—

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.462 Requirements concerning property, equipment and supplies for the benefit of private school children with disabilities.

(a) A public agency must keep title to and exercise continuing administrative control of all property, equipment, and supplies that the public agency acquires with funds under section 611 or 619 of the Act for the benefit of private school children with disabilities.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall 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 shall 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))

Procedures for By-Pass

§ 300.480 By-pass—general.

(a) The Secretary implements a by-pass if an SEA is, and was on December 2, 1983, prohibited by law from providing for the participation of private school children with disabilities in the program assisted or carried out under Part B of the Act, as required by section 612(a)(10)(A) of the Act and by §§ 300.452–300.462.

(b) The Secretary waives the requirement of section 612(a)(10)(A) of the Act and of §§ 300.452–300.462 if the Secretary implements a by-pass.

(Authority: 20 U.S.C. 1412(f)(1))

§ 300.481 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 to consider matters such as—

(1) The prohibition imposed by State law that results in the need for a by-pass;

(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; and

(3) The establishment of policies and procedures to ensure that private school children with disabilities receive services consistent with the requirements of section 612(a)(10)(A) of the Act and §§ 300.452–300.462.

(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 in a manner consistent with the requirements of section 612(a)(10)(A) of the Act and §§ 300.452–300.462 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 that may not exceed the amount per child provided by the Secretary under Part B of the Act for all children with disabilities in the State for the preceding fiscal year; by

(2) The number of private school children with disabilities (as defined by §§ 300.7(a) and 300.450) in the State, 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))

Due Process Procedures

§ 300.482 Notice of intent to implement a by-pass.

(a) Before taking any final action to implement a by-pass, the Secretary provides the affected SEA 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 to respond; and

(2) Advises the SEA 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 by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1412(f)(3)(A))

§ 300.483 Request to show cause.

An SEA seeking an opportunity to show cause why a by-pass should not be implemented shall submit a written request for a show cause hearing to the Secretary.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.484 Show cause hearing.

(a) If a show cause hearing is requested, the Secretary—

(1) Notifies the SEA and other appropriate public and private school officials of the time and place for the hearing; and

(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.

(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 may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(e) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.485 Decision.

(a) The designee who conducts the show cause hearing—

(1) 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 15 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies the SEA 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))

§ 300.486 Filing requirements.

(a) Any written submission under §§ 300.482–300.485 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.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.487 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)–(D) of the Act.

(Authority: 20 U.S.C. 1412(f)(3)(B)–(D))

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 300.500 General responsibility of public agencies; definitions.

(a) *Responsibility of SEA and other public agencies.* Each SEA shall ensure that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of §§ 300.500–§ 300.529.

(b) *Definitions of ''consent,'' ''evaluation,'' and ''personally identifiable.''* As used in this part—

(1) *Consent* means that—

(i) 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;

(ii) 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

(iii) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time;

(2) *Evaluation* means procedures used in accordance with §§ 300.530–300.536 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class; and

(3) *Personally identifiable* means that information includes—

(i) The name of the child, the child's parent, or other family member;

(ii) The address of the child;

(iii) A personal identifier, such as the child's social security number or student number; or

(iv) 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))

Note: With respect to paragraph (b)(1)(iii) of this section, the parent's ability to revoke consent, if invoked, is not retroactive, *i.e.*, it does not negate an action that has occurred after the consent was given and before it was revoked.

§ 300.501 Opportunity to examine records; parent participation in meetings.

(a) *General.* The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.562–300.569, an opportunity to—

(1) Inspect and review all education records with respect to—

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child; and

(2) Participate in all meetings with respect to—

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

(b) *Parent participation in meetings.* (1) Each public agency shall provide notice consistent with § 300.345 (a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (a)(2) of this section.

(2) For purposes of this section, the term ''meetings'' means a prearranged event in which public agency personnel come together at the same time and place to discuss any matter described in paragraph (a)(2) of this section relating to an individual child with a disability. The term 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. The term 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 shall 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.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency shall use procedures consistent with the procedures described in § 300.345 (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 shall 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 the parents, if the public agency is unable to obtain the parents' participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement, including information that is consistent with the requirements of § 300.345(d).

(5) The public agency shall take whatever action is necessary to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness, or whose native language is other than English.

(Authority: 20 U.S.C. 1414(f), 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 shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part—

(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 § 300.301.

(b) *Parent right to evaluation at public expense.* 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. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either initiate a hearing under § 300.507 to show that its evaluation is appropriate, or insure an independent educational evaluation is provided at public expense unless the agency demonstrates in a hearing under § 300.507 that the evaluation obtained by the parent did not meet agency criteria. If the public agency initiates 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.

(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 as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, 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.

(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))

Note 1: If a parent requests an independent educational evaluation at public expense, there is no requirement under Part B of the Act that the parent specify areas of disagreement with the public agency's evaluation as a prior condition to obtaining

the independent educational evaluation. Thus, unless a public agency chooses to initiate a due process hearing in accordance with paragraph (b) of this section, the agency must respond to the parent's request by insuring an independent educational evaluation is provided at public expense in a timely manner. A public agency may not impose conditions on obtaining an independent educational evaluation, other than the agency criteria described in paragraph (e) of this section.

Note 2: This section requires public agencies to provide parents with information on how and where an independent educational evaluation of their child at public expense can be obtained. Public agencies are encouraged to make this information widely available to parents in a manner that is readily understandable to the general public so that if parents disagree with an agency evaluation they will have access to the criteria the agency will apply to an IEE.

A public agency may not require that evaluations obtained by parents meet all agency criteria, if doing so would be inconsistent with the parents' right to an IEE. For example, the agency could not require a parent to meet a criterion that required the IEE to be conducted by an agency employee.

§ 300.503 Prior notice by the public agency; content of notice.

(a) *Notice.* (1) 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—

(i) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(ii) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(2) If the notice described under paragraph (a)(1) of this section relates to an action proposed by the public agency that also requires parental consent under § 300.505, the agency may give notice at the same time it requests parent consent.

(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 any other options that the agency considered and the reasons why those options were rejected;

(4) A description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) A description of any other factors that are relevant to the agency's proposal or refusal;

(6) 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;

(7) Sources for parents to contact to obtain assistance in understanding the provisions of this part; and

(8) A statement informing the parents about the State complaint procedures under §§ 300.660–300.662, including a description of how to file a complaint and the timelines under those procedures.

(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 SEA or LEA shall 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), (4) and (c), 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, at a minimum—

(1) Upon initial referral for evaluation;

(2) Upon each notification of an IEP meeting;

(3) Upon reevaluation of the child; and

(4) Upon receipt of a request for due process under § 300.507.

(b) *Contents.* The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §§ 300.403, 300.500–300.529, and 300.560–300.577 relating to—

(1) Independent educational evaluation;

(2) Prior written notice;

(3) Parental consent;

(4) Access to educational records;

(5) Opportunity to present complaints;

(6) The child's placement during pendency of due process proceedings;

(7) Procedures for students who are subject to placement in an interim alternative educational setting;

(8) Requirements for unilateral placement by parents of children in private schools at public expense;

(9) Mediation;

(10) Due process hearings, including requirements for disclosure of evaluation results and recommendations;

(11) State-level appeals (if applicable in that State);

(12) Civil actions; and

(13) Attorneys' fees.

(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 SEA or LEA shall 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(d))

§ 300.505 Parental consent.

(a)(1) Parental consent must be obtained before—

(i) Conducting an initial evaluation;

(ii) Initial provision of special education and related services to a child with a disability in a program providing special education and related services; and

(iii) Except as provided in paragraph (c) of this section, before conducting any new test as a part of a reevaluation of an eligible child under Part B of the Act.

(2) Consent for initial evaluation may not be construed as consent for initial placement described in paragraph (a)(1)(ii) of this section.

(b) *Refusal.* If the parents of the child with a disability refuse consent for initial evaluation or a reevaluation, the agency may continue to pursue those evaluations by using the due process procedures under §§ 300.507–300.509, or the mediation procedures under § 300.506 if appropriate, except to the extent inconsistent with State law relating to parental consent.

(c) *Failure to respond to request for reevaluation.*

(1) Informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent has failed to respond.

(2) To meet the reasonable measures requirement in paragraph (c)(1) of this section, the public agency must use procedures consistent with those in §§ 300.345(d).

(d) *Additional State consent requirements.* 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.

(e) *Limitation.* A public agency may not require parental consent as a condition of any benefit to the parent or the child except for the service or activity for which consent is required under paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(b)(3); 1414 (a)(1)(C) and (c)(3))

Note 1: Paragraph (b) of this section means that if the parents of a child with a disability refuse consent for an initial evaluation or any reevaluation, and the agency wishes to pursue the evaluation or reevaluation, it may do so by using the due process or mediation procedures under Part B of the Act unless doing so would be inconsistent with State law relating to parent consent. For example, if State law provides that parents' right to consent to an initial evaluation cannot be overridden, the agency under Part B would not be able to take any action regarding that initial evaluation once parents had refused consent. If State law provided a mechanism different than due process or mediation under Part B as the means to override a parent refusal of consent, the agency would use that State mechanism if it wished to pursue the evaluation.

Note 2: If a State adopts a consent requirement in addition to those described in paragraph (a) of this section and consent is refused, paragraph (e) of this section requires that the public agency must nevertheless provide the services and activities that are not in dispute. For example, if a State requires parental consent to the provision of all services identified in an IEP and the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents.

If the parent refuses to consent and the public agency determines that the service or activity in dispute is necessary to provide FAPE to the child, paragraph (d) of this section requires that the agency must implement its procedures to override the refusal. This section does not preclude the agency from reconsidering its proposal if it believes that circumstances warrant.

Note 3: If parents refuse consent to a reevaluation that the agency needs to provide appropriate services to the child consistent with § 300.536, the agency must either take appropriate measures, consistent with paragraph (b) of this section to override the parents' refusal of consent, or, if State law prohibits override of parent consent for reevaluation, the agency may cease providing services to the child under Part B of the Act.

§ 300.506 Mediation.

(a) *General.* Each public agency shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in § 300.503(a)(1) to resolve the disputes through a mediation process which, at a minimum, must be available whenever a hearing is requested under §§ 300.507 or 300.520–300.528.

(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 due process hearing under § 300.506, 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) The State shall 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.

(3) The State shall bear the cost of the mediation process, including the costs of meetings described in paragraph (b)(2) of this section.

(4) 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.

(5) An agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement.

(6) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.

(c) *Impartiality of mediator.* An individual who serves as a mediator under this part—

(1) May not be an employee of—

(i) Any LEA or any State agency described under § 300.194; or

(ii) An SEA that is providing direct services to a child who is the subject of the mediation process; and

(2) Must not have a personal or professional conflict of interest.

(d) *Meeting to encourage mediation.* (1) A public agency may establish procedures to require parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party—

(i) Who is under contract with a parent training and information center or community parent resource center in the State established under section 682 or 683 of the Act, or an appropriate alternative dispute resolution entity; and

(ii) Who would explain the benefits of the mediation process, and encourage the parents to use the process.

(2) A public agency may not deny or delay a parent's right to a due process hearing under § 300.507 if the parent fails to participate in the meeting described in paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1415(e))

Note 1: With respect to paragraph (b)(2) of this section, the House Committee Report on Pub. L. 105–17 includes the following statement:

* * * the bill provides that the State shall maintain a list of individuals who are qualified mediators. The Committee intends that whenever such a mediator is not selected on a random basis from that list, both the parents and the agency are involved in selecting the mediator, and are in agreement with the individual who is selected. (H. Rep. No. 105–95, p. 106 (1997))

Note 2: With regard to the provision in paragraph (b)(6) that mediation discussions must be confidential and may not be used in any subsequent due process hearings or civil proceedings, the House Committee Report on Pub. L. 105–17 notes that ''nothing in this bill shall supersede any parental access rights under the Family Educational Rights and Privacy Act of 1974 or foreclose access to information otherwise available to the parties.'' (H. Rep. No. 105–95, p. 107 (1997)). The Report also includes an example of a confidentiality pledge, which makes clear that the intent of this provision is to protect discussions that occur in the mediation process from use in subsequent due process hearings and civil proceedings under the Act, and not to exempt from discovery, because it was disclosed during mediation, information that otherwise would be subject to discovery.

§ 300.507 Impartial due process hearing; parent notice; disclosure.

(a) *General.* (1) A parent or a public agency may initiate a hearing 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) When a hearing is initiated under paragraph (a)(1) of this section, the public agency shall inform the parents of the availability of mediation described in § 300.506.

(3) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if—

(i) The parent requests the information; or

(ii) The parent or the agency initiates a hearing under this section.

(b) *Agency responsible for conducting 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) *Parent notice to the public agency.*

(1) *General.* The public agency must have procedures that require the parent of a child with a disability or the attorney representing the child, to provide notice (which must remain confidential) to the public agency in a request for a hearing under paragraph (a)(1) of this section.

(2) *Content of parent notice.* The notice required in paragraph (c)(1) of this section must include—

(i) The name of the child;

(ii) The address of the residence of the child;

(iii) The name of the school the child is attending;

(iv) A description of the nature of the problem of the child relating to the proposed initiation or change, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the parents at the time.

(3) *Model form to assist parents.* Each SEA shall develop a model form to assist parents in filing a request for due process that includes the information required in paragraphs (c)(1) and (2) of this section.

(4) *Right to due process hearing.* A public agency may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in paragraphs (c)(1) and (2) of this section.

(Authority: 20 U.S.C. 1415(b)(5), (b)(6), (b)(7), (b)(8), (e)(1) and (f)(1))

Note 1: Part B of the Act and the regulations under Part B of the Act do not provide any authority for a public agency to deny a parent's request for an impartial due process hearing, even if the agency believes that the parent's issues are not new. Thus, the determination of whether or not a parent's request for a hearing is based on new issues can only be made by an impartial hearing officer.

Note 2: The House Committee Report on Pub. L. 105–17 notes that attorneys' fees to prevailing parents may be reduced if the attorney representing the parents did not provide the public agency with specific information about the child and the basis of the dispute described in paragraphs (c)(1) and (2) of this section. With respect to the intent of the new notice provision, the House report includes the following statement:

* * * The Committee believes that the addition of this provision will facilitate an early opportunity for schools and parents to develop a common frame of reference about problems and potential problems that may remove the need to proceed to due process and instead foster a partnership to resolve problems. (H. Rep. 105–95, p. 105 (1997))

§ 300.508 Impartial hearing officer.

(a) A hearing may not be conducted—

(1) By a person who is an employee of the State agency or the LEA that is involved in the education or care of the child; or

(2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) 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.

(c) Each public agency shall 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.

(Authority: 20 U.S.C. 1415(f)(3))

§ 300.509 Hearing rights.

(a) *General.* Any party to a hearing conducted pursuant to §§ 300.507 or 300.520—300.528, or an appeal conducted pursuant to § 300.510, 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 5 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 requirement.* (1) At least 5 business days prior to a hearing conducted pursuant to § 300.507(a), each party shall 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.* (1) Parents involved in hearings must be given the right to—

(i) Have the child who is the subject of the hearing present; and

(ii) Open the hearing to the public.

(2) The record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section must be provided at no cost to parents.

(d) *Findings and decision to advisory panel and general public.* The public agency, after deleting any personally identifiable information, shall—

(1) Transmit the findings and decisions referred to in paragraph (a)(5) of this section to the State advisory panel established under § 300.650; and

(2) Make those findings and decisions available to the public.

(Authority: 20 U.S.C. 1415(f)(2)and (h))

§ 300.510 Finality of decision; appeal; impartial review.

(a) *Finality of decision.* A decision made in a hearing conducted pursuant to §§ 300.507 or 300.520—300.528 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and § 300.512.

(Authority: 20 U.S.C. 1415(i)(1)(A))

(b) *Appeal of decisions; impartial review.*

(1) *General.* If the hearing required by § 300.507 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) *SEA responsibility for review.* If there is an appeal, the SEA shall conduct an impartial review of the hearing. The official conducting the review shall—

(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 § 300.508 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 written findings and the decision to the parties.

(c) *Findings and decision to advisory panel and general public.* The SEA, after deleting any personally identifiable information, shall—

(1) Transmit the findings and decisions referred to in paragraph (b)(2)(vi) of this section to the State advisory panel established under § 300.650; 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 § 300.511.

(Authority: 20 U.S.C. 1415(g); H. R. Rep. No. 94—664, at p. 49 (1975))

Note 1: The SEA may conduct its review either directly or through another State agency acting on its behalf. However, the SEA remains responsible for the final decision on review.

Note 2: All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in § 300.509 relating to hearings also apply.

§ 300.511 Timelines and convenience of hearings and reviews.

(a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing—

(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 shall 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)

§ 300.512 Civil action.

(a) *General.* Any party aggrieved by the findings and decision made under §§ 300.507 or 300.520–300.528 who does not have the right to an appeal under § 300.510(b)(2), and any party aggrieved by the findings and decision under § 300.510(e), has the right to bring a civil action with respect to the complaint presented pursuant to § 300.507. 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) *Additional requirements.* In any action brought under paragraph (a) of this section, the court—

(1) Shall receive the records of the administrative proceedings;

(2) Shall hear additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, shall grant the relief that the court determines to be appropriate.

(c) *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.

(d) *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 300.510 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), (i)(3)(A), and 1415(l))

§ 300.513 Attorneys' fees.

(a) 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 the parents of a child with a disability who is the prevailing party.

(b) Funds under Part B of the Act may not be used to pay attorney's fees.

(Authority: 20 U.S.C. 1415(i)(3)(B))

Note: There is nothing in this part that prohibits a State from enacting a law that permits hearing officers to award attorneys' fees to parents who are prevailing parties under Part B of the Act.

§ 300.514 Child's status during proceedings.

(a) Except as provided in § 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint, 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 or a 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))

Note: This section does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 300.515 Surrogate parents.

