

(1) The definition of *Tribal governing body of a school* has been replaced with the definition of *tribal governing body* from 25 U.S.C. 2021(19).

(2) Section 300.707(c), regarding an additional requirement under "Use of amounts by Secretary of the Interior," has been revised to clarify that, with respect to all other children aged 3 to 21, inclusive, on reservations, the SEA of the State in which the reservation is located must ensure that all the requirements of Part B of the Act are met.

- Section 300.713 (Plan for coordination of services) has been revised to require (1) in § 300.713(a), the Secretary of the Interior to develop and implement a plan for the coordination of services for all Indian children with disabilities residing on reservations served by elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior, and (2) in § 300.713(b), the plan to provide for the coordination of services benefiting these children from whatever source covered by the plan, including SEAs, and State, local, and tribal juvenile and adult correctional facilities.

Analysis of Comments and Changes

Introduction

In response to the invitation in the NPRM, more than 5,500 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM immediately follows this introduction.

The perspectives of parents, individuals with disabilities, teachers, related services providers, State and local officials, members of Congress, and others were very important in helping us to identify where changes to the proposed regulations were necessary, and in formulating many of the changes. In light of the comments received, a number of significant changes are reflected in these final regulations.

We discuss substantive issues under the subpart and section to which they pertain. References to subparts in this analysis are to those contained in the final regulations. The analysis generally does not address—

(a) Minor changes, including technical changes made to the language published in the NPRM;

(b) Suggested changes the Secretary is not legally authorized to make under applicable statutory authority; and

(c) Comments that express concerns of a general nature about the Department

or other matters that are not directly relevant to these regulations, such as requests for information about innovative instructional methods or matters that are within the purview of State and local decision-makers.

Subpart A—General

Definitions Used in This Part

Applicability of This Part to State and Local Agencies (§ 300.2)

Comment: None.

Discussion: Section § 300.2(c)(2) contains an incorrect reference to § 300.148(b). The correct reference should be to § 300.148.

Changes: We have removed the reference to § 300.148(b) and replaced it with a reference to § 300.148.

Assistive Technology Device (§ 300.5)

Comment: Some commenters opposed the exclusion of surgically implanted medical devices in the definition of *assistive technology device*. Another commenter recommended limiting the definition of *assistive technology device* to a device that is needed to achieve educational outcomes, rather than requiring local educational agencies (LEAs) to pay for any assistive technology device that increases, maintains, or improves any functional need of the child.

Discussion: The definition of *assistive technology device* in § 300.5 incorporates the definition in section 602(1)(B) of the Act. We do not believe the definition should be changed in the manner suggested by the commenters because the changes are inconsistent with the statutory definition. The definition in the Act specifically refers to any item, piece of equipment, or product system that is used to increase, maintain, or improve the functional capabilities of the child and specifically excludes a medical device that is surgically implanted or the replacement of such device. Accordingly, we continue to believe it is appropriate to exclude surgically implanted medical devices from this definition. In response to the second comment, § 300.105(a) requires each public agency to ensure that assistive technology devices (or assistive technology services, or both) are made available to a child with a disability if required as part of the child's special education, related services, or supplementary aids and services. This provision ties the definition to a child's educational needs, which public agencies must meet in order to ensure that a child with a disability receives a free appropriate public education (FAPE).

Changes: None.

Comment: One commenter requested that the regulations clarify that an assistive technology device is not synonymous with an augmentative communication device. A few commenters recommended including recordings for the blind and dyslexic playback devices in the definition of *assistive technology devices*. Some commenters recommended including language in the regulations clarifying that medical devices used for breathing, nutrition, and other bodily functions are assistive technology devices.

Discussion: The definition of *assistive technology device* does not list specific devices, nor would it be practical or possible to include an exhaustive list of assistive technology devices. Whether an augmentative communication device, playback devices, or other devices could be considered an assistive technology device for a child depends on whether the device is used to increase, maintain, or improve the functional capabilities of a child with a disability, and whether the child's individualized education program (IEP) Team determines that the child needs the device in order to receive a free appropriate public education (FAPE). However, medical devices that are surgically implanted, including those used for breathing, nutrition, and other bodily functions, are excluded from the definition of an *assistive technology device* in section 602(1)(B) of the Act. The exclusion applicable to a medical device that is surgically implanted includes both the implanted component of the device, as well as its external components.

Changes: None.

Comment: A few commenters asked whether the definition of *assistive technology device* includes an internet-based instructional program, and what the relationship is between internet-based instructional programs and specially-designed instruction.

Discussion: An instructional program is not a device, and, therefore, would not meet the definition of an *assistive technology device*. Whether an internet-based instructional program is appropriate for a particular child is determined by the child's IEP Team, which would determine whether the program is needed in order for the child to receive FAPE.

Changes: None.

Comment: A few commenters recommended including the proper functioning of hearing aids in the definition of *assistive technology device*.

Discussion: We believe that the provision requiring public agencies to ensure that hearing aids worn in school are functioning properly is more appropriately included in new § 300.113

(proposed § 300.105(b)). As noted in the *Analysis of Comments and Changes* section discussing subpart B, we have added a new § 300.113 to address the routine checking (*i.e.*, making sure they are turned on and working) of hearing aids and external components of surgically implanted devices.

Changes: None.

Assistive Technology Service (§ 300.6)

Comment: One commenter requested clarifying “any service” in the definition of *assistive technology service*.

Discussion: We believe the definition is clear that an *assistive technology service* is any service that helps a child with a disability select an appropriate assistive technology device, obtain the device, or train the child to use the device.

Changes: None.

Comment: One commenter stated that services necessary to support the use of playback devices for recordings for the blind and dyslexic should be added to the definition of *assistive technology service*.

Discussion: A service to support the use of recordings for the blind and dyslexic on playback devices could be considered an assistive technology service if it assists a child with a disability in the selection, acquisition, or use of the device. If so, and if the child’s IEP Team determines it is needed for the child to receive FAPE, the service would be provided. The definition of *assistive technology service* does not list specific services. We do not believe it is practical or possible to include an exhaustive list of assistive technology services, and therefore, decline to add the specific assistive technology service recommended by the commenter to the definition.

Changes: None.

Comment: One commenter recommended evaluating all children with speech or hearing disabilities to determine if they can benefit from the Federal Communications Commission’s specialized telephone assistive services for people with disabilities.

Discussion: Evaluations under section 614 of the Act are for the purpose of determining whether a child has a disability and because of that disability needs special education and related services, and for determining the child’s special education and related services needs. It would be inappropriate under the Act to require evaluations for other purposes or to require an evaluation for telephone assistive services for all children with speech and hearing disabilities. However, if it was determined that learning to use

telephone assisted services, was an important skill for a particular child (e.g., as part of a transition plan), it would be appropriate to conduct an evaluation of that particular child to determine if the child needed specialized instruction in order to use such services.

Changes: None.

Comment: One commenter requested that the definition of *assistive technology service* specifically exclude a medical device that is surgically implanted, the optimization of device functioning, maintenance of the device, and the replacement of the device.

Discussion: The definition of *related services* in § 300.34(b) specifically excludes a medical device that is surgically implanted, the optimization of device functioning, maintenance of the device, or the replacement of that device. In addition, the definition of *assistive technology device* in § 300.5 specifically excludes a medical device that is surgically implanted and the replacement of that device. We believe it is unnecessary to repeat these exclusions in the definition of *assistive technology service*.

Changes: None.

Charter School (§ 300.7)

Comment: Several commenters suggested that we include in the regulations the definitions of terms that are defined in other statutes. For example, one commenter requested including the definition of *charter school* in the regulations.

Discussion: Including the actual definitions of terms that are defined in statutes other than the Act is problematic because these definitions may change over time (*i.e.*, through changes to statutes that establish the definitions). In order for these regulations to retain their accuracy over time, the U.S. Department of Education (Department) would need to amend the regulations each time an included definition that is defined in another statute changes. The Department believes that this could result in significant confusion.

However, we are including the current definition of *charter school* in section 5210(1) of the ESEA here for reference.

The term *charter school* means a public school that:

1. In accordance with a specific State statute authorizing the granting of charters to schools, is exempt from significant State or local rules that inhibit the flexible operation and management of public schools, but not from any rules relating to the other requirements of this paragraph [the

paragraph that sets forth the Federal definition];

2. Is created by a developer as a public school, or is adapted by a developer from an existing public school, and is operated under public supervision and direction;

3. Operates in pursuit of a specific set of educational objectives determined by the school’s developer and agreed to by the authorized public chartering agency;

4. Provides a program of elementary or secondary education, or both;

5. Is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution;

6. Does not charge tuition;

7. Complies with the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and Part B of the Individuals with Disabilities Education Act;

8. Is a school to which parents choose to send their children, and that admits students on the basis of a lottery, if more students apply for admission than can be accommodated;

9. Agrees to comply with the same Federal and State audit requirements as do other elementary schools and secondary schools in the State, unless such requirements are specifically waived for the purpose of this program [the Public Charter School Program];

10. Meets all applicable Federal, State, and local health and safety requirements;

11. Operates in accordance with State law; and

12. Has a written performance contract with the authorized public chartering agency in the State that includes a description of how student performance will be measured in charter schools pursuant to State assessments that are required of other schools and pursuant to any other assessments mutually agreeable to the authorized public chartering agency and the charter school.

Changes: None.

Child With a Disability (§ 300.8)

General (§ 300.8(a))

Comment: Several commenters stated that many children with fetal alcohol syndrome (FAS) do not receive special education and related services and recommended adding a disability category for children with FAS to help solve this problem.

Discussion: We believe that the existing disability categories in section

602(3) of the Act and in these regulations are sufficient to include children with FAS who need special education and related services. Special education and related services are based on the identified needs of the child and not on the disability category in which the child is classified. We, therefore, do not believe that adding a separate disability category for children with FAS is necessary to ensure that children with FAS receive the special education and related services designed to meet their unique needs resulting from FAS.

Changes: None.

Comment: Some commenters suggested that the definition of *child with a disability* be changed to “student with a disability” and that the word “student,” rather than “child,” be used throughout the regulations because students over the age of 18 are not children.

Discussion: Section 602(3) of the Act defines *child with a disability*, not student with a disability. Therefore, we do not believe it is appropriate to change the definition as requested by the commenters. The words “child” and “student” are used throughout the Act and we generally have used the word “child” or “children,” except when referring to services and activities for older students (e.g., transition services, postsecondary goals).

Changes: None.

Comment: Some commenters supported § 300.8(a)(2), which states that if a child needs only a related service and not special education, the child is not a child with a disability under the Act. Another commenter recommended a single standard for the provision of a related service as special education, rather than allowing States to determine whether a related service is special education.

Discussion: Section 300.8(a)(2)(i) states that if a child has one of the disabilities listed in § 300.8(a)(1), but only needs a related service, the child is not a child with a disability under the Act. However, § 300.8(a)(2)(ii) provides that, if a State considers a particular service that could be encompassed by the definition of *related services* also to be special education, then the child would be determined to be a child with a disability under the Act. We believe it is important that States have the flexibility to determine whether, consistent with the definition of the term *special education* in section 602(29) of the Act and new § 300.39 (proposed § 300.38), such a service should be regarded as special education and to identify a child who needs that service as a child with a disability. States are in the best position to

determine whether a service that is included in the definition of *related services* should also be considered special education in that State.

Changes: None.

Comment: None.

Discussion: Section § 300.8(a)(2)(ii) contains an incorrect reference to § 300.38(a)(2). The correct reference should be to § 300.39(a)(2).

Changes: We have removed the reference to § 300.38(a)(2) and replaced it with a reference to § 300.39(a)(2).

Children Aged Three Through Nine Experiencing Developmental Delays (§ 300.8(b))

Comment: Several commenters expressed support for allowing LEAs to select a subset of the age range from three through nine for their definition of *developmental delay*. A few commenters recommended clarifying that States, not the LEAs, define the age range of children eligible under this category of developmental delay.

Discussion: Section 300.8(b) states that the use of the developmental delay category for a child with a disability aged three through nine, or any subset of that age range, must be made in accordance with § 300.111(b). Section 300.111(b) gives States the option of adopting a definition of *developmental delay*, but does not require an LEA to adopt and use the term. However, if an LEA uses the category of developmental delay, the LEA must conform to both the State’s definition of the term and the age range that has been adopted by the State. If a State does not adopt the category of developmental delay, an LEA may not use that category as the basis for establishing a child’s eligibility for special education and related services.

Based on the comments, it appears that § 300.8(b) has been misinterpreted as stating that LEAs are allowed to establish the age range for defining *developmental delay* independent of the State. We believe it is important to avoid such confusion and, therefore, will modify § 300.8(b) to clarify the provision.

Changes: For clarity, we have removed the phrase, “at the discretion of the State and LEA in accordance with § 300.111(b)” and replaced it with “subject to the conditions in § 300.111(b).”

Deafness (§ 300.8(c)(3))

Comment: One commenter stated that children who are hard of hearing are often denied special education and related services because the definition of *deafness* includes the phrase, “adversely affects a child’s educational

performance,” which school district personnel interpret to mean that the child must be failing in school to receive special education and related services.

Discussion: As noted in the *Analysis of Comments and Changes* section discussing subpart B, we have clarified in § 300.101(c) that a child does not have to fail or be retained in a course or grade in order to be considered for special education and related services. However, in order to be a child with a disability under the Act, a child must have one or more of the impairments identified in section 602(3) of the Act and need special education and related services because of that impairment. Given the change in § 300.101(c), we do not believe clarification in § 300.8(c)(3) is necessary.

Changes: None.

Emotional Disturbance (§ 300.8(c)(4))

Comment: Numerous commenters requested defining or eliminating the term “socially maladjusted” in the definition of *emotional disturbance* stating that there is no accepted definition of the term, and no valid or reliable instruments or methods to identify children who are, or are not, “socially maladjusted.” Some commenters stated that children who need special education and related services have been denied these services, or have been inappropriately identified under other disability categories and received inappropriate services because the definition of *emotional disturbance* excludes children who are socially maladjusted. One commenter stated that using the term “socially maladjusted” contributes to the negative image of children with mental illness and does a disservice to children with mental illness and those who seek to understand mental illness.

One commenter stated that emotional disturbance is one of the most misused and misunderstood disability categories and is often improperly used to protect dangerous and aggressive children who violate the rights of others. The commenter stated that the definition of *emotional disturbance* is vague and offers few objective criteria to differentiate an emotional disability from ordinary development, and requires the exclusion of conditions in which the child has the ability to control his or her behavior, but chooses to violate social norms.

One commenter recommended adding autism to the list of factors in § 300.8(c)(4)(i)(A) that must be ruled out before making an eligibility determination based on emotional disturbance. The commenter stated that

many children with autism are inappropriately placed in alternative educational programs designed for children with serious emotional and behavioral problems.

Discussion: Historically, it has been very difficult for the field to come to consensus on the definition of *emotional disturbance*, which has remained unchanged since 1977. On February 10, 1993, the Department published a "Notice of Inquiry" in the **Federal Register** (58 FR 7938) soliciting comments on the existing definition of *serious emotional disturbance*. The comments received in response to the notice of inquiry expressed a wide range of opinions and no consensus on the definition was reached. Given the lack of consensus and the fact that Congress did not make any changes that required changing the definition, the Department recommended that the definition of *emotional disturbance* remain unchanged. We reviewed the Act and the comments received in response to the NPRM and have come to the same conclusion. Therefore, we decline to make any changes to the definition of *emotional disturbance*.

Changes: None.

Comment: One commenter suggested that the regulations include a process to identify children who are at risk for having an emotional disturbance.

Discussion: We decline to include a process to identify children who are at risk for having an emotional disturbance. A child who is at risk for having any disability under the Act is not considered a *child with a disability* under § 300.8 and section 602(3) of the Act and, therefore, is not eligible for services under the Act.

Changes: None.

Mental Retardation (§ 300.8(c)(6))

Comment: One commenter suggested using the term "intellectual disability" in place of "mental retardation" because "intellectual disability" is a more acceptable term. The commenter also stated that the definition of *mental retardation* is outdated, and should, instead, address a child's functional limitations in specific life areas.

Discussion: Section 602(3)(A) of the Act refers to a "child with mental retardation," not a "child with intellectual disabilities," and we do not see a compelling reason to change the term. However, States are free to use a different term to refer to a child with mental retardation, as long as all children who would be eligible for special education and related services under the Federal definition of *mental retardation* receive FAPE.

We do not believe the definition of *mental retardation* needs to be changed because it is defined broadly enough in § 300.8(c)(6) to include a child's functional limitations in specific life areas, as requested by the commenter. There is nothing in the Act or these regulations that would prevent a State from including "functional limitations in specific life areas" in a State's definition of *mental retardation*, as long as the State's definition is consistent with these regulations.

Changes: None.

Multiple Disabilities (§ 300.8(c)(7))

Comment: One commenter asked why the category of multiple disabilities is included in the regulations when it is not in the Act.

Discussion: The definition of *multiple disabilities* has been in the regulations since 1977 and does not expand eligibility beyond what is provided for in the Act. The definition helps ensure that children with more than one disability are not counted more than once for the annual report of children served because States do not have to decide among two or more disability categories in which to count a child with multiple disabilities.

Changes: None.

Orthopedic Impairment (§ 300.8(c)(8))

Comment: One commenter requested that the examples of congenital anomalies in the definition of *orthopedic impairment* in current § 300.7(c)(8) be retained.

Discussion: The examples of congenital anomalies in current § 300.7(c)(8) are outdated and unnecessary to understand the meaning of *orthopedic impairment*. We, therefore, decline to include the examples in § 300.8(c)(8).

Changes: None.

Other Health Impairment (§ 300.8(c)(9))

Comment: We received a significant number of comments requesting that we include other examples of specific acute or chronic health conditions in the definition of *other health impairment*. A few commenters recommended including children with dysphagia because these children have a swallowing and feeding disorder that affects a child's vitality and alertness due to limitations in nutritional intake. Other commenters recommended including FAS, bipolar disorders, and organic neurological disorders. Numerous commenters requested including Tourette syndrome disorders in the definition of *other health impairment* because children with Tourette syndrome are frequently

misclassified as emotionally disturbed. A number of commenters stated that Tourette syndrome is a neurological disorder and not an emotional disorder, yet children with Tourette syndrome continue to be viewed as having a behavioral or conduct disorder and, therefore, do not receive appropriate special education and related services.

Discussion: The list of acute or chronic health conditions in the definition of *other health impairment* is not exhaustive, but rather provides examples of problems that children have that could make them eligible for special education and related services under the category of other health impairment. We decline to include dysphagia, FAS, bipolar disorders, and other organic neurological disorders in the definition of *other health impairment* because these conditions are commonly understood to be health impairments. However, we do believe that Tourette syndrome is commonly misunderstood to be a behavioral or emotional condition, rather than a neurological condition. Therefore, including Tourette syndrome in the definition of *other health impairment* may help correct the misperception of Tourette syndrome as a behavioral or conduct disorder and prevent the misdiagnosis of their needs.

Changes: We have added Tourette syndrome as an example of an acute or chronic health problem in § 300.8(c)(9)(i).

Comment: A few commenters expressed concern about determining a child's eligibility for special education services under the category of other health impairment based on conditions that are not medically determined health problems, such as "central auditory processing disorders" or "sensory integration disorders." One commenter recommended that the regulations clarify that "chronic or acute health problems" refer to health problems that are universally recognized by the medical profession.

Discussion: We cannot make the change requested by the commenters. The determination of whether a child is eligible to receive special education and related services is made by a team of qualified professionals and the parent of the child, consistent with § 300.306(a)(1) and section 614(b)(4) of the Act. The team of qualified professionals and the parent of the child must base their decision on careful consideration of information from a variety of sources, consistent with § 300.306(c). There is nothing in the Act that requires the team of qualified professionals and the parent to consider only health problems that are

universally recognized by the medical profession, as requested by the commenters. Likewise, there is nothing in the Act that would prevent a State from requiring a medical evaluation for eligibility under other health impairment, provided the medical evaluation is conducted at no cost to the parent.

Changes: None.

Comment: One commenter stated that the category of other health impairment is one of the most rapidly expanding eligibility categories because the definition is vague, confusing, and redundant. The commenter noted that the definition of *other health impairment* includes terms such as "alertness" and "vitality," which are difficult to measure objectively.

Discussion: We believe that the definition of *other health impairment* is generally understood and that the group of qualified professionals and the parent responsible for determining whether a child is a child with a disability are able to use the criteria in the definition and appropriately identify children who need special education and related services. Therefore, we decline to change the definition.

