

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.

Comment: One commenter suggested clarifying in § 300.101 that FAPE must be available to children with disabilities in the least restrictive environment.

Discussion: We do not believe further clarification is needed in § 300.101, as the matter is adequately covered elsewhere in the regulations. Section 300.101 clarifies that, in order to be eligible to receive funds under Part B of the Act, States must, among other conditions, ensure that FAPE is made available to all children with specified disabilities in mandated age ranges. The term FAPE is defined in § 300.17 and section 602(9)(D) of the Act as including, among other elements, special education and related services, provided at no cost to parents, in conformity with an individualized education program (IEP). Sections 300.114 through 300.118, consistent with section 612(a)(5) of the Act, implement the Act's strong preference for educating children with disabilities in regular classes with appropriate aids and supports. Specifically, § 300.114 provides that States must have in effect policies and procedures ensuring that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Changes: None.

Comment: A few commenters recommended including language in § 300.101(a) specifying that children with disabilities expelled or suspended from the general education classroom must be provided FAPE in the least restrictive environment.

Discussion: The Department believes it would not be appropriate to include the requested language in this section because services in these circumstances are provided under somewhat different criteria than is normally the case. Section 300.530 clarifies the procedures school personnel must follow when removing a child with a disability who violates a code of student conduct from their current placement (e.g., suspension and expulsion). This includes how decisions are made regarding the educational services the child receives and the location in which they will be provided. School officials need some reasonable amount of flexibility in providing services to children with disabilities who have

violated school conduct rules, and should not necessarily have to provide exactly the same services, in the same settings, to these children. Therefore, we decline to regulate further in this regard.

Changes: None.

Comment: Some commenters expressed concern that children with disabilities have to fail or be retained in a grade or course in order to be considered eligible for special education and related services.

Discussion: Section 300.101(c) provides that a child is eligible to receive special education and related services even though the child is advancing from grade to grade. Further, it is implicit from paragraph (c) of this section that a child should not have to fail a course or be retained in a grade in order to be considered for special education and related services. A public agency must provide a child with a disability special education and related services to enable him or her to progress in the general curriculum, thus making clear that a child is not ineligible to receive special education and related services just because the child is, with the support of those individually designed services, progressing in the general curriculum from grade-to-grade or failing a course or grade. The group determining the eligibility of a child for special education and related services must make an individual determination as to whether, notwithstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services. However, to provide additional clarity we will revise paragraph (c)(1) of this section to explicitly state that children do not have to fail or be retained in a course or grade in order to be considered eligible for special education and related services.

Changes: Section 300.101(c)(1) has been revised to provide that children do not have to fail or be retained in a course or grade in order to be considered eligible for special education and related services.

Limitation—Exception to FAPE for Certain Ages (§ 300.102)

Comment: One commenter requested that the regulations clarify that children with disabilities who do not receive a regular high school diploma continue to be eligible for special education and related services. One commenter expressed concern that the provision in § 300.102(a)(3)(ii) regarding children with disabilities who have not been awarded a regular high school diploma could result in the delay of transition services in the context of the child's

secondary school experience and postsecondary goals.

Discussion: We believe that § 300.102(a)(3) is sufficiently clear that public agencies need not make FAPE available to children with disabilities who have graduated with a regular high school diploma and that no change is needed to the regulations. Children with disabilities who have not graduated with a regular high school diploma still have an entitlement to FAPE until the child reaches the age at which eligibility ceases under the age requirements within the State. However, we have reviewed the regulations and believe that it is important for these regulations to define "regular diploma" consistent with the ESEA regulations in 34 CFR § 200.19(a)(1)(i). Therefore, we will add language to clarify that a regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or general educational development (GED) credential.

We do not believe § 300.102 could be interpreted to permit public agencies to delay implementation of transition services, as stated by one commenter because transition services must be provided based on a child's age, not the number of years the child has remaining in the child's high school career. Section 300.320(b), consistent with section 614(d)(1)(A)(i)(VIII) of the Act, requires each child's IEP to include, beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, appropriate measurable postsecondary goals and the transition services needed to assist the child in reaching those goals.

Changes: A new paragraph (iv) has been added in § 300.102(a)(3) stating that a regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or GED.