(a) *General.* Each public agency shall ensure that the rights of a child are protected if—

(1) No parent (as defined in § 300.19) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes 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) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall ensure that a person selected as a surrogate—

(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 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.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency that is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under

paragraphs (c) and (d)(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 surrogate parent.

(e) *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.

(Authority: 20 U.S.C. 1415(b)(2))

§ 300.516 [Reserved]

§ 300.517 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 shall 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; and

(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.

(3) Whenever a State transfers rights under this part pursuant to paragraph (a) (1) or (2), the agency shall notify the individual and the parents of the transfer of rights.

(b) *Special rule.* If, under State law, a child with a disability, described in paragraph (a) of this section, is determined not to have the ability to provide informed consent with respect to the educational program of the student, the State shall 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))

Discipline Procedures

§ 300.520 Authority of school personnel.

(a) School personnel may order—

(1) The removal of a child with a disability from the child's current educational placement to an appropriate interim alternative educational setting, another setting, or suspension, including a suspension without the provision of educational services, for not more than 10 school days (to the extent the alternatives would be applied to children without disabilities); and

(2) A change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days, if—

(i) The child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency; or

(ii) The child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

(b) Except as provided in paragraph (c) of this section, either before or not later than 10 business days after taking the action described in paragraph (a) of this section—

(1) If the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention plan for the child before the behavior that resulted in the suspension described in paragraph (a) of this section, the agency shall convene an IEP meeting to develop an assessment plan and appropriate behavioral interventions to address that behavior; or

(2) If the child already has a behavioral intervention plan, the IEP team shall review the plan and modify it, as necessary, to address the behavior.

(c) If the child with a disability is removed from the child's current educational placement for 10 school days or fewer under paragraph (a)(1) of this section in a given school year, and no further removal or disciplinary action is contemplated, the activities in paragraph (b) of this section need not be conducted.

(d) 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*—

(i) Means a controlled substance; but

(ii) Does not include such a substance that is legally possessed or used under the supervision or 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) *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), (10))

Note 1: Removing a child with disabilities from the child's current educational placement for not more than 10 school days does not constitute a change of placement under the Part B regulation. A series of removals from a child's current educational placement in a school year each of which is less than 10 school days but cumulate to more than 10 school days in a school year may constitute a change in placement, if, in any given case, factors such as the length of each removal, the total amount of time that the child is removed, and the proximity of the removals to one another, lead to the conclusion that the child has been excluded from the current placement to such an extent that there has been a change of placement.

Note 2: Although paragraph (c) of this section provides that public agencies need not conduct the review described in paragraph (b) if a child is removed from the regular placement for 10 school days or fewer and no further removal or disciplinary action is contemplated, public agencies are strongly encouraged to review as soon as possible the circumstances surrounding the behavior that led to the child's removal and consider whether the child was being provided services in accordance with the IEP, and whether the behavior could be addressed through minor classroom or program adjustments or whether the child's IEP team should be reconvened to address possible changes in that document.

§ 300.521 Authority of hearing officer.

A hearing officer under section 615 of the Act may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer, in an expedited due process hearing—

(a) Determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or to others;

(b) Considers the appropriateness of the child's current placement;

(c) Considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(d) Determines that the interim alternative educational setting meets the requirements of § 300.522.

(e) As used in this section, the term *substantial evidence* means beyond a preponderance of the evidence.

(Authority: 20 U.S.C. 1415(k) (2), (10))

§ 300.522 Determination of setting.

(a) *General.* The alternative educational setting referred to in §§ 300.520 and 300.521 must be determined by the IEP team.

(b) *Additional requirements.* Any interim alternative educational setting in which a child is placed under § 300.520 or 300.521 must—

(1) Be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(2) Include services and modifications designed to address the behavior described in § 300.520 or 300.521, or any other behavior that results in the child being removed from the child's current educational placement for more than 10 school days in a school year, so that it does not recur.

(Authority: 20 U.S.C. 1415(k)(3))

§ 300.523 Manifestation determination review.

(a) *General.* If an action is contemplated as described in § 300.520 or 300.521, or if an action involving a removal of a child from the child's current educational placement for more than 10 school days in a given school year is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children—

(1) Not later than the date on which the decision to take that action is made, the parents must be notified of that decision and of all procedural safeguards accorded under this section; and

(2) Immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(b) *Exception.* If, under § 300.520(a)(1), the child with disabilities is removed from the child's current educational placement for 10 school days or fewer in a given school year, and no further disciplinary action is contemplated, the review in paragraph (a) of this section need not be conducted.

(c) *Individuals to carry out review.* A review described in paragraph (a) of this section must be conducted by the IEP team and other qualified personnel.

(d) *Conduct of review.* In carrying out a review described in paragraph (a) of this section, the IEP team may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team—

(1) First considers, in terms of the behavior subject to disciplinary action, all relevant information, including—

(i) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;

(ii) Observations of the child; and

(iii) The child's IEP and placement; and

(2) Then determines that—

(i) In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(ii) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(e) *Decision.* If the IEP team determines that any of the standards in (d)(2) of this section were not met, the behavior must be considered a manifestation of the child's disability.

(f) *Meeting.* The review described in paragraph (a) of this section may be conducted at the same IEP meeting that is convened under § 300.520(b).

(Authority: 20 U.S.C. 1415(k)(4))

Note 1: The House Committee Report on Pub. L. No 105–17 states that the determination described in § 300.523(c)(2):

. . . .recognizes that where there is a relationship between a child's behavior and a failure to provide or implement an IEP or placement, the IEP team must conclude that the behavior was a manifestation of the child's disability. Similarly, where the IEP team determines that an appropriate placement and IEP were provided, the IEP team must then determine that the remaining two standards have been satisfied. This section is not intended to require an IEP team to find that a child's behavior was a manifestation of a child's disability based on a technical violation of the IEP or placement requirements that are unrelated to the educational/behavior needs of the child. (House Rep. No. 105–95, pp. 110–111)

Note 2: If the result of the manifestation determination is that the behavior is a manifestation of the child's disability, the LEA must take immediate steps to remedy any deficiencies found in the child's IEP or placement, or their implementation. For a child who has been placed in a 45-day placement under § 300.520(a)(2) or 300.521 and for whom the child's behavior subject to discipline is a manifestation of the child's disability, these remedies often should enable the child to return to the child's current educational placement before the expiration of the 45-day period.

§ 300.524 Determination that behavior was not manifestation of disability.

(a) *General.* If the result of the review described in § 300.523 is a determination, consistent with § 300.523(e), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 612(a)(1) of the Act.

(b) *Additional requirement.* If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(c) *Child's status during due process proceedings.* Section 300.514 applies if a parent requests a hearing to challenge a determination, made through the review described in § 300.523, that the behavior of the child was not a manifestation of the child's disability.

(Authority: 20 U.S.C. 1415(k)(5))

Note: The provision in paragraph (c) of this section means that during the pendency of any administrative or judicial proceeding to challenge a determination that the child's behavior is not a manifestation of the child's disability, the child remains in the child's current educational placement or the child's placement under § 300.526, whichever applies.

§ 300.525 Parent appeal.

(a) *General.*

(1) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

(2) The State or local educational agency shall arrange for an expedited hearing in any case described in this section if requested by a parent.

(b) *Review of decision.*

(1) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements of § 300.523(e).

(2) In reviewing a decision under § 300.520(a)(2) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards in § 300.521.

(Authority: 20 U.S.C. 1415(k)(6))

§ 300.526 Placement during appeals.

(a) *General.* If a parent requests a hearing regarding a disciplinary action

described in § 300.520(a)(2) or 300.521 to challenge the interim alternative educational setting or the manifestation determination, 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 § 300.520(a)(2) or 300.521, whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(b) *Current placement.* If a child is placed in an interim alternative educational setting pursuant to— § 300.520(a)(2) or 300.521 and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement the child must remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in paragraph (c) of this section.

(c) *Expedited hearing.*

(1) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the LEA may request an expedited due process hearing.

(2) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards in § 300.521.

(3) A placement ordered pursuant to paragraph (c)(2) of this section may not be longer than 45 days.

(Authority: 20 U.S.C. 1415(k)(7))

Note: An LEA may seek subsequent expedited hearings under paragraph (c)(1) of this section if, at the expiration of the time period of the placement ordered under paragraph (c) of this section, the LEA maintains that the child is still dangerous and the issue has not been resolved through due process.

§ 300.527 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 any rule or code of conduct of the local educational agency, including any behavior described in §§ 300.520 or 300.521, may assert any of the protections provided for in this part if the LEA had knowledge (as determined in accordance with this paragraph) 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—

(1) The parent of the child has expressed concern in writing (or orally if the parent is illiterate in English or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(2) The behavior or performance of the child demonstrates the need for these services;

(3) The parent of the child has requested an evaluation of the child pursuant to §§ 300.530–300.536; or

(4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel of the agency.

(c) *Conditions that apply if no basis of knowledge.*

(1) *General.* If an LEA does not have knowledge that a child is a child with a disability (in accordance with paragraph (b) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with paragraph (c)(2) of this section.

(2) *Limitations.*

(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 § 300.520 or 300.521, 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.

(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 shall provide special education and related services in accordance with the provisions of this part, including the requirements of §§ 300.520–300.529 and section 612(a)(1)(A) of the Act.

(Authority: 20 U.S.C. 1415(k)(8))

§ 300.528 Expedited due process hearings.

(a) Expedited due process hearings under §§ 300.521–300.526 must—

(1) Result in a decision within 10 business days of the request for the hearing, unless the parents and school officials otherwise agree;

(2) Meet the requirements of § 300.508, except that a State may provide that the time periods identified in § 300.509(a)(3) and § 300.509(b) for purposes of expedited due process hearings under §§ 300.521–300.526 are not less than two business days; and

(3) Be conducted by a due process hearing officer who satisfies the requirements of § 300.508.

(b) A State may establish different procedural rules for expedited hearings under §§ 300.521–300.526 than it has established for due process hearings under § 300.507.

(c) The decisions on expedited due process hearings are appealable under a State's normal due process appeal procedures.

(Authority: 20 U.S.C. 1415(k)(2), (6), (7))

§ 300.529 Referral to and action by law enforcement and judicial authorities.

(a) Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent 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) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(Authority: 20 U.S.C. 1415(k)(9))

Procedures for Evaluation and Determination of Eligibility

§ 300.530 General.

Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.530–300.536.

(Authority: 20 U.S.C. 1414(b)(3); 1412(a)(7))

§ 300.531 Initial evaluation.

Each public agency shall conduct a full and individual initial evaluation, in accordance with §§ 300.532 and 300.533, before the initial provision of special education and related services to a child with a disability under Part B of the Act.

(Authority: 20 U.S.C. 1414(a)(1))

§ 300.532 Evaluation procedures.

Each public agency shall ensure, at a minimum, that—

(a) Tests and other evaluation materials used to assess a child under Part B of the Act—

(1) Are selected and administered so as not to be discriminatory on a racial or cultural basis; and

(2) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(b) A variety of assessment tools and strategies are used to gather relevant functional and developmental information about the child, including information provided by the parent, that may assist in determining—

(1) Whether the child is a child with a disability under § 300.7; and

(2) The content of the child's IEP, including information related to enabling the child—

(i) To be involved in and progress in the general curriculum; or

(ii) For a preschool child, to participate in appropriate activities.

(c) Any standardized tests that are given to a child—

(i) Have been validated for the specific purpose for which they are used; and

(ii) Are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests;

(d) Tests 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;

(e) Tests are selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test 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);

(f) No single procedure is used 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;

(g) 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;

(h) The public agency uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors; and

(i) The public agency uses assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

(Authority: 20 U.S.C. 1414 (a)(6)(B), (b) (2) and (3))

Note 1: Under Title VI of the Civil Rights Act of 1964, in order to properly evaluate a child who may be limited English proficient, the public agency must first determine the child's proficiency in English and the child's native language. Under Title VI, an accurate assessment of the child's language proficiency must include objective assessment of reading, writing, speaking, and understanding. Under this section and § 300.534(b), information about the child's language proficiency must be considered in determining how to conduct the evaluation of the child to prevent misclassification. Under both Title VI and Part B of the Act, the public agency has a responsibility to ensure that children with limited English proficiency are not evaluated on the basis of criteria that essentially measure English language skills.

Note 2: In some situations, there may be no one on the staff of a public agency who is able to administer a test or other evaluation in a child's native language, as required under paragraph (a)(2) of this section, but an appropriate individual is available in the surrounding area. Ways that a public agency can identify an individual in the surrounding area who is able to administer a test or other evaluation in the child's native language include contacting neighboring school districts, local universities, and professional organizations. For LEP students, in situations where it is clearly not feasible to provide and administer tests in the child's native language or mode of communication, the public agency still needs to obtain and consider accurate and reliable information that will enable the agency to make an informed decision as to whether the child has a disability and the effects of the disability on the child's educational needs.

Note 3: If an assessment is not conducted under standard conditions, information about the extent to which the assessment varied from standard conditions, such as the qualifications of the person administering the test or the method of test administration, needs to be included in the evaluation report. This information is needed so that the team of qualified professionals can evaluate the effects of these variances on the validity and reliability of the information reported and to determine whether additional assessments are needed.

§ 300.533 Determination of needed evaluation data.

(a) *Review of existing evaluation data.* As part of an initial evaluation (if appropriate) and as part of any reevaluation under Part B of the Act, a team that includes the individuals required by § 300.344, and other qualified professionals, as appropriate, shall—

(1) Review existing evaluation data on the child, including—

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based assessments and 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) Whether the child has a particular category of disability, as described in § 300.7, or, in case of a reevaluation of a child, whether the child continues to have such a disability;

(ii) The present levels of performance and educational needs of the child;

(iii) Whether the child needs special education and related services, or 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 curriculum.

(b) *Need for additional data.* The public agency shall administer tests and other evaluation materials as may be needed to produce the data identified under paragraph (a) of this section.

(c) *Requirements if additional data are not needed.* (1) If the determination under paragraph (a) of this section is that no additional data are needed to determine whether the child continues to be a child with a disability, the public agency shall notify the child's parents—

(i) Of that determination and the reasons for it; and

(ii) Of the right of the parents to request an assessment to determine whether the child continues to be a child with a disability.

(2) The public agency is not required to conduct the assessment described in paragraph (c)(1)(ii) of this section unless requested to do so by the child's parents.

(Authority: 20 U.S.C. 1414(c)(1), (2) and (4))

Note: The requirement in paragraph (a) of this section and § 300.534(a)(1) that review of evaluation data and eligibility decisions be made by groups that include ''qualified professionals,'' is intended to ensure that the teams making these determinations include individuals with the knowledge and skills necessary to interpret the evaluation data and make an informed determination as to whether the child is a child with a disability under § 300.7, and to determine whether the child needs special education and related services. The composition of the team will

vary depending upon the nature of the child's suspected disability and other relevant factors. For example, if a student is suspected of having a learning disability, a professional whose sole expertise is visual impairments would be an inappropriate choice. If a student is limited English proficient, it will be important to include a person on the team of qualified professionals who is knowledgeable about the identification, assessment, and education of limited English proficient students.

§ 300.534 Determination of eligibility

(a) Upon completing the administration of tests and other evaluation materials—

(1) A team of qualified professionals and the parent of the child must determine whether the child is a child with a disability, as defined in § 300.7; and

(2) The public agency must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent.

(b) A child may not be determined to be a child with a disability if the determinant factor for that determination is—

(1) Lack of instruction in reading or math; or

(2) Limited English proficiency.

(c) A public agency must evaluate a child with a disability in accordance with §§ 300.532 and 300.533 before determining that the child is no longer a child with a disability.

(Authority: 20 U.S.C. 1414(b)(4) and (5), (c)(5))

§ 300.535 Procedures for determining eligibility and placement.

(a) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.7, and the educational needs of the child, each public agency shall—

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and

(2) Ensure that information obtained from all of these sources is documented and carefully considered.

(b) 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 §§ 300.340–300.350.

(Authority: 20 U.S.C. 1412(a)(6), 1414(b)(4))

Note: Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in determining whether a child is a child with a disability, as defined in § 300.7. The agency would not have to use all the sources in every instance. The point of the requirement is to ensure that more than one source is used in interpreting evaluation data and in making these determinations. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other children with disabilities, such as a child who has a severe articulation impairment as his primary disability. For such a child, the speech-language pathologist, in complying with the multiple source requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 300.536 Reevaluation.

Each public agency shall ensure—

(a) That the IEP of each child with a disability is reviewed in accordance with §§ 300.340–300.350; and

(b) That a reevaluation of each child, in accordance with §§ 300.530(b), 300.532, and 300.533, is conducted if conditions warrant a reevaluation, or if the child's parent or teacher requests a reevaluation, but at least once every three years.

(Authority: 20 U.S.C. 1414(a)(2))

Additional Procedures for Evaluating Children With Specific Learning Disabilities

§ 300.540 Additional team members.

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in § 300.7, must be made by the child's parents and a team of qualified professionals which must include—

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(Authority: 20 U.S.C. 1411 note)

§ 300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if—

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression.

(ii) Listening comprehension.

(iii) Written expression.

(iv) Basic reading skill.

(v) Reading comprehension.

(vi) Mathematics calculation.

(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of—

(1) A visual, hearing, or motor impairment;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(Authority: 20 U.S.C. 1411 note)

§ 300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(Authority: 20 U.S.C. 1411 note)

§ 300.543 Written report.

(a) For a child suspected of having a specific learning disability, the documentation of the team's determination of eligibility, as required by § 300.534(a)(2), must include a statement of—

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(b) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(Authority: 20 U.S.C. 1411 note)

Least Restrictive Environment

§ 300.550 General.

(a) A State shall demonstrate to the satisfaction of the Secretary that the

State has in effect policies and procedures to ensure that it meets the requirements of §§ 300.550–300.556.