Changes: None.

Specific Learning Disability (§ 300.8(c)(10))

Comment: One commenter recommended changing the definition of *specific learning disability* to refer to a child's response to scientific, research-based intervention as part of the procedures for evaluating children with disabilities, consistent with § 300.307(a). A few commenters recommended aligning the definition of *specific learning disability* with the requirements for determining eligibility in § 300.309.

One commenter recommended using the word "disability," instead of "disorder," and referring to specific learning disabilities as a "disability in one or more of the basic psychological processes." A few commenters stated that the terms "developmental aphasia" and "minimal brain dysfunction" are antiquated and should be removed from the definition. A few commenters questioned using "imperfect ability" in the definition because it implies that a child with minor problems in listening, thinking, speaking, reading, writing, spelling, or calculating math could be determined to have a specific learning disability.

Discussion: The definition of *specific learning disability* is consistent with the procedures for evaluating and determining the eligibility of children suspected of having a specific learning

disability in §§ 300.307 through 300.311. We do not believe it is necessary to repeat these procedures in the definition of *specific learning disability*.

Section 602(30) of the Act refers to a "disorder" in one or more of the basic psychological processes and not to a "disability" in one or more of the basic psychological processes. We believe it would be inconsistent with the Act to change "disorder" to "disability," as recommended by one commenter. We do not believe that the terms "developmental aphasia" and "minimal brain dysfunction" should be removed from the definition. Although the terms may not be as commonly used as "specific learning disability," the terms continue to be used and we see no harm in retaining them in the definition. We do not agree that the phrase "imperfect ability" implies that a child has a minor problem and, therefore, decline to change this phrase in the definition of *specific learning disability*.

Changes: None.

Comment: We received several requests to revise the definition of *specific learning disability* to include specific disabilities or disorders that are often associated with specific learning disabilities, including Aspergers syndrome, FAS, auditory processing disorders, and nonverbal learning disabilities.

Discussion: Children with many types of disabilities or disorders may also have a specific learning disability. It is not practical or feasible to include all the different disabilities that are often associated with a specific learning disability. Therefore, we decline to add these specific disorders or disabilities to the definition of *specific learning disability*.

Changes: None.

Comment: A few commenters suggested clarifying the word "cultural" in § 300.8(c)(10)(ii) to clarify that cultural disadvantage or language cannot be the basis for determining that a child has a disability.

Discussion: We believe the term "cultural" is generally understood and do not see a need for further clarification. We also do not believe that it is necessary to clarify that language cannot be the basis for determining whether a child has a specific learning disability. Section 300.306(b)(1)(iii), consistent with section 614(b)(5)(C) of the Act, clearly states that limited English proficiency cannot be the basis for determining a child to be a child with a disability under any of the disability categories in § 300.8.

Changes: None.

Consent (§ 300.9)

Comment: Numerous commenters noted that the regulations include the terms "consent," "informed consent," "agree," and "agree in writing" and asked whether all the terms have the same meaning.

Discussion: These terms are used throughout the regulations and are consistent with their use in the Act. The definition of *consent* requires a parent to be fully informed of all information relevant to the activity for which consent is sought. The definition also requires a parent to agree in writing to an activity for which consent is sought. Therefore, whenever *consent* is used in these regulations, it means that the consent is both informed and in writing.

The meaning of the terms "agree" or "agreement" is not the same as *consent*. "Agree" or "agreement" refers to an understanding between the parent and the public agency about a particular question or issue, which may be in writing, depending on the context.

Changes: None.

Comment: A few commenters recommended adding a requirement to the definition of *consent* that a parent be fully informed of the reasons why a public agency selected one activity over another.

Discussion: We do not believe it is necessary to include the additional requirement recommended by the commenter. The definition of *consent* already requires that the parent be fully informed of all the information relevant to the activity for which consent is sought.

Changes: None.

Comment: A few commenters requested that the Department address situations in which a child is receiving special education services and the child's parent wants to discontinue services. A few commenters stated that public agencies should not be allowed to use the procedural safeguards to continue to provide special education and related services to a child whose parent withdraws consent for the continued provision of special education and related services.

Discussion: The Department intends to propose regulations to permit parents who previously consented to the initiation of special education services, to withdraw their consent for their child to receive, or continue to receive, special education services. Because this is a change from the Department's longstanding policies and was not proposed in the NPRM, we will provide the public the opportunity to comment

on this proposed change in a separate notice of proposed rulemaking.

Changes: None.

Core Academic Subjects (§ 300.10)

Comment: A few commenters suggested adding the definition of *core academic subjects* from the ESEA to the regulations and including any additional subjects that are considered core academic subjects for children in the State in which the child resides.

Discussion: The definition of *core academic subjects* in § 300.10, consistent with section 602(4) of the Act, is the same as the definition in section 9101 of the ESEA. We believe it is unnecessary to change the definition to include additional subjects that particular States consider to be core academic subjects. However, there is nothing in the Act or these regulations that would prevent a State from including additional subjects in its definition of “core academic subjects.”

Changes: None.

Comment: A few commenters requested clarifying the definition of *core academic subjects* for a secondary school student when the student is functioning significantly below the secondary level.

Discussion: The definition of *core academic subjects* does not vary for secondary students who are functioning significantly below grade level. The Act focuses on high academic standards and clear performance goals for children with disabilities that are consistent with the standards and expectations for all children. As required in § 300.320(a), each child’s IEP must include annual goals to enable the child to be involved in and make progress in the general education curriculum, and a statement of the special education and related services and supplementary aids and services to enable the child to be involved and make progress in the general education curriculum. It would, therefore, be inconsistent and contrary to the purposes of the Act for the definition of *core academic subjects* to be different for students who are functioning below grade level.

Changes: None.

Comment: One commenter asked that the core content area of “science” apply to social sciences, as well as natural sciences.

Discussion: We cannot change the regulations in the manner recommended by the commenter because the ESEA does not identify “social sciences” as a core academic subject. Neither does it identify “social studies” as a core academic subject. Instead, it identifies specific core academic areas: History, geography, economics, and civics and

government. The Department’s nonregulatory guidance on “Highly Qualified Teachers, Improving Teacher Quality State Grants” (August 3, 2005) explains that if a State issues a composite social studies license, the State must determine in which of the four areas (history, geography, economics, and civics and government), if any, a teacher is qualified. (see question A–20 in the Department’s nonregulatory guidance available at <http://www.ed.gov/programs/teacherqual/legislation.html#guidance>).

Changes: None.

Day; Business Day; School Day (§ 300.11)

Comment: A few commenters stated that a partial day should be considered a school day only if there is a safety reason for a shortened day, such as a two hour delay due to snow, and that regularly scheduled half days should not be considered a *school day* for funding purposes. One commenter stated that many schools count the time on the bus, recess, lunch period, and passing periods as part of a school day for children with disabilities, and recommended that the regulations clarify that non-instructional time does not count against a child’s instructional day unless such times are counted against the instructional day of all children. One commenter recommended the definition of *school day* include days on which extended school year (ESY) services are provided to children with disabilities.

Discussion: The length of the school day and the number of school days do not affect the formula used to allocate Part B funds to States. *School day*, as defined in § 300.11(c)(1), is any day or partial day that children are in attendance at school for instructional purposes. If children attend school for only part of a school day and are released early (e.g., on the last day before summer vacation), that day would be considered to be a *school day*.

Section 300.11(c)(2) already defines *school day* as having the same meaning for all children, including children with and without disabilities. Therefore, it is unnecessary for the regulations to clarify that non-instructional time (e.g., recess, lunch) is not counted as instructional time for a child with a disability unless such times are counted as instructional time for all children. Consistent with this requirement, days on which ESY services are provided cannot be counted as a *school day* because ESY services are provided only to children with disabilities.

Changes: None.

Educational Service Agency (§ 300.12)

Comment: One commenter questioned the accuracy of the citation, 20 U.S.C. 1401(5), as the basis for including “intermediate educational unit” in the definition of *educational service agency*.

Discussion: The definition of *educational service agency* is based on the provisions in section 602(5) of the Act. The definition was added by the Amendments to the Individuals with Disabilities Education Act in 1997, Pub. L. 105–17, to replace the definition of “intermediate educational unit” (IEU) in section 602(23) of the Act, as in effect prior to June 4, 1997. *Educational service agency* does not exclude entities that were considered IEUs under prior law. To avoid any confusion about the use of this term, the definition clarifies that *educational service agency* includes entities that meet the definition of IEU in section 602(23) of the Act as in effect prior to June 4, 1997. We believe the citation for IEU is consistent with the Act.

Changes: None.

Comment: One commenter requested that the regulations clarify that the reference to the definition of *educational service agency* in the definition of *local educational agency* or *LEA* in § 300.28 means that educational service agencies (ESAs) and Bureau of Indian Affairs (BIA) schools have full responsibility and rights as LEAs under all provisions of the Act, including § 300.226 (early intervening services).

Discussion: With respect to ESAs, we believe that the provisions in § 300.12 and § 300.28 clarify that ESAs have full responsibility and rights as LEAs, including the provisions in § 300.226 related to early intervening services. However, the commenter’s request regarding BIA schools is inconsistent with the Act. The definition of *local educational agency* in § 300.28 and section 602(19) of the Act, including the provision on BIA funded schools in section 602(19)(C) of the Act and in § 300.28(c), states that the term “LEA” includes an elementary school or secondary school funded by the BIA, “but only to the extent that the inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under the Act with the smallest student population.” Therefore, BIA schools do not have full responsibility and rights as LEAs under all provisions of the Act.

Changes: None.

Excess Costs (§ 300.16)

Comment: One commenter stated that an example on calculating excess costs would be a helpful addition to the regulations.

Discussion: We agree with the commenter and will include an example of calculating excess costs in *Appendix A to Part 300—Excess Costs Calculation*. In developing the example, we noted that while the requirements in § 300.202 exclude debt service and capital outlay in the calculation of excess costs, the definition of *excess costs* in § 300.16 does not mention this exclusion. We believe it is important to include this exclusion in the definition of *excess costs* and will add language in § 300.16 to make this clear and consistent with the requirements in § 300.202.

Changes: We have revised § 300.16(b) to clarify that the calculation of excess costs may not include capital outlay or debt service. We have also added *Appendix A to Part 300—Excess Costs Calculation* that provides an example and an explanation of how to calculate excess costs under the Act. A reference to Appendix A has been added in § 300.16(b).

Free Appropriate Public Education or FAPE (§ 300.17)

Comment: One commenter stated that the requirements in §§ 300.103 through 300.112 (Other FAPE Requirements) should be included in the definition of FAPE.

Discussion: The other FAPE requirements in §§ 300.103 through 300.112 are included in subpart B of these regulations, rather than in the definition of FAPE in subpart A, to be consistent with the order and structure of section 612 of the Act, which includes all the statutory requirements related to State eligibility. The order and structure of these regulations follow the general order and structure of the provisions in the Act in order to be helpful to parents, State and LEA personnel, and the public both in reading the regulations, and in finding the direct link between a given statutory requirement and the regulation related to that requirement.

Changes: None.

Comment: Some commenters stated that the definition of FAPE should include special education services that are provided in conformity with a child's IEP in the least restrictive environment (LRE), consistent with the standards of the State educational agency (SEA).

Discussion: The definition of FAPE in § 300.17 accurately reflects the specific

language in section 602(9) of the Act. We believe it is unnecessary to change the definition of FAPE in the manner recommended by the commenters because providing services in conformity with a child's IEP in the LRE is implicit in the definition of FAPE. Consistent with § 300.17(b), FAPE means that special education and related services must meet the standards of the SEA and the requirements in Part B of the Act, which include the LRE requirements in §§ 300.114 through 300.118. Additionally, § 300.17(d) provides that FAPE means that special education and related services are provided in conformity with an IEP that meets the requirements in section 614(d) of the Act. Consistent with section 614(d)(1)(i)(V) of the Act, the IEP must include a statement of the extent, if any, to which the child will not participate with nondisabled children in the regular education class.

Changes: None.

Comment: One commenter recommended removing "including the requirements of this part" in § 300.17(b) because this phrase is not included in the Act, and makes every provision in Part B of the Act a component of FAPE.

Discussion: Section 300.17 is the same as current § 300.13, which has been in the regulations since 1977. We do not believe that § 300.17 makes every provision of this part applicable to FAPE.

Changes: None.

Highly Qualified Special Education Teachers (§ 300.18)

Comment: One commenter requested including the definition of "highly qualified teacher," as defined in the ESEA, in the regulations.

Discussion: The ESEA defines "highly qualified" with regard to any public elementary or secondary school teacher. For the reasons set forth earlier in this notice, we are not adding definitions from other statutes to these regulations. However, we will include the current definition here for reference.

The term "highly qualified"—

(A) When used with respect to any public elementary school or secondary school teacher teaching in a State, means that—

(i) The teacher has obtained full State certification as a teacher (including certification obtained through alternative routes to certification) or passed the State teacher licensing examination, and holds a license to teach in such State, except that when used with respect to any teacher teaching in a public charter school, the term means that the teacher meets the

requirements set forth in the State's public charter school law; and

(ii) The teacher has not had certification or licensure requirements waived on an emergency, temporary, or provisional basis;

(B) When used with respect to—

(i) An elementary school teacher who is new to the profession, means that the teacher—

(I) Holds at least a bachelor's degree; and

(II) Has demonstrated, by passing a rigorous State test, subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum (which may consist of passing a State-required certification or licensing test or tests in reading, writing, mathematics, and other areas of the basic elementary school curriculum); or

(ii) A middle or secondary school teacher who is new to the profession, means that the teacher holds at least a bachelor's degree and has demonstrated a high level of competency in each of the academic subjects in which the teacher teaches by—

(I) Passing a rigorous State academic subject test in each of the academic subjects in which the teacher teaches (which may consist of a passing level of performance on a State-required certification or licensing test or tests in each of the academic subjects in which the teacher teaches); or

(II) Successful completion, in each of the academic subjects in which the teacher teaches, of an academic major, a graduate degree, coursework equivalent to an undergraduate academic major, or advanced certification or credentialing; and

(C) When used with respect to an elementary, middle, or secondary school teacher who is not new to the profession, means that the teacher holds at least a bachelor's degree and—

(i) Has met the applicable standard in clause (i) or (ii) of subparagraph (B), which includes an option for a test; or

(ii) Demonstrates competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation that—

(I) Is set by the State for both grade appropriate academic subject matter knowledge and teaching skills;

(II) Is aligned with challenging State academic content and student academic achievement standards and developed in consultation with core content specialists, teachers, principals, and school administrators;

(III) Provides objective, coherent information about the teacher's attainment of core content knowledge in

the academic subjects in which a teacher teaches;

(IV) Is applied uniformly to all teachers in the same academic subject and the same grade level throughout the State;

(V) Takes into consideration, but not be based primarily on, the time the teacher has been teaching in the academic subject;

(VI) Is made available to the public upon request; and

(VII) May involve multiple, objective measures of teacher competency.

Changes: None.

Comment: A few commenters recommended defining the term "special education teacher." Other commenters recommended that States define highly qualified special education teachers and providers. One commenter stated that the regulations should define the role of the special education teacher as supplementing and supporting the regular education teacher who is responsible for teaching course content.

One commenter requested that the regulations clarify that a special education teacher who is certified as a regular education teacher with an endorsement in special education meets the requirements for a highly qualified special education teacher. Another commenter recommended changing the definition of a *highly qualified special education teacher* so that States cannot provide a single certification for all areas of special education. One commenter requested clarification regarding the highly qualified special education teacher standards for special education teachers with single State endorsements in the area of special education. A few commenters recommended clarifying that when a State determines that a teacher is fully certified in special education, this means that the teacher is knowledgeable and skilled in the special education area in which certification is received. One commenter recommended that teacher qualifications and standards be consistent from State to State.

Discussion: Section 300.18(b), consistent with section 602(10)(B) of the Act, provides that a highly qualified special education teacher must have full State special education certification (including certification obtained through alternative routes to certification) or have passed the State special education teacher licensing examination and hold a license to teach in the State; have not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and hold at least a bachelor's degree. Except

to the extent addressed in § 300.18(c) and (d), special education teachers who teach core academic subjects must, in addition to meeting these requirements, demonstrate subject-matter competency in each of the core academic subjects in which the teacher teaches.

States are responsible for establishing certification and licensing standards for special education teachers. Each State uses its own standards and procedures to determine whether teachers who teach within that State meet its certification and licensing requirements. Teacher qualifications and standards are consistent from State to State to the extent that States work together to establish consistent criteria and reciprocity agreements. It is not the role of the Federal government to regulate teacher certification and licensure.

Changes: None.

Comment: One commenter stated that LEAs must train special education teachers because most special education teachers are not highly qualified upon graduation from a college program. A few commenters recommended that the regulations encourage SEAs to require coursework for both special education and general education teachers in the areas of behavior management and classroom management. One commenter recommended that the requirements for special education teachers include competencies in reading instruction and in properly modifying and accommodating instruction. Another commenter supported training in special education and related services for general education teachers. One commenter expressed support for collaboration between special education and regular education teachers. Some commenters recommended requiring a highly qualified general education teacher teaching in a self-contained special education classroom to work in close collaboration with the special education teacher assigned to those children. Another commenter stated that the definition of a *highly qualified special education teacher* will be meaningless if the training for teachers is not consistent across States.

Discussion: Personnel training needs vary across States and it would be inappropriate for the regulations to require training on specific topics. Consistent with § 300.156 and section 612(a)(14) of the Act, each State is responsible for ensuring that teachers, related services personnel, paraprofessionals, and other personnel serving children with disabilities under Part B of the Act are appropriately and adequately prepared and trained and have the content knowledge and skills

required to serve children with disabilities.

Changes: None.

Comment: One commenter recommended that the regulations include standards for highly qualified special education paraprofessionals, similar to the requirements under the ESEA.

Discussion: Section § 300.156(b) specifically requires the qualifications for paraprofessionals to be consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services.

In addition, the ESEA requires that paraprofessionals, including special education paraprofessionals who assist in instruction in title I-funded programs, have at least an associate's degree, have completed at least two years of college, or meet a rigorous standard of quality and demonstrate, through a formal State or local assessment, knowledge of, and the ability to assist in instruction in reading, writing, and mathematics, reading readiness, writing readiness, or mathematics readiness, as appropriate. Paraprofessionals in title I schools do not need to meet these requirements if their role does not involve instructional support, such as special education paraprofessionals who solely provide personal care services. For more information on the ESEA requirements for paraprofessionals, see 34 CFR 200.58 and section 1119 of the ESEA, and the Department's nonregulatory guidance, *Title I Paraprofessionals* (March 1, 2004), which can be found on the Department's Web site at: <http://www.ed.gov/policy/elsec/guid/paraguidance.pdf>.

We believe these requirements are sufficient to ensure that children with disabilities receive services from paraprofessionals who are appropriately and adequately trained. Therefore, we decline to include additional standards for paraprofessionals.

Changes: None.

Comment: Numerous commenters requested clarification as to whether early childhood and preschool special education teachers must meet the highly qualified special education teacher standards. Several commenters stated that requiring early childhood and preschool special education teachers to meet the highly qualified special education teacher standards would exceed statutory authority and exacerbate the shortage of special education teachers. A few commenters supported allowing States to decide

whether the highly qualified special education teacher requirements apply to preschool teachers.

Discussion: The highly qualified special education teacher requirements apply to all public elementary school and secondary school special education teachers, including early childhood or preschool teachers if a State includes the early childhood or preschool programs as part of its elementary school and secondary school system. If the early childhood or preschool program is not a part of a State's public elementary school and secondary school system, the highly qualified special education teacher requirements do not apply.

Changes: None.

Comment: One commenter requested clarification regarding the scope of the highly qualified special education teacher requirements for instructors who teach core academic subjects in specialized schools, such as schools for the blind, and recommended that there be different qualifications for instructors who provide orientation and mobility instruction or travel training for children who are blind or visually impaired.

One commenter requested adding travel instructors to the list of special educators who need to be highly qualified. Some commenters recommended adding language to include certified and licensed special education teachers of children with low incidence disabilities as highly qualified special education teachers. A few commenters requested that the requirements for teachers who teach children with visual impairments include competencies in teaching Braille, using assistive technology devices, and conducting assessments, rather than competencies in core subject areas. Some commenters requested more flexibility in setting the standards for teachers of children with visual impairments and teachers of children with other low incidence disabilities. One commenter requested clarification regarding the requirements for teachers of children with low incidence disabilities.