Comment: One commenter requested clarification as to how States should include children with disabilities who require special education services through age 21 in calculating, for adequate yearly progress (AYP) purposes, the percentage of children who graduate with a regular high school diploma in the standard number of years. The commenter expressed concern that States, in order to comply with their high school graduation rate academic outcome requirements under the ESEA, will change the grade status from 12th grade to 11th grade for those children with disabilities who will typically age out of the public education

system under the Act. The commenter further stated that this will affect the exception to FAPE provisions in § 300.102 for children with disabilities who require special education services through age 21.

Discussion: The calculation of graduation rates under the ESEA for AYP purposes (34 CFR 200.19(a)(1)(i)) does not alter the exception to FAPE provisions in § 300.102(a)(3) for children with disabilities who graduate from high school with a regular high school diploma, but not in the standard number of years. The public agency must make FAPE available until age 21 or the age limit established by State law, even though the child would not be included as graduating for AYP purposes under the ESEA. In practice, though, there is no conflict between the Act and the ESEA, as the Department interprets the ESEA title I regulations to permit States to propose a method for accurately accounting for students who legitimately take longer than the standard number of years to graduate.

Changes: None.

Residential Placement: (§ 300.104)

Comment: A few commenters requested that the regulations clarify that parents cannot be held liable for any costs if their child with a disability is placed in a residential setting by a public agency in order to provide FAPE to the child.

Discussion: Section 300.104, consistent with section 612(a)(1) and (a)(10)(B) of the Act, is a longstanding provision that applies to placements that are made by public agencies in public and private institutions for educational purposes and clarifies that parents are not required to bear the costs of a public or private residential placement if such placement is determined necessary to provide FAPE. If a public agency determines in an individual situation that a child with a disability cannot receive FAPE from the programs that the public agency conducts and, therefore, placement in a public or private residential program is necessary to provide special education and related services to the child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

In situations where a child's educational needs are inseparable from the child's emotional needs and an individual determination is made that the child requires the therapeutic and habilitation services of a residential program in order to "benefit from special education," these therapeutic and habilitation services may be "related services" under the Act. In

such a case, the SEA is responsible for ensuring that the entire cost of that child's placement, including the therapeutic care as well as room and board, is without cost to the parents. However, the SEA is not responsible for providing medical care. Thus, visits to a doctor for treatment of medical conditions are not covered services under Part B of the Act and parents may be responsible for the cost of the medical care.

Changes: None.

Assistive Technology (§ 300.105)

Comment: One commenter recommended removing § 300.105 and including the requirements in this section in the definition of *assistive technology device* in § 300.5 and *assistive technology service* in § 300.6.

Discussion: Section 300.5 and § 300.6 define the terms *assistive technology device* and *assistive technology service*, respectively. Section 300.105 is not part of the definition of these terms, but rather is necessary to specify the circumstances under which public agencies are responsible for making available assistive technology devices and assistive technology services to children with disabilities.

Changes: None.

Comment: A few commenters requested clarifying in § 300.105(b) whether hearing aids are included in the definition of an *assistive technology device*.

Discussion: An *assistive technology device*, as defined in § 300.5, means any item, piece of equipment, or product system that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The decision of whether a hearing aid is an assistive technology device is a determination that is made on an individual basis by the child's IEP Team. However, even if the IEP Team determines that a hearing aid is an *assistive technology device*, within the meaning of § 300.5, for a particular child, the public agency is responsible for the provision of the assistive technology device as part of FAPE, only if, as specified in § 300.105, the device is required as part of the child's *special education* defined in § 300.39, *related services* defined in § 300.34, or *supplementary aids and services* defined in § 300.42.

As a general matter, public agencies are not responsible for providing personal devices, such as eyeglasses or hearing aids that a child with a disability requires, regardless of whether the child is attending school. However, if it is not a surgically implanted device and a child's IEP

Team determines that the child requires a personal device (e.g., eyeglasses) in order to receive FAPE, the public agency must ensure that the device is provided at no cost to the child's parents.

Changes: None.

Comment: One commenter recommended adding language to § 300.105(b) to include, in addition to hearing aids, other hearing enhancement devices, such as a cochlear implant.

Discussion: Section 300.105(b), as proposed, requires a public agency to ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly. This is a longstanding requirement and was included pursuant to a House Committee Report on the 1978 appropriations bill (H. Rpt. No. 95-381, p. 67 (1977)) directing the Department to ensure that children with hearing impairments are receiving adequate professional assessment, follow-up, and services. The Department believes that, given the increase in the number of children with disabilities with surgically implanted devices (e.g., cochlear implants, vagus nerve stimulators, electronic muscle stimulators), and rapid advances in new technologies to help children with disabilities, it is important that these regulations clearly address any obligation public agencies have to provide follow-up and services to ensure that such devices are functioning properly.