(b) Each public agency shall ensure—

(1) That 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

(2) That 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.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall 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 § 300.17 (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))

Note: Home instruction is usually appropriate for only a limited number of children, such as children who are medically fragile and are not able to participate in a school setting with other children.

§ 300.552 Placements.

In determining the educational placement of a child with a disability, each public agency shall 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 §§ 300.550–300.554;

(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;

(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; and

(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.

(Authority: 20 U.S.C. 1412(a)(5))

Note 1: With respect to paragraph (a)(1) of this section, nothing in this part would prohibit a public agency from allowing the group of persons that makes the placement decision also to serve as the child's IEP team, so long as all individuals described in § 300.344 are included.

Note 2: Section 300.552 includes some of the main factors that must be considered in determining the extent to which a child with a disability can be educated with children who are not disabled. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to ensure that each child with a disability receives an education that is appropriate to his or her individual needs.

The requirements of § 300.552, as well as the other requirements of §§ 300.550–300.556, apply to all preschool children with disabilities who are entitled to receive FAPE. Public agencies that provide preschool programs for nondisabled preschool children must ensure that the requirements of § 300.552(c) are met. Public agencies that do not operate programs for nondisabled preschool children are not required to initiate those programs solely to satisfy the requirements regarding placement in the LRE embodied in §§ 300.550–300.556. For these public agencies, some alternative methods for meeting the requirements of §§ 300.550–300.556 include—

(1) Providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);

(2) Placing children with disabilities in private school programs for nondisabled preschool children or private school preschool programs that integrate children with disabilities and nondisabled children; and

(3) Locating classes for preschool children with disabilities in regular elementary schools.

In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met, based upon the child's IEP, and meets all of the other requirements of §§ 300.340–300.351 and §§ 300.550–300.556.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR part 104—Appendix, Paragraph 24) includes several points regarding educational placements of children with disabilities that are pertinent to this section:

1. With respect to determining proper placements, the analysis states: ''* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *.''

2. With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home, and this issue may be raised by the parent under the due process provisions of this subpart.

Note 3: If IEP teams appropriately consider positive behavioral interventions and supplementary aids and services and if necessary include those services in IEPs, many children who otherwise would be disruptive will be able to participate in regular education classrooms.

§ 300.553 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 § 300.306, each public agency shall 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))

Note: Section 300.553 is taken from a requirement in the regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 regulations includes the following statement: ''[This paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.'' (34 CFR part 104—Appendix, Paragraph 24.)

§ 300.554 Children in public or private institutions.

Each SEA shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to ensure that § 300.550 is effectively implemented.

(Authority: 20 U.S.C. 1412(a)(5))

Note: The requirement to educate children with disabilities with nondisabled children also applies to children in public and private institutions or other care facilities. Each SEA

must ensure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 300.555 Technical assistance and training activities.

Each SEA shall carry out activities to ensure that teachers and administrators in all public agencies—

(a) Are fully informed about their responsibilities for implementing § 300.550; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.556 Monitoring activities.

(a) The SEA shall carry out activities to ensure that § 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 300.550, the SEA shall—

(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))

Confidentiality of Information

§ 300.560 Definitions.

As used in §§ 300.560–300.577—

Destruction means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

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).

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))

§ 300.561 Notice to parents.

(a) The SEA shall give notice that is adequate to fully inform parents about the requirements of § 300.127, 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 the Family Educational Rights and Privacy Act of 1974 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))

§ 300.562 Access rights.

(a) Each participating agency shall 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 shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, 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))

§ 300.563 Record of access.

Each participating agency shall 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))

§ 300.564 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))

§ 300.565 List of types and locations of information.

Each participating agency shall 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))

§ 300.566 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))

§ 300.567 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 shall 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 shall inform the parent of the refusal and advise the parent of the right to a hearing under § 300.568.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§ 300.568 Opportunity for a hearing.

The agency shall, 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))

§ 300.569 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 shall 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 shall 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))

§ 300.570 Hearing procedures.

A hearing held under § 300.568 must be conducted according to the procedures under 34 CFR 99.22.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.571 Consent.

(a) 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 part 99.

(c) The SEA shall 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))

§ 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall 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 § 300.127 and 34 CFR part 99.

(d) Each participating agency shall 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))

§ 300.573 Destruction of information.

(a) The public agency shall 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))

Note: Under § 300.573, the personally identifiable information on a child with a disability may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b) of this section.

§ 300.574 Children's rights.

The SEA shall provide 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.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

Note 1: Under the regulations for the Family Educational Rights and Privacy Act of 1974 (34 CFR 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.

Note 2: 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 § 300.517, the rights regarding educational records in §§ 300.562–300.573 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.

§ 300.575 Enforcement.

The SEA shall provide 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))

§ 300.576 Disciplinary information.

(a) The State may require that a LEA 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 individualized education program and any statement of current or previous disciplinary action that has been taken against the child.

(Authority: 20 U.S.C. 1413(j))

§ 300.577 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 5 U.S.C. 552a (the Privacy Act of 1974), the Secretary applies the requirements of 5 U.S.C. 552a (b)(1)–(2), (4)–(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)–(10); (h); (m); and (n); and the regulations implementing those provisions in 34 CFR part 5b.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

Department Procedures

§ 300.580 Determination by the Secretary that a State is eligible.

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))

§ 300.581 Notice and hearing before determining that a State is not eligible.

(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 calendar days after it receives the notice of the proposed final determination that the State is not eligible; and

(4) Provides information about the procedures followed for a hearing.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.582 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))

§ 300.583 Hearing procedures.

(a) As used in §§ 300.581–300.586 the term *party* or *parties* means the following:

(1) An SEA that requests a hearing regarding the proposed disapproval of its State plan 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 Panel.

(b) Within 15 days after receiving a request for a hearing, the Secretary designates a Hearing Official or Panel and notifies the parties.

(c) The Hearing Official or Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or 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 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 Panel may schedule a prehearing conference of the Hearing Official or Panel and parties.

(3) Any party may request the Hearing Official or Panel to schedule a prehearing or other conference. The Hearing Official or Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or 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 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 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 shall 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 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 Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(e) The Hearing Official or Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or 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 Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Panel may examine witnesses.

(j) The Hearing Official or Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or 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 Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m)(1) The parties shall present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or 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 Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or 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 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 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 shall file with the Hearing Official or Panel all written motions, briefs, and other documents and shall at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.584 Initial decision; final decision.

(a) The Hearing Official or Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under § 300.581.

(b) The initial decision of a Panel is made by a majority of Panel members.

(c) The Hearing Official or 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 Panel within 15 days of the date the party receives the Panel's decision.

(e) The Hearing Official or 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 Panel within seven days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or 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 Panel becomes the final decision of the Secretary unless, within 25 days after the end of the time for receipt of written comments, the Secretary informs the Hearing Official or Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary may reject or modify the initial decision of the Hearing Official or 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 Hearing Official's or Panel's proceedings, and written comments. The Secretary may remand the matter for further proceedings.

(j) The Secretary issues the final decision within 30 days after notifying the Hearing Official or Panel that the initial decision is being further reviewed.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.585 Filing requirements.

(a) Any written submission under §§ 300.581–300.585 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 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. 1413(c))

§ 300.586 Judicial review.

If a State is dissatisfied with the Secretary's final action 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 action, file with the United States Court of Appeals for the circuit in which that State is located a petition for review of that action. A copy of the petition must be forthwith 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 action was based, as provided in section 2112 of title 28, United States Code.

(Authority: 20 U.S.C. 1416(b))

§ 300.587 Enforcement.

(a) *General.* The Secretary initiates an action described in paragraph (b) of this section if the Secretary finds—

(1) That there has been a failure by the State to comply substantially with any provision of Part B of the Act, this part, or 34 CFR part 301; or

(2) That there is a failure to comply with any condition of an LEA's or SEA's eligibility under Part B of the Act, this part or 34 CFR part 301, including the terms of any agreement to achieve compliance with Part B of the Act, this part, or Part 301 within the timelines specified in the agreement.

(b) *Types of action.* The Secretary, after notifying the SEA (and any LEA or State agency affected by a failure described in paragraph (a)(2) of this section)—

(1) Withholds in whole or in part any further payments to the State under Part B of the Act;

(2) Refers the matter to the Department of Justice for enforcement; or

(3) Takes any other enforcement action authorized by law.

(c) *Nature of withholding.* (1) If the Secretary determines that it is appropriate to withhold further payments under paragraph (b)(1) of this section, the Secretary may determine that the withholding will be limited to programs or projects, or portions thereof, affected by the failure, or that the SEA shall not make further payments under Part B of the Act to specified LEA or State agencies affected by the failure.

(2) Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of Part B of the Act, this part, or 34 CFR part 301, as specified in paragraph (a) of this section, payments to the State under Part B of the Act are withheld in whole or in part, or payments by the SEA under Part B of the Act are limited to local educational agencies and State agencies whose actions did not cause or were not involved in the failure, as the case may be.

(3) Any SEA, LEA, or other State agency that has received notice under paragraph (a) of this section shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of that agency.

(4) Before withholding under paragraph (b)(1) of this section, the Secretary provides notice and a hearing pursuant to the procedures in §§ 300.581–300.586.

(d) *Referral for appropriate enforcement.* (1) Before the Secretary makes a referral under paragraph (b)(2) of this section for enforcement, or takes any other enforcement action authorized by law under paragraph (b)(3), the Secretary provides the State—

(i) With reasonable notice; and

(ii) With an opportunity for a hearing.

(2) The hearing described in paragraph (d)(1)(ii) 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 such a referral for enforcement.

(e) *Divided State agency responsibility*. For purposes of this part, if responsibility for ensuring that the requirements of this part 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 § 300.600(d), and if the Secretary finds that the failure to comply substantially with the provisions of Part B of the Act or this part are related to a failure by the public agency, the Secretary takes one of the enforcement actions described in paragraph (b) of this section to ensure compliance with Part B of the Act and this part, except—

(1) Any reduction or withholding of payments to the State under paragraph (b)(1) of this section is 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 State educational agency; and

(2) Any withholding of funds under paragraph (e)(1) of this section is limited to the specific agency responsible for the failure to comply with Part B of the Act or this part.

(Authority: 20 U.S.C. 1416)

Note: Other enforcement actions authorized by law include issuance of a complaint to compel compliance through a cease and desist order under 20 U.S.C. 1234e and entering into a compliance agreement to bring a recipient into compliance under 20 U.S.C. 1234f.

§§ 300.588 [Reserved]

§ 300.589 Waiver of requirement regarding supplementing and not supplanting with Part B funds.

(a) Except as provided under §§ 300.232–300.235, 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 § 300.602 without regard to the prohibition on supplanting other funds (See § 300.372).

(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 § 300.153 (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 § 300.125 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 §§ 300.660–300.662; and

(D) The State's hearing procedures under §§ 300.507–300.511 and 300.520–300.528;

(3) A summary of all State and Federal monitoring reports, and State complaint decisions (see §§ 300.660–300.662) and hearing decisions (see §§ 300.507–300.511 and 300.520–300.528), 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 § 300.650, the State's Parent Training and Information Center or Centers, the State's Protection and Advocacy organization, and other organizations representing the interests of children with disabilities and their parents, and a summary of the input of these organizations.

(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 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)(19)(A) and § 300.154(a) if it satisfies the requirements of paragraphs (b) through (e) of this section.

(g)(1) 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)(18)(C), (19)(C)(ii) and (E))

Subpart F—State Administration; General

§ 300.600 Responsibility for all educational programs.

(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—

(i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and

(ii) Meets the education standards of the SEA (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(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 children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(Authority: 20 U.S.C. 1412(a)(11))

Note: The requirement in § 300.600(a) reflects the desire of the Congress for a central point of responsibility and accountability in the education of children with disabilities within each State. With respect to SEA responsibility, the Senate Report on Pub. L. 94–142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the SEA shall be the responsible agency * * *.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. In many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (S. Rep. No. 94–168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options that may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning SEA standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's office issues an administrative directive establishing the SEA responsibility.

(3) State law, regulation, or policy designates the SEA as responsible for establishing standards for all educational programs for individuals with disabilities, and includes responsibility for monitoring.

(4) State law mandates that the SEA is responsible for all educational programs.

§ 300.601 Relation of Part B to other Federal programs.

Part B of the Act may not be construed to permit a State to reduce medical and other assistance available to children with disabilities, or to alter the eligibility of a child with a disability, under title V (Maternal and Child Health) or title XIX (Medicaid) of the Social Security Act, to receive services that are also part of FAPE.

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

§ 300.602 State-level activities.

(a) Each State may retain not more than the amount described in paragraph (b) of this section for administration in accordance with §§ 300.620 and 300.621 and other State-level activities in accordance with § 300.370.

(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 this section 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 611 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. 1411(f)(1)(A) and (B))

Use of Funds

§ 300.620 Use of funds for State administration.

(a) For the purpose of administering Part B of the Act, including 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)—

(1) Each State may use not more than twenty percent of the maximum amount it may retain under § 300.602(a) for any fiscal year or $500,000 (adjusted by the cumulative rate of inflation since fiscal year 1998, as measured by the percentage increase, if any, in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), whichever is greater; and

(2) Each outlying area may use up to five percent of the amount it receives under this section for any fiscal year or $35,000, whichever is greater.

(b) Funds described in paragraph (a) of this section may also be used for the administration of Part C of the Act, if the SEA is the lead agency for the State under that part.

(Authority: 20 U.S.C. 1411(f)(2))

§ 300.621 Allowable costs.

(a) The SEA may use funds under § 300.620 for—

(1) Administration of State activities under Part B of the Act and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of children with disabilities;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of children with disabilities;

(3) Technical assistance to LEAs with respect to the requirements of Part B of the Act;

(4) Leadership services for the program supervision and management of special education activities for children with disabilities; and

(5) Other State leadership activities and consultative services.

(b) The SEA shall use the remainder of its funds under § 300.620 in accordance with § 300.370.

(Authority: 20 U.S.C. 1411(f)(2))

§ 300.622 Subgrants to LEAs for capacity-building and improvement.

In any fiscal year in which the percentage increase in the State's allocation under 611 of the Act exceeds 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), each State shall reserve, from its allocation under 611 of the Act, the amount described in § 300.623 to make subgrants to LEAs, unless that amount is less than $100,000, to assist them in providing direct services and in making systemic change to improve results for children with disabilities through one or more of the following:

(a) Direct services, including alternative programming for children who have been expelled from school, and services for children in correctional facilities, children enrolled in State-operated or State-supported schools, and children in charter schools.

(b) Addressing needs or carrying out improvement strategies identified in the

State's Improvement Plan under subpart 1 of Part D of the Act.

(c) Adopting promising practices, materials, and technology, based on knowledge derived from education research and other sources.

(d) Establishing, expanding, or implementing interagency agreements and arrangements between LEAs and other agencies or organizations concerning the provision of services to children with disabilities and their families.

(e) Increasing cooperative problem-solving between parents and school personnel and promoting the use of alternative dispute resolution.

(Authority: 20 U.S.C. 1411(f)(4)(A))

§ 300.623 Amount required for subgrants to LEAs.

For each fiscal year, the amount referred to in § 300.622 is—

(a) The maximum amount the State was allowed to retain under § 300.602(a) for the prior fiscal year, or, for fiscal year 1998, 25 percent of the State's allocation for fiscal year 1997 under section 611; multiplied by

(b) The difference between the percentage increase in the State's allocation under this section and 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(f)(4)(B))

Note: The amount required for these subgrants will vary from year to year and is determined by the size of the increase in the State's allocation. Funds used for the required subgrants to LEAs in one year become part of the required flow-through to LEAs under § 300.712 in the next year. In those years in which the State's allocation does not increase over the prior year by at least the rate of inflation, the required set-aside for these grants will be zero. However, States may always use, at their discretion, funds reserved for State-level activities under § 300.602 for these subgrants.

§ 300.624 State discretion in awarding subgrants.

The State may establish priorities in awarding subgrants under § 300.622 to LEAs competitively or on a targeted basis.

(Authority: 20 U.S.C. 1411(f)(4)(B))

Note: The purpose of these subgrants, as distinguished from the formula subgrants to LEAs, is to provide funding that the SEA can direct to address particular needs not readily addressed through formula assistance to school districts such as funding for services to children who have been suspended or expelled. The SEA can also use these funds to promote innovation, capacity-building, and systemic changes that are needed to improve educational results.

State Advisory Panel

§ 300.650 Establishment of advisory panels.

(a) Each State shall establish and maintain, in accordance with §§ 300.650—300.653, a State advisory panel on the education of children with disabilities.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 300.652, the State may modify the existing panel so that it fulfills all of the requirements of §§ 300.650—300.653, instead of establishing a new advisory panel.

(Authority: 20 U.S.C. 1412(a)(21)(A))

Note: The advisory panel required by §§ 300.650—300.653 must advise the State regarding the education of all children with disabilities in the State. This includes advising the State on the education of eligible students with disabilities who have been convicted as adults and incarcerated in adult prisons, even if, consistent with § 300.600(d), a State assigns general supervision responsibility for those students to a public agency other than an SEA.

§ 300.651 Membership.

(a) *General.* The membership of the State advisory panel must consist of members appointed by the Governor, or any other official authorized under State law to make these appointments, that is representative of the State population and that is composed of individuals involved in, or concerned with the education of children with disabilities, including—

(1) Parents of children with disabilities;

(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;

(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) At least one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities; and

(10) 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.

(Authority: 20 U.S.C. 1412(a)(21)(B) and (C))

§ 300.652 Advisory panel functions.

The State advisory panel shall—

(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))

§ 300.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the SEA. This report must be made available to the public in a manner consistent with other public reporting requirements of Part B of the Act.

(c) Official minutes must be kept on all panel meetings and must be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 300.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 300.620 for this purpose.

(Authority: 20 U.S.C. 1412(a)(21))

State Complaint Procedures

§ 300.660 Adoption of State complaint procedures.