Discussion: Consistent with § 300.156 and section 612(a)(14) of the Act, it is the responsibility of each State to ensure that teachers and other personnel serving children with disabilities under Part B of the Act are appropriately and adequately prepared and trained and have the content knowledge and skills to serve children with disabilities, including teachers of children with visual impairments and teachers of children with other low incidence disabilities.

The highly qualified special education teacher requirements apply to all public school special education teachers. There are no separate or special provisions for special education teachers who teach in specialized schools, for teachers of children who are blind and visually impaired, or for teachers of children with other low incidence disabilities and we do not believe there should be because these children should receive the same high quality instruction from teachers who meet the same high standards as all other teachers and who have the subject matter knowledge and teaching skills necessary to assist these children to achieve to high academic standards.

Changes: None.

Comment: One commenter requested clarification on how the highly qualified special education teacher requirements impact teachers who teach children of different ages. A few commenters recommended adding a provision for special education teachers who teach at multiple age levels, similar to the special education teacher who teaches multiple subjects.

Discussion: The Act does not include any special requirements for special education teachers who teach at multiple age levels. Teachers who teach at multiple age levels must meet the same requirements as all other special education teachers to be considered highly qualified. The clear intent of the Act is to ensure that all children with disabilities have teachers with the subject matter knowledge and teaching skills necessary to assist children with disabilities achieve to high academic standards. Therefore, we do not believe there should be different requirements for teachers who teach at multiple age levels.

Changes: None.

Comment: One commenter recommended including specific criteria defining a highly qualified special education literacy teacher.

Discussion: Under § 300.18(a), a special education literacy teacher who is responsible for teaching reading must meet the ESEA highly qualified teacher requirements including competency in reading, as well as the highly qualified special education teacher requirements. We do not believe that further regulation is needed as the Act leaves teacher certification and licensing requirements to States.

Changes: None.

Comment: Many commenters expressed concern that the highly qualified special education teacher standards will make it more difficult to recruit and retain special education teachers. Some commenters stated that

most special education teachers will need to hold more than one license or certification to meet the highly qualified special education teacher requirements and that the time and expense needed to obtain the additional licenses or certifications is unreasonable. One commenter stated that schools will have to hire two or three teachers for every one special education teacher, thereby increasing education costs.

One commenter expressed concern about losing special education teachers who teach multiple subjects in alternative education and homebound programs because they will not meet the highly qualified special education teacher requirements. One commenter expressed concern that the requirements set a higher standard for teachers in self-contained classrooms. Another commenter stated that requiring special education teachers in secondary schools to be experts in all subjects is a burden that elementary teachers do not have.

Discussion: The Department understands the concerns of the commenters. However, the clear intention of the Act is to ensure that all children with disabilities have teachers with the subject-matter knowledge and teaching skills necessary to assist children with disabilities achieve to high academic standards.

To help States and districts meet these standards, section 651 of the Act authorizes State Personnel Development grants to help States reform and improve their systems for personnel preparation and professional development in early intervention, educational, and transition services in order to improve results for children with disabilities. In addition, section 662 of the Act authorizes funding for institutions of higher education, LEAs, and other eligible local entities to improve or develop new training programs for teachers and other personnel serving children with disabilities.

Changes: None.

Comment: One commenter requested further clarification regarding the requirements for secondary special education teachers to be highly qualified in the core subjects they teach, as well as certified in special education.

Discussion: Consistent with § 300.18(a) and (b) and section 602(10)(A) and (B) of the Act, secondary special education teachers who teach core academic subjects must meet the highly qualified teacher standards established in the ESEA (which includes competency in each core academic subject the teacher teaches) and the highly qualified special education teacher requirements in

§ 300.18(b) and section 602(10)(B) of the Act.

Consistent with § 300.18(c) and section 602(10)(C) of the Act, a secondary special education teacher who teaches core academic subjects exclusively to children assessed against alternate achievement standards can satisfy the highly qualified special education teacher requirements by meeting the requirements for a highly qualified elementary teacher under the ESEA, or in the case of instruction above the elementary level, have subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, to effectively teach to those standards.

Changes: None.

Comment: One commenter expressed concern that the highly qualified teacher requirements will drive secondary teachers who teach children with emotional and behavioral disorders out of the field and requested that the requirements be changed to require special education certification in one core area, plus a reasonable amount of training in other areas. Another commenter recommended permitting special education teachers of core academic subjects at the elementary level to be highly qualified if they major in elementary education and have coursework in math, language arts, and science. One commenter recommended that any special education teacher certified in a State prior to 2004 be exempt from having to meet the highly qualified special education teacher requirements.

Discussion: The definition of a highly qualified special education teacher in § 300.18 accurately reflects the requirements in section 602(10) of the Act. To change the regulations in the manner recommended by the commenters would be inconsistent with the Act and the Act's clear intent of ensuring that all children with disabilities have teachers with the subject matter knowledge and teaching skills necessary to assist children with disabilities achieve to high academic standards. Therefore, we decline to change the requirements in § 300.18.

Changes: None.

Comment: One commenter stated that there is a double standard in the highly qualified teacher requirements because general education teachers are not required to be certified in special education even though they teach children with disabilities. Another commenter recommended requiring general education teachers who teach children with disabilities to meet the highly qualified special education teacher requirements.

Discussion: We cannot make the changes suggested by the commenter because the Act does not require general education teachers who teach children with disabilities to be certified in special education. Further, the legislative history of the Act would not support these changes. Note 21 in the U.S. House of Representatives Conference Report No. 108-779 (Conf. Rpt.), p. 169, clarifies that general education teachers who are highly qualified in particular subjects and who teach children with disabilities in those subjects are not required to have full State certification as a special education teacher. For example, a reading specialist who is highly qualified in reading instruction, but who is not certified as a special education teacher, would not be prohibited from providing reading instruction to children with disabilities.

The Act focuses on ensuring that children with disabilities achieve to high academic standards and have access to the same curriculum as other children. In order to achieve this goal, teachers who teach core academic subjects to children with disabilities must be competent in the core academic areas in which they teach. This is true for general education teachers, as well as special education teachers.

Changes: None.

Comment: Some commenters expressed concern that LEAs may reduce placement options for children with disabilities because of the shortage of highly qualified teachers. A few commenters recommended requiring each State to develop and implement policies to ensure that teachers meet the highly qualified special education teacher requirements, while maintaining a full continuum of services and alternative placements to respond to the needs of children with disabilities.

Discussion: It would be inconsistent with the LRE requirements in section 612(a)(5) of the Act for a public agency to restrict the placement options for children with disabilities. Section 300.115, consistent with section 612(a)(5) of the Act, requires each public agency to ensure that a continuum of alternative placements is available to meet the needs of children with disabilities.

The additional requirements requested by the commenter are not necessary because States already must develop and implement policies to ensure that the State meets the LRE and personnel standards requirements in sections 612(a)(5) and (a)(14) of the Act, respectively.

Changes: None.

Comment: One commenter stated that personnel working in charter schools should meet the same requirements as all other public school personnel. Several commenters expressed concern regarding the exemption of charter school teachers from the highly qualified special education teacher requirements. One commenter stated that while a special education teacher in a charter school does not have to be licensed or certified by the State if the State's charter school law does not require such licensure or certification, all other elements of the highly qualified special education teacher requirements should apply to charter school teachers, including demonstrated competency in core academic subject areas.

Discussion: The certification requirements for charter school teachers are established in a State's public charter school law, and may differ from the requirements for full State certification for teachers in other public schools. The Department does not have the authority to change State charter school laws to require charter school teachers to meet the same requirements as all other public school teachers.

In addition to the certification requirements established in a State's public charter school law, if any, section 602(10) of the Act requires charter school special education teachers to hold at least a bachelor's degree and, if they are teaching core academic subjects, demonstrate competency in the core academic areas they teach. We will add language in § 300.18(b) to clarify that special education teachers in public charter schools must meet the certification or licensing requirements, if any, established by a State's public charter school law.

Changes: We have added the words "if any" in § 300.18(b)(1)(i) to clarify that special education teachers in public charter schools must meet any certification or licensing requirements established by a State's public charter school law.

Comment: One commenter stated that the regulations use the terms "highly qualified" and "fully certified" in a manner that implies they are synonymous, and recommended that the regulations maintain the distinction between the two terms.

Discussion: Full State certification is determined under State law and policy and means that a teacher has fully met State requirements, including any requirements related to a teacher's years of teaching experience. For example, State requirements may vary for first-year teachers versus teachers who are not new to the profession. Full State

certification also means that the teacher has not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.

The terms "highly qualified" and "fully certified" are synonymous when used to refer to special education teachers who are not teaching core academic subjects. For special education teachers teaching core academic subjects, however, both full special education certification or licensure and subject matter competency are required.

Changes: We have changed the heading to § 300.18(a) and the introductory material in § 300.18(a) and (b)(1) for clarity.

Comment: A few commenters recommended prohibiting States from creating new categories to replace emergency, temporary, or provisional licenses that lower the standards for full certification in special education.

Discussion: We do not believe it is necessary to add the additional language recommended by the commenters. Section 300.18(b)(1)(ii) and section 602(10)(B)(ii) of the Act are clear that a teacher cannot be considered a highly qualified special education teacher if the teacher has had special education certification or licensure waived on an emergency, temporary, or provisional basis. This would include any new certification category that effectively allows special education certification or licensure to be waived on an emergency, temporary, or provisional basis.

Changes: None.

Comment: Some commenters supported alternative route to certification programs for special education teachers. One commenter stated that these programs are necessary to increase the number of highly qualified teachers and will help schools on isolated tribal reservations recruit, train, and retain highly qualified teachers. However, numerous commenters expressed concerns and objections to alternative route to certification programs for special education teachers. Several commenters stated that allowing individuals making progress in an alternative route to certification program to be considered highly qualified and fully certified creates a lower standard, short-changes children, is not supported by any provision in the Act, and undermines the requirement for special education teachers to be fully certified. One commenter stated that this provision is illogical and punitive to higher education teacher training programs because it allows individuals in an alternative route to certification program to be considered highly qualified and

fully certified during their training program, while at the same time individuals in regular teacher training programs that meet the same requirements as alternative route to certification programs are not considered highly qualified or fully certified. One commenter argued that an individual participating in an alternative route to certification program would need certification waived on an emergency, temporary, or provisional basis, which means the individual has not met the requirements in § 300.18(b)(1)(ii). Another commenter stated that three years is not enough time for a teacher enrolled in an alternative route to certification program to assume the functions of a teacher.

Discussion: While we understand the general objections to alternative route to certification programs expressed by the commenters, the Department believes that alternative route to certification programs provide an important option for individuals seeking to enter the teaching profession. The requirements in § 300.18(b)(2) were included in these regulations to provide consistency with the requirements in 34 CFR 200.56(a)(2)(ii)(A) and the ESEA, regarding alternative route to certification programs. To help ensure that individuals participating in alternative route to certification programs are well trained, there are certain requirements that must be met as well as restrictions on who can be considered to have obtained full State certification as a special education teacher while enrolled in an alternative route to certification program. An individual participating in an alternative route to certification program must (1) hold at least a bachelor's degree and have demonstrated subject-matter competency in the core academic subject(s) the individual will be teaching; (2) assume the functions of a teacher for not more than three years; and (3) demonstrate satisfactory progress toward full certification, as prescribed by the State. The individual also must receive, before and while teaching, high-quality professional development that is sustained, intensive, and classroom-focused and have intensive supervision that consists of structured guidance and regular ongoing support.

It was the Department's intent to allow an individual who wants to become a special education teacher, but does not plan to teach a core academic subject, to enroll in an alternative route to certification program and be considered highly qualified, provided that the individual holds at least a bachelor's degree. This requirement,

however, was inadvertently omitted in the NPRM. Therefore, we will add appropriate references in § 300.18(b)(3) to clarify that an individual participating in an alternative route to certification program in special education who does not intend to teach a core academic subject, may be considered a highly qualified special education teacher if the individual holds at least a bachelor's degree and participates in an alternative route to certification program that meets the requirements in § 300.18(b)(2).

Changes: Appropriate citations have been added in § 300.18(b)(3) to clarify the requirements for individuals enrolled in alternative route to special education teacher certification programs.

Comment: A few commenters recommended more specificity in the requirements for teachers participating in alternative route to certification programs, rather than giving too much discretion to States to develop programs that do not lead to highly qualified personnel. However, one commenter recommended allowing States the flexibility to create their own guidelines for alternative route to certification programs.

Several commenters recommended clarifying the requirements for the teacher supervising an individual who is participating in an alternative route to certification program. One commenter recommended requiring supervision, guidance, and support by a professional with expertise in the area of special education in which the teacher desires to become certified.

Discussion: Consistent with § 300.18(b)(2)(ii), States are responsible for ensuring that the standards for alternative route to certification programs in § 300.18(b)(2)(i) are met. It is, therefore, up to each State to determine whether to require specific qualifications for the teachers responsible for supervising teachers participating in an alternative route to certification program.

Changes: None.

Comment: One commenter requested clarification regarding the roles and responsibilities of special education teachers who do not teach core academic subjects.

Discussion: Special education teachers who do not directly instruct children in any core academic subject or who provide only consultation to highly qualified teachers of core academic subjects do not need to demonstrate subject-matter competency in those subjects. These special educators could provide consultation services to other teachers, such as adapting curricula,

using behavioral supports and interventions, or selecting appropriate accommodations for children with disabilities. They could also assist children with study skills or organizational skills and reinforce instruction that the child has already received from a highly qualified teacher in that core academic subject.

Changes: None.

Comment: Many commenters recommended including language in the regulations to clarify that special education teachers who do not teach core academic subjects and provide only consultative services must restrict their services to areas that supplement, not replace, the direct instruction provided by a highly qualified general education teacher. One commenter recommended that States develop criteria for teachers who provide consultation services. Another commenter stated that special education teachers should not work on a consultative basis.

Discussion: The definition of consultation services and whether a special education teacher provides consultation services are matters best left to the discretion of each State. While States may develop criteria to distinguish consultation versus instructional services, the Act and the ESEA are clear that teachers who provide direct instruction in a core academic subject, including special education teachers, must meet the highly qualified teacher requirements, which include demonstrated competency in each of the core academic subjects the teacher teaches.

Changes: None.

Requirements for Highly Qualified Special Education Teachers Teaching to Alternate Achievement Standards (§ 300.18(c))

Comment: One commenter recommended replacing “alternate achievement standards” with “alternate standards.” A few commenters requested including a definition of alternate achievement standards in the regulations.

Discussion: “Alternate achievement standards” is statutory language and, therefore, it would be inappropriate to change “alternate achievement standards” to “alternate standards.”

For the reasons set forth earlier in this notice, we are not adding definitions from other statutes to these regulations. However, we will include the current description of alternate achievement standards in 34 CFR 200.1(d) of the ESEA regulations here for reference.

For children under section 602(3) of the Individuals with Disabilities Education Act with the most significant

cognitive disabilities who take an alternate assessment, a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards—

- (1) Are aligned with the State’s academic content standards;
- (2) Promote access to the general curriculum; and
- (3) Reflect professional judgment of the highest achievement standards possible.

Changes: None.

Comment: Several commenters expressed concern with allowing high school students with significant cognitive disabilities to be taught by a certified elementary school teacher. One commenter stated that high school students with disabilities should be prepared to lead productive adult lives, and not be treated as young children. Another commenter stated that these requirements foster low expectations for children with the most significant cognitive disabilities and will be used to justify providing children with instruction that is not age appropriate or that denies access to the general education curriculum. A few commenters stated that the requirements for special education teachers teaching to alternate achievement standards should be the same as the requirements for all special education teachers.

Some commenters recommended requiring teachers who teach to alternate achievement standards to have subject matter knowledge to provide instruction aligned to the academic content standards for the grade level in which the student is enrolled. One commenter recommended requiring any special education teacher teaching to alternate achievement standards to demonstrate knowledge of age-appropriate core curriculum content to ensure children with disabilities are taught a curriculum that is closely tied to the general education curriculum taught to other children of the same age.

Discussion: The regulations promulgated under section 1111(b)(1) of the ESEA permit States to use alternate achievement standards to evaluate the performance of a small group of children with the most significant cognitive disabilities who are not expected to meet grade-level standards even with the best instruction. An alternate achievement standard sets an expectation of performance that differs in complexity from a grade-level achievement standard. Section 602(10)(C)(ii) of the Act, therefore, allows special education teachers teaching exclusively children who are

assessed against alternate achievement standards to meet the highly qualified teacher standards that apply to elementary school teachers. In the case of instruction above the elementary level, the teacher must have subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, in order to effectively teach to those standards.

We do not agree that allowing middle and high school students with the most significant cognitive disabilities to be taught by teachers who meet the qualifications of a highly qualified elementary teacher fosters low expectations, encourages students to be treated like children, promotes instruction that is not age appropriate, or denies students access to the general curriculum. Although alternate achievement standards differ in complexity from grade-level standards, 34 CFR 200.1(d) requires that alternate achievement standards be aligned with the State’s content standards, promote access to the general curriculum, and reflect professional judgment of the highest achievement standards possible. In short, we believe that the requirements in § 300.18(c) will ensure that teachers teaching exclusively children who are assessed against alternate achievement standards will have the knowledge to provide instruction aligned to grade-level content standards so that students with the most significant cognitive disabilities are taught a curriculum that is closely tied to the general curriculum.

Changes: None.

Comment: A few commenters requested clarification regarding the meaning of “subject matter knowledge appropriate to the level of instruction provided” in § 300.18(c)(2).

Discussion: Section 300.18(c)(2) requires that if a teacher (who is teaching exclusively to alternate achievement standards) is teaching students who need instruction above the elementary school level, the teacher must have subject matter knowledge appropriate to the level of instruction needed to effectively teach to those standards. The purpose of this requirement is to ensure that teachers exclusively teaching children who are assessed based on alternate academic achievement standards above the elementary level have sufficient subject matter knowledge to effectively instruct in each of the core academic subjects being taught, at the level of difficulty being taught. For example, if a high school student (determined by the IEP Team to be assessed against alternate achievement standards) has knowledge and skills in math at the 7th grade level,

but in all other areas functions at the elementary level, the teacher would need to have knowledge in 7th grade math in order to effectively teach the student to meet the 7th grade math standards. No further clarification is necessary.

Changes: None.

Comment: A few commenters recommended that the regulations include requirements for teachers who provide instruction to children assessed against modified achievement standards. Several commenters stated that the requirements for teachers teaching children assessed against modified achievement standards should be the same for teachers teaching children assessed against alternate achievement standards.

Discussion: The Department has not issued final regulations addressing modified achievement standards and the specific criteria for determining which children with disabilities should be assessed based on modified achievement standards. As proposed, the modified achievement standards must be aligned with the State's academic content standards for the grade in which the student is enrolled and provide access to the grade-level curriculum. For this reason, we see no need for a further exception to the "highly qualified teacher" provisions at this time.

Changes: None.

Requirements for Highly Qualified Special Education Teachers Teaching Multiple Subjects (§ 300.18(d))

Comment: A few commenters stated that the requirements for teachers who teach two or more core academic subjects exclusively to children with disabilities are confusing. Some commenters requested additional guidance and flexibility for special education teachers teaching two or more core academic subjects. Other commenters recommended allowing special education teachers more time to become highly qualified in all the core academic subjects they teach.

Discussion: The requirements in § 300.18(d), consistent with section 602(10)(C) of the Act, provide flexibility for teachers who teach multiple core academic subjects exclusively to children with disabilities. Section 300.18(d)(2) and (3) allows teachers who are new and not new in the profession to demonstrate competence in all the core academic subjects in which the teacher teaches using a single, high objective uniform State standard of evaluation (HOUSSE) covering multiple subjects. In addition, § 300.18(d)(3) gives a new special education teacher

who teaches multiple subjects, and who is highly qualified in mathematics, language arts, or science at the time of hire, two years after the date of employment to demonstrate competence in the other core academic subjects in which the teacher teaches. We do not believe that further clarification is necessary.

Changes: None.

Comment: One commenter requested clarification regarding the meaning of the following phrases in § 300.18(d): "multiple subjects," "in the same manner," and "all the core academic subjects."

Discussion: "Multiple subjects" refers to two or more core academic subjects. Section 300.18(d) allows teachers who are new or not new to the profession to demonstrate competence in "all the core subjects" in which the teacher teaches "in the same manner" as is required for an elementary, middle, or secondary school teacher under the ESEA. As used in this context, "in the same manner" means that special education teachers teaching multiple subjects can demonstrate competence in the core academic subjects they teach in the same way that is required for elementary, middle, or secondary school teachers in 34 CFR 200.56 of the ESEA regulations. "All the core subjects" refers to the core academic subjects, which include English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography, consistent with § 300.10.

Changes: None.

Comment: One commenter recommended ensuring that the requirements in § 300.18(d) apply to special education teachers who teach children with severe disabilities in more than one core subject area.

Discussion: The requirements in § 300.18(d) do not exclude teachers who teach children with severe disabilities in more than one core subject area. Consistent with § 300.18(d) and section 602(10)(D) of the Act, the requirements apply to special education teachers who teach two or more core academic subjects exclusively to children with disabilities, including, but not limited to, children with severe disabilities. We do not believe that further clarification is necessary.

Changes: None.

Comment: A significant number of commenters recommended adding language to the regulations to permit a separate HOUSSE for special education teachers, including a single HOUSSE that covers multiple subjects. Some commenters supported a single HOUSSE covering multiple subjects for

special education teachers, as long as those adaptations of a State's HOUSSE for use with special education teachers do not establish lower standards for the content knowledge requirements for special education teachers.

Discussion: States have the option of developing a method by which teachers can demonstrate competency in each subject they teach on the basis of a HOUSSE. Likewise, we believe States should have the option of developing a separate HOUSSE for special education teachers.

States have flexibility in developing their HOUSSE evaluation as long as it meets each of the following criteria established in section 9101(23)(C)(ii) of the ESEA:

- Be set by the State for both grade-appropriate academic subject-matter knowledge and teaching skills;
- Be aligned with challenging State academic content and student academic achievement standards and developed in consultation with core content specialists, teachers, principals, and school administrators;
- Provide objective, coherent information about the teacher's attainment of core content knowledge in the academic subjects in which a teacher teaches;
- Be applied uniformly to all teachers in the same academic subject and teaching in the same grade level throughout the State;
- Take into consideration, but not be based primarily on, the time the teacher has been teaching in the academic subject; and
- Be made available to the public upon request.

The ESEA also permits States, when developing their HOUSSE procedures, to involve multiple, objective measures of teacher competency. Each evaluation should have a high, objective, uniform standard that the candidate is expected to meet or to exceed. These standards for evaluation must be applied to each candidate in the same way.

We believe it is appropriate and consistent with the Act to permit States to develop a separate HOUSSE for special education teachers to demonstrate subject matter competency and to use a single HOUSSE covering multiple subjects, provided that any adaptations to the HOUSSE do not establish a lower standard for the content knowledge requirements for special education teachers and meet all the requirements for a HOUSSE for regular education teachers established in section 9101(23)(C)(ii) of the ESEA.

Changes: We have added a new paragraph (e) to § 300.18 to allow States to develop a separate HOUSSE for

special education teachers and to permit the use of a single HOUSSE covering multiple subjects. Subsequent paragraphs have been renumbered.

Comment: A few commenters stated that the HOUSSE should only be used to address the content requirements, not primary certification as a special educator.

Discussion: A HOUSSE is a method by which teachers can demonstrate competency in each subject they teach. A HOUSSE does not address the requirement for full State certification as a special education teacher.

Changes: None.

Comment: Several commenters recommended clarifying the requirements for a HOUSSE, particularly at the high school level. One commenter recommended clarifying the use of a separate HOUSSE for teachers of children with visual impairments.

Discussion: The requirements for a HOUSSE apply to public school elementary, middle, and high school special education teachers. Neither the Act nor the ESEA provides for different HOUSSE procedures at the high school level. Similarly, there are no requirements for separate HOUSSE procedures for teachers who teach children with visual impairments or any other specific type of disability. We do not believe it is necessary or appropriate to establish separate requirements for separate HOUSSE procedures for teachers who teach children with visual impairments or any other specific type of disability. All children with disabilities, regardless of their specific disability, should have teachers with the subject matter knowledge to assist them to achieve to high academic standards.

Changes: None.

Comment: One commenter recommended that States work collaboratively to ensure there is State reciprocity of content area standards for special education teachers, including HOUSSE provisions.

Discussion: It is up to each State to determine when and on what basis to accept another State's determination that a particular teacher is highly qualified. Additionally, each State determines whether to consider a teacher from another State to be both fully certified and competent in each subject area.

Changes: None.

Comment: One commenter requested specific guidance on how to design a multi-subject HOUSSE for special education teachers.

Discussion: The Department's non-regulatory guidance on *Improving Teacher Quality State Grants* issued on

August 3, 2005 (available at <http://www.ed.gov/programs/teacherqual/guidance.doc>.) provides the following guidance to States when developing their HOUSSE procedures (see question A-10):

- Do the HOUSSE procedures provide an "objective" way of determining whether teachers have adequate subject-matter knowledge in each core academic subject they teach?

- Is there a strong and compelling rationale for each part of the HOUSSE procedures?

- Do the procedures take into account, but not primarily rely on, previous teaching experience?

- Does the plan provide solid evidence that teachers have mastered the subject-matter content of each of the core academic subjects they are teaching? (Note: experience and association with content-focused groups or organizations do not necessarily translate into an objective measure of content knowledge.)

- Has the State consulted with core content specialists, teachers, principals, and school administrators?

- Does the State plan to widely distribute its HOUSSE procedures, and are they presented in a format understandable to all teachers?

Changes: None.

Comment: A few commenters asked whether the additional time allowed for teachers living in rural areas who teach multiple subjects applies to special education teachers. One commenter requested that teachers in rural areas have three extra years after the date of employment to meet the standards. Another commenter stated it will be difficult for these teachers to meet the highly qualified special education teacher requirements even with an extended deadline.

Discussion: The Department's policy on flexibility for middle and high school teachers in rural schools applies to special education teachers. Under this policy, announced on March 15, 2004, States may permit LEAs eligible to participate in the Small Rural School Achievement (SRSA) program that employ teachers who teach multiple subjects and are highly qualified in at least one core academic subject, to have until the end of the 2006-07 school year for these teachers to be highly qualified in each subject that they teach. Newly-hired teachers in these covered LEAs have three years from the date of hire to become highly qualified in each core academic subject that they teach. More information about this policy is available in the Department's nonregulatory guidance, *Improving Teacher Quality State Grants* (August 3,

2005), which can be found on the Department's Web site at: <http://www.ed.gov/programs/teacherqual/guidance.doc>.

Changes: None.

Comment: Some commenters requested a definition of "new" special education teacher and asked whether it applies to teachers hired after the date of enactment of the Act, December 3, 2004, or after the 2005-06 school year. One commenter asked whether a fully certified regular education teacher who enrolls in a special education teacher training program would be considered "new" to the profession when he or she completes the training program.

Discussion: Under the Act, mere completion of a special education teacher training program is not a sufficient predicate for being considered a highly qualified special education teacher. Section 602(10)(B) of the Act requires full State certification or licensure as a special education teacher, and this would apply to teachers who are already certified or licensed as a regular education teacher, as well as to other individuals.

On the question of when a person is "new to the profession," the Department's non-regulatory guidance on *Improving Teacher Quality State Grants* issued on August 3, 2005, clarifies that States have the authority to define which teachers are new and not new to the profession; however, those definitions must be reasonable. The guidance further states that the Department strongly believes that a teacher with less than one year of teaching experience is "new" to the profession (see Question A-6). (The guidance is available at <http://www.ed.gov/programs/teacherqual/guidance.doc>). This guidance is applicable to determinations of when a person is new or not new to the profession under section 602(10)(C) and (D)(ii) of the Act and § 300.18(c) and (d)(2).

Under section 602(10)(D)(iii) of the Act, and reflected in § 300.18(d)(3), there is additional flexibility for "a new special education teacher" who is teaching multiple subjects and is highly qualified in mathematics, language arts, or science, to demonstrate competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession, which may include a single, high objective uniform State standard of evaluation covering multiple subjects, not later than 2 years after the date of employment. The phrase "2 years after the date of employment" in section

602(10)(D)(iii) of the Act is interpreted to mean 2 years after employment as a special education teacher.

For purposes of this provision, we consider it appropriate to consider a fully certified regular education teacher who subsequently becomes fully certified or licensed as a special education teacher to be considered a "new special education teacher" when they are first hired as a special education teacher. We will add language to new § 300.18(g) (proposed § 300.18(f)) to make this clear.

Changes: We have restructured § 300.18(g) (proposed § 300.18(f)) and added a new paragraph (g)(2) to permit a fully certified regular education teacher who subsequently becomes fully certified or licensed as a special education teacher to be considered a new special education teacher when first hired as a special education teacher.

Comment: Some commenters recommended that the regulations clarify how co-teaching fits with the highly qualified special education teacher requirements. A few commenters stated that a special education teacher should be considered a highly qualified teacher if co-teaching with a highly qualified general education teacher. One commenter stated that co-teaching will encourage districts to work toward more inclusive settings for children with disabilities while also ensuring that teachers with appropriate qualifications are in the classroom. One commenter supported co-teaching as a method for special education teachers to learn core content knowledge and be supported by the general education teacher. One teacher recommended that a highly qualified general education teacher supervise teachers who do not meet the highly qualified special education teacher requirements.

Discussion: The term "co-teaching" has many different meanings depending on the context in which it is used. Whether and how co-teaching is implemented is a matter that is best left to State and local officials' discretion. Therefore, we decline to include language regarding co-teaching in these regulations. Regardless of whether co-teaching models are used, States and LEAs must ensure that teachers meet the highly qualified teacher requirements in 34 CFR 200.56 and section 9101(23) of the ESEA and the highly qualified special education teacher requirements in § 300.18 and section 602(10) of the Act, as well as the personnel requirements in § 300.156 and section 612(a)(14) of the Act.

Changes: None.

Comment: One commenter recommended requiring schools to post the credentials of educational personnel in a place with public access, and to include in the procedural safeguards notice a parent's right to request the credentials of any teacher who supports the child in an educational environment. Another commenter stated that parents should have access to records documenting the type of supervision that is being provided when a teacher or other service provider is under the supervision of a highly qualified teacher. One commenter stated that the ESEA requires districts to provide parents with information about the personnel qualifications of their child's classroom teachers and asked whether this requirement applies to special education teachers.

Discussion: There is nothing in the Act that authorizes the Department to require schools to publicly post the credentials of educational personnel or to provide parents with information about the qualification of their child's teachers and other service providers. Section 615 of the Act describes the guaranteed procedural safeguards afforded to children with disabilities and their parents under the Act but does not address whether parents can request information about the qualifications of teachers and other service providers.

However, section 1111(h)(6) of the ESEA requires LEAs to inform parents about the quality of a school's teachers in title I schools. The ESEA requires that at the beginning of each school year, an LEA that accepts title I, part A funding must notify parents of children in title I schools that they can request information regarding their child's classroom teachers, including, at a minimum: (1) Whether the teacher has met the State requirements for licensure and certification for the grade levels and subject matters in which the teacher provides instruction; (2) whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived; (3) the college major and any other graduate certification or degree held by the teacher, and the field of discipline of the certification or degree; and (4) whether the child is provided services by paraprofessionals, and if so, their qualifications. In addition, each title I school must provide parents with timely notice that the parent's child has been assigned, or has been taught for four or more consecutive weeks by, a teacher who is not highly qualified. These requirements apply only to those special education teachers who teach core academic subjects in title I schools.

Changes: None.

Rule of Construction (New § 300.18(f)) (Proposed § 300.18(e))

Comment: A number of commenters stated that the rule of construction in new § 300.18(f) (proposed § 300.18(e)) and § 300.156(e) should use the same language. One commenter stated that in order to prevent confusion, the right of action limitations regarding highly qualified teachers in new § 300.18(f) (proposed § 300.18(e)) and personnel qualifications in § 300.156(e) should use consistent language regarding individual and class actions, and clearly underscore that the limitations are applicable to both administrative and judicial actions. One commenter recommended reiterating the language from section 612(a)(14)(D) of the Act that nothing prevents a parent from filing a State complaint about staff qualifications. Another commenter expressed concern because new § 300.18(f) (proposed § 300.18(e)) and § 300.156(e) may be construed to prevent due process hearings when an LEA or SEA fails to provide a highly qualified teacher.

Discussion: We agree that the rule of construction in new § 300.18(f) (proposed § 300.18(e)) and § 300.156(e) should be the same. We will change the regulations to clarify that a parent or student may not file a due process complaint on behalf of a student, or file a judicial action on behalf of a class of students for the failure of a particular SEA or LEA employee to be highly qualified; however, a parent may file a complaint about staff qualifications with the SEA. In addition to permitting a parent to file a complaint with the SEA, an organization or an individual may also file a complaint about staff qualifications with the SEA, consistent with the State complaint procedures in §§ 300.151 through 300.153.

Changes: We have added "or to prevent a parent from filing a complaint about staff qualifications with the SEA as provided for under this part" in new § 300.18(f) (proposed § 300.18(e)).

Comment: Several commenters recommended that the regulations specify that the failure of an SEA or LEA to provide a child with a disability a highly qualified teacher can be a consideration in the determination of whether a child received FAPE, if the child is not learning the core content standards or not meeting IEP goals. However, a few commenters recommended that the regulations clarify that it is not a denial of FAPE if a special education teacher is not highly qualified.

Discussion: If the only reason a parent believes their child was denied FAPE is that the child did not have a highly qualified teacher, the parent would have no right of action under the Act on that basis. The rules of construction in new § 300.18(f) (proposed § 300.18(e)) and § 300.156(e) do not allow a parent or student to file a due process complaint for failure of an LEA or SEA to provide a highly qualified teacher.

Changes: None.

Comment: One commenter expressed concern with the rule of construction in new § 300.18(f) (proposed § 300.18(e)) because there are no requirements to develop a specific enforcement system to ensure that teachers meet the highly qualified standard. A few commenters recommended changing the rule of construction so that States meet their supervisory responsibilities under the Act if LEAs in the State are sanctioned under the ESEA for not having highly qualified teachers.

Some commenters recommended clarifying that when the SEA or LEA employs an individual who is not highly qualified, States meet their responsibilities for general supervision under the Act through the notice and other sanction procedures identified under the ESEA.

One commenter stated that the regulations are silent with regard to SEA actions when meeting the general supervision requirements under the Act, and noted that unless the regulations are expanded to clarify that SEA enforcement procedures under compliance monitoring are limited to ESEA enforcement procedures, the highly qualified teacher requirements of an individual teacher may inappropriately become the target for a finding of noncompliance. This commenter further stated that the ESEA contains specific procedures for failure of a district to comply with the highly qualified teacher provisions, and if the SEA also exercises sanctioning authority under the Act, schools could be punished twice under two separate provisions of Federal law for the same infraction. The commenter recommended that to avoid double jeopardy the regulations should clarify that the ESEA enforcement procedures for a district's failure to hire a highly qualified teacher follow the provisions of the ESEA, not the Act.

Discussion: The implementation and enforcement of the highly qualified teacher standards under the ESEA and the Act complement each other. The Office of Elementary and Secondary Education (OESE) currently monitors the implementation of the highly qualified teacher standards for teachers

of core academic subjects under the ESEA. This includes special education teachers who teach core academic subjects.

The Office of Special Education programs (OSEP) collects data about special education personnel qualifications and requires that SEAs establish and maintain qualifications to ensure that personnel essential to carrying out the purposes of Part B of the Act are appropriately and adequately prepared and trained. Those personnel must also have the content knowledge and skills to serve children with disabilities, consistent with § 300.156.

OESE and OSEP will share their data to ensure that the highly qualified teacher requirements under the ESEA and the Act are met. This sharing of information will also prevent schools from being punished twice for the same infraction.

Changes: None.

Teachers Hired by Private Elementary and Secondary Schools (New § 300.18(h)) (Proposed § 300.18(g))

Comment: Some commenters agreed with new § 300.18(h) (proposed § 300.18(g)), which states that the highly qualified special education teacher requirements do not apply to teachers hired by private elementary schools and secondary schools. However, many commenters disagreed, stating that children placed by an LEA in a private school are entitled to receive the same high quality instruction as special education children in public schools. A few commenters stated that LEAs will place children in private schools to avoid hiring highly qualified teachers. Some commenters stated that public funds should not be used for any school that is not held to the same high standards as public schools. Other commenters stated that children with the most significant disabilities who are placed in private schools are children with the most need for highly qualified teachers. A few commenters stated that this provision is contrary to the intent of the ESEA and the Act to support the educational achievement of children with disabilities. Other commenters stated that if instruction by a highly qualified teacher is a hallmark of FAPE, it should be an element of FAPE in any educational setting in which the child is enrolled by a public agency.

A few commenters recommended that States have the discretion to determine whether and to what extent the highly qualified teacher requirements apply to teachers who teach publicly-placed and parentally-placed children with disabilities. The commenters stated that

the SEA is in the best position to weigh the needs of private school children for highly qualified teachers and to assess what effect these requirements would have on the shortage of special education teachers in the State. One commenter asked whether the highly qualified teacher requirements apply to providers in private residential treatment centers where children with disabilities are placed to receive FAPE.

Discussion: New § 300.18(h) (proposed § 300.18(g)) accurately reflects the Department's position that the highly qualified special education teacher requirements do not apply to teachers hired by private elementary schools and secondary schools. This includes teachers hired by private elementary schools and secondary schools who teach children with disabilities. Consistent with this position and in light of comments received regarding the requirements for private school teachers providing equitable services for parentally-placed private school children with disabilities under § 300.138, we will add language to new § 300.18(h) (proposed § 300.18(g)) to clarify that the highly qualified special education teacher requirements also do not apply to private school teachers who provide equitable services to parentally-placed private school children with disabilities under § 300.138.

Changes: We have added language in new § 300.18(h) (proposed § 300.18(g)) to clarify that the highly qualified special education teacher requirements also do not apply to private school teachers who provide equitable services to parentally-placed private school children with disabilities under § 300.138.

Homeless Children (§ 300.19)

Comment: Several commenters requested adding the definition of *homeless children* in the regulations so that it is readily accessible to parents, advocates, and educators.

Discussion: The term *homeless children* is defined in the McKinney-Vento Homeless Assistance Act. For the reasons set forth earlier in this notice, we are not adding the definitions of other statutes to these regulations. However, we will include the current definition of *homeless children* in section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11431 *et seq.* (McKinney-Vento Act) here for reference.

The term *homeless children* and youths—

(A) means individuals who lack a fixed, regular, and adequate nighttime

residence (within the meaning of section 103(a)(1)); and

(B) includes—

(i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;

(ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 103(a)(2)(C));

(iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

(iv) migratory children (as such term is defined in section 1309 of the Elementary and Secondary Education Act of 1965) who qualify as homeless for the purposes of this subtitle because the children are living in circumstances described in clauses (i) through (iii).

Changes: None.

Comment: One commenter stated that regulations are needed to address school selection and enrollment provisions under the McKinney-Vento Act. Another commenter recommended that the regulations include the McKinney-Vento Act's requirement that school stability for homeless children be maintained during periods of residential mobility and that homeless children enrolled in new schools have the ability to immediately attend classes and participate in school activities.

Discussion: We appreciate the commenters' concerns, but do not believe it is necessary to duplicate the requirements of the McKinney-Vento Act in these regulations. We believe that these issues, as well as other issues regarding children with disabilities who are homeless, would be more appropriately addressed in non-regulatory guidance, in which more detailed information and guidance can be provided on how to implement the requirements of the Act and the McKinney-Vento Act to best meet the needs of homeless children with disabilities. We will work with the Office of Elementary and Secondary Education to provide guidance and disseminate information to special education teachers and administrators regarding their responsibilities for serving children with disabilities who are homeless.

Changes: None.

Indian and Indian Tribe (§ 300.21)

Comment: One commenter expressed support for combining and moving the definition of *Indian and Indian tribe* from current § 300.264 to the definitions section of these regulations because the term is applicable in instances not related to BIA schools. However, another commenter stated that the definition was unnecessary because the purpose of the Act is to ensure that every child has FAPE.

Discussion: The definitions of *Indian and Indian tribe* are included in sections 602(12) and (13) of the Act, respectively, and are, therefore, included in subpart A of these regulations. Subpart A includes definitions for those terms and phrases about which we are frequently asked and which we believe will assist SEAs and LEAs in implementing the requirements of the Act. Including the definitions of *Indian and Indian tribe* in the definitions section does not in any way affect the provision of FAPE to all eligible children under the Act.

Changes: None.