Each SEA shall adopt written procedures for—

(a) Resolving any complaint that meets the requirements of § 300.662 by—

(1) Providing for the filing of a complaint with the SEA; and

(2) 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

(b) Widely disseminating to parents and other interested individuals, including parent training centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's procedures under §§ 300.660—300.662.

(Authority: 20 U.S.C. 2831(a))

Note: In resolving a complaint alleging failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, may award compensatory services as a remedy for the denial of FAPE.

§ 300.661 Minimum State complaint procedures.

Each SEA shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after a complaint is filed under § 300.660(a) to—

(1) Carry out an independent on-site investigation, if the SEA determines that such 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) 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

(4) 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) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) Procedures for effective implementation of the SEA's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

(Authority: 20 U.S.C. 2831(a))

Note 1: If a written complaint is received that is also the subject of a due process hearing under § 300.507, or contains multiple issues, of which one or more may be part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved within the 60 calendar-day timeline using the complaint procedures described in this section.

Note 2: If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties, then the hearing decision is binding, and the SEA would inform the complainant to that effect. A complaint alleging a public agency's failure to implement a due process decision, however, would have to be resolved by the SEA.

§ 300.662 Filing a complaint.

(a) An organization or individual may file a signed written complaint under the procedures described in §§ 300.660–300.661.

(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; and

(2) The facts on which the statement is based.

(c) 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 § 300.660(a) unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received under § 300.660(a).

(Authority: 20 U.S.C. 2831(a))

Note: The SEA must resolve any complaint that meets the requirements of this section, even if the complaint is filed by an organization or individual from another State.

Subpart G—Allocation of Funds; Reports Allocations

§ 300.700 Special definition of the term "State".

For the purposes of §§ 300.701, 300.703–300.714, the term *State* means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 1411(h)(2))

§ 300.701 Grants to States.

(a) *Purpose of grants.* The Secretary makes grants to States and the outlying areas 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 amounts.* The maximum amount of the grant a State may receive under section 611 of the Act for any fiscal year is—

(1) The number of children with disabilities in the State who are receiving special education and related services—

(i) Aged 3 through 5 if the State is eligible for a grant under section 619 of the Act; and

(ii) Aged 6 through 21; multiplied by—

(2) Forty (40) percent of the average per-pupil expenditure in public elementary and secondary schools in the United States.

(Authority: 20 U.S.C. 1411(a))

§ 300.702 Definition.

For the purposes of this section the term *average per-pupil expenditure in public elementary and secondary schools in the United States* means—

(a) Without regard to the source of funds—

(1) 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

(2) Any direct expenditures by the State for the operation of those agencies; divided by

(b) 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. 1411(h)(1))

§ 300.703 Allocations to States.

(a) *General.* After reserving funds for studies and evaluations under section 674(e) of the Act, and for payments to the outlying areas and the Secretary of the Interior under §§ 300.717–300.722 and 300.715, the Secretary allocates the remaining amount among the States in accordance with paragraph (b) of this section and §§ 300.704–300.705 or 300.706–300.709.

(b) *Interim formula.* Except as provided in §§ 300.706–300.709, the Secretary allocates the amount described in paragraph (a) of this section among the States in accordance with section 611(a)(3), (4), (5) and (b)(1), (2) and (3) of the Act, as in effect prior to June 4, 1997, except that the determination of the number of children with disabilities receiving special education and related services under section 611(a)(3) of the Act (as then in effect) may be calculated as of December 1, or, at the State's discretion, the last Friday in October, of the fiscal year for which the funds were appropriated.

(Authority: 20 U.S.C. 1411(d))

§§ 300.704–300.705 [Reserved]

§ 300.706 Permanent formula.

(a) *Establishment of base year.* The Secretary allocates the amount described in § 300.703(a) among the States in accordance with §§ 300.706–300.709 for each fiscal year beginning with the first fiscal year for which the amount appropriated under 611(j) of the Act is more than $4,924,672,200.

(b) *Use of base year.*

(1) *Definition.* As used in this section, the term *base year* means the fiscal year preceding the first fiscal year in which this section applies.

(2) *Special rule for use of base year amount.* If a State received any funds under this section for the base year on the basis of children aged 3 through 5, but does not make FAPE available to all children with disabilities aged 3 through 5 in the State in any subsequent fiscal year, the Secretary computes the State's base year amount, solely for the purpose of calculating the State's allocation in that subsequent year under §§ 300.707–300.709, by subtracting the amount allocated to the State for the base year on the basis of those children.

(Authority: 20 U.S.C. 1411(e)(1) and (2))

§ 300.707 Increase in funds.

If the amount available for allocations to States under § 300.706 is equal to or greater than the amount allocated to the States under this section for the preceding fiscal year, those allocations are calculated as follows:

(a) Except as provided in § 300.708, the Secretary—

(1) Allocates to each State the amount it received for the base year;

(2) Allocates 85 percent of any remaining funds to States on the basis of their 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

(3) Allocates 15 percent of those remaining funds to States on the basis of their relative populations of children described in paragraph (a)(2) of this section 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. 1411(e)(3))

§ 300.708 Limitation.

(a) Notwithstanding § 300.707, allocations under this section are subject to the following:

(1) No State's allocation may be less than its allocation for the preceding fiscal year.

(2) No State's allocation may be less than the greatest of—

(i) The sum of—

(A) The amount it received for the base year; and

(B) One-third of one percent of the amount by which the amount appropriated under section 611(j) of the Act exceeds the amount appropriated under section 611 of the Act for the base year;

(ii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by the percentage by which the increase in the funds appropriated from the preceding fiscal year exceeds 1.5 percent; or

(iii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by 90 percent of the percentage increase in the amount appropriated from the preceding fiscal year.

(b) Notwithstanding paragraph (a)(2) of this section, no State's allocation under § 300.707 may exceed the sum of—

(1) The amount it received 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.

(c) If the amount available for allocations to States under § 300.307 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. 1411(e)(3)(B) and (C))

§ 300.709 Decrease in funds.

If the amount available for allocations to States under § 300.706 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:

(a) If the amount available for allocations is greater than the amount allocated to the States for the base year, each State is allocated the sum of—

(1) The amount it received for the base year; and

(2) An amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over the base year bears to the total of those increases for all States.

(b)(1) If the amount available for allocations is equal to or less than the amount allocated to the States for the base year, each State is allocated the amount it received for the base year.

(2) If the amount available is insufficient to make the allocations described in paragraph (b)(1) of this section, those allocations are ratably reduced.

(Authority: 20 U.S.C. 1411(e)(4))

§ 300.710 Allocation for State in which by-pass is implemented for private school children with disabilities.

In determining the allocation under §§ 300.700—300.709 of a State in which the Secretary will implement a by-pass for private school children with disabilities under §§ 300.451—300.487, 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 §§ 300.7(a) and 300.450) 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))

§ 300.711 Subgrants to LEAs.

Each State that receives a grant under section 611 of the Act for any fiscal year shall distribute in accordance with § 300.712 any funds it does not retain under § 300.602 and is not required to distribute under §§ 300.622 and 300.623 to LEAs in the State that have established their eligibility under section 613 of the Act, and to State agencies that received funds under section 614A(a) of the Act for fiscal year 1997, as then in effect, and have established their eligibility under section 613 of the Act, for use in accordance with Part B of the Act.

(Authority: 20 U.S.C. 1411(g)(1))

§ 300.712 Allocations to LEAs.

(a) *Interim procedure.* For each fiscal year for which funds are allocated to States under § 300.703(b) each State shall allocate funds under § 300.711 in accordance with section 611(d) of the Act, as in effect prior to June 4, 1997.

(b) *Permanent procedure.* For each fiscal year for which funds are allocated to States under §§ 300.706–300.709, each State shall allocate funds under § 300.711 as follows:

(1) *Base payments.* The State first shall award each agency described in § 300.711 the amount that agency would have received under this section for the base year, as defined in § 300.706(b)(1), if the State had distributed 75 percent of its grant for that year under section § 300.703(b).

(2) *Allocation of remaining funds.* The State then shall—

(i) Allocate 85 percent of any remaining funds to those agencies on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction; and

(ii) Allocate 15 percent of those remaining funds to those agencies in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(Authority: 20 U.S.C. 1411(g)(2))

Note: In distributing funds under paragraph (b)(2)(i) of this section, States should use the best data that are available to them on enrollment in public and private schools. If data on enrollment in private schools are not available, States or LEAs are not expected to initiate new data collections to obtain these data. However, States are encouraged to try to obtain enrollment data from private, nonprofit schools that want their students to participate in the program.

In distributing funds under paragraph (b)(2)(ii) of this section, States have discretion in determining what data to use to allocate funds among LEAs on the basis of children living in poverty. States should use the best data available to them that reflect the distribution of children living in poverty. Examples of options include census poverty data, data on children in families receiving assistance under the State program funded under Part A of title IV of the Social Security Act, data on children participating in the free or reduced-price meals program under the National School Lunch Act, and allocations under title I of the Elementary and Secondary Education Act.

§ 300.713 Former Chapter 1 State agencies.

(a) To the extent necessary, the State—

(1) Shall use funds that are available under § 300.602(a) to ensure that each State agency that received fiscal year 1994 funds under subpart 2 of Part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as in effect in fiscal year 1994) receives, from the combination of funds under § 300.602(a) and funds provided under § 300.711, an amount equal to—

(i) The number of children with disabilities, aged 6 through 21, to whom the agency was providing special education and related services on December 1, or, at the State's discretion, the last Friday in October, of the fiscal year for which the funds were appropriated, subject to the limitation in paragraph (b) of this section; multiplied by

(ii) The per-child amount provided under such subpart for fiscal year 1994; and

(2) May use those funds to ensure that each LEA that received fiscal year 1994 funds under that subpart for children who had transferred from a State-operated or State-supported school or program assisted under that subpart receives, from the combination of funds available under § 300.602(a) and funds provided under § 300.711, an amount for each child, aged 3 through 21 to whom the agency was providing special education and related services on December 1, or, at the State's discretion, the last Friday in October, of the fiscal year for which the funds were appropriated, equal to the per-child amount the agency received under that subpart for fiscal year 1994.

(b) The number of children counted under paragraph (a)(1)(i) of this section may not exceed the number of children aged 3 through 21 for whom the agency received fiscal year 1994 funds under subpart 2 of Part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as in effect in fiscal year 1994).

(Authority: 20 U.S.C. 1411(g)(3))

§ 300.714 Reallocation of LEA funds.

If a 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 Part B of the Act that are not needed by that local agency 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 they serve.

(Authority: 20 U.S.C. 1411(g)(4))

§ 300.715 Payments to the Secretary of the Interior for the education of Indian children.

(a) *Reserved amounts for Secretary of Interior.* From the amount appropriated for any fiscal year under 611(j) of the Act, the Secretary reserves 1.226 percent to provide assistance to the Secretary of the Interior in accordance with this section.

(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 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 paragraph (a) of this section for that fiscal year.

(c) *Calculation of number of children.* In the case of Indian students aged 3 to 5, inclusive, who are enrolled in programs affiliated with the Bureau of Indian Affairs (BIA) schools and that are required by the States in which these schools are located to attain or maintain State accreditation, and which schools have this accreditation prior to the date of enactment of the Individuals with Disabilities Education Act Amendments of 1991, the school may count those children for the purpose of distribution of the funds provided under this section to the Secretary of the Interior.

(d) *Responsibility for meeting the requirements of Part B.* The Secretary of the Interior shall meet all of the requirements of Part B of the Act for the children described in paragraph (b) of this section, in accordance with § 300.260.

(Authority: 20 U.S.C. 1411(c); 1411(i)(1) (A) and (B))

§ 300.716 Payments for education and services for Indian children with disabilities aged 3 through 5.

(a) *General.* With funds appropriated under 611(j) 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 those tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities aged 3 through 5 on reservations served by elementary 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 § 300.715(a).

(b) *Distribution of funds.* The Secretary of the Interior shall distribute the total amount of the payment under paragraph (a) of this section by allocating to each tribe or tribal organization an amount based on the number of children with disabilities ages 3 through 5 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 shall 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 3 through 5, 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 entities shall, as appropriate, 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 shall provide to the Secretary of the Interior a biennial report of activities undertaken under this paragraph, 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 one in which the report is made. The Secretary of the Interior shall include a summary of this information on a biennial basis in the report to the Secretary required under section 611(i). 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(i)(3))

§ 300.717 Outlying areas and freely associated States.

From the amount appropriated for any fiscal year under 611(j) of the Act, the Secretary reserves not more than one percent, which must be used—

(a) To provide assistance to the outlying areas in accordance with their respective populations of individuals aged 3 through 21; and

(b) For fiscal years 1998 through 2001, to carry out the competition described in § 300.719, except that the amount reserved to carry out that competition may not exceed the amount reserved for fiscal year 1996 for the competition under Part B of the Act described under the heading ''SPECIAL EDUCATION'' in Public Law 104–134.

(Authority: 20 U.S.C. 1411(b)(1))

§ 300.718 Outlying area—definition.

As used in this part, the term *outlying area* means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(Authority: 20 U.S.C. 1402(18))

§ 300.719 Limitation for freely associated States.

(a) *Competitive grants.* The Secretary uses funds described in § 300.717(b) to award grants, on a competitive basis, to Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated States to carry out the purposes of this part.

(b) *Award basis.* The Secretary awards grants under paragraph (a) of this section on a competitive basis, pursuant to the recommendations of the Pacific Region Educational Laboratory in Honolulu, Hawaii. Those recommendations must be made by experts in the field of special education and related services.

(c) *Assistance requirements.* Any freely associated State that wishes to receive funds under Part B of the Act shall include, in its application for assistance—

(1) Information demonstrating that it will meet all conditions that apply to States under this part;

(2) An assurance that, notwithstanding any other provision of this part, 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;

(3) 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

(4) Such other information and assurances as the Secretary may require.

(d) *Termination of eligibility.* Notwithstanding any other provision of law, the freely associated States may not receive any funds under Part B of the Act for any program year that begins after September 30, 2001.

(e) *Administrative costs.* The Secretary may provide not more than five percent of the amount reserved for grants under this section to pay the administrative costs of the Pacific Region Educational Laboratory under paragraph (b) of this section.

(f) *Eligibility for award.* An outlying area is not eligible for a competitive award under § 300.719 unless it receives assistance under § 300.717(a).

(Authority: 20 U.S.C. 1411(b)(2) and (3))

§ 300.720 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 those areas or to the freely associated States under Part B of the Act.

(Authority: 20 U.S.C. 1411(b)(4))

§ 300.721 [Reserved]

§ 300.722 Definition.

As used in this part, the term *freely associated States* means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

(Authority: 20 U.S.C. 1411(b)(6))

Reports

§ 300.750 Annual report of children served—report requirement.

(a) The SEA shall report to the Secretary no later than February 1 of each year the number of children with disabilities aged 3 through 21 residing in the State who are receiving special education and related services.

(b) The SEA shall submit the report on forms provided by the Secretary.

(Authority: 20 U.S.C. 1411(d)(2); 1418(a))

Note: It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make FAPE available. For example, while section 611(a)(5) of the Act prior to the Individuals with Disabilities Education Act Amendments of 1997 limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged 3 through 17 (in States that serve all children with disabilities aged 3 through 5) or 5 through 17 (in States that do not serve all children with disabilities aged 3 through 5), a State might find that 13 percent (or some other percentage) of its children have disabilities. In that case, the State must make FAPE available to all of those children with disabilities.

§ 300.751 Annual report of children served—information required in the report.

(a) For any year before the total appropriation for section 611 of the Act first exceeds $4,924,672,200, the SEA shall include in its report a table that shows—

(1) The number of children with disabilities receiving special education and related services on December 1, or at the State's discretion on the last Friday in October, of that school year;

(2) The number of children with disabilities aged 3 through 5 who are receiving FAPE;

(3) The number of those children with disabilities aged 6 through 21 within each disability category, as defined in the definition of ''children with disabilities'' in § 300.7; and

(4) The number of those children with disabilities aged 3 through 21 for each year of age (3, 4, 5, etc.).

(b) For the purpose of this part, a child's age is the child's actual age on the date of the child count: December 1, or, at the State's discretion, the last Friday in October.

(c) The SEA may not report a child aged 6 through 21 under more than one disability category.

(d) If a child with a disability aged 6 through 21 has more than one disability, the SEA shall report that child in accordance with the following procedure:

(1) A child with deaf-blindness must be reported under the category ''deaf-blindness.''

(2) A child who has more than one disability (other than deaf-blindness) must be reported under the category ''multiple disabilities.''

(Authority: 20 U.S.C. 1411(d)(2); 1418(a))

§ 300.752 Annual report of children served—certification.

The SEA shall include in its report a certification signed by an authorized official of the agency that the information provided 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. 1411(d)(2); 1417(b))

§ 300.753 Annual report of children served—criteria for counting children.

(a) 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 either—

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The SEA may not include children with disabilities in its report who—

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education; or

(4) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 300.184(c)(2).

(Authority: 20 U.S.C. 1411(d)(2); 1417(b))

Note 1: Under paragraph (a) of this section, the State may count children with disabilities in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

Note 2: Both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Department expects that there would only be limited situations in which special education would be clearly separate from regular education—generally, if speech services are the only special education required by the child. For example, the child's parents may have enrolled the child in a regular program in a private school, but the child might be receiving speech services in a program funded by the LEA. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 612(a)(10)(A) of the Act regarding private schools) to public agencies to provide services to children enrolled by their parents in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that if a public agency places or refers a child with a disability to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If an SEA or LEA is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 300.754 Annual report of children served—other responsibilities of the State education agency.

In addition to meeting the other requirements of §§ 300.750–300.753, the SEA shall—

(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 § 300.750(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 §§ 300.750–300.753; 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. 1411(d)(2); 1417(b))

Note: States should note that the data required in the annual report of children served are not to be transmitted to the Secretary in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

§ 300.755 Disproportionality.