Comment: One commenter requested omitting "State Indian tribes" that are not also federally-recognized tribes from the definition of *Indian and Indian tribe* stating that Federal recognition of an Indian tribe should be a predicate for the tribe's eligibility for Federal programs and services. One commenter expressed concern that including "State Indian tribes" in the definition could imply that the Secretary of the Interior is responsible for providing special education and related services or funding to all State Indian tribes.

Discussion: Section 602(13) of the Act and § 300.21(b) define *Indian tribe* as "any Federal or State Indian tribe" and do not exclude State Indian tribes that are not federally-recognized tribes. We will add a new paragraph (c) to § 300.21 clarifying that the definition of *Indian and Indian tribe* is not intended to indicate that the Secretary of Interior is required to provide services or funding to a State Indian tribe that is not listed in the **Federal Register** list of Indian entities recognized as eligible to receive services from the United States, published pursuant to Section 104 of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a-1.

Changes: A new paragraph (c) has been added to § 300.21 to provide this clarification.

Comment: One commenter stated that it was unclear how many States have defined Indian tribes that are not defined by the Federal government and asked what the effect would be on the

provision of services by including State Indian tribes in the definition. Another commenter stated that including State Indian tribes in the definition of *Indian and Indian tribe* implies that children of State-recognized tribes are considered differently than other children.

Discussion: As noted in the discussion responding to the previous comment, the list of Indian entities recognized as eligible to receive services from the United States is published in the **Federal Register**, pursuant to Section 104 of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a-1. The Federal government does not maintain a list of other State Indian tribes. Including State Indian tribes that are not federally recognized in the definition does not affect who is responsible under the Act for the provision of services to children with disabilities who are members of State Indian tribes. Under section 611(h)(1) of the Act, the Secretary of the Interior is responsible for providing special education and related services to children age 5 through 21 with disabilities on reservations who are enrolled in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. With respect to all other children aged 3 through 21 on reservations, the SEA of the State in which the reservation is located is responsible for ensuring that all the requirements of Part B of the Act are implemented.

Changes: None.

Individualized Family Service Plan (§ 300.24)

Comment: A few commenters recommended including the entire definition of *individualized family service plan* in the regulations so that parents and school personnel do not have to shift back and forth between documents.

Discussion: Adding the entire definition of *individualized family service plan* in section 636 of the Act, which includes information related to assessment and program development; periodic review; promptness after assessment; content of the plan; and parental consent, would unnecessarily add to the length of the regulations. However, the required content of the IFSP in section 636(d) of the Act is added here for reference.

The *individualized family service plan* shall be in writing and contain—

(1) A statement of the infant's or toddler's present levels of physical development, cognitive development, communication development, social or emotional development, and adaptive

development, based on objective criteria;

(2) a statement of the family's resources, priorities, and concerns relating to enhancing the development of the family's infant or toddler with a disability;

(3) a statement of the measurable results or outcomes expected to be achieved for the infant or toddler and the family, including pre-literacy and language skills, as developmentally appropriate for the child, and the criteria, procedures, and timelines used to determine the degree to which progress toward achieving the results or outcomes is being made and whether modifications or revisions of the results or outcomes or services are necessary;

(4) a statement of specific early intervention services based on peer-reviewed research, to the extent practicable, necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and method of delivering services;

(5) a statement of the natural environments in which early intervention services will appropriately be provided, including a justification of the extent, if any, to which the services will not be provided in a natural environment;

(6) the projected dates for initiation of services and the anticipated length, duration, and frequency of the services;

(7) the identification of the service coordinator from the profession most immediately relevant to the infant's or toddler's or family's needs (or who is otherwise qualified to carry out all applicable responsibilities under this part) who will be responsible for the implementation of the plan and coordination with other agencies and persons, including transition services; and

(8) the steps to be taken to support the transition of the toddler with a disability to preschool or other appropriate services.

Changes: None.

Infant or Toddler With a Disability (§ 300.25)

Comment: A few commenters recommended including the entire definition of *infant or toddler with a disability* in the regulations so that parents and school personnel do not have to shift back and forth between documents.

Discussion: We agree with the commenters and, therefore, will include the definition of *infant or toddler with a disability* from section 632(5) of the Act in these regulations for reference.

Changes: Section 300.25 has been revised to include the entire definition of *infant or toddler with a disability* from section 632(5) of the Act.

Institution of Higher Education (§ 300.26)

Comment: One commenter recommended including the definition of *institution of higher education* in these regulations.

Discussion: The term *institution of higher education* is defined in section 101 of the Higher Education Act of 1965, as amended, 20 U.S.C. 1021 *et seq.* (HEA). For the reasons set forth earlier in this notice, we are not adding definitions from other statutes to these regulations. However, we are including the current definition here for reference.

(a) Institution of higher education— For purposes of this Act, other than title IV, the term *institution of higher education* means an educational institution in any State that—

(1) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(2) is legally authorized within such State to provide a program of education beyond secondary education;

(3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(b) Additional Institutions Included— For purposes of this Act, other than title IV, the term *institution of higher education* also includes—

(1) Any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a); and

(2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1), admits as regular students persons who are beyond the age of

compulsory school attendance in the State in which the institution is located.

Changes: None.

Comment: One commenter requested that we add language to the regulations that would allow Haskell and Sipi, postsecondary programs under the Haskell Indian Nations University and Southwestern Indian Polytechnic Institute Administrative Act of 1988, 25 U.S.C. 3731 *et seq.*, to be included in the definition of *institution of higher education*.

Discussion: The Haskell and Sipi postsecondary programs under the Haskell Indian Nations University and Southwestern Indian Polytechnic Institute Administrative Act of 1988, 25 U.S.C. 3731 *et seq.* meet the statutory definition of *institution of higher education* in section 602(17) of the Act because they meet the definition of the term in section 101 of the HEA. The Act does not include specific institutions in the definition of *institution of higher education*, nor do we believe it is necessary to add specific institutions to the definition in § 300.26.

Changes: None.

Limited English Proficient (§ 300.27)

Comment: One commenter requested specific information about bilingual qualified personnel and qualified interpreters. Some commenters recommended including the definition of "limited English proficient" in the regulations.

Discussion: Each State is responsible for determining the qualifications of bilingual personnel and interpreters for children with limited English proficiency.

The term *limited English proficient* is defined in the ESEA. For the reasons set forth earlier in this notice, we are not adding the definitions from other statutes to these regulations. However, we will include the current definition in section 9101(25) of the ESEA here for reference.

The term *limited English proficient* when used with respect to an individual, means an individual—

(A) Who is aged 3 through 21;

(B) Who is enrolled or preparing to enroll in an elementary school or secondary school;

(C)(i) who was not born in the United States or whose native language is a language other than English;

(ii)(I) who is a Native American or Alaska Native, or a native resident of the outlying areas; and
(II) who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or

(iii) who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and

(D) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual—

(i) the ability to meet the State's proficient level of achievement on State assessments described in section 1111(b)(3);

(ii) the ability to successfully achieve in classrooms where the language of instruction is English; or

(iii) the opportunity to participate fully in society.

Changes: None.

Local Educational Agency (§ 300.28)

Comment: One commenter suggested revising § 300.28 to ensure that all responsibilities and rights attributed to an LEA apply to an ESA.

Discussion: We believe that the provisions in § 300.12 and § 300.28 are clear that ESAs have full responsibilities and rights as LEAs. We, therefore, decline to revise § 300.28.

Changes: None.

Comment: None.

Discussion: Through its review of charter schools' access to Federal funding, it has come to the Department's attention that additional guidance is needed regarding whether charter schools that are established as their own LEAs must be nonprofit entities in order to meet the definition of LEA in § 300.28. The definition of LEA in § 300.28(b)(2) specifically includes a public charter school that is established as an LEA under State law and that exercises administrative control or direction of, or performs a service function for, itself. For purposes of the Act, the definitions of *charter school*, *elementary school*, and *secondary school* in §§ 300.7, 300.13, and 300.36, respectively, require that a public elementary or secondary charter school be a nonprofit entity. Therefore, a public elementary or secondary charter school established as its own LEA under State law, also must be a nonprofit entity. Although these regulations do not specifically define nonprofit, the definition in 34 CFR § 77.1 applies to these regulations. In order to eliminate any confusion on this issue, we will revise the definition of LEA to reflect that a public elementary or secondary charter school that is established as its own LEA under State law must be a nonprofit entity.

Changes: For clarity, we have revised § 300.28(b)(2) by inserting the term "nonprofit" before "charter school that

is established as an LEA under State law."

Comment: One commenter stated that § 300.28(c) is in error from a technical drafting perspective because it does not follow the statutory language in section 602(19)(C) of the Act. The commenter also suggested adding a definition of "BIA funded school," rather than adding a new definition of LEA related to BIA funded schools.

Discussion: We agree that § 300.28(c) does not accurately reflect the statutory language in section 602(19)(C) of the Act and, as written, could be interpreted as defining BIA funded schools. This was not our intent. Rather, the intent was to include "BIA funded schools" in the definition of LEA, consistent with section 602(19)(C) of the Act.

In order to correct the technical drafting error, we will change § 300.28(c) to accurately reflect section 602(19)(C) of the Act. We decline to add a definition of "BIA funded schools." The Act does not define this term and the Department does not believe that it is necessary to define the term.

Changes: In order to correct a technical drafting error, § 300.28(c) has been revised to be consistent with statutory language.

Native Language (§ 300.29)

Comment: A few commenters expressed support for retaining the definition of *native language*, stating that it is important to clarify that sign language is the native language of many children who are deaf. One commenter stated it is important to clarify that the language normally used by the child may be different than the language normally used by the parents. Another commenter stated that the definition of *native language* does not adequately cover individuals with unique language and communication techniques such as deafness or blindness or children with no written language.

Discussion: The definition of *native language* was expanded in the 1999 regulations to ensure that the full range of needs of children with disabilities whose native language is other than English is appropriately addressed. The definition clarifies that in all direct contact with the child (including an evaluation of the child), *native language* means the language normally used by the child and not that of the parents, if there is a difference between the two. The definition also clarifies that for individuals with deafness or blindness, or for individuals with no written language, the *native language* is the mode of communication that is normally used by the individual (such as sign language, Braille, or oral

communication). We believe this language adequately addresses the commenters' concerns.

Changes: None.

Parent (§ 300.30)

Comment: Several commenters objected to the term "natural parent" in the definition of *parent* because "natural parent" presumes there are "unnatural parents." The commenters recommended using "birth parent" or "biological parent" throughout the regulations.

Discussion: We understand that many people find the term "natural parent" offensive. We will, therefore, use the term "biological parent" to refer to a non-adoptive parent.

Changes: We have replaced the term "natural parent" with "biological parent" in the definition of *parent* and throughout these regulations.

Comment: A significant number of commenters recommended retaining the language in current § 300.20(b), which states that a foster parent can act as a parent if the biological parent's authority to make educational decisions on the child's behalf have been extinguished under State law, and the foster parent has an ongoing, long-term parental relationship with the child; is willing to make the educational decisions required of parents under the Act; and has no interest that would conflict with the interest of the child.

A few commenters stated that current § 300.20(b) better protects children's interests and should not be removed. Another commenter stated that removing current § 300.20 will have unintended consequences for the many foster children who move frequently to new homes because there will be confusion as to who has parental rights under the Act. A few commenters stated that short-term foster parents may not have the knowledge of the child or the willingness to actively participate in the special education process, which will effectively leave the child without a parent.

One commenter stated that § 300.30 needs to be changed to protect biological and adoptive parents from arbitrary decisions by educational officials who lack the legal authority to make educational decisions for the child and to ensure that when no biological or adoptive parent is available, a person with a long-term relationship with, and commitment to, the child has decision-making authority.

Discussion: Congress changed the definition of *parent* in the Act. The definition of *parent* in these regulations reflects the revised statutory definition of *parent* in section 602(23) of the Act.

The Department understands the concerns expressed by the commenters, but believes that the changes requested would not be consistent with the intent of the statutory changes. In changing the definition of *parent* in the Act, Congress incorporated some of the wording from the current regulations and did not incorporate in the new definition of *parent*, the current foster parent language referenced by the commenters.

Changes: None.

Comment: One commenter recommended allowing a foster parent who does not have a long-term relationship to be the parent, if a court, after notifying all interested parties, determines that it is in the best interest of the child.

Discussion: Section 300.30(b)(2) clearly states that if a person is specified in a judicial order or decree to act as the parent for purposes of § 300.30, that person would be considered the parent under Part B of the Act.

Changes: None.

Comment: One commenter stated that § 300.30(a)(2) withdraws the rights of biological parents under the Act without due process of law.

Discussion: We do not agree with the commenter. If more than one person is attempting to act as a parent, § 300.30(b)(1) provides that the biological or adoptive parent is presumed to be the parent if that person is attempting to act as the parent under § 300.30, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child, or there is a judicial order or decree specifying some other person to act as a parent under Part B of the Act. We do not believe that provisions regarding lack of legal authority or judicial orders or decrees would apply unless there has already been a determination, through appropriate legal processes, that the biological parent should not make educational decisions for the child or that another person has been ordered to serve as the parent.

Changes: None.

Comment: One commenter stated that § 300.30(a)(2) is unwieldy and difficult to implement because it requires extensive fact finding by the LEA to determine whether any contractual obligations would prohibit the foster parent from acting as a parent.

Discussion: The statutory language concerning the definition of *parent* was changed to permit foster parents to be considered a child's parent, unless State law prohibits a foster parent from serving as a parent. The language in the regulations also recognizes that similar restrictions may exist in State

regulations or in contractual agreements between a State or local entity and a foster parent, and should be accorded similar deference. We believe it is essential for LEAs to have knowledge of State laws, regulations, and any contractual agreements between a State or local entity and a foster parent to ensure that the requirements in § 300.30(a)(2) are properly implemented. States and LEAs should develop procedures to make this information more readily and easily available so that LEAs do not have to engage in extensive fact finding each time a child with a foster parent enrolls in a school.

Changes: None.

Comment: One commenter stated that the regulations need to clarify that guardians *ad litem* do not meet the definition of a *parent* except for wards of the State where consent for the initial evaluation has been given by an individual appointed by the judge to represent the child in the educational decisions concerning the child.

Discussion: We agree that guardians with limited appointments that do not qualify them to act as a parent of the child generally, or do not authorize them to make educational decisions for the child, should not be considered to be a *parent* within the meaning of these regulations. What is important is the legal authority granted to individuals appointed by a court, and not the term used to identify them. Whether a person appointed as a guardian *ad litem* has the requisite authority to be considered a *parent* under this section depends on State law and the nature of the person's appointment. We will revise § 300.30(a)(3) to clarify that a guardian must be authorized to act as the child's parent generally or must be authorized to make educational decisions for the child in order to fall within the definition of *parent*.

Changes: We have added language in § 300.30(a)(3) to clarify when a guardian can be considered a *parent* under the Act.

Comment: One commenter requested adding a "temporary parent" appointed in accordance with sections 615(b)(2) or 639(a)(5) of the Act to the definition of *parent*.

Discussion: There is nothing in the Act that would prevent a temporary surrogate parent from having all the rights of a parent. Note 89 of the Conf. Rpt., p. 35810, provides that appropriate staff members of emergency shelters, transitional shelters, independent living programs, and street outreach programs would not be considered to be employees of agencies involved in the education or care of unaccompanied

youth (and thus prohibited from serving as a surrogate parent), provided that such a role is temporary until a surrogate parent can be appointed who meets the requirements for a surrogate parent in § 300.519(d). This provision is included in § 300.519(f), regarding surrogate parents. Therefore, we do not believe it is necessary to add "temporary parent" to the definition of *parent* in § 300.30.

Changes: None.

Comment: A few commenters stated that the definition of *parent* is confusing, especially in light of the definition of *ward of the State* in new § 300.45 (proposed § 300.44) and the LEA's obligation to appoint a surrogate parent. These commenters stated that § 300.30 should cross-reference the definition of *ward of the State* in new § 300.45 (proposed § 300.44) and state that the appointed surrogate parent for a child who is a ward of the State is the parent.

Discussion: Section 615(b)(2) of the Act does not require the automatic appointment of a surrogate parent for every child with a disability who is a ward of the State. States and LEAs must ensure that the rights of these children are protected and that a surrogate parent is appointed, if necessary, as provided in § 300.519(b)(1). If a child who is a ward of the State already has a person who meets the definition of *parent* in § 300.30, and that person is willing and able to assume the responsibilities of a parent under the Act, a surrogate parent might not be needed. Accordingly, we do not believe it is necessary to make the changes suggested by the commenters.

Changes: None.

Comment: One commenter expressed concern that public agencies will require biological or adoptive parents to affirmatively assert their rights or to take action in order to be presumed to be the parent. The commenter requested clarifying in § 300.30(b)(1) that biological or adoptive parents do not have to take affirmative steps in order for the presumption to apply.

Discussion: The biological or adoptive parent would be presumed to be the parent under these regulations, unless a question was raised about their legal authority. There is nothing in the Act that requires the biological or adoptive parent to affirmatively assert their rights to be presumed to be the parent. We continue to believe that § 300.30(b)(1) is clear and, therefore, will not make the changes requested by the commenters.

Changes: None.

Comment: Some commenters recommended removing "when attempting to act as a parent under this

part” in § 300.30(b)(1). A few commenters stated that there is no explanation of what it means for a biological parent to “attempt to act as a parent.” Another commenter stated that the regulations do not set any guidelines for determining how a public agency decides if a biological or adoptive parent is attempting to act as a parent.

One commenter stated “attempting to act” would require LEAs to make determinations about a biological parent’s decision-making authority and this should be left up to courts to determine. One commenter stated that the regulations permit multiple persons to act as a child’s parent and do not adequately set forth a process to determine who should be identified as the actual parent for decision-making purposes. The commenter further stated that the regulations do not set out a procedure or a timeframe by which public agency officials should determine if a biological parent has retained the right to make educational decisions for his or her child.

One commenter stated that the definition of *parent* gives school districts excessive power; for example a school could appoint a surrogate parent if the foster parent was excessively demanding. The commenter further stated that a clearer order of priority and selection mechanism with judicial oversight needs to be in place so that school districts cannot “parent shop” for the least assertive individual, and so that relatives, foster parents, social workers, and others involved with the child will know who has educational decision making authority.

One commenter questioned whether § 300.30(b) helps identify parents or confuses situations in which the person to be designated the parent is in dispute. Another commenter stated that the requirements in § 300.30(b) place the responsibility of determining who serves as the parent of a child in foster care directly on the shoulders of school administrators who are not child welfare experts. The commenter recommended that a foster parent automatically qualify as a parent when the rights of the child’s biological parents have been extinguished and the foster parent has a long-term relationship with the child, no conflict of interest, and is willing to make educational decisions.

Discussion: Section 300.30(b) was added to assist schools and public agencies in determining the appropriate person to serve as the parent under Part B of the Act in those difficult situations in which more than one individual is “attempting to act as a parent” and make educational decisions for a child.

It recognizes the priority of the biological or adoptive parent and the authority of the courts to make decisions, and does not leave these decisions to school administrators.

The phrase “attempting to act as a parent” is generally meant to refer to situations in which an individual attempts to assume the responsibilities of a parent under the Act. An individual may “attempt to act as a parent” under the Act in many situations; for example, if an individual provides consent for an evaluation or reevaluation, or attends an IEP Team meeting as the child’s parent. We do not believe it is necessary or possible to include in these regulations the numerous situations in which an individual may “attempt to act as a parent.”

Section 300.30(b)(1) provides that the biological or adoptive parent is presumed to be the parent if that person is attempting to act as the parent under § 300.30, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child, or there is a judicial order or decree specifying some other person to act as a parent under Part B of the Act. Section 300.30(b)(2) provides that if a person (or persons) is specified in a judicial order or decree to act as the parent for purposes of § 300.30, that person would be the parent under Part B of the Act. We do not believe that it is necessary for these regulations to establish procedures or a timeline for a public agency to determine whether a biological parent has retained the right to make educational decisions for a child. Such procedures and timelines will vary depending on how judicial orders or decrees are routinely handled in a State or locality, and are best left to State and local officials to determine.

Changes: None.

Comment: A few commenters recommended modifying § 300.30(b)(2) to clarify that a court has the discretion to decide who has the right to make educational decisions for a child. One commenter recommended clarifying that the judicial decree referred to in § 300.30(b)(2) relates specifically to divorce situations, rather than situations involving children who are wards of the State. Another commenter stated that § 300.30(b)(2) appears to be aimed at situations where the court has designated a parent, such as in a custody decree, and that it is not clear what the provision adds.