(a) *General.* Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, shall provide for the collection and examination of data to determine if significant disproportionality based on race is occurring in the State or in the schools operated by the Secretary of the Interior 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; and

(2) The placement in particular educational settings of these children.

(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 shall 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 Part B of the Act.

(Authority: 20 U.S.C. 1418(c))

§ 300.756 Acquisition of equipment; construction or alteration of facilities.

(a) *General.* If the Secretary determines that a program authorized under Part B of the Act would 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 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 Guidelines for Buildings and Facilities''); or

(2) Appendix A of part 101–19.6 of title 41, Code of Federal Regulations (commonly known as the ''Uniform Federal Accessibility Standards'').

(Authority: 20 U.S.C. 1405)

Appendices A and B to Part 300 [Reserved]

2. Part 301 is revised to read as follows:

PART 301—PRESCHOOL GRANTS FOR CHILDREN WITH DISABILITIES

Subpart A—General

Sec.

Authority: 20 U.S.C. 1419, unless otherwise noted.

Subpart A—General

§ 301.1 Purpose of the Preschool Grants for Children With Disabilities Program.

The purpose of the Preschool Grants for Children With Disabilities program (Preschool Grants program) is to provide grants to States to assist them in providing special education and related services—

(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))

§§ 301.2–301.3 [Reserved]

§ 301.4 Applicable regulations.

The following regulations apply to the Preschool Grants program:

(a) The Education Department General Administrative Regulations (EDGAR) in title 34 of the Code of Federal Regulations—

(1) Part 76 (State-Administered Programs) except §§ 76.125–76.137 and 76.650—76.662;

(2) Part 77 (Definitions that Apply to Department Regulations);

(3) Part 79 (Intergovernmental Review of Department of Education Programs and Activities);

(4) Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments);

(5) Part 81 (General Education Provision Act—Enforcement);

(6) Part 82 (New Restrictions on Lobbying); and

(7) Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for a Drug-Free Workplace (Grants)).

(b) The regulations in this part 301.

(c) The regulations in 34 CFR part 300.

(Authority: 20 U.S.C. 1419)

§ 301.5 Applicable definitions.

(a) *Definitions in the Act.* The following terms used in this part are defined in the Act: Educational service agency Local educational agency State educational agency

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
EDGAR
Fiscal year
Grant period
Secretary
Subgrant

(c) *Other definitions.* The following definitions also apply to this part:

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

Part B child count means the child count required by section 611(d)(2) of the Act.

Preschool means the age range of 3 through 5 years.

State means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 1402, 1419)

§ 301.6 Applicability of Part C of the Act to two-year-old children with disabilities.

Part C of the Act does not apply to any child with disabilities receiving a free appropriate public education, in accordance with part B of the Act, with funds received under the Preschool Grants program.

(Authority: 20 U.S.C. 1419(h))

Subpart B—State Eligibility for a Grant

§ 301.10 Eligibility of a State to receive a grant.

A State is eligible to receive a grant if—

(a) The State is eligible under 34 CFR part 300; and

(b) The State demonstrates to the satisfaction of the Secretary that it has in effect policies and procedures that assure the provision of a free appropriate public education—

(1) For all children with disabilities aged three through five years in accordance with the requirements in 34 CFR part 300; and

(2) For any two-year-old children, provided services by the SEA or by an LEA or ESA under section 301.1.

(Authority: 20 U.S.C. 1419 (a), (b))

§ 301.11 [Reserved]

§ 301.12 Sanctions if a State does not make a free appropriate public education available to all preschool children with disabilities.

If a State does not meet the requirements in section 619(b) of the Act—

(a) The State is not eligible for a grant under the Preschool Grant program;

(b) The State is not eligible for funds under 34 CFR part 300 for children with disabilities aged 3 through 5 years; and

(c) No SEA, LEA, ESA, or other public institution or agency within the State is eligible for a grant under Subpart 2 of part D of the Act if the grant relates exclusively to programs, projects, and activities pertaining to children with disabilities aged 3 through 5 years.

(Authority: 20 U.S.C. 1411(d)(2) and (e)(2)(B); 1419(b); 1461(j))

Subpart C—Allocation of Funds to States

§ 301.20 Allocations to States.

After reserving funds for studies and evaluations under section 674(e) of the Act, the Secretary allocates the remaining amount among the States in accordance with §§ 301.21–301.23.

(Authority: 20 U.S.C. 1419(c)(1))

§ 301.21 Increase in funds.

If the amount available for allocation to States under § 301.20 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 § 301.22, the Secretary—

(1) Allocates to each State the amount it received for fiscal year 1997;

(2) Allocates 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 5; and

(3) Allocates 15 percent of those remaining funds to States on the basis of their relative populations of children described in paragraph (a)(2) of this section 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))

§ 301.22 Limitation.

(a) Notwithstanding § 301.21, allocations under that section are subject to the following:

(1) No State's allocation may be less than its allocation for the preceding fiscal year.

(2) No State's allocation may be less than the greatest of—

(i) The sum of—

(A) The amount it received 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 exceeds the amount appropriated under section 619 of the Act for fiscal year 1997;

(ii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by the percentage by which the increase in the funds appropriated from the preceding fiscal year exceeds 1.5 percent; or

(iii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by 90 percent of the percentage increase in the amount appropriated from the preceding fiscal year.

(b) Notwithstanding paragraph (a)(2) of this section, no State's allocation under § 301.21 may exceed the sum of—

(1) The amount it received 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.

(c) If the amount available for allocation to States under § 301.21 and paragraphs (a) and (b) of this section is insufficient to pay those allocations in full, the Secretary ratably reduces those allocations, subject to paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 1419(c)(2)(B) and (C))

§ 301.23 Decrease in funds.

If the amount available for allocations to States under § 301.20 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 it received for fiscal year 1997; and

(2) An amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over fiscal year 1997 bears to the total of those increases for all States.

(b)(1) If the amount available for allocations is equal to the amount allocated to the States for fiscal year 1997, each State is allocated the amount it received for that year.

(2) If the amount available is less than the amount allocated to States for fiscal year 1997, the Secretary allocates amounts equal to the allocations for fiscal year 1997, ratably reduced.

(Authority: 20 U.S.C. 1419(c)(3))

§ 301.24 State-level activities.

(a) Each State may retain not more than the amount described in paragraph (b) of this section for administration and other State-level activities in accordance with §§ 301.25 and 301.26.

(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))

§ 301.25 Use of funds for 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), each State may use not more than twenty percent of the maximum amount it may retain under § 301.24 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, if the SEA is the lead agency for the State under that part.

(Authority: 20 U.S.C. 1419(e))

§ 301.26 Use of State agency allocations.

Each State shall use any funds it retains under § 301.24 and does not use for administration under § 301.25 for any of the following:

(a) 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 3 or older than 5 as long as those services also benefit children with disabilities aged 3 through 5.

(b) Direct services for children eligible for services under section 619 of the Act.

(c) Developing a State improvement plan under subpart 1 of Part D of the Act.

(d) Activities at the State and local levels to meet the performance goals established by the State under section 612(a)(16) of the Act and to support implementation of the State improvement plan under subpart 1 of Part D of the Act if the State receives funds under that subpart.

(e) Supplementing 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 to exceed one percent of the amount received by the State under section 619 of the Act for a fiscal year.

(Authority: 20 U.S.C. 1419(f))

Note: The Individual with Disabilities Education Act Amendments of 1997 made a number of changes to the Act designed to encourage better coordination of services among programs, including flexibility for States to use State administration funds under section 619(e) to coordinate activities with other programs that provide services to children with disabilities and to fund administrative costs related to part C. Consistent with the intent of these provisions, an example of an authorized activity under paragraph (a) would be to plan

and develop a statewide comprehensive delivery system for children with disabilities aged birth through five.

Subpart D—Allocation of funds to local educational agencies.

§ 301.30 Subgrants to local educational agencies.

Each State that receives a grant under section 619 of the Act for any fiscal year shall distribute any funds it does not retain under § 301.24 to local educational agencies in the State that have established their eligibility under section 613 of the Act.

(Authority: 20 U.S.C. 1419(g)(1))

§ 301.31 Allocations to local educational agencies.

(a) *Base payments.* The State shall first award each agency described in § 301.27 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 then in effect.

(b) *Allocation of remaining funds.* After making allocations under paragraph (a) of this section, the State shall—

(1) Allocate 85 percent of any remaining funds to those agencies on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction; and

(2) Allocate 15 percent of those remaining funds to those agencies in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(Authority: 20 U.S.C. 1419(g)(1))

Note: In distributing funds under paragraph (b)(1) of this section, States should use the best data that is available to them on enrollment in public and private schools. If data on enrollment in private schools is not available, States or LEAs are not expected to initiate new data collections to obtain this data. However, States are encouraged to try to obtain enrollment data from private schools that want their students to participate in the program.

In distributing funds under paragraph (b)(2) of this section, States have discretion in determining what data to use to allocate funds among LEAs on the basis of children living in poverty. States should use the best data available to them that reflect the distribution of children living in poverty. Examples of options include census poverty data, data on children in families receiving assistance under the State program funded under Part A of title IV of the Social Security Act, data on children participating in the free or reduced-price meals program under the National School Lunch Act, and allocations under title I of the Elementary and Secondary Education Act.

§ 301.32 Reallocation of LEA funds.

(a) If a SEA determines that an LEA is adequately providing a free appropriate public education to all children with disabilities aged 3 through 5 residing in the area served by that agency 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 local agency to provide a free appropriate public education to other local educational agencies in the State that are not adequately providing special education and related services to all children with disabilities aged 3 through 5 residing in the areas they serve.

(b) If a State provides services to preschool children with disabilities because some or all LEAs and ESAs are unable or unwilling to provide appropriate programs, the SEA may use payments that would have been available to those LEAs or ESAs to provide special education and related services to children with disabilities aged 3 through 5 years, and to two-year-old children with disabilities receiving services consistent with § 301.1 who are residing in the area served by those LEAs and ESAs.

(Authority 20 U.S.C. 1414(d), 1419(g)(2))

PART 303—EARLY INTERVENTION PROGRAM FOR INFANTS AND TODDLERS WITH DISABILITIES

3. The authority citation for part 303 is revised to read as follows:

Authority: 20 U.S.C. 1431–1445, unless otherwise noted.

4. Section 303.18 is revised to read as follows:

§ 303.18 Parent.

(a) As used in this part, ''parent'' means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 303.406. The term does not include the State if the child is a ward of the State.

(b) State law may provide that a foster parent qualifies as a parent under this part if—

(1) The natural parents' authority to make early intervention or educational decisions on the child's behalf has been relinquished under State law;

(2) The foster parent has an ongoing, long-term parental relationship with the child;

(3) The foster parent is willing to participate in making early intervention or educational decisions on the child's behalf; and

(4) The foster parent has no interest that would conflict with the interests of the child.

(Authority: 20 U.S.C. 1436)

Note: The term ''parent'' has been defined to include persons acting in the place of a parent, such as a grandparent or stepparent with whom a child lives, as well as persons who are legally responsible for the child's welfare, and, at the discretion of the State, a foster parent meeting the requirements of paragraph (b) of this section. The definition in this section is identical to the definition used in the regulations under Part B of the Act (34 CFR 300.19).

5. Section 303.403 is amended by removing the word ''and'' at the end of paragraph (b)(2); removing the period at the end of paragraph (b)(3) and adding, in its place, ''; and''; by adding a new paragraph (b)(4); and by revising the citation of authority to read as follows:

§ 303.403 Prior notice; native language.

* * * * *

(b) *Content of notice.* The notice must be in sufficient detail to inform the parents about—

* * * * *

(4) The State complaint procedures under §§ 303.510–512, including a description of how to file a complaint and the timelines under those procedures.

(Authority: 20 U.S.C. 1439(a)(6) and (7))

6. Section 303.510 is amended by revising paragraph (b); redesignating the existing note as Note 1; adding a new Note 2; and revising the citation of authority to read as follows:

§ 303.510 Adopting complaint procedures.

* * * * *

(b) Widely disseminating to parents and other interested individuals, including parent training centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's procedures under §§ 303.510 through 303.512.

(Authority: 20 U.S.C. 1435(a)(10))

Note 1: Because of the interagency nature of Part C of the Act, complaints received under these regulations could concern violations by (1) any public agency in the State that receives funds under this part (e.g., the lead agency and the Council), (2) other public agencies that are involved in the State's early intervention program, or (3) private service providers that receive Part C funds on a contract basis from a public agency to carry out a given function or provide a given service required under this part. These complaint procedures are in addition to any other rights under State or Federal law. The lead agency must provide for the filing of a complaint with the lead agency and, at the lead agency's discretion, with a public agency subject to a right of appeal to the lead agency.

Note 2: In resolving a complaint alleging failure to provide services in the IFSP, a lead

agency, pursuant to its general supervisory authority under this part, may award compensatory services as a remedy.

7. Section 303.511 is amended by adding a new paragraph (c) and a note; and revising the citation of authority to read as follows:

§ 303.511 An organization or individual may file a complaint.

* * * * *

(c) The alleged violation must have occurred not more than one year prior to the date that the complaint is received by the public agency unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received by the public agency.

(Authority: 20 U.S.C. 1435(a)(10))

Note: The lead agency must resolve any complaint that meets the requirements of this section, even if the complaint is filed by an organization or individual from another State.

8. Section 303.512 is revised by removing paragraph (d), revising the citation of authority, and adding two notes following the revised citation of authority to read as follows:

§ 303.512 Minimum State complaint procedures.

* * * * *

(Authority: 20 U.S.C. 1435(a)(10))

Note 1: If a written complaint is received that is also the subject of a due process hearing under § 303.420, or contains multiple issues, of which one or more may be part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved within the 60-calendar-day timeline using the complaint procedures described in this section.

Note 2: If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties, then the hearing decision is binding, and the lead agency would inform the complainant to that effect. A complaint alleging a public agency's failure to implement a due process decision, however, would have to be resolved by the lead agency.

9. Section 303.520 is amended by adding new paragraphs (d) and (e) and three notes; and revising the citation of authority to read as follows:

§ 303.520 Policies related to payment for services.

* * * * *

(d) *Infants and toddlers with disabilities who are covered by private insurance.*

(1) A lead agency may not require parents of infants and toddlers with disabilities, if they would incur a financial cost, to use private insurance proceeds to pay for the services that must be provided to an eligible infant or toddler under this part.

(2) For the purposes of this section, the term ''financial costs'' includes—

(i) An out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim, but not including incidental costs such as the time needed to file an insurance claim or the postage needed to mail the claim;

(ii) A decrease in available lifetime coverage or any other benefit under an insurance policy; and

(iii) An increase in premiums or the discontinuation of the policy.

(e) *Proceeds from public or private insurance.* Proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR 80.25.

(Authority: 20 U.S.C. 1435(a)(10); 1432(4)(B))

Note 1: Under paragraph (d), States are prohibited from requiring that families use private insurance as a condition of receiving services under this part, if that use results in financial cost to the family. The use of parents' insurance proceeds to pay for services in these circumstances must be voluntary. For example, a family could not be required to access private insurance that is required to enable a child to receive Medicaid services, if that insurance use results in financial costs to the family.

Note 2: If the State cannot get parental consent to use private insurance, the State may use funds under this part to pay for the service. In addition, in order to avoid financial cost to parents who would otherwise consent to use of private insurance, the lead agency may use funds under this part to pay the costs of accessing the insurance; e.g., deductible or co-pay amounts.

Note 3: Paragraph (e) clarifies that, if a State receives funds from public or private insurance for services under this part, the State is not required to return those funds to the Department or to dedicate those funds for use in this program, although a State retains the option of using those funds in this program. If a State 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 nonsupplanting provision in § 303.124. This is because the expenditure that is reimbursed is considered to be an expenditure of funds from the source that provides the reimbursement.

Appendix C to Part 300—Notice of Interpretation

Authority: Individuals with Disabilities Education Act (20 U.S.C. 1401, *et seq.*), unless otherwise noted.

Interpretation of Individualized Education Program (IEP) Requirements of the Individuals with Disabilities Education Act (IDEA)

The IEP requirements of the IDEA emphasize the importance of each child with a disability's involvement and progress in the general curriculum; of the involvement of parents and students, together with regular and special education personnel in making individualized decisions to support each child's educational success; and of preparing students with disabilities for employment and other post-school experiences. This Appendix provides guidance regarding Part B IEP requirements, especially as they relate to these core concepts, as well as other issues regarding the development and content of IEPs.

I. Involvement and Progress in the General Curriculum

In enacting the IDEA Amendments of 1997, the Congress found that:

* * * research, demonstration, and practice [over the past 20 years] in special education and related disciplines have demonstrated that an effective educational system now and in the future must—(A) maintain high academic standards and clear performance goals for children with disabilities, consistent with the standards and expectations for all students in the educational system, and provide for appropriate and effective strategies and methods to ensure that students who are children with disabilities have maximum opportunities to achieve those standards and goals. [§ 651(a)(6)(A) of the Act.]

Accordingly, the evaluation and IEP provisions of Part B place great emphasis on the involvement and progress of children with disabilities in the general curriculum. While the Act and regulations recognize that IEP teams must make individualized decisions about the special education and related services, and supplementary aids and services, provided to each child with a disability, they are driven by IDEA's strong preference that, to the maximum extent appropriate, children with disabilities be educated in regular classes with their nondisabled peers with appropriate supplementary aids and services.

1. What are the major Part B IEP requirements that govern the involvement and progress of children with disabilities in the general curriculum?

Present Levels of Educational Performance

Section 300.347(a)(1) requires that the IEP for each child with a disability include ''* * * a statement of the child's present levels of educational performance, including—(i) *How the child's disability affects the child's involvement and progress in the general curriculum*; or (ii) *for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities* * * *'' (Italics added.) (''Appropriate activities'' in this context refers to age-relevant developmental abilities or milestones that typically developing children of the same age would be performing or would have achieved.)