Discussion: Section 300.30(b)(2) specifically states that if a judicial decree or order identifies a person or persons to act as the parent of a child or to make educational decisions on behalf of a child, then that person

would be determined to be the parent. It was intended to add clarity about who would be designated a parent when there are competing individuals under § 300.30(a)(1) through (4) who could be considered a parent for purposes of this part. It is not necessary to specify or limit this language to provide that the judicial decree or order applies to specific situations, such as divorce or custody cases. However, it should not authorize courts to appoint individuals other than those identified in § 300.30(a)(1) through (4) to act as parents under this part. Specific authority for court appointment of individuals to provide consent for initial evaluations in limited circumstances is in § 300.300(a)(2)(c). Authority for court appointment of a surrogate parent in certain situations is in § 300.519(c).

Changes: We have revised § 300.30(b)(2) to limit its application to individuals identified under § 300.30(a)(1) through (4) and have deleted the phrase “except that a public agency that provides education or care for the child may not act as the parent” as unnecessary.

Comment: One commenter recommended allowing foster parents to act as parents only when the birth parent’s rights have been extinguished or terminated. A few commenters requested that the regulations clarify the circumstances under which a foster parent can take over educational decision making. One commenter stated that allowing a foster parent to act as a parent would disrupt the special education process.

Discussion: Under § 300.30(a)(2), a foster parent can be considered a parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent. However, in cases where a foster parent and a biological or adoptive parent attempt to act as the parent, § 300.30(b)(1) clarifies that the biological or adoptive parent is presumed to be the parent, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. Section 300.30(b)(2) further clarifies that if a person or persons such as a foster parent or foster parents is specified in a judicial order or decree to act as the parent for purposes of § 300.30, that person would be the parent under Part B of the Act. We do not believe that further clarification is necessary.

Changes: None.

Comment: A few commenters recommended that “extinguished under State law” be defined to mean both temporary and permanent termination

of parental rights to make educational decisions because this would allow courts to make more timely decisions regarding the role of a parent and not feel bound to wait for a full termination of parental rights.

Discussion: The phrase “extinguished under State law” is not used in the Act or these regulations. The phrase was used in the definition of parent in current § 300.20(b)(1). The comparable provision in these regulations is in § 300.30(b)(1), which refers to situations in which the “biological or adoptive parent does not have legal authority to make educational decisions for the child.” We do not believe that either of these phrases affects the timeliness of decision making by courts regarding parental rights.

Changes: None.

Comment: Some commenters stated that “consistent with State law” should be included in § 300.30(b)(2) in order to honor local laws already in place to protect these children.

Discussion: We do not believe the change recommended by the commenters is necessary. Courts issue decrees and orders consistent with applicable laws.

Changes: None.

Comment: One commenter stated that it would not be wise to completely exclude an agency involved in the education or care of the child from serving as a parent because situations in which an LEA acts as a parent are very rare and only occur under very unusual circumstances.

Discussion: The exclusion of an agency involved in the education or care of the child from serving as a parent is consistent with the statutory prohibition that applies to surrogate parents in sections 615(b)(2) and 639(a)(5) of the Act.

Changes: None.

Comment: One commenter recommended that the regulations clarify the responsibilities of the LEA when a biological or adoptive parent and a foster parent attempt to act as the parent. Although the regulations state that the biological or adoptive parent must be presumed to be the parent unless the biological or adoptive parent has been divested of this authority by a court, the commenter stated that the regulations are not clear as to whether the LEA has the duty to notify the biological or adoptive parent, accommodate his or her schedule, or otherwise take steps to facilitate the biological or adoptive parent’s participation.

One commenter recommended clarifying the relative rights of a biological or adoptive parent and a

foster parent when a child is in foster care and the foster parent is not prohibited by the State from acting as a parent.

Discussion: Section 300.30(b)(1) states that when more than one party is qualified under § 300.30(a) to act as the parent, the biological or adoptive parent is presumed to be the parent (unless a judicial decree or order identifies a specific person or persons to act as the parent of a child). The biological or adoptive parent has all the rights and responsibilities of a parent under the Act, and the LEA must provide notice to the parent, accommodate his or her schedule when arranging meetings, and involve the biological or adoptive parent in the education of the child with a disability. Thus, if a child is in foster care (and the foster parent is not prohibited by the State from acting as a parent) and the biological or adoptive parent is attempting to act as a parent, the biological or adoptive parent is presumed to be the parent unless the biological or adoptive parent does not have legal authority to make educational decisions for the child or a judicial decree or order identifies a specific person or persons to act as the parent of a child.

Changes: None.

Comment: A few commenters stated that it is unclear when or under what circumstances a biological or adoptive parent ceases or surrenders their rights to a foster parent to make educational decisions for a child. One commenter stated that the regulations should define clearly the situations when this would occur and the level of proof that must be shown by the party seeking to make educational decisions on behalf of a child. The commenter stated that only under the most extreme and compelling circumstances should a court be able to appoint another individual to take the place of a biological or adoptive parent.

Discussion: It would be inappropriate and beyond the authority of the Department to regulate on the termination of parental rights to make educational decisions. It is the responsibility of a court to decide whether to appoint another person or persons to act as a parent of a child or to make educational decisions on behalf of a child.

Changes: None.

Comment: One commenter requested clarifying to whom LEAs must provide notice, or obtain consent in situations where there are disputes between biological or adoptive parents (e.g., when parents separate or divorce).

Discussion: In situations where the parents of a child are divorced, the parental rights established by the Act

apply to both parents, unless a court order or State law specifies otherwise.

Changes: None.

Comment: A few commenters recommended clarifying in the regulations that a private agency that contracts with a public agency for the education or care of the child may not act as a parent.

Discussion: A private agency that contracts with a public agency for the education or care of the child, in essence, works for the public agency, and therefore, could not act as a parent under the Act. We do not believe it is necessary to regulate on this matter.

Changes: None.

Parent Training and Information Center (§ 300.31)

Comment: One commenter requested describing a *parent training and information center* (PTI) and a community parent resource center (CPRC) in the regulations, rather than referencing section 671 or 672 of the Act.

Discussion: We do not believe it is necessary to include these descriptions in the regulations. Section 671 of the Act describes the program requirements for a PTI and section 672 of the Act describes the program requirements for a CPRC. These sections describe the activities required of PTIs and CPRCs, as well as the application process for discretionary funding under Part D of the Act, and would unnecessarily add to the length of the regulations.

Changes: None.

Comment: One commenter stated that, in order for a State or LEA to be considered for funding under the Act, the regulations should require partnerships with the PTIs and the CPRCs, as well as input from PTIs and CPRCs on assessing State and local needs, and developing and implementing a plan to address State and local needs.

Discussion: We disagree with the commenter. There is nothing in the Act that requires States or LEAs, as a condition of funding, to obtain input from PTIs and CPRCs in assessing needs or developing and implementing a plan to address State or local needs. States and LEAs are free to do so, but it is not a requirement for funding.

Changes: None.

Public Agency (§ 300.33)

Comment: One commenter stated that the term *public agency* is not in the Act and noted that no State has created a new type of public education agency beyond LEAs and SEAs. The commenter stated that including the definition of *public agency* in the regulations,

therefore, raises concerns regarding the responsibility and authority for future special education services.

Discussion: The definition of *public agency* refers to all agencies responsible for various activities under the Act. The terms "LEA" or "SEA" are used when referring to a subset of public agencies. We disagree that the definition raises concerns about the responsibility and authority for future educational services because the term *public agency* is used only for those situations in which a particular regulation does not apply only to SEAs and LEAs.

During our internal review of the NPRM, we found several errors in the definition of *public agency*. Our intent was to use the same language in current § 300.22. We will, therefore, correct these errors to be consistent with current § 300.22. Additionally, we will clarify that a charter school must be a nonprofit charter school. As noted in the discussion regarding § 300.28(b)(2), we clarified that a charter school established as its own LEA under State law, must be a nonprofit charter school.

Changes: We have removed the phrase "otherwise included as" the second time it appears, and replaced it with "a school of an" in § 300.33. We have also changed "LEAs" to "LEA" and "ESAs" to "ESA" the third time these abbreviations appear in § 300.33.

Related Services (§ 300.34)

Related Services, General (§ 300.34(a))

Comment: One commenter requested defining *related services* as enabling a child with a disability to receive FAPE in the LRE.

Discussion: The definition of *related services* is consistent with section 601(26) of the Act, which does not refer to LRE. The Department believes that revising the regulations as requested would inappropriately expand the definition in the Act. Furthermore, the regulations in § 300.114(a)(2)(ii) already prevent placement of a child outside the regular education environment unless the child cannot be satisfactorily educated in the regular education environment with the use of supplementary aids and services. Therefore, we see no need to make the change suggested by the commenter.

Changes: None.

Comment: We received numerous requests to revise § 300.34 to add specific services in the definition of *related services*. A few commenters recommended including marriage and family therapy. One commenter recommended adding nutrition therapy and another commenter recommended adding recreation therapy. A significant

number of commenters recommended adding art, music, and dance therapy. One commenter recommended adding services to ensure that medical devices, such as those used for breathing, nutrition, and other bodily functions, are working properly. One commenter requested adding programming and training for parents and staff as a related service.

A few commenters requested clarification on whether auditory training and aural habilitation are related services. One commenter asked whether hippotherapy should be included as a related service. Other commenters recommended adding language in the regulations stating that the list of related services is not exhaustive. A few commenters asked whether a service is prohibited if it is not listed in the definition of *related services*.

Discussion: Section 300.34(a) and section 602(26) of the Act state that *related services* include other supportive services that are required to assist a child with a disability to benefit from special education. We believe this clearly conveys that the list of services in § 300.34 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. It would be impractical to list every service that could be a related service, and therefore, no additional language will be added to the regulations.

Consistent with §§ 300.320 through 300.328, each child's IEP Team, which includes the child's parent along with school officials, determines the instruction and services that are needed for an individual child to receive FAPE. In all cases concerning related services, the IEP Team's determination about appropriate services must be reflected in the child's IEP, and those listed services must be provided in accordance with the IEP at public expense and at no cost to the parents. Nothing in the Act or in the definition of *related services* requires the provision of a related service to a child unless the child's IEP Team has determined that the related service is required in order for the child to benefit from special education and has included that service in the child's IEP.

Changes: None.

Comment: One commenter recommended adding behavior interventions to the list of related services, stating that while positive behavioral interventions and supports are often provided by one of the professionals listed in § 300.34(c), other

types of specialists also often provide them.

Discussion: The list of related services in § 300.34 is consistent with section 602(26) of the Act and, as noted above, we do not believe it is necessary to add additional related services to this list. We agree with the commenter that there may be many professionals in a school district who are involved in the development of positive behavioral interventions. Including the development of positive behavioral interventions in the description of activities under *psychological services* (§ 300.34(b)(10)) and *social work services in schools* (§ 300.34(b)(14)) is not intended to imply that school psychologists and social workers are automatically qualified to perform these services or to prohibit other qualified personnel from providing these services, consistent with State requirements.

Changes: None.

Exception; Services That Apply to Children With Cochlear Implants (§ 300.34(b))

Comment: Many commenters opposed the exclusion of surgically implanted devices from the definition of *related services*. Many commenters stated that the Act does not exclude the maintenance or programming of surgically implanted devices from the definition of related services, and that the regulations should specifically state that *related services* includes the provision of mapping services for a child with a cochlear implant. A few commenters stated that the issue of mapping cochlear implants needs to be clarified so that schools and parents understand who is responsible for providing this service. One commenter requested that the regulations clearly specify that optimization of a cochlear implant is a medical service and define mapping as an audiological service.

Discussion: The term "mapping" refers to the optimization of a cochlear implant and is not included in the definition of *related services*. Specifically, "mapping" and "optimization" refer to adjusting the electrical stimulation levels provided by the cochlear implant that is necessary for long-term post-surgical follow-up of a cochlear implant. Although the cochlear implant must be properly mapped in order for the child to hear well in school, the mapping does not have to be done in school or during the school day in order for it to be effective. The exclusion of mapping from the definition of *related services* reflects the language in Senate Report (S. Rpt.) No. 108-185, p. 8, which states that the Senate committee did not intend that

mapping a cochlear implant, or even the costs associated with mapping, such as transportation costs and insurance co-payments, be the responsibility of a school district. These services and costs are incidental to a particular course of treatment chosen by the child's parents to maximize the child's functioning, and are not necessary to ensure that the child is provided access to education, regardless of the child's disability, including maintaining health and safety while in school. We will add language in § 300.34(b) to clarify that mapping a cochlear implant is an example of device optimization and is not a related service under the Act.

Changes: We have added "(e.g., mapping)" following "functioning" in § 300.34(b) to clarify that mapping a surgically implanted device is not a related service under the Act.

Comment: A significant number of commenters stated that children with cochlear implants need instruction in listening and language skills to process spoken language, just as children with hearing loss who use hearing aids, and requested that the regulations clarify that excluding the optimization of device functioning from the definition of *related services* does not impact a child's access to related services such as speech and language therapy, assistive listening devices, appropriate classroom acoustics, auditory training, educational interpreters, cued speech transliterators, and specialized instruction.

One commenter requested that the regulations explicitly state whether a public agency is required to provide more speech and language services or audiology services to a child with a cochlear implant. Another commenter requested that the regulations clarify that optimization only refers to access to assistive technology, such as assistive listening devices (e.g., personal frequency modulation (FM) systems) and monitoring and troubleshooting of the device function that is required under proper functioning of hearing aids.

Discussion: Optimization generally refers to the mapping necessary to make the cochlear implant work properly and involves adjusting the electrical stimulation levels provided by the cochlear implant. The exclusion of mapping as a related service is not intended to deny a child with a disability assistive technology (e.g., FM system); proper classroom acoustical modifications; educational support services (e.g., educational interpreters); or routine checking to determine if the external component of a surgically implanted device is turned on and working. Neither does the exclusion of

mapping as a related service preclude a child with a cochlear implant from receiving the related services (e.g., speech and language services) that are necessary for the child to benefit from special education services. As the commenters point out, a child with a cochlear implant may still require related services, such as speech and language therapy, to process spoken language just as other children with hearing loss who use hearing aids may need those services and are entitled to them under the Act if they are required for the child to benefit from special education. Each child's IEP Team, which includes the child's parent along with school officials, determines the related services, and the amount of services, that are required for the child to benefit from special education. It is important that the regulations clearly state that a child with a cochlear implant or other surgically implanted medical device is entitled to related services that are determined by the child's IEP Team to be necessary for the child to benefit from special education. Therefore, we will add language in § 300.34(b) to clarify that a child with a cochlear implant or other surgically implanted medical device is entitled to those related services that are required for the child to benefit from special education, as determined by the child's IEP Team.

Changes: We have reformatted § 300.34(b) and added a new paragraph (2) to clarify that a child with a cochlear implant or other surgically implanted device is entitled to the related services that are determined by the child's IEP Team to be required for the child to benefit from special education. We have also added the phrase "services that apply to children with surgically implanted devices, including cochlear implants" to the heading in § 300.34(b).

Comment: One commenter expressed concern that excluding the optimization of device functioning and maintenance of the device as related services will establish different standards for serving children with cochlear implants versus children who use hearing aids and other external amplification devices, and recommended clarifying that routine monitoring of cochlear implants and other surgically implanted devices to ensure that they are functioning in a safe and effective manner is permitted under the Act.

A few commenters stated that some schools are interpreting the exclusion of device optimization, functioning, and maintenance to mean that they do not have to help the child change a battery in the externally worn speech processor connected with the surgically implanted

device, make certain that it is turned on, or help the child to learn to listen with the cochlear implant. One commenter stated that children with cochlear implants should have the same services as children who use a hearing aid when the battery needs changing or equipment breaks down.

One commenter stated that § 300.34(b) is confusing and should explicitly state that the exception of the optimization of device functioning, maintenance of the device, or replacement of the device is limited to surgically implanted devices. The commenter stated that the language could erroneously lead to an interpretation that this exception is applicable to all medical devices. One commenter expressed concern that this misinterpretation could put insulin pumps and other medical devices that are required for the health of the child in the same category as cochlear implants.

A few commenters stated that it is important to clarify that excluding the optimization of device functioning and the maintenance of the device should not be construed to exclude medical devices and services that children need to assist with breathing, nutrition, and other bodily functions while the child is involved with education and other school-related activities.

One commenter stated that a school nurse, aide, teacher's aide, or any other person who is qualified and trained should be allowed to monitor and maintain, as necessary, a surgically implanted device.

Discussion: A cochlear implant is an electronic device surgically implanted to stimulate nerve endings in the inner ear (cochlea) in order to receive and process sound and speech. The device has two parts, one that is surgically implanted and attached to the skull and, the second, an externally worn speech processor that attaches to a port in the implant. The internal device is intended to be permanent.

Optimization or "mapping" adjusts or fine tunes the electrical stimulation levels provided by the cochlear implant and is changed as a child learns to discriminate signals to a finer degree. Optimization services are generally provided at a specialized clinic. As we discussed previously regarding § 300.34, optimization services are not a covered service under the Act. However, a public agency still has a role in providing services and supports to help children with cochlear implants.

Particularly with younger children or children who have recently obtained implants, teachers and related services personnel frequently are the first to notice changes in the child's perception

of sounds that the child may be missing. This may manifest as a lack of attention or understanding on the part of the child or frustration in communicating. The changes may indicate a need for remapping, and we would expect that school personnel would communicate with the child's parents about these issues. To the extent that adjustments to the devices are required, a specially trained professional would provide the remapping, which is not considered the responsibility of the public agency.

In many ways, there is no substantive difference between serving a child with a cochlear implant in a school setting and serving a child with a hearing aid. The externally worn speech processor connected with the surgically implanted device is similar to a hearing aid in that it must be turned on and properly functioning in order for the child to benefit from his or her education. Parents of children with cochlear implants and parents of children with hearing aids both frequently bring to school extra batteries, cords, and other parts for the hearing aids and externally worn speech processors connected with the surgically-implanted devices, especially for younger children. The child also may need to be positioned so that he or she can directly see the teacher at all times, or may need an FM amplification system such as an audio loop.

For services that are not necessary to provide access to education by maintaining the health or safety of the child while in school, the distinguishing factor between those services that are not covered under the Act, such as mapping, and those that are covered, such as verifying that a cochlear implant is functioning properly, in large measure, is the level of expertise required. The maintenance and monitoring of surgically implanted devices require the expertise of a licensed physician or an individual with specialized technical expertise beyond that typically available from school personnel. On the other hand, trained lay persons or nurses can routinely check an externally worn processor connected with a surgically implanted device to determine if the batteries are charged and the external processor is operating. (As discussed below, the Act does require public agencies to provide those services that are otherwise related services and are necessary to maintain a child's health or safety in school even if those services require specialized training.) Teachers and related services providers can be taught to first check the externally worn speech processor to make sure it is turned on, the volume and sensitivity

settings are correct, and the cable is connected, in much the same manner as they are taught to make sure a hearing aid is properly functioning. To allow a child to sit in a classroom when the child's hearing aid or cochlear implant is not functioning is to effectively exclude the child from receiving an appropriate education. Therefore, we believe it is important to clarify that a public agency is responsible for the routine checking of the external components of a surgically implanted device in much the same manner as a public agency is responsible for the proper functioning of hearing aids.

The public agency also is responsible for providing services necessary to maintain the health and safety of a child while the child is in school, with breathing, nutrition, and other bodily functions (e.g., nursing services, suctioning a tracheotomy, urinary catheterization) if these services can be provided by someone who has been trained to provide the service and are not the type of services that can only be provided by a licensed physician. (*Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999)).

Changes: We have added new § 300.113 to cover the routine checking of hearing aids and external components of surgically implanted devices. The requirement for the routine checking of hearing aids has been removed from proposed § 300.105 and included in new § 300.113(a). The requirement for routine checking of an external component of a surgically implanted medical device has been added as new § 300.113(b). The requirements for assistive technology devices and services remain in § 300.105 and the heading has been changed to reflect this change. We have also included a reference to new § 300.113(b) in new § 300.34(b)(2).

Comment: A few commenters stated that specialized cochlear implant audiologists who are at implant centers or closely associated with them should program cochlear implants. One commenter stated that, typically, school audiologists and school personnel do not have the specialized experience to program cochlear implants.

Discussion: The personnel with the specific expertise or licensure required for the optimization (e.g., mapping) of surgically implanted devices are decisions to be made within each State based on applicable State statutes and licensing requirements. Since mapping is not covered under the Act, personnel standards for individuals who provide mapping services are beyond the scope of these regulations.

Changes: None.

Audiology (§ 300.34(c)(1))

Comment: One commenter stated that the definition of *audiology* does not reflect current audiology practice in schools and recommended new language to include services for children with auditory-related disorders, provision of comprehensive audiologic habilitation and rehabilitation services; consultation and training of teachers and other school staff; and involvement in classroom acoustics.

Discussion: The definition of *audiology* is sufficiently broad to enable audiologists to be involved in the activities described by the commenter. We do not believe it is necessary to change the definition to add the specific functions recommended by the commenter.

Changes: None.

Comment: A few commenters requested adding mapping services for a child with a cochlear implant to the definition of *audiology*.

Discussion: For the reasons discussed previously in this section, § 300.34(b) specifically excludes the optimization of a surgically implanted device from the definition of *related services*. This includes mapping of a cochlear implant.

Changes: None.

Comment: One commenter stated that the definition of *audiology* appears to be limited to children who are deaf or hard of hearing, and recommended adding language to allow children without expressive speech to receive such services.

Discussion: The term *audiology*, as defined in § 300.34(c)(1), focuses on identifying and serving children who are deaf or hard of hearing. It is not necessary to add language in the regulations regarding children without expressive speech because the determining factor of whether audiology services are appropriate for a child is whether the child may be deaf or hard of hearing, not whether a child has expressive speech.

Changes: None.

Early Identification and Assessment of Disabilities (§ 300.34(c)(3))

Comment: Some commenters noted that "early identification and assessment of disabilities" was removed from the list of related services in § 300.34(a).

Discussion: "Early identification and assessment of disabilities" was inadvertently omitted from the list of related services in § 300.34(a).

Changes: "Early identification and assessment" will be added to the list of related services in § 300.34(a).

Interpreting Services (§ 300.34(c)(4))

Comment: One commenter recommended that the definition of *interpreting services* requires that such services be provided by a qualified interpreter who is able to effectively, accurately, and impartially use any specialized vocabulary, both receptively and expressively. A few commenters strongly recommended requiring interpreting services to be provided by qualified interpreters to ensure equivalent communication access and effective communication with, and for, children who are deaf or hard of hearing. The commenter stated that personnel standards for interpreters vary greatly across SEAs and LEAs, and requiring qualified interpreters would be consistent with the definition of other related services included in these regulations such as *physical therapy* and *occupational therapy*.

One commenter recommended defining the function of an interpreter as a person who facilitates communication between children who are deaf or hard of hearing, staff, and children, regardless of the job title.

Discussion: Section 300.156, consistent with section 612(a)(14) of the Act, clarifies that it is the responsibility of each State to establish personnel qualifications to ensure that personnel necessary to carry out the purposes of the Act are appropriately and adequately prepared and trained and have the content knowledge and skills to serve children with disabilities. It is not necessary to add more specific functions of individuals providing interpreting services, as recommended by the commenters. States are appropriately given the flexibility to determine the qualifications and responsibilities of personnel, based on the needs of children with disabilities in the State.

Changes: None.

Comment: A few commenters recommended including American sign language and sign language systems in the definition of *interpreting services*.

Discussion: The definition of *interpreting services* is sufficiently broad to include American sign language and sign language systems, and therefore, will not be changed. We believe it is important to include sign language transliteration (e.g., translation systems such as Signed Exact English and Contact Signing), in addition to sign language interpretation of another language (e.g., American sign language) in the definition of *interpreting services*, and will add this language to § 300.34(c)(4)(i).

Changes: We have added language to § 300.34(c)(4)(i) to include sign language transliteration.

Comment: A few commenters recommended changing the definition of *interpreting services* to clarify that the need for interpreting services must be based on a child's disability and not degree of English proficiency.

Discussion: The definition of *interpreting services* clearly states that interpreting services are used with children who are deaf or hard of hearing. The nature and type of interpreting services required for children who are deaf or hard of hearing and also limited in English proficiency are to be determined by reference to the Department's regulations and policies regarding students with limited English proficiency. For example, the Department's regulations in 34 CFR part 100, implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, require that recipients of Federal financial assistance ensure meaningful access to their programs and activities by students who are limited English proficient, including those who are deaf or hard of hearing. The requirement to provide services to students who are limited English proficient and others is also governed by various Department policy memoranda including the September 27, 1991 memorandum, "Department of Education Policy Update on Schools' Obligations Toward National Origin Minority Students With Limited English Proficiency"; the December 3, 1985 guidance document, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures"; and the May 1970 memorandum to school districts, "Identification of discrimination and Denial of Services on the Basis of National Origin," 35 FR 11595. These documents are available at <http://www.lep.gov>. We do not believe additional clarification is necessary.

Changes: None.

Comment: One commenter stated that the definition of *interpreting services* appears to be limited to children who are deaf or hard of hearing, and recommended adding language to allow children without expressive speech to receive such services.

Discussion: *Interpreting services*, as defined in § 300.34(c)(4), clearly states that interpreting services are used with children who are deaf and hard of hearing. Therefore, a child who is not deaf or hard of hearing, but who is without expressive speech, would not be considered eligible to receive interpreting services as defined in § 300.34(c)(4). However, such a child could be considered eligible for speech-

language pathology services, consistent with § 300.34(c)(15).

Changes: None.

Comment: Some commenters recommended including communication access real-time transcription (CART) services in the definition of *interpreting services* because these services are being used with increasing frequency in postsecondary education and employment settings, and familiarity and experience with CART services may better prepare children who are deaf or hard of hearing to transition to higher education and employment environments. A few commenters stated that the definition of *interpreting services* appears to limit interpreting services to the methods listed in § 300.34(c)(4), which exclude tactile and close vision interpreting for children who are deaf-blind.

Discussion: Although the definition of *interpreting services* is written broadly to include other types of interpreting services, we believe that it is important to include in the definition services in which oral communications are transcribed into real-time text. Therefore, we are adding language to § 300.34(c)(4) to refer to transcription services and include several examples of transcription systems used to provide such services.

We also believe that it is important that the definition of *interpreting services* include services for children who are deaf-blind. However, because there are many types of interpreting services for children who are deaf-blind, in addition to tactile and close vision interpreting services, we will add a more general statement to include interpreting services for children who are deaf-blind, rather than listing all the different methods that might be used for children who are deaf-blind.

Changes: We have restructured § 300.34(c)(4) and added "and transcription services such as communication real-time translation (CART), C-Print, and TypeWell" to the definition of interpreting services in paragraph (c)(4)(i). We have also added a new paragraph (c)(4)(ii) to include interpreting services for children who are deaf-blind.

Medical Services (§ 300.34(c)(5))

Comment: One commenter stated that the definition of *medical services* is not in the Act and recommended that the definition be broader than the decision in *Cedar Rapids Community School Dist. v. Garrett F.*, 526 U.S. 66 (1999), which the definition appears to follow.

Discussion: The list of related services in § 300.34(a) includes medical services

for diagnostic and evaluation purposes, consistent with section 602(26) of the Act. The Department continues to believe that using language from the Act to define *medical services* is essential. Defining *medical services* more broadly, as recommended by the commenter, would not be consistent with the Act.

Changes: None.

Orientation and Mobility Services (§ 300.34(c)(7))

Comment: Several commenters supported including travel training in the definition of *orientation and mobility services* and recommended adding a reference to the definition of *travel training* in new § 300.39(b)(4) (proposed § 300.38(b)(4)). However, other commenters stated that travel training should appear as a distinct related service and should not be included in the definition of *orientation and mobility services* because children who are blind and visually impaired receive this type of instruction from certified orientation and mobility specialists. One commenter stated that the regulations should specify that travel training is for children with cognitive or other disabilities.

Discussion: We believe that including travel training in the definition of *orientation and mobility services* may be misinterpreted to mean that travel training is available only for children who are blind or visually impaired or that travel training is the same as orientation and mobility services. We will, therefore, remove travel training from § 300.34(c)(7). This change, however, does not diminish the services that are available to children who are blind or visually impaired.

Travel training is defined in new § 300.39(b)(4) (proposed § 300.38(b)(4)) for children with significant cognitive disabilities and any other children with disabilities who require this instruction, and, therefore, would be available for children who are blind or visually impaired, as determined by the child's IEP Team. Travel training is not the same as orientation and mobility services and is not intended to take the place of appropriate orientation and mobility services.

Changes: We have removed "travel training instruction" from § 300.34(c)(7)(ii) to avoid confusion with the definition of *travel training* in new § 300.39(b)(4) (proposed § 300.38(b)(4)), and to clarify that travel training is not the same as orientation and mobility services and cannot take the place of appropriate orientation and mobility services.

Comment: One commenter recommended that the regulations

specify who is qualified to provide travel training instruction and stated that it is critical that skills such as street crossing be taught correctly.

Discussion: Section 300.156, consistent with section 612(a)(14) of the Act, requires each State to establish personnel qualifications to ensure that personnel necessary to carry out the purposes of the Act are appropriately and adequately prepared and trained and have the content knowledge and skills to serve children with disabilities. It is, therefore, the State's responsibility to determine the qualifications that are necessary to provide travel training instruction.

Changes: None.

Parent Counseling and Training (§ 300.34(c)(8))

Comment: A few commenters stated that the definition of *parent counseling and training* in § 300.34(c)(8) is not included in the definition of *related services* in section 602(26)(A) of the Act and, therefore, should not be included in the regulations.

Discussion: Paragraphs (i) and (ii) of § 300.34(c)(8), regarding assisting parents in understanding the special needs of their child, and providing parents with information about child development, respectively, are protected by section 607(b) of the Act, and cannot be removed. Section 300.34(c)(8)(iii), regarding helping parents acquire the skills to allow them to support the implementation of their child's IEP or IFSP, was added in the 1999 regulations to recognize the more active role of parents as participants in the education of their children. Although not included in the Act, we believe it is important to retain this provision in these regulations so that there is no question that parent counseling and training includes helping parents acquire skills that will help them support the implementation of their child's IEP or IFSP.

Changes: None.

Comment: One commenter recommended that the regulations describe the responsibility of LEAs to provide parent counseling and training.

Discussion: As with other related services, an LEA only is responsible for providing parent counseling and training if a child's IEP Team determines that it is necessary for the child to receive FAPE. To include this language in the definition of *parent counseling and training*, moreover, would be unnecessarily duplicative of § 300.17(d), which states that FAPE means special education and related services that are provided in conformity with an IEP that meets the requirements in §§ 300.320 through 300.324.

Changes: None.

Physical Therapy (§ 300.34(c)(9))

Comment: One commenter recommended the definition of *physical therapy* include related therapeutic services for children with degenerative diseases.

Discussion: We do not believe the suggested change is necessary because the definition of *physical therapy* is broadly defined and could include therapeutic services for children with degenerative diseases. It is the responsibility of the child's IEP Team to determine the special education and related services that are necessary for a child to receive FAPE. There is nothing in the Act that prohibits the provision of therapeutic services for children with degenerative diseases, if the IEP Team determines they are needed for an individual child and, thereby, includes the services in the child's IEP.

Changes: None.

Comment: One commenter stated that the definition of *physical therapy* in § 300.34(c)(9) is circular and requested that a functional definition be provided.

Discussion: The definition of *physical therapy* has been in the regulations since 1977 and is commonly accepted by SEAs, LEAs, and other public agencies. We do not believe it is necessary to change the definition.

Changes: None.

Psychological Services (§ 300.34(c)(10))

Comment: One commenter recommended that the definition of *psychological services* include strategies to facilitate social-emotional learning.

Discussion: We do not believe the definition should be revised to add a specific reference to the strategies recommended by the commenter. The definition of *psychological services* is sufficiently broad to enable psychologists to be involved in strategies to facilitate social-emotional learning.

Changes: None.

Comment: One commenter stated that unless the definition of *psychological services* includes research-based counseling, schools will argue that they are required to provide counseling services delivered by social workers because counseling is included in the definition of *social work services in schools*.

Discussion: We do not believe including research-based counseling in the definition of *psychological services* is necessary. Including counseling in the definition of *social work services in schools* in § 300.34(c)(14) is intended to indicate the types of personnel who assist in this activity and is not intended

either to imply that school social workers are automatically qualified to perform counseling or to prohibit other qualified personnel from providing counseling, consistent with State requirements.

Changes: None.

Comment: One commenter stated that other related services personnel, in addition to school psychologists, should be permitted to develop and deliver positive behavioral intervention strategies.

Discussion: There are many professionals who might also play a role in developing and delivering positive behavioral intervention strategies. The standards for personnel who assist in developing and delivering positive behavioral intervention strategies will vary depending on the requirements of the State. Including the development and delivery of positive behavioral intervention strategies in the definition of *psychological services* is not intended to imply that school psychologists are automatically qualified to perform these duties or to prohibit other qualified personnel from providing these services, consistent with State requirements.

Changes: None.

Recreation (§ 300.34(c)(11))

Comment: A few commenters requested modifying the definition of *recreation* to include therapeutic recreation services provided by a qualified recreational therapist, which include services that restore, remediate, or rehabilitate to improve functioning and independence, and reduce or eliminate the effects of illness or disability.

Discussion: We do not believe it is necessary to change the definition of *recreation* as recommended by the commenters because the definition is sufficiently broad to include the services mentioned by the commenters.

Changes: None.

School Health Services and School Nurse Services (Proposed School Nurse Services) (§ 300.34(c)(13))

Comment: Some commenters noted that while “school health services” is included in the list of related services in § 300.34(a), it is not defined, which will result in confusion about the relationship between “school health services” and “school nurse services.”

Some commenters stated that adding the definition of *school nurse services* and eliminating the definition of *school health services* must not narrow the range of related services available to children. One commenter recommended that the definition of *school nurse services* allow school nurse services to

be provided by other qualified persons, as well as a qualified school nurse, because the majority of schools do not have a school nurse on staff. One commenter requested that the regulations clarify that schools can continue to use registered nurses or other personnel to provide school nurse services, consistent with State law. Another commenter stated that there is well-established case law upholding the obligation of an SEA and LEA to provide health-related services necessary for a child to benefit from special education.

Discussion: School health services was retained in the definition of *related services* in § 300.34(a). However, the definition of *school health services* was inadvertently removed in the NPRM. To correct this error, we will add school health services to the definition of *school nurse services* and clarify that *school health services and school nurse services* means health services that are designed to enable a child with a disability to receive FAPE. We will also add language to clarify that school nurse services are provided by a qualified school nurse and that school health services are provided by either a qualified school nurse or other qualified person. We recognize that most schools do not have a qualified school nurse on a full-time basis (i.e., a nurse that meets the State standards for a qualified school nurse), and that many schools rely on other qualified school personnel to provide school health services under the direction of a school nurse. Therefore, we believe it is important to retain the definition of *school health services and school nurse services* in these regulations.

With the changes made in § 300.34(c), it is not necessary for the reference to “school nurse services” in § 300.34(a) to include the phrase, “designed to enable a child with a disability to receive a free appropriate public education as described in the IEP of the child.” We will, therefore, remove this phrase in § 300.34(a).

Changes: Section 300.34(c)(13) has been revised to include a definition of *school health services and school nurse services*. Additional language has been added to clarify who provides school health services and school nurse services. We have also modified § 300.34(a) by deleting the redundant phrase, “designed to enable a child with a disability to receive a free appropriate public education as described in the IEP of the child.”

Comment: One commenter stated that adding *school nurse services* to the definition of *related services* makes it more burdensome for the delivery of

services to children who are medically-fragile.

Discussion: It is unclear how adding *school nurse services* to the definition of *related services* affects services to children who are medically fragile. As defined in § 300.34(c)(13), *school health services and school nurse services* are designed to enable a child with a disability to receive FAPE as described in the child’s IEP. A child who is medically fragile and needs school health services or school nurse services in order to receive FAPE must be provided such services, as indicated in the child’s IEP.

Changes: None.

Comment: One commenter stated that the definition of *school nurse services* should include services that enable a child with a disability to receive FAPE in the LRE. Another commenter stated that school nurses can be extremely supportive of children with disabilities receiving FAPE in the LRE and recommended changing the regulations to ensure that parents understand that the definition of *related services* includes school nurse services.

Discussion: The LRE requirements in §§ 300.114 through 300.120 provide, that to the maximum extent appropriate, children with disabilities are to be educated with children who are not disabled. It is not necessary to repeat this requirement in the definition of *school health services and school nurse services*.

We agree that school health services and school nurse services are important related services. Section 300.34(a) and section 602(26)(A) of the Act are clear that the definition of *related services* includes school health services and school nurse services. The IEP Team, of which the parent is an integral member, is responsible for determining the services that are necessary for the child to receive FAPE. We, therefore, do not believe that it is necessary to add a regulation requiring public agencies to ensure that parents understand that related services include school health services and school nurse services.

Changes: None.

Comment: One commenter stated that including the phrase, “designed to enable a child with a disability to receive a free appropriate public education” in § 300.34(c)(13) in relation to school nurse services, is unnecessary and confusing.

Discussion: As stated in § 300.34(a), the purpose of related services is to assist a child with a disability to benefit from special education. We believe it is necessary to specify that school health services and school nurse services are related services only to the extent that

the services allow a child to benefit from special education and enable a child with a disability to receive FAPE.

Changes: None.

Social Work Services in Schools (§ 300.34(c)(14))

Comment: One commenter recommended including strategies to facilitate social-emotional learning in the definition of *social work services in schools*. A few commenters stated that the role of the school social worker is evolving and recommended that the definition include the role of social workers as integral members of pre-referral teams that deliver interventions to decrease the number of referrals to special education. One commenter recommended that the definition include a reference to the social worker's role in addressing the relevant history and current functioning of an individual within his or her environmental context, rather than referring to social-developmental histories. Another commenter stated that social workers are trained to find resources in the home, school, and community and recommended including such language in the definition.

Discussion: The definition of *social work services in schools* is sufficiently broad to include the services described by the commenters and we do not believe the definition should be revised to add these more specific functions.

Changes: None.

Comment: One commenter stated that the definition of *social work services in schools* removes language from the 1983 regulations that states that social work services allow children with disabilities to maximize benefit from the learning program. The commenter stated that this is a higher standard than what is required in § 300.34(c)(14), which only requires that services enable a child to learn as effectively as possible, and, therefore, the 1983 definition should be retained, consistent with section 607(b) of the Act.

Discussion: We disagree with the commenter. The definition of *social work services in schools* in the 1977 regulations included "mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program." As explained in the preamble to the final 1992 regulations, the phrase "to receive maximum benefit" was intended only to provide that the purpose of activities carried out by personnel qualified to provide social work services in schools is to mobilize resources so that a child can learn as effectively as possible in his or her educational program. The

language in the preamble to the final 1992 regulations also clarified that this provision did not set a legal standard for that program or entitle the child to a particular educational benefit. The preamble further explained that, during the public comment period for the 1992 regulations, commenters raised concerns that the term "maximum benefit" appeared to be inconsistent with the decision by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). Therefore, the phrase was revised to read "to learn as effectively as possible in his or her educational program." This is the same phrase used in the 1999 regulations and in these regulations in § 300.34(c)(14)(iv). Because the language in the 1977 final regulations did not entitle a child to any particular benefit, the change made in 1992 did not lessen protections for a child, and, therefore, is not subject to section 607(b) of the Act.

Changes: None.

Comment: One commenter recommended adding a reference to "functional behavioral assessments" in § 300.34(c)(14)(v) because functional behavioral assessments should always precede the development of behavioral intervention strategies. Another commenter expressed concern that § 300.34(c)(14)(iv), regarding social work services to mobilize school and community resources to enable the child to learn as effectively as possible, creates a potential for litigation. The commenter asked whether a school district could face a due process hearing for failure to mobilize community resources if there are no community resources to address the needs of the child or family.

Discussion: The definition of *social work services in schools* includes examples of the types of social work services that may be provided. It is not a prescriptive or exhaustive list. The child's IEP Team is responsible for determining whether a child needs social work services, and what specific social work services are needed in order for the child to receive FAPE. Therefore, while conducting a functional behavioral assessment typically precedes developing positive behavioral intervention strategies, we do not believe it is necessary to include functional behavioral assessments in the definition of *social work services in schools* because providing positive behavioral intervention strategies is just an example of a social work service that might be provided to a child if the child's IEP Team determines that such services are needed for the child to receive FAPE. Similarly, if a child's IEP Team determines that mobilizing

community resources would not be an effective means of enabling the child to learn as effectively as possible because there are no community resources to address the needs of the child, the IEP Team would need to consider other ways to meet the child's needs. While there is the possibility that a due process hearing might be filed based on a failure to mobilize community resources that do not exist, we do not believe that such a claim could ever be successful, as the regulation does not require the creation of community resources that do not exist.