Measurable Annual Goals, Including Benchmarks or Short-term Objectives

Measurable annual goals, including benchmarks or short-term objectives, are instrumental to the strategic planning process used to develop and implement the IEP for each child with a disability. Once the IEP team has developed measurable annual goals for a child, the team can (1) develop strategies that will be most effective in realizing those goals and (2) develop measurable, intermediate steps (short-term objectives) or major milestones (benchmarks) that will enable families, students, and educators to monitor progress during the year, and, if appropriate, to revise the IEP consistent with the child's instructional needs.

Part B's strong emphasis on linking the educational program of children with disabilities to the general curriculum is reflected in § 300.347(a)(2), which requires that the IEP include:

a statement of measurable annual goals, including benchmarks or short-term objectives, related to—(i) *meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum;* and (ii) meeting each of the child's other educational needs that result from the child's disability. [Italics added.]

Special Education and Related Services and Supplementary Aids and Services

The requirements regarding services provided to address a child's present levels of educational performance and to make progress toward the identified goals reinforce the emphasis on progress in the general curriculum, as well as maximizing the extent to which children with disabilities are educated with nondisabled children. Section 300.347(a)(3) requires that the IEP include:

a statement of the special education and related services and supplementary aids and services 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 for the child—(i) To advance appropriately toward attaining the annual goals; (ii) *to be involved and progress in the general curriculum* * * * 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 [extracurricular and other nonacademic activities]* * * * [Italics added.]

Extent to Which Child Will Participate With Nondisabled Children

Section 300.347(a)(4) requires that each child's IEP include ''* * * an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in [extracurricular and other nonacademic] activities] * * *'' This is consistent with the least restrictive environment provisions at §§ 300.550–300.553, which include requirements that:

(1) Each child with a disability be educated with nondisabled children to the maximum extent appropriate (§ 300.550(b)(1));

(2) Each child with a disability be removed from the regular educational environment only when the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (§ 300.550(b)(1)); and

(3) To the maximum extent appropriate to the child's needs, each child with a disability participate with nondisabled children in nonacademic and extracurricular services and activities (§ 300.553).

Participation in State or Districtwide Assessments of Student Achievement

Consistent with § 300.138(a), which sets forth a presumption that children with disabilities will be included in general State- and district-wide assessment programs, and provided with appropriate accommodations if necessary, § 300.347(a)(5) requires that the IEP for each student with a disability include: (i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and (ii) if the IEP Team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of—(A) Why that assessment is not appropriate for the child; and (B) How the child will be assessed.

Regular Education Teacher Participation in the Development, Review, and Revision of IEPs

Very often, regular education teachers play a central role in the education of children with disabilities (House Report No. 105–95, p. 103 (1997)) and have important expertise regarding the general curriculum and the general education environment. Further, especially with the emphasis on involvement and progress in the general curriculum added by the IDEA Amendments of 1997, regular education teachers have an increasingly critical role in implementing, together with special education and related services personnel, the program of FAPE for most children with disabilities, as described in their IEPs. Accordingly, the IDEA Amendments of 1997 added a requirement that each child's IEP team must include at least one regular education teacher of the child, if the child is, or may be, participating in the regular education environment (see § 300.344(a)(2)). (See also §§ 300.346(d) on the role of a regular education teacher in the development, review and revision of IEPs.)

2. Must a child's IEP address his or her involvement in the general curriculum, regardless of the nature and severity of the child's disability and the setting in which the child is educated?

Yes. The IEP for all children with disabilities must address how the child will be involved and progress in the general curriculum, as described. The Part B regulations recognize that some children with disabilities will have some educational needs that result from their disabilities that cannot be fully met by involvement and progress in the general curriculum; accordingly, § 300.347(a)(2) requires that each child's IEP include:

a statement of measurable annual goals, including benchmarks or short-term objectives, related to—(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; *and (ii) meeting each of the child's other educational needs that result from the child's disability.* [Italics added.]

Thus, the IEP team for each child with a disability must make an individualized determination regarding how the child will participate in the general curriculum, and what, if any, educational needs that will not be met through involvement in the general curriculum should be addressed in the IEP. This includes children who are educated in separate classrooms or schools.

3. What must public agencies do to meet the requirements at §§ 300.344(a)(2) and 300.346(d), regarding the participation of a ''regular education teacher'' in the development and review of the IEP, for children aged 3 through 5 who are receiving preschool special education services?

If a public agency provides ''regular education'' preschool services to non-disabled children, then the requirements of §§ 300.344(a)(2) and 300.346(d) apply as they do in the case of older children with disabilities. If a public agency makes kindergarten available to nondisabled children, then a regular education kindergarten teacher could appropriately be the regular education teacher who would participate in an IEP meeting for a kindergarten-aged child who is, or may be, participating in the regular education environment. If a public agency does not provide regular preschool education services to nondisabled children, the agency would designate an individual who, under State standards, is qualified to serve nondisabled children of the same age.

4. Must the measurable annual goals in a child's IEP address all areas of the general curriculum, or only those areas in which the child's involvement and progress are affected by the child's disability?

Section 300.347(a)(2) requires that each child's IEP include a ''.* * * statement of measurable annual goals, including benchmarks or short-term objectives, *related to—(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum*; and (ii) meeting each of the child's other educational needs that result from the child's disability* * * *'' (Italics added). Thus, a public agency is not required to include in an IEP annuals goals that relate to areas of the general curriculum in which the child's disability does not affect the child's ability to be involved in and progress in the general curriculum.

II. Involvement of Parents and Students

One of the key purposes of the IDEA Amendments of 1997 is to ''Expand and promote opportunities for parents, special education, related services, regular education, and early intervention service providers, and other personnel to work in new partnerships at both the State and local levels (House Report 105–95, p. 82 (1997)). Indeed, the Committee viewed the Amendments as an opportunity to ''[strengthen] the role of parents.'' (House

Report 105–95, p-82 (1997).) Accordingly, the Amendments require that parents have ''an opportunity * * * to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child'' (§ 300.501). Parents must now be part of the teams that determine what additional data are needed as part of an evaluation of their child (§ 300.533(a)(1)); their child's eligibility (§ 300.534(a)(1)); and the educational placement of their child (§ 300.501(c)). Parents' concerns, and information that they provide regarding their children, must be considered in developing and reviewing their children's IEPs (§§ 300.343(c)(iii) and 300.346 (a)(1)(i) and (b)).

As explained, the requirements for keeping parents informed about the educational progress of their children, particularly as it relates to their progress in the general curriculum, have been strengthened (§ 300.347(a)(7)).

The IDEA Amendments of 1997 and the 1990 amendments have both included provisions which greatly strengthen involvement of students with disabilities in decisions regarding their own futures, to facilitate movement from school to post-school activities. The IDEA Amendments of 1990 included provisions regarding transition services, which require: (a) A coordinated set of activities within an outcome-oriented process to facilitate movement from school to post-school activities; (b) that the transition services provided to each student be ''* * * based on the individual student's needs, taking into account the student's preferences and interests'' (§ 300.27(b)), (c) that the public agency invite a student with a disability to any IEP meetings for which a purpose is the consideration of transition services (§ 300.344(b)(1)), and that, if ''* * * the student does not attend, the public agency * * * take other steps to ensure that the student's preferences and interests are considered (§ 300.344(b)(2)). States may now transfer most parent rights under Part B to the student when the student reaches the age of majority under State law (§ 300.517), and beginning at least one year before a student reaches the age of majority under State law, the IEP must include a statement that the student has been informed of any rights that will transfer to him or her upon reaching the age of majority (§ 300.347(c)).

5. What is the role of the parents, including surrogate parents, in decisions regarding the educational program of their children?

The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents (1) provide critical information about their child's abilities, interests, performance, and history, (2) participate in the discussion about the child's need for special education and related services and supplementary aids and services, and (2) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.

As noted, Part B specifically provides that parents have the right to:

(a) Participate in meetings about their child's identification, evaluation, educational program (including IEP meetings), and educational placement (§§ 300.344(a)(1) and 300.517);

(b) Be part of the teams that determine what additional data are needed as part of an evaluation of their child (§ 300.533(a)(1)), and determine their child's eligibility (§ 300.534(a)(1)) and educational placement (§ 300.501(c));

(c) Have their concerns and information that they provide regarding their child considered in developing and reviewing their child's IEPs (§§ 300.343(c)(iii) and 300.346 (a)(1)(i) and (b)); and

(d) Be regularly informed (by such means as periodic report cards), as specified in their child's IEP, at least as often as parents are informed of their nondisabled children's progress, of their child's progress toward the annual goals in the IEP and the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year (§ 300.347(a)(7)).

A surrogate parent is a person appointed to represent the interests of a child with a disability in the educational decision-making process when no parent (as defined at § 300.19) is known, the agency, after reasonable efforts, cannot locate the child's parents, or the child is a ward of the State under the laws of the State. A surrogate parent has all of the rights and responsibilities of a parent under Part B. Thus, the surrogate parent is entitled to (1) participate in the child's IEP meeting, (2) examine the child's education records, and (3) receive notice, grant consent, and invoke due process to resolve differences. (See § 300.515, Surrogate parents.)

6. What are the Part B requirements regarding the participation of a child or youth with a disability in an IEP meeting?

If a purpose of an IEP meeting will be the consideration of needed transition services, the public agency must invite the student and, as part of notification to the parent of the IEP meeting, inform the parents that the agency will invite the student to the IEP meeting. If the student does not attend, the public agency must take other steps to ensure that the student's preferences and interests are considered. Section § 300.517 permits States to transfer procedural rights under Part B from the parents to students with disabilities who reach the age of majority under State law, but who have not been determined to be incompetent under State law. If procedural rights under Part B are, consistent with State law and § 300.517, transferred from the parents to the student, the public agency would be required to ensure that the student has the right to participate in IEP meetings set forth for parents in § 300.345. However, at the discretion of the student or the public agency, the parents also could attend IEP meetings as ''individuals who have knowledge or special expertise regarding the child * * *'' (see § 300.344(a)(6)).

In other circumstances, the child may attend ''if appropriate.'' (§ 300.344(a)(7)) Generally, a child with a disability should attend the IEP meeting if the parent decides that it is appropriate for the child to do so. If possible, the agency and parents should discuss the appropriateness of the child's participation before a decision is made, in order to help the parents determine whether or not the child's attendance will be (1) helpful in developing the IEP or (2) directly beneficial to the child or both. The agency should inform the parents before each IEP meeting—as part of notification under § 300.345(a)(1)—that they may invite their child to participate.

7. Must the public agency let the parents know who will be at the IEP meeting?

Yes. In notifying parents about the meeting, the agency ''must indicate the purpose, time, and location of the meeting, and *who will be in attendance.*'' (§ 300.345(b), italics added.) In addition, if a purpose of the IEP meeting is the consideration of transition services for a student, the notice must also inform the parents that the agency is inviting the student, and identify any other agency that will be invited to send a representative. The public agency should also inform the parents of their right to invite to the meeting ''other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate * * *'' (§ 300.344(a)(6)). It is also appropriate for the agency to ask the parents what if any individuals they will to bring to the meeting.

8. Do parents have the right to a copy of their child's IEP?

Yes. Section 300.345(f) states that the public agency shall give the parent, on request, a copy of the IEP. It is recommended that public agencies provide parents with a copy of the IEP within a reasonable time following the IEP meeting, or inform them at the IEP meeting of their right to request and receive a copy.

9. What is a public agency's responsibility if it is not possible to reach consensus on what services should be included in a child's IEP?

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding the child's needs and appropriate goals, the extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and districtwide assessments, and the services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are to be equal partners with school personnel in making these decisions, and the IEP team must consider parents' concerns and information that they provide regarding their child in developing and reviewing IEPs (§§ 300.343(c)(iii) and 300.346(a)(1) and (b)).

The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. If it is not possible to reach consensus in an IEP meeting, the public agency must provide the parents with

prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program and placement, and the parents have the right to seek resolution of any disagreements through mediation or other informal means, or by initiating an impartial due process hearing. Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal step, without resort to a due process hearing. However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing.

10. Does Part B require that public agencies inform parents regarding the educational progress of their children with disabilities?

Yes, the Part B statute and regulations include a number of provisions to help ensure that parents are involved in decisions regarding, and informed about, their child's educational progress, including the child's progress in the general curriculum. First, the parents will be informed regarding their child's present levels of educational performance through the development of the IEP. Section 300.347(a)(1) requires that each IEP include:

* * * a statement of the child's present levels of educational performance, including—(i) How the child's disability affects the child's involvement and progress in the general curriculum; or (ii) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities * * *

Further, § 300.347(a)(7) sets forth requirements for regularly informing parents about their child's educational progress. That section requires that the IEP include:

* * * a statement of—(i) How the child's progress toward the annual goals * * * will be measured; and (ii) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents of nondisabled children are informed, of—(A) Their child's progress toward the annual goals * * * ; and (B) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

Finally, the parents will, as part of the IEP team, participate, at least once every 12 months, in a review of their child's educational progress. Part B requires that a public agency initiate and conduct a meeting, at which the IEP team:

* * * (1) Reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and (2) revises the IEP as appropriate to address—(i) Any lack of expected progress toward the annual goals * * * and in the general curriculum, if appropriate; (ii) The results of any reevaluation * * * ; (iii) Information about the child provided to, or by, the parents * * * ; (iv) The child's anticipated needs; or (v) Other matters.

III. Preparing Students With Disabilities for Employment and Other Post-School Experiences

One of the primary purposes of the IDEA is 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 employment and independent living * * *'' (§ 300.1(a)).

Similarly, one of the key purposes of the IDEA Amendments of 1997 was to ''promote improved educational results for children with disabilities through early intervention, preschool, and educational experiences that prepare them for later educational challenges and employment.'' (House Report No. 105–95, p. 82 (1997).) Thus, throughout their preschool, elementary, and secondary education, the IEP for each child with a disability must, to the extent appropriate for the individual child, focus on providing instruction and experiences that enable the child to prepare himself or herself for later educational experiences and for post-school activities, including formal education, if appropriate, employment, and independent living.

Although preparation for adult life is, as explained, a key component of a free appropriate public education throughout a child's educational experiences, Part B sets forth specific requirements for transition from secondary education to post-school activities, which must be implemented no later than age 14 and 16, respectively, which require an intensified focus on that preparation as students with disabilities begin and prepare to complete their secondary education.

11. What must the IEP team do to meet the requirements that the IEP include ''a statement of * * * transition service needs'' beginning at age 14 (§ 300.347(b)(1)(i)),'' and a statement of needed transition services'' no later than age 16 (§ 300.347(b)(1)(ii))?

Section 300.347(b)(1) requires that, beginning no later than age 14, each student's IEP include specific transition-related content, and, beginning no later than age 16, a statement of needed transition services:

Beginning at age 14, each student's IEP must include ''* * * a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program)'' (§ 300.347(b)(1)(i)).

No later than age 16 (and younger, if determined appropriate by the IEP Team), each student's IEP must include ''a statement of needed transition services for the child, including, if appropriate, a statement of the interagency responsibilities or any needed linkages * * *'' (§ 300.347(b)(1)(ii)).

The House Report on the IDEA Amendments of 1997 makes clear that the requirement added to the statute in 1997 that beginning at age 14, or younger if appropriate, the IEP include ''a statement of the transition service needs'' is ''* * * designed to augment, and not replace,'' the separate, preexisting requirement that the IEP include, ''* * * beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services * * *'' (House Report No. 105–95, p. 102 (1997).) As clarified by the Report, ''The purpose of [the requirement in § 300.347(b)(1)(i)] is to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school.'' (House Report No. 105–95, pp. 101–102 (1997).) The report further explains that ''[F]or example, for a child whose transition goal is a job, a transition service could be teaching the child how to get to the job site on public transportation.'' (House Report No. 105–95, p–102 (1997).) Thus, beginning at age 14, the IEP team, in determining appropriate measurable annual goals (including benchmarks or short-term objectives) and services for a student, must determine what instruction and educational experiences will assist the student to prepare for transition from secondary education to post-secondary life. The statement of transition service needs should relate directly to the student's goals beyond secondary education, and show how planned studies are linked to these goals. For example, a student interested in exploring a career in computer science may have a statement of transition service needs connected to technology course work, while another student's statement of transition needs could describe why public bus transportation training is important for future independence in the community. Though the focus of the transition planning process may shift as the student approaches graduation, the IEP team must discuss specific areas beginning at the age of 14 years and review these areas annually.

This requirement is distinct from the requirement, at § 300.347(b)(1)(ii), that the IEP include:

* * * beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

The term ''transition services'' is defined at § 300.27 to mean:

* * * a coordinated set of activities for a student with a disability that—(a) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (b) Is based on the individual student's needs, taking into account the student's preferences and interests; and (c) Includes—(1) Instruction; (2) Related services; (3) Community experiences; (4) The development of employment and other post-school adult living objectives; and (5) If appropriate, acquisition of daily living skills and functional vocational evaluation. (Section § 300.347(b)(2) provides, however, that, ''If the IEP team determines that services are not needed in one or more of the areas specified in § 300.27((c)(1) through (4), the IEP must include a statement to that effect and the basis upon which the determination was made.)

Thus, while § 300.347(b)(1)(i) requires that the IEP team begin by age 14 to address the

student's need for instruction that will assist the student to *prepare* for transition, § 300.347(b)(2)(ii) requires that by age 16 the IEP include a ''coordinated set of activities * * *, designed within an outcome-oriented process, that promotes movement from school to post-school activities. * * *'' Section 300.344(b)(3) further requires that, in implementing § 300.347(b)(2)(ii), public agencies invite (in addition to required participants for all IEP meetings), must also invite a representative of any other agency that is likely to be responsible for providing or paying for transition services. Thus, § 300.346(a)(7)(ii) requires a broader focus on coordination of services across, and linkages between, agencies beyond the SEA and LEA.

12. Must the IEP for each student with a disability, beginning no later than age 16, include all ''needed transition services,'' as identified by the IEP team and consistent with the definition at § 300.27, even if an agency other than the public agency will provide those services? What is the public agency's responsibility if another agency fails to provide agreed-upon transition services?