Changes: None.

Speech-language Pathology Services (§ 300.34(c)(15))

Comment: One commenter stated that children who need speech therapy should have it for a full classroom period, five days a week, and not be removed from other classes to receive this related service.

Discussion: It would be inconsistent with the Act to dictate the amount and location of services for all children receiving speech-language pathology services, as recommended by the commenter. As with all related services, section 614(d)(1)(A)(i)(IV) of the Act provides that the child's IEP Team is responsible for determining the services that are needed for the child to receive FAPE. This includes determining the type of related service, as well as the amount and location of services.

Changes: None.

Comment: One commenter stated that the definition of *speech-language pathology services* appears to be limited to children who are deaf or hard of hearing, and recommended adding language to the regulations to allow children without expressive speech to receive such services.

Discussion: There is nothing in the Act or the regulations that would limit speech-language pathology services to children who are deaf or hard of hearing or to children without expressive speech. The definition of *speech-language pathology services* specifically includes services for children who have language impairments, as well as speech impairments.

Changes: None.

Comment: One commenter requested the definition of *speech-language pathology services* specify the qualifications and standards for speech-language professionals. Another commenter requested that the definition require a highly qualified provider to deliver speech-language services. One commenter requested that the definition require a speech-language pathologist to provide speech-language services.

Discussion: Consistent with § 300.156 and section 612(a)(14) of the Act, it is up to each State to establish personnel qualifications to ensure that personnel necessary to carry out the purposes of the Act are appropriately and adequately prepared and trained and have the content knowledge and skills to serve children with disabilities. Section 300.156(b), consistent with section 614(a)(14)(B) of the Act, specifically requires that these personnel qualifications must include qualifications for related services personnel. Establishing qualifications for individuals providing speech-language services in these regulations would be inconsistent with these statutory and regulatory requirements.

Changes: None.

Comment: One commenter stated that the roles and responsibilities for speech-language pathologists in schools have been expanded to help all children gain language and literacy skills and recommended that the definition of *speech-language pathology services* be revised to include consultation and collaboration with other staff members to plan and implement special intervention monitoring programs and modify classroom instruction to assist children in achieving academic success. The commenter also recommended including services for other health impairments, such as dysphagia, in the definition of *speech-language pathology services*.

Discussion: The Act provides for speech-language pathology services for children with disabilities. It does not include speech-language pathology services to enable all children to gain language and literacy skills, as suggested by the commenter. It would, therefore, be inconsistent with the Act to change the definition of *speech-language pathology services* in the manner recommended by the commenter. We believe that the definition is sufficiently broad to include services for other health impairments, such as dysphagia, and therefore, decline to revise the definition to include this specific service.

Changes: None.

Transportation (§ 300.34(c)(16))

Comment: A few commenters stated that the definition of *transportation* should require transportation to be provided between school and other locations in which IEP services are provided. Other commenters requested that the definition explicitly define transportation as door-to-door services, including provisions for an aide to

escort the child to and from the bus each day.

Discussion: A child's IEP Team is responsible for determining whether transportation between school and other locations is necessary in order for the child to receive FAPE. Likewise, if a child's IEP Team determines that supports or modifications are needed in order for the child to be transported so that the child can receive FAPE, the child must receive the necessary transportation and supports at no cost to the parents. We believe the definition of *transportation* is sufficiently broad to address the commenters' concerns. Therefore, we decline to make the requested changes to the definition.

Changes: None.

Comment: Some commenters recommended removing the term "special transportation" from the definition of *transportation* because the term gives the impression that adapted buses are used for a separate and different transportation system, when, in fact, adapted buses are part of the regular transportation fleet and system. These commenters stated that adapted buses should only be used as a separate, special transportation service if the child's IEP indicates that the transportation needs of the child can be met only with transportation services that are separate from the transportation services for all children.

Discussion: We do not believe it is necessary to make the change requested by the commenters. It is assumed that most children with disabilities will receive the same transportation provided to nondisabled children, consistent with the LRE requirements in §§ 300.114 through 300.120, unless the IEP Team determines otherwise. While we understand the commenter's concern, adapted buses may or may not be part of the regular transportation system in a particular school system. In any case, if the IEP Team determines that a child with a disability requires transportation as a related service in order to receive FAPE, or requires supports to participate in integrated transportation with nondisabled children, the child must receive the necessary transportation or supports at no cost to the parents.

Changes: None.

Scientifically Based Research (new § 300.35)

Comment: A number of commenters requested that the regulations include a definition of *scientifically based research*.

Discussion: The definition of *scientifically based research* is important to the implementation of Part

B of the Act and, therefore, we will include a reference to the definition of that term in section 9101(37) of the ESEA.

For the reasons set forth earlier in this notice, we are not including definitions from other statutes in these regulations. However, we will include the current definition of *scientifically based research* in section 9101(37) of the ESEA here for reference.

Scientifically based research—

(a) Means research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs; and

(b) Includes research that—

(1) Employs systematic, empirical methods that draw on observation or experiment;

(2) Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn;

(3) Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators;

(4) Is evaluated using experimental or quasi-experimental designs in which individuals, entities, programs, or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls;

(5) Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication or, at a minimum, offer the opportunity to build systematically on their findings; and

(6) Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.

Changes: A cross-reference to the definition of *scientifically based research* in section 9101(37) of the ESEA has been added as new § 300.35. Subsequent definitions have been renumbered accordingly.

Secondary School (New § 300.36) (Proposed § 300.35)

Comment: One commenter requested clarification regarding the definition of *secondary school* and whether "grade 12" refers to the regular grade 12 curriculum aligned to State academic achievement standards under the ESEA or a limit on the number of years

children with a disabilities can spend in school.

Discussion: The term “grade 12” in the definition of *secondary school* has the meaning given it under State law. It is not intended to impose a Federal limit on the number of years a child with a disability is allowed to complete his or her secondary education, as some children with disabilities may need more than 12 school years to complete their education.

Changes: None.

Services Plan (New § 300.37) (Proposed § 300.36)

Comment: One commenter stated that the term services plan is not in the Act and, therefore, should be removed. However, the commenter stated that if the definition of *services plan* remained in the regulations, it should reflect the fact that parentally-placed private school children are not entitled to FAPE.

Discussion: The definition of *services plan* was included to describe the content, development, and implementation of plans for parentally-placed private school children with disabilities who have been designated to receive equitable services. The definition cross-references the specific requirements for the provision of services to parentally-placed private school children with disabilities in § 300.132 and §§ 300.137 through 300.139, which provide that parentally-placed private school children have no individual right to special education and related services and thus are not entitled to FAPE. We do not believe further clarification is necessary.

Changes: None.

Special Education (New § 300.39) (Proposed § 300.38)

Comment: One commenter requested modifying the definition of *special education* to distinguish special education from other forms of education, such as remedial programming, flexible grouping, and alternative education programming. The commenter stated that flexible grouping, diagnostic and prescriptive teaching, and remedial programming have expanded in the general curriculum in regular classrooms and the expansion of such instruction will only be encouraged with the implementation of early intervening services under the Act.

Discussion: We believe the definition of *special education* is clear and consistent with the definition in section 602(29) of the Act. We do not believe it is necessary to change the definition to distinguish special education from the

other forms of education mentioned by the commenter.

Changes: None.

Individual Special Education Terms Defined (New § 300.39(b)) (Proposed § 300.38(b))

Comment: A few commenters provided definitions of “accommodations” and “modifications” and recommended including them in new § 300.39(b) (proposed § 300.38(b)).

Discussion: The terms “accommodations” and “modifications” are terms of art referring to adaptations of the educational environment, the presentation of educational material, the method of response, or the educational content. They are not, however, examples of different types of “education” and therefore we do not believe it is appropriate to define these terms of art or to include them in new § 300.39(b) (proposed § 300.38(b)).

Changes: None.

Physical Education (New § 300.39(b)(2)) (Proposed § 300.38(b)(2))

Comment: One commenter requested that adaptive physical education be subject to the LRE requirements of the Act.

Discussion: The requirements in §§ 300.114 through 300.120 require that, to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. This requirement applies to all special education services, including adaptive physical education. We see no need to repeat this requirement specifically for the provision of adaptive physical education.

Changes: None.

Specially Designed Instruction (New § 300.39(b)(3)) (Proposed § 300.38(b)(3))

Comment: One commenter stated that the regulations should strengthen the requirements ensuring children access to the general curriculum, because many children with disabilities still do not have the tools they need or the teachers with expertise to access the general curriculum.

Discussion: We believe the regulations place great emphasis on ensuring that children with disabilities have access to the general education curriculum. New § 300.39(b)(3) (proposed § 300.38(b)(3)) defines *specially designed instruction* as adapting the content, methodology, or delivery of instruction to address the unique needs of the child and to ensure access to the general curriculum so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. In addition, ensuring that children with

disabilities have access to the general curriculum is a major focus of the requirements for developing a child’s IEP. For example, § 300.320(a)(1) requires a child’s IEP to include a statement of how the child’s disability affects the child’s involvement and progress in the general education curriculum; § 300.320(a)(2)(i) requires annual IEP goals to be designed to enable the child to be involved in and make progress in the general education curriculum; and § 300.320(a)(4) requires the IEP to include a statement of the special education and related services the child will receive, as well as the program modifications or supports for school personnel that will be provided, to enable the child to be involved in and make progress in the general education curriculum. We do not believe additional language is necessary.

Changes: None.

Travel Training (New § 300.39(b)(4)) (Proposed § 300.38(b)(4))

Comment: A few commenters recommended strengthening the definition of *travel training* in new § 300.39(b)(4) (proposed § 300.38(b)(4)) and adding travel training to new § 300.43 (proposed § 300.42) (*transition services*) to acknowledge that transportation is vitally important for children with disabilities to have full participation in the community. The commenters recommended that the definition of *travel training* include providing instruction to children with disabilities, other than blindness, to enable them to learn the skills and behaviors necessary to move effectively and safely in various environments, including use of public transportation.

Discussion: We believe the definition of *travel training* already acknowledges the importance of transportation in supporting children with disabilities to fully participate in their communities. New § 300.43(a)(4) (proposed § 300.42(a)(4)) defines *travel training* to include providing instruction that enables children to learn the skills necessary to move effectively and safely from place to place in school, home, at work and in the community. Therefore, we do not believe that further clarification is necessary. We also do not believe that it is necessary to add travel training to the definition of *transition services*, as recommended by the commenters. We believe that IEP Teams already consider the importance of transportation and travel training services in the course of planning for a student’s postsecondary transition needs. It is unnecessary to state that travel training includes instructing children with disabilities other than

blindness, as requested by the commenters, because the definition of *travel training* already states that travel training is appropriate for any child with a disability who requires this instruction.

Changes: None.

Comment: A few commenters strongly recommended clarifying that the definition of *travel training* does not include training for children with visual impairments, regardless of whether they have additional disabilities.

Discussion: Any child with a disability, including a child with a visual impairment, who needs travel training instruction to receive FAPE, as determined by the child's IEP Team, can receive travel training instruction. New § 300.39(b)(4) (proposed § 300.38(b)(4)) specifically states that *travel training* means providing instruction to children with significant cognitive disabilities and any other children with disabilities who require this instruction. We, therefore, decline to change the definition, as recommended by the commenters.

Changes: None.

Vocational Education (New § 300.39(b)(5)) (Proposed § 300.38(b)(5))

Comment: A few commenters recommended revising the definition of *vocational education* to include specially designed educational programs that are directly related to the preparation of individuals for paid or unpaid employment or for additional preparation for a career not requiring a baccalaureate or advanced degree.

Discussion: We believe that the more general reference to "organized education programs" in the definition of *vocational education* is accurate and should not be changed to refer to "specially designed educational programs," as recommended by the commenter, because some children with disabilities will benefit from educational programs that are available for all children and will not need specially designed programs.

Changes: None.

Comment: Some commenters stated that Congress did not intend that the definition of *vocational education* would include vocational and technical education. The commenters stated that the addition of vocational and technical education to the definition of *vocational education* creates a right under the Act to educational services that would be extremely costly for States and LEAs to implement.

Other commenters stated that including the definition of *vocational and technical education* from the Carl D. Perkins Act expands FAPE beyond

secondary education, which is an unwarranted responsibility for school districts. One commenter stated that the definition could be interpreted to require public agencies to provide two years of postsecondary education for students with disabilities. A few commenters strongly recommended removing the definition of *vocational and technical education*.

Some commenters recommended removing the reference to the postsecondary level for a 1-year certificate, an associate degree, and industry-recognized credential in the definition of *vocational and technical education*. One commenter suggested that proposed § 300.38(b)(6)(i)(A) conclude with the word "or" to clarify that the sequence of courses is discretionary.

Discussion: The definition of *vocational education* was revised to include the definition of *vocational and technical education* in the Carl D. Perkins Vocational and Applied Technology Act of 1988, as amended, 20 U.S.C. 2301, 2302(29). However, based on the comments we received, it is apparent that including the definition of *vocational and technical education* has raised concerns and confusion regarding the responsibilities of SEAs and LEAs to provide vocational education.

Therefore, we will remove the definition of *vocational and technical education* in proposed § 300.38(b)(6) and the reference to vocational and technical education in proposed § 300.38(b)(5)(ii).

Changes: The definition of *vocational and technical education* in proposed § 300.38(b)(6) has been removed. Accordingly, the reference to vocational and technical education in proposed § 300.38(b)(5)(ii) has also been removed.

Supplementary Aids and Services (New § 300.42) (Proposed § 300.41)

Comment: A few commenters stated that the definition of *supplementary aids and services* should be changed to mean aids, services, and other supports provided in general education classes or other settings to children with disabilities, as well as to educators, other support staff, and nondisabled peers, if necessary, to support the inclusion of children with disabilities.

Discussion: The definition of *supplementary aids and services* in new § 300.42 (proposed § 300.41) is consistent with the specific language in section 602(33) of the Act, and refers to aids, services, and other supports for children with disabilities. We do not believe it is necessary to change the definition to include providing aids, services, and supports to other

individuals because § 300.320(a)(4) requires each child's IEP to include a statement of the program modifications or supports for school personnel that will be provided to enable the child to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities.

As noted in the *Analysis of Comments and Changes* section for subpart B, we have clarified in § 300.107(a) that States must ensure that public agencies take steps to provide nonacademic and extracurricular services and activities, including providing supplementary aids and services determined appropriate and necessary by the child's IEP Team to afford children with disabilities an equal opportunity for participation in those services and activities. We have, therefore, revised the definition of *supplementary aids and services* in new § 300.42 (proposed § 300.41) to be consistent with this change.

Changes: We have added language in new § 300.42 (proposed § 300.41) to clarify that supplementary aids and services can be provided in extracurricular and nonacademic settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.

Comment: None.

Discussion: New § 300.42 (proposed § 300.41) contains an incorrect reference to § 300.112. The correct reference should be to § 300.114.

Changes: We have removed the reference to § 300.112 and replaced it with a reference to § 300.114.

Transition Services (New § 300.43) (Proposed § 300.42)

Comment: One commenter recommended replacing the word "child" with "student" in the definition of *transition services*.

Discussion: The definition of *transition services* follows the language in section 602(34) of the Act. The words "child" and "student" are used throughout the Act and we have used the statutory language in these regulations whenever possible.

Changes: None.

Comment: One commenter recommended that the regulations include vocational and career training through work-study as a type of transition service. A few commenters stated that the definition of *transition services* must specify that a student's need for transition services cannot be based on the category or severity of a student's disability, but rather on the student's individual needs.

Discussion: We do not believe it is necessary to change the definition of *transition services* because the definition is written broadly to include a range of services, including vocational and career training that are needed to meet the individual needs of a child with a disability. The definition clearly states that decisions regarding transition services must be made on the basis of the child's individual needs, taking into account the child's strengths, preferences, and interests. As with all special education and related services, the student's IEP Team determines the transition services that are needed to provide FAPE to a child with a disability based on the needs of the child, not on the disability category or severity of the disability. We do not believe further clarification is necessary.

Changes: None.

Comment: A few commenters stated that the regulations do not define "functional" or explain how a student's functional performance relates to the student's unique needs or affects the student's education. The commenters noted that the word "functional" is used throughout the regulations in various forms, including "functional assessment," "functional goals," "functional abilities," "functional needs," "functional achievement," and "functional performance," and should be defined to avoid confusion. One commenter recommended either defining the term or explicitly authorizing States to define the term.

One commenter recommended clarifying that "functional performance" must be a consideration for any child with a disability who may need services related to functional life skills and not just for students with significant cognitive disabilities. A few commenters stated that the definition of *transition services* must specify that "functional achievement" includes achievement in all major life functions, including behavior, social-emotional development, and daily living skills.

Discussion: We do not believe it is necessary to include a definition of "functional" in these regulations because the word is generally used to refer to activities and skills that are not considered academic or related to a child's academic achievement as measured on Statewide achievement tests. There is nothing in the Act that would prohibit a State from defining "functional," as long as the definition and its use are consistent with the Act.

We also do not believe it is necessary for the definition of *transition services* to refer to all the major life functions or to clarify that functional performance must be a consideration for any child

with a disability, and not just for students with significant cognitive disabilities. As with all special education and related services, the student's IEP Team determines the services that are needed to provide FAPE to a child with a disability based on the needs of the child.

Changes: None.

Comment: One commenter requested a definition of "results-oriented process."

Discussion: The term "results-oriented process," which appears in the statutory definition of *transition services*, is generally used to refer to a process that focuses on results. Because we are using the plain meaning of the term (i.e., a process that focuses on results), we do not believe it is necessary to define the term in these regulations.

Changes: None.

Comment: A few commenters stated that "acquisition of daily living skills and functional vocational evaluation" is unclear as a child does not typically "acquire" an evaluation. The commenters stated that the phrase should be changed to "functional vocational skills."

Discussion: We agree that the phrase is unclear and will clarify the language in the regulation to refer to the "provision of a functional vocational evaluation."

Changes: We have added "provision of a" before "functional vocational evaluation" in new § 300.43(a)(2)(v) for clarity.

Universal Design (New § 300.44)
(Proposed § 300.43)

Comment: Many commenters requested including the full definition of *universal design* in the regulations, rather than providing a reference to the definition of the term.

Discussion: The term *universal design* is defined in the Assistive Technology Act of 1998, as amended. For the reasons set forth earlier in this notice, we are not including in these regulations full definitions of terms that are defined in other statutes. However, we will include the definition of this term from section 3 of the Assistive Technology Act of 1998, as amended, 29 U.S.C. 3002, here for reference.

The term *universal design* means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies) and products and services that are

interoperable with assistive technologies.

Changes: None.

Comment: Several commenters stated that the definition of *universal design* should be changed to include the universal design of academic content standards, curricula, instructional materials, and assessments.

Discussion: The definition of *universal design* is statutory. Congress clearly intended that we use this specific definition when it used this term in the Act. We do not believe we can change this definition as suggested by the commenters.

Changes: None.

Subpart B—State Eligibility

FAPE Requirements

Free Appropriate Public Education (FAPE) (§ 300.101)

Comment: One commenter recommended revising § 300.101 to ensure that children with disabilities who are suspended or expelled from their current placement are provided educational services consistent with State academic achievement standards. One commenter asked whether children with disabilities who are suspended or expelled from their current placement must continue to be taught by highly qualified teachers.

Discussion: We believe the concern raised by the commenter is already addressed by this regulation and elsewhere in the regulations and that no changes to § 300.101 are necessary. Section 300.530(d), consistent with section 615(k)(1)(D) of the Act, clarifies that a child with a disability who is removed from his or her current placement for disciplinary reasons, irrespective of whether the behavior is determined to be a manifestation of the child's disability, must be allowed to participate in the general education curriculum, although in another setting, and to progress toward meeting his or her IEP goals. As the term "general education curriculum" is used throughout the Act and in these regulations, the clear implication is that there is an education curriculum that is applicable to all children and that this curriculum is based on the State's academic content standards.

Children with disabilities who are suspended or expelled from their current placement in public schools must continue to be taught by highly qualified teachers, consistent with the requirements in §§ 300.156 and 300.18. Private school teachers are not subject to the highly qualified teacher requirements under this part.

Changes: None.