Section 300.347(b)(1)(ii) requires that the IEP for each child with a disability, beginning no later than age 16, or younger if determined appropriate by the IEP team, include all ''needed transition services,'' as identified by the IEP team and consistent with the definition at § 300.27, regardless of whether the public agency or some other agency will provide those services. Section 300.346(b)(1)(ii) specifically requires that the statement of needed transition services include, ''* * * if appropriate, a statement of the interagency responsibilities or any needed linkages.''

Further, the need to include in the IEP transition services to be provided by agencies other than the public agency is contemplated by § 300.348(a), which specifies what the public agency must do if another agency participating in the development of the statement of needed transition services fails to provide a needed transition service that it agreed to provide:

If a participating agency fails to provide agreed-upon transition services contained in the IEP of a student with a disability, the public agency responsible for the student's education shall, as soon as possible, initiate a meeting for the purpose of identifying alternative strategies to meet the transition objectives and, if necessary, revising the student's IEP.

This requirement is consistent with the public agency's ultimate responsibility to ensure that FAPE is available to each eligible child with a disability (see § 300.300). That responsibility includes the planning and coordination of transition services through the IEP. This inter-agency planning and coordination may be supported through a variety of mechanisms, including memoranda of understanding, interagency agreements, assignment of a transition coordinator to work with other participating agencies, or the establishment of guidelines to work with other agencies identified as potential service providers. If an agreed-upon service by another agency is not provided, the public agency responsible for the student must exercise alternative strategies to meet the student's needs. This requires that the public agency provide the services, or convene an IEP meeting as soon as possible to identify alternative strategies to meet the needs of the transition services needs of the student, and to revise the IEP accordingly. Alternative strategies might include the identification of another funding source, referral to another agency, the public agency's identification of other district-wide or community resources that it can use to meet the student's identified need appropriately, or a combination of these strategies. As emphasized by § 300.348(b), however:

Nothing in [Part B] 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 students with disabilities who meet the eligibility criteria of that agency.

However, the fact that an agency other than the LEA does not fulfill its responsibility does not relieve the LEA of its responsibility to ensure that FAPE is available to each student with a disability.

Note: See also § 300.142(b)(2), which requires that if an agency other than the LEA fails to provide or pay for a special education or related service (which could include a transition service), the LEA must provide or pay for the service, and may then claim reimbursement from the agency that failed to provide or pay for the service.

13. Under what circumstances must a public agency invite representatives from other agencies to an IEP meeting at which a child's need for transition services will be considered?

Section 300.344(c)(ii) requires that, ''In implementing the requirements of [§ 300.347(b)(1)(ii) requiring a statement of needed transition services], the public agency shall also invite a representative of any other agency that is likely to be responsible for providing or paying for transition services.'' To meet this requirement, the public agency must establish and implement appropriate procedures to ensure that it identifies all agencies that are ''likely to be responsible for providing or paying for transition services'' for each student addressed by § 300.347(b)(1)(ii), and invites each of those agencies to the IEP meeting. If, during the course of an IEP meeting, the team identifies additional agencies that are ''likely to be responsible for providing or paying for transition services'' for the student, the public agency must determine whether it is necessary to invite those agencies to an additional IEP meeting in order to develop an appropriate statement of needed transition services for the student.

IV. Other Questions Regarding the Development and Content of IEPS

14. For a child with a disability receiving special education for the first time, when must an IEP be developed—before placement or after placement?

Section 300.342(b)(1) requires that an IEP be ''*in effect* before special education and related services are provided to a child.'' (Italics added.) The appropriate placement for a particular child with a disability cannot be determined until after decisions have been made about the child's needs and the services that the public agency will provide to meet those needs. These decisions must be made at the IEP meeting, and it would not be permissible first to place the child and then develop the IEP. Therefore, the IEP must be developed before placement. This requirement does not preclude temporarily placing an eligible child with a disability in a program as part of the evaluation process—before the IEP is finalized—to assist a public agency in determining the appropriate placement for the child. It is essential that the temporary placement not become the final placement before the IEP is finalized. In order to ensure that this does not happen, the State might consider requiring LEAs to take the following actions:

a. Develop an *interim* IEP for the child that sets out the specific conditions and timelines for the trial placement. (See paragraph c.)

b. Ensure that the parents agree to the interim placement before it is carried out, and that they are involved throughout the process of developing, reviewing, and revising the child's IEP.

c. Set a specific timeline (e.g., 30 days) for completing the evaluation, finalizing the IEP, and making judgments about the most appropriate placement for the child.

d. Conduct an IEP meeting at the end of the trial period in order to finalize the child's IEP.

15. Who is responsible for ensuring the development of IEPs for children with disabilities served by a public agency other than an LEA?

The answer as to which public agency has direct responsibility for ensuring the development of IEPs for children with disabilities served by a public agency other than an LEA will vary from State to State, depending upon State law, policy, or practice. The SEA is ultimately responsible for ensuring that all Part B requirements, including the IEP requirements, are met for eligible children within the State, including those children served by a public agency other than an LEA. (See § 300.600 regarding the SEA's general supervisory responsibility for all education programs for children with disabilities, with one exception. The Governor (or another individual pursuant to State law) may, consistent with State law, assign to any public agency in the State the responsibility of ensuring that Part B requirements are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.)

The SEA must ensure that every child with a disability in the State has FAPE available, regardless of which State or local agency is responsible for educating the child. (The only exception to this responsibility is that, as noted, the SEA is not responsible for ensuring that FAPE is made available to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons, if the State has assigned that responsibility to a public agency other than the SEA.) Although the SEA has flexibility in deciding the best means to meet this obligation (e.g., through interagency

agreements), the SEA must ensure that no eligible child with a disability is denied FAPE due to jurisdictional disputes among agencies.

When an LEA is responsible for the education of a child with a disability, the LEA remains responsible for developing the child's IEP, regardless of the public or private school setting into which it places the child.

16. For a child placed out of State by an educational or non-educational State or local agency, is the placing or receiving State responsible for the child's IEP?

Regardless of the reason for the placement, the ''placing'' State is responsible for developing the child's IEP and ensuring that it is implemented. The determination of the specific agency in the placing State that is responsible for the child's IEP would be based on State law, policy, or practice. However, the SEA in the placing State is responsible for ensuring that the child has FAPE available.

17. If a disabled child has been receiving special education from one public agency and transfers to another public agency in the same State, must the new public agency develop an IEP before the child can be placed in a special education program?

If a child with a disability changes school districts in the same State, the State and its public agencies have an ongoing responsibility to ensure that the child receives FAPE, and the new public agency is responsible for ensuring that the child receives special education and related services in conformity with an IEP. The new public agency must ensure that the child has an IEP in effect before the agency can provide special education and related services. The new public agency may meet this responsibility by either adopting the IEP the former public agency developed for the child or by developing a new IEP for the child. Before the child's IEP is finalized, the new public agency may provide interim services agreed upon by both the parents and the new public agency. If the parents and the new public agency are unable to agree on an interim IEP and placement, the new public agency must implement the old IEP to the extent possible until a new IEP is developed and implemented.

In general, while the new public agency must conduct an IEP meeting, it would not be necessary if: (1) A copy of the child's current IEP is available; (2) the parents indicate that they are satisfied with the current IEP; and (3) the new public agency determines that the current IEP is appropriate and can be implemented as written.

If the child's current IEP is not available, or if either the new public agency or the parent believes that it is not appropriate, the new public agency must conduct an IEP meeting within a short time after the child enrolls in the new public agency (normally, within one week).

18. What timelines apply to the development and implementation of an initial IEP for a child with a disability?

Section 300.343(b) requires a public agency to: (1) Ensure that an offer of services in accordance with an IEP is made to parents within a reasonable period of time from the agency's receipt of parent consent to an initial evaluation; and (2) in meeting that timeline, conduct a meeting to develop the IEP within 30-calendar days of a determination that the child needs special education and related services. Section 300.342(b)(2) requires that an IEP be implemented as soon as possible following the meeting in which the IEP is developed.

19. Must a public agency hold separate meetings to determine a child's eligibility for special education and related services, develop the child's IEP, and determine the child's placement, or may the agency meet all of these requirements in a single meeting?

A public agency may, after a child is determined by ''a team of qualified professionals and the parent'' (see § 300.534(a)(1)) to be a child with a disability who needs special education services, continue in the same meeting to develop an IEP for the child and to determine the child's placement. However, the public agency must ensure that it: (1) Meets all of the Part B requirements regarding meetings to develop IEPs, including providing appropriate notification to the parents, consistent with the requirements of § 300.345, and including the required team participants, consistent with the requirements of § 300.344; and (2) the requirements of § 300.533 regarding eligibility decisions.

20. How frequently must a public agency conduct meetings to review, and if appropriate revise, the IEP for each child with a disability?

A public agency must initiate and conduct meetings periodically, but at least once every twelve months, to determine whether the annual goals for the child are being achieved, and to revise the IEP as appropriate to address: (a) Any lack of expected progress toward the annual goals and in the general curriculum, if appropriate; (b) the results of any reevaluation; (c) information about the child provided to, or by, the parents; (d) the child's anticipated needs; or (e) other matters (§ 300.343(c)).

A public agency must also ensure that an IEP is in effect for each child at the beginning of each school year (§ 300.342(a)). It may conduct IEP meetings at any time during the year. However, if the agency conducts the IEP meeting prior to the beginning of the next school year, it must ensure that the IEP contains the necessary special education and related services and supplementary aids and services to ensure that the student's IEP can be appropriately implemented during the next school year. Otherwise, it would be necessary for the public agency to conduct another IEP meeting.

Although the public agency is responsible for determining when it is necessary to conduct an IEP meeting, the parents of a child with a disability have the right to request an IEP meeting at any time. For example, if the parents believe that the child is not progressing satisfactorily or that there is a problem with the child's current IEP, it would be appropriate for the parents to request an IEP meeting. If a child's teachers feels that the child's placement or IEP services are not appropriate to the child, the teachers should follow agency procedures with respect to (1) calling or meeting with the parents or (2) requesting the agency to hold another IEP meeting to review the child's IEP. The legislative history of Public Law 94–142 makes it clear that there should be as many meetings a year as any one child may need (121 Cong. Rec. S20428–29 (Nov. 19, 1975) (remarks of Senator Stafford)).

In general, if either a parent or a public agency believes that a required component of the student's IEP should be changed, the public agency must conduct an IEP meeting if it believes that the question of whether the student's IEP needs to be revised to ensure the provision of FAPE to the student is a matter that must be considered by the IEP team. If a parent requests an IEP meeting because the parent believes that a change in the provision of FAPE to the child or the educational placement of the child, and the agency refuses to convene an IEP meeting to determine whether such a change is needed, the agency must provide written notice to the parents of the refusal, including an explanation of why the agency has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student. Under § 300.506(a), the parents or agency may initiate a due process hearing at any time regarding any proposal or refusal regarding the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child.

21. May IEP meetings be audio or video-tape-recorded?

Part B does not address the use of audio or video recording devices at IEP meetings, and no other Federal statute either authorizes or prohibits the recording of an IEP meeting by either a parent or a school official. Therefore, an SEA or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings. If a public agency has a policy prohibiting the use of these devices at IEP meetings, that policy must provide for exceptions if they are necessary to ensure that the parent understands the IEP or the IEP process or to implement other parental rights guaranteed under Part B. Any recording of an IEP meeting that is maintained by the public agency is an ''education record,'' within the meaning of the Family Educational Rights and Privacy Act (''FERPA''; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR Part 99) and Part B (§§ 300.560–300.575).

Parents wishing to use audio or video recording devices at IEP meetings should consult State or local policies for further guidance.

22. Who can serve as the representative of the public agency at an IEP meeting?

The IEP team must include a representative of the local educational agency who: (a) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (b) is knowledgeable about the general curriculum; and (c) is knowledgeable about the availability of resources of the local educational agency (§ 300.344(a)(4)). Each State or local agency may determine which specific staff member will serve as the agency representative in a particular IEP meeting, so long as the individual meets these

requirements. It is, however, important that the agency representative have the authority to commit agency resources and be able to ensure that whatever services are set out in the IEP will actually be provided.

Note: IEP meetings for continuing placements may in some instances be more routine than those for initial placements, and, thus, may not require the participation of a key administrator.

23. For a child with a disability being considered for initial placement in special education, which teacher or teachers should attend the IEP meeting?

A child's IEP team must include at least one of the student's regular education teachers (if the child is, or may be participating in the regular education environment) and at least one special education teacher, or, if appropriate, at least one of the child's special education providers (§ 300.344(a)(2) and (3)). Each IEP must include a statement of present levels of educational performance, including a statement of how the child's disability affects the child's involvement and progress in the general curriculum (§ 300.347(a)(1)). The regular education teacher is a required participant on the IEP team of a child who is, or may be, participating in the regular educational environment, regardless of the extent of that participation.

The child's special education teacher could be either (1) a teacher qualified to provide special education in the child's area of suspected disability, or (2) another special education provider such as a speech pathologist, physical or occupational therapist, etc., if the related service consists of specially designed instruction and is considered special education under the applicable State standard.

Note: Sometimes more than one meeting is necessary in order to finalize a child's IEP. In this process, if the special education teacher who will be working with the child is identified, it would be useful to have that teacher participate in the meeting with the parents and other members of the IEP team in finalizing the IEP. If this is not possible, the agency should ensure that the teacher is given a copy of the child's IEP as soon as possible after the IEP is finalized and before the teacher begins working with the child.

24. If a child with a disability attends several regular classes, must all of the child's regular education teachers attend the IEP meeting?

No. The IEP team need not include more than one regular education teacher of the child. If the participation of more than one regular education teacher is considered by the agency or the parents to be beneficial to the child's success in school (e.g., in terms of enhancing the child's participation in the general curriculum), it would be appropriate for them to attend the meeting.

25. For a child whose primary disability is a speech impairment, may a public agency meet its responsibility under § 300.344(a)(3) to ensure that the IEP team includes ''at least one special education teacher, or, if appropriate, at least one special education provider of the child'' by including a speech-language pathologist in the IEP team?

Yes, if speech is considered special education under State standards. As with other children with disabilities, the IEP team must also include at least one of the child's *regular education* teachers if the child is, or may be, participating in the regular education environment.

26. Do public agencies and parents have the option of bringing any individual of their choice to a student's IEP meeting? Would it be permissible for other individuals to attend IEP meetings at the discretion of the parents or the agency?

The IEP team may, at the discretion of the parent or the agency, include ''other individuals *who have knowledge or special expertise regarding the child* * * *'' (§ 300.344(a)(6), italics added). This is a change from prior law, which had provided, without qualification, that parents or agencies could bring other individuals to IEP meetings at the discretion of the parents or agency. However, the legislative history of Public Law 94–142 made it clear that attendance at IEP meetings should be limited to those who have an intense interest in the child. (121 Cong. Rec. S10974 (June 18, 1975) (remarks of Sen. Randolph).)

Part B does not provide for the participation of individuals such as representatives of teacher organizations or attorneys at IEP meetings. For example, since a representative of a teacher organization would be concerned with the interests of the teacher rather than the interests of the child, and generally would not possess knowledge or expertise regarding the child, it generally would be inappropriate for such an official to attend an IEP meeting. While either the parent or public agency may consider inviting their attorneys to an IEP meeting, parents and public agencies need to ensure that their attorneys possess knowledge and expertise regarding the child to warrant their participation. However, the participation of attorneys at IEP meetings should be discouraged if their participation would have the potential for creating an adversarial atmosphere which would not necessarily be in the best interests of the child. Further, as provided in Section 615(i)(3)(D)(ii) of the Act, ''Attorneys'' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation * * * conducted prior to the [request for a due process hearing].''

27. Must related services personnel attend IEP meetings?

Although Part B does not expressly require that the IEP team include related services personnel as part of the IEP team (§ 300.344(a)), it is appropriate for those persons to be included if a particular related service is to be discussed as part of the IEP meeting. Section 300.344(a)(6) provides that the IEP team also includes ''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* * * *.'' (Italics added.)

Further, § 300.344(a)(3) requires that the IEP team for each child with a disability include ''at least one special education teacher, or, if appropriate, at least one special education provider of the child * * *'' This requirement can be met by the participation of either (1) a special education teacher of the child, or (2) another special education provider such as a speech pathologist, physical or occupational therapist, etc., if the related service consists of specially designed instruction and is considered special education under the applicable State standard.

If a child with a disability has an identified need for related services, it would be appropriate for the related services personnel to attend the meeting or otherwise be involved in developing the IEP. As explained in the House Report on the IDEA Amendments of 1997, ''Related services personnel should be included on the team when a particular related service will be discussed at the request of the child's parents or the school.'' (House Report 105–95, p. 103 (1997).) For example, if the child's evaluation indicates the need for a specific related service (e.g., physical therapy, occupational therapy, special transportation services, school social work services, school health services, or counseling), the agency should ensure that a qualified provider of that service either (1) attends the IEP meeting, or (2) provides a written recommendation concerning the nature, frequency, and amount of service to be provided to the child. This written recommendation could be a part of the evaluation report.

28. Must the public agency ensure that all services specified in a child's IEP are provided?

Yes. The public agency must ensure that all services set forth in the child's IEP are provided, consistent with the child's needs as identified in the IEP. It may provide each of those services directly, through its own staff resources; indirectly, by contracting with another public or private agency; or through other arrangements. In providing the services, the agency may use whatever State, local, Federal, and private sources of support are available for those purposes (see § 300.301(a)), but the services must be at no cost to the parents, and the public agency remains responsible for ensuring that the IEP services are provided in a manner that appropriately meets the student's needs as specified in the IEP. The SEA and responsible public agency may not allow the failure of another agency to provide services described in the child's IEP to deny or delay the provision of FAPE to a child.

29. Is it permissible for an agency to have the IEP completed before the IEP meeting begins?

No. Agency staff may come to an IEP meeting prepared with evaluation findings and proposed recommendations regarding IEP content, but the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. Agencies that use this approach must ensure that there is a full discussion with the parents of the child's needs and the services to be provided to meet those needs before the child's IEP is finalized.

30. Must a public agency include transportation in a child's IEP as a related service?

A public agency must provide transportation as a related service if it is required to assist the disabled child to benefit from special education. (This includes transporting a preschool-aged child to the site at which the public agency provides special education and related services to the child, if that site is different from the site at which the child receives other preschool or daycare services.) In determining whether to include transportation in a child's IEP, the IEP team must consider how the child's disability affects the child's need for transportation, including determining whether the child's disability prevents the child from using the same transportation provided to nondisabled children, or from getting to school in the same manner as nondisabled children. The public agency must ensure that any transportation service included in a child's IEP as a related service is provided at public expense and at no cost to the parents, and that the child's IEP describes the transportation arrangement.

Even if a child's IEP team determines that the child does not require transportation as a related service, Section 504 of the Rehabilitation Act of 1973 requires that the child receive the same transportation provided to nondisabled children. If a public agency transports nondisabled children, it must transport disabled children under the same terms and conditions. However, if a child's IEP team determines that a student does not need transportation as a related service, and the public agency transports only those children whose IEPs specify transportation as a related service, and does not transport nondisabled children, the public agency would not be required to provide transportation to a disabled child.

31. Must a public agency provide related services that are required to assist a child with a disability to benefit from special education, whether or not those services are included in the list of related services in § 300.16?

The Note following § 300.16 clarifies that ''[T]he list of related services is not exhaustive and may include other developmental, corrective, or supportive services * * *), if they are required to assist a child with a disability to benefit from special education.'' This could, depending upon the unique needs of a child, include such services as nutritional services or service coordination.

32. Must the IEP specify the amount of services or may it simply list the services to be provided?

The amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
		Subpart A—General
		Purpose Applicability, and Regulations That Apply to This Program
300.1	300.1	Purpose.
300.2	300.2	Applicability to State, local, and private agencies.
300.3	300.3	Regulations that apply.
		Definitions
300.4	300.4	Act.
300.5	300.5	Assistive technology device.
300.6	300.6	Assistive technology service.
300.7	300.7	Children with disabilities. (Retitled ''Child with a disability.'')
300.8	300.11	Free appropriate public education.
300.9	300.13	Include.
300.10	300.9	Intermediate educational unit. (Replaced by new definition from Pub. L. 105–17, entitled, ''Educational service agency.'')
300.11	300.17	Local educational agency.
300.12	300.18	Native language.
300.13	300.19	Parent.
300.14	300.20	Public agency.
300.15	300.21	Qualified.
300.16	300.22	Related service.
300.17	300.24	Special education.
300.18	300.27	Transition services.
		Subpart B—State Plans and [LEA] Applications (Retitled ''State and Local Eligibility'')
		State Plans—General (Retitled ''State Eligibility—General'')
300.110	300.110	Condition of assistance.
300.111		Contents of plans.
		State Plans—Contents (Retitled ''State Eligibility—Specific Conditions'')
300.121	300.121	Right to a free appropriate public education. (Retitled ''Free appropriate public education'' (FAPE).
300.122	300.122	Timelines and ages for free appropriate public education. (Retitled ''Exception to FAPE for certain ages.'')
300.123	300.123	Full educational opportunity goal (FEOG).
300.124		[Reserved].
300.125	300.124	FEOG—Timetable.
300.126		FEOG—Facilities, personnel, and services.
300.127		Priorities.
300.128	300.125	Identification, location, and evaluation of children with disabilities.
300.129	300.127	(Retitled ''child find.'') Confidentiality of personally identifiable information.

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.130	300.128	Individualized education programs.
300.131	300.129	Procedural safeguards.
300.132	300.130	Least restrictive environment.
300.133	300.126	Protection in evaluation procedures. (Retitled ''Procedures for evaluation and determination of eligibility.'')
300.134	300.141	Responsibility of [SEA] for all educational programs. (Retitled ''SEA Responsibility for general supervision.'')
300.135		[Reserved].
300.136	300.143	Implementation procedures—SEA. (Retitled ''SEA implementation of procedural safeguards.'')
300.137	300.148	Procedures for consulation. (Retitled ''Public participation.'')
300.138	300.151	Other Federal programs.
300.139	300.135	Comprehensive system of personnel development.
300.140	300.133	Private schools.
300.141	300.145	Recovery of funds for misclassified children.
300.142–143		[Reserved].
300.144	300.144	Hearing on application. (Retitled ''Hearings relating to LEA eligibility.'')
300.145	300.152	Prohibition of commingling.
300.146	300.137	Annual evaluation. (Replaced by new section from P.L. 105–17, entitled, ''Performance goals and indicators.'')
300.147	300.150	State advisory panel.
300.148	300.155	Policies and procedures for use of Part B funds.
300.149	300.156	Description of use of Part B funds. (Retitled ''Annual description of use of Part B funds.'')
300.150	300.153	State-level nonsupplanting.
300.151	300.147	Additional information if [SEA] provides direct services.
300.152	300.142	Interagency agreements. (Retitled ''Methods of ensuring services.'')
300.153	300.136	Personnel standards.
300.154	300.132	Transition of individuals from Part H to Part B. (Retitled ''Transition of children from Part C to preschool programs.'')
		LEA Applications—General (Retitled ''LEA Eligibility—General'')
300.180	300.180	Submission of application. (Retitled ''Condition of assistance.'')
300.181		[Reserved].
300.182	300.184	The excess cost requirement. (Retitled ''Excess cost requirement.'')
300.183	300.185	Meeting the excess cost requirement.
300.184		Excess costs—computation of minimum amount.
300.185		Computation of excess costs—consolidated application.
300.186		Excess costs—limitation on use of Part B funds.
300.187–189	300.186–189	[Reserved].
300.190	300.190	Consolidated applications. (Retitled ''Joint establishment of eligibility.'')
300.191	300.191	[Reserved].
300.192	300.192	State regulation of consolidated applications. (Retitled ''Requirements for establishing eligibility.'')
300.193	300.197	SEA approval; disapproval. (Retitled ''LEA and State agency compliance.'')
300.194	300.197	Withholding. (Retitled ''LEA and State agency compliance.'')
		LEA Applications—Contents (Retitled ''LEA Eligibility—Specific Conditions'')
300.220	300.220	Child identification. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.221	300.220	Confidentiality of personally identifiable information. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.222	300.220	Full educational opportunity goal—timetable. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.223		Facilities, personnel, and services.
300.224	300.221	Personnel development.
300.225		Priorities.
300.226		Parent involvement.
300.227	300.220	Participation in regular education programs. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.228		[Reserved].
300.229	300.230	Excess cost. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Use of amounts.'')
300.230	300.230	Nonsupplanting. (Amended by P.L. 105–17, and incorporated into a new requirement, entitled, ''Use of amounts.'')
300.231		Comparable services.
300.232–234		[Reserved].
300.235	300.220	[IEPs]. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.236		[Reserved].
300.237	300.220	Procedural safeguards. (Incorporated into a new requirement added by P.L. 105–17, entitled, ''Consistency with State policies.'')
300.238		Use of Part B funds.
300.239		[Reserved].
300.240	300.240	Other requirements. (Comparable to a provision added by P.L. 105–17, entitled, ''Information for SEA.'')
		Application From Secretary of the Interior (Retitled ''Secretary of the Interior—Eligibility'')
300.260	300.260	Submission of application; approval. (Retitled, ''Submission of information.'')
300.261	300.261	Public participation.
300.262	300.262	Use of Part B funds.
300.263	300.267	Applicable regulations.
		Public Participation
300.280	300.280	Public hearings before adopting a State plan. (Retitled ''Public hearings before adopting State policies and procedures.'')
300.281	300.281	Notice.
300.282	300.282	Opportunity to participate; comment period.
300.283	300.283	Review of public comments before adopting plan. (Retitled ''Review public comments before adopting policies and procedures.'')
300.284	300.284	Publication and availability of approved plan. (Retitled ''Publication and availability of approved policies and procedures.'')
		Subpart C—Services
		Free Appropriate Public Education
300.300	300.300	Timelines for [FAPE]. (Retitled ''Provision of FAPE.'')
300.301	300.301	FAPE—methods and payments.
300.302	300.302	Residential placement.
300.303	300.303	Proper functioning of hearing aids.
300.304	300.304	Full educational opportunity goal.
300.305	300.305	Program options.
300.306	300.306	Nonacademic services.
300.307	300.307	Physical education.
300.308	300.308	Assistive technology.
		Priorities in the Use of Part B Funds
300.320		Definitions of ''first priority children'' and ''second priority children.''
300.321		Priorities.
300.322		[Reserved].
300.323		Services to other children.
300.324		Application of local educational agency to use funds for the second priority.
		Individualized Education Programs
300.340	300.340	Definitions.
300.341	300.341	State educational agency responsibility.
300.342	300.342	When individualized education programs must be in effect.
300.343	300.343	Meetings.
300.344	300.344	Participants in meetings. (Retitled ''IEP Team.'')
300.345	300.345	Parent participant.
300.346	300.347	Content of individualized education program.
300.347	300.348	Agency responsibilities for transition services.
300.348	300.349	Private school placements by public agencies.
300.349	300.350	Children with disabilities in parochial or other private schools. (Retitled ''Children with disabilities in religious affiliated or other private schools.'')
300.350	300.351	Individualized education program—accountability.
		oi0Direct Service by the Sea
300.360	300.360	Use of [LEA] allocation for direct services.
300.361	300.361	Nature and location of services.
300.370	300.370	Use of State agency allocations.
300.371		State matching.
300.372	300.372	Applicability of nonsupplanting requirement.
		oi0Comprehensive System of Personnel Development
300.380	300.380	General.
300.381	300.381	Adequate supply of qualified personnel.
300.382		Personnel preparation and continuing education.
300.383		Data system on personnel and personnel development.

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.384–387	300.383–387	[Reserved].
		Subpart D—Private Schools
		Children with Disabilities in Private Schools Placed or Referred by Public Agencies
300.400	300.400	Applicability of Secs. 300.400–300.402.
300.401	300.401	Responsibility of State educational agency.
300.402	300.402	Implementation by State educational agency.
300.403	300.403	Placement of children by parents.
		Children With Disabilities Enrolled by Their Parents in Private Schools
300.450	300.450	Definition of ''private school children with disabilities.''
300.451	300.452	[SEA] responsibility. (Retired ''Basic requirement-services'').
300.452	300.453	[LEA] responsibility. (Revised based on P.L. 105–17, and retitled ''Expenditures.'')
		Procedures for By-Pass
300.480	300.480	By-pass—general.
300.481	300.481	Provisions for services under a by-pass.
300.482	300.482	Notice of intent to implement a by-pass.
300.483	300.483	Request to show cause.
300.484	300.484	Show cause hearing.
300.485	300.485	Decision.
300.486	300.486	Filing requirements.
300.487	300.487	Judicial review.
		Subpart E—Procedural Safeguards
		Due Process Procedures for Parents and Children
300.500	3300.500	Definitions of ''consent'', ''evaluation'', and ''personally identifiable''. (Combined §§ 300.500 and 300.501, and retitled ''General responsibility of public agencies; definitions.'')
300.501	300.500	General responsibility of public agencies. (Combined §§ 300.500 and 300.501, and retitled ''General responsibility of public agencies; definitions.'')
300.502	300.501	Opportunity to examine records.
300.503	300.502	Independent educational evaluation.
300.504	300.503	Prior notice; parent consent. (Retitled ''Prior notice by the public agency; content of notice.'')
300.505	300.503	Content of notice. (Retitled ''Prior notice by the public agency; content of notice.'')
300.506	300.507	Impartial due process hearing. (Retitled ''Impartial due process hearing; parent notice; disclosure.'')
300.507	300.508	Impartial hearing officer.
300.508	300.509	Hearing rights.
300.509	300.510	Hearing decision; appeal. (Combined §§ 300.509 and 300.510, and retitled ''Finality of decision; appeal; impartial review.'')
300.510	300.510	Administrative appeal; impartial review. (Combined §§ 300.509 and 300.510, and retitled ''Finality of decision; appeal; impartial review.'')
300.511	300.512	Civil action.
300.512	300.511	Timeless and convenience of hearings and reviews.
300.513	300.514	Child's status during proceedings.
300.514	300.515	Surrogate parents.
300.515	300.513	Attorneys' fees.
		Protection in Evaluation Procedures (Retitled ''Procedures for Evaluation and Determination of Eligibility'')
300.530	300.530	General.
300.531	300.531	Preplacement evaluation. (Retitled ''Initial evaluation.'')
300.532	300.532	Evaluation procedures.
300.533	300.534–35	Placement procedures. (Replaced by § 300.534 (''Determination of eligibility'') and § 300.535 (''Procedures for determining eligibility.'')
300.534	300.536	Reevaluation.
		Additional Procedures for Evaluating Children With Specific Learning Disabilities
300.540	300.540	Additional team members.
300.541	300.541	Criteria for determining the existence of a specific learning disability.
300.542	300.542	Observation.
300.543	300.543	Written report.
		Least Restrictive Environment
300.550	300.550	General.
300.551	300.551	Continuum of alternative placements.
300.552	300.552	Placements.
300.553	300.553	Nonacademic settings.
300.554	300.554	Children in public or private institutions.

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.555	300.555	Technical assistance and training activities.
300.556	300.556	Monitoring activities.
		Confidentially of Information
300.560	300.560	Definitions.
300.561	300.561	Notice to parents.
300.562	300.562	Access rights.
300.563	300.563	Record of access.
300.564	300.564	Records on more than one child.
300.565	300.565	List of types and location of information.
300.566	300.566	Fees.
300.567	300.567	Amendment of records at parent's request.
300.568	300.568	Opportunity for a hearing.
300.569	300.569	Result of hearing.
300.570	300.570	Hearing procedures.
300.571	300.571	Consent.
300.572	300.572	Safeguards.
300.573	300.573	Destruction of information.
300.574	300.574	Children's rights.
300.575	300.575	Enforcement.
300.576	300.577	Department. (Retitled ''Department use of personally identifiable information.'')
		Department Procedures
300.580		[Reserved].
300.581	300.581	Disapproval of a State plan. (Combined §§ 300.581 and 300.582, and retitled ''Notice and hearing before determining that a State is not eligible.'')
300.582	300.581	Content of notice. (Combined §§ 300.581 and 300.582, and retitled ''Notice and hearing before determining that a State is not eligible.'')
300.583	300.582	Hearing Official or Panel.
300.584	300.583	Hearing procedures.
300.585	300.584	Initial decision; final decision.
300.586	300.585	Filing requirements.
300.587	300.586	Judicial review.
300.588		[Reserved].
300.589	300.589	Waiver of requirement regarding supplementing and supplanting with Part B funds.
		Subpart F—State Administration
		General
300.600	300.600	Responsibility for all educational programs.
300.601	300.601	Relation of Part B to other Federal programs.
		Use of Funds
300.620	300.620	Federal funds for State administration. (Retitled ''Use of funds for State administration.'')
300.621	300.621	Allowable costs.
		State Advisory Panel
300.650	300.650	Establishment (Retitled ''Establishment of advisory panels.'')
300.6651	300.651	Membership.
300.652	300.652	Advisory panel functions.
300.653	300.653	Advisory panel procedures.
		State Complaint Procedures
300.660	300.660	Adoption of State complaint procedures.
300.661	300.661	Minimum State complaint procedures.
300.662	300.662	Filing a complaint.
		Subpart G—Allocation of Funds; Reports
		Allocations
300.700	300.700	Special definition of the term State.
300.701	300.701	State entitlement; formula. (Retitled ''Grants to States.'')
300.702	300.704	[Reserved].
300.703	300.705	[Reserved].
300.704	300.708	Hold harmless provision. (Comparable, in part, to § 300.708 (''Limitations'').
300.705	300.710	Allocation for State in which by-pass is implemented for private school children with disabilities.
300.706	300.703	Within-State distribution: Fiscal Year 1979 and after. (Comparable, in part, to § 300.703 (''Allocations to States.''), which sets out the formula added by Public Law 105–17).
300.707	300.711–712	Local educational agency entitlement; formula. (Retitled ''Subgrants to local educational agencies'') (Retitled ''Allocation to local educational agencies.'')

APPENDIX—DISTRIBUTION TABLE SHOWING EACH CURRENT REGULATORY SECTION AND THE CORRESPONDING PROPOSED REGULATORY SECTION [1]—Continued

[**Note:** Appendix will not be codified in the Code of Federal Regulations]

Current regulatory section current section No.	Comparable proposed regulatory section proposed section No.	Subpart and section title
300.708	300.714	Reallocation of [LEA] funds.
300.709	300.715	Payments to the Secretary of the Interior for the education of Indian children.
300.710	300.716	Payments to the Secretary of the Interior for Indian tribes or tribal organizations. (Retitled ''Payments for education and services for Indian children with disabilities aged 3 through 5.'')
300.711	300.716	Entitlements to jurisdictions. (Replaced by §§ 300.717 (''Outlying areas and freely associated States.'') and 300.718 (''Outlying area—definition.'')
		Reports
300.750	300.750	Annual report of children served—report requirement.
300.751	300.751	Annual report of children served—information required in the report.
300.752	300.752	Annual report of children served—certification.
300.753	300.753	Annual report of children served—criteria for counting children.
300.754	300.754	Annual report of children served—other responsibilities of [SEA].

[1] The purpose of this table is to assist each reader to find where a given section number in the current regulations is located in this NPRM. The table does *not* include (1) any new regulatory provisions that have been added as a result of the IDEA Amendments of 1997, or (2) any other new area on which the Secretary is proposing to regulate.

[FR Doc. 97–28006 Filed 10–22–97; 8:45 am]

BILLING CODE 4000–01–P