Section 602(1) of the Act clarifies that the definition of *assistive technology device* does not include a medical device that is surgically implanted or the replacement of such device. Section 602(26) of the Act also stipulates that only medical services that are for diagnostic and evaluative purposes and required to assist a child with a disability to benefit from special education are considered a *related service*. We believe Congress was clear in its intent in S. Rpt. 108-185, p. 8, which states:

[T]he definitions of "assistive technology device" and "related services" do not include a medical device that is surgically implanted, or the post-surgical maintenance, programming, or replacement of such device, or an external device connected with the use of a surgically implanted medical device (other than the costs of performing routine maintenance and monitoring of such external device at the same time the child is receiving other services under the act).

The Department believes, however, that public agencies have an obligation to change a battery or routinely check an external component of a surgically

implanted medical device to make sure it is turned on and operating. However, mapping a cochlear implant (or paying the costs associated with mapping) is not routine checking as described above and should not be the responsibility of a public agency. We will add language to the regulations to clarify a public agency's responsibility regarding the routine checking of external components of surgically implanted medical devices.

Changes: A new § 300.113 has been added with the heading, "Routine checking of hearing aids and external components of surgically implanted medical devices." Section 300.105(b), regarding the proper functioning of hearing aids, has been removed and redesignated as new § 300.113(a). We have added a new paragraph (b) in new § 300.113 clarifying that, for a child with a surgically implanted medical device who is receiving special education and related services under this part, a public agency is responsible for routine checking of external components of surgically implanted medical devices, but is not responsible for the post-surgical maintenance, programming, or replacement of a medical device that has been surgically implanted (or of an external component of a surgically implanted medical device).

The provisions in § 300.105 have been changed to conform with the other changes to this section and the phrase "proper functioning of hearing aids" has been removed from the heading.

Extended School Year Services (§ 300.106)

Comment: Several commenters recommended removing § 300.106 because the requirement to provide extended school year (ESY) services to children with disabilities is not required in the Act.

Discussion: The requirement to provide ESY services to children with disabilities who require such services in order to receive FAPE reflects a longstanding interpretation of the Act by the courts and the Department. The right of an individual child with a disability to receive ESY services is based on that child's entitlement to FAPE under section 612(a)(1) of the Act. Some children with disabilities may not receive FAPE unless they receive necessary services during times when other children, both disabled and nondisabled, normally would not be served. We believe it is important to retain the provisions in § 300.106 because it is necessary that public agencies understand their obligation to ensure that children with disabilities

who require ESY services in order to receive FAPE have the necessary services available to them, and that individualized determinations about each disabled child's need for ESY services are made through the IEP process.

Changes: None.

Comment: One commenter stated that the ESY requirements in § 300.106 should not be included as part of the State eligibility requirements and would be more appropriately included in the definition of FAPE in § 300.17.

Discussion: The definition of FAPE in § 300.17 is taken directly from section 602(9) of the Act. We believe the ESY requirements are appropriately included under the FAPE requirements as a part of a State's eligibility for assistance under Part B of the Act because the right of an individual child with a disability to ESY services is based on a child's entitlement to FAPE. As a part of the State's eligibility for assistance under Part B of the Act, the State must make FAPE available to all children with disabilities residing in the State in mandated age ranges.

Changes: None.

Comment: One commenter recommended removing the word "only" in § 300.106(a)(2) because it is unduly limiting.

Discussion: The inclusion of the word "only" is intended to be limiting. ESY services must be provided "only" if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child. We do not think this language is overly restrictive; instead, we think it is necessary for providing appropriate parameters to the responsibility of the IEP Team.

Changes: None.

Comment: A few commenters suggested revising § 300.106(a)(3)(i) to specifically state that, in addition to particular categories of disabilities, public agencies may not limit ESY services to particular age ranges. Other commenters proposed adding "preschooler with a disability" to the definition of ESY services in § 300.106(b)(1).

Discussion: The revisions recommended by the commenters are not necessary. Section 300.106(a) clarifies that each public agency must ensure that ESY services are available for children with disabilities if those services are necessary for the children to receive FAPE. Section 300.101(a) clearly states that FAPE must be available to all children aged 3 through 21, inclusive, residing in the State, except for children ages 3, 4, 5, 18, 19, 20, or 21 to the

extent that its application to those children would be inconsistent with State law or practice, or the order of any court, regarding the provision of public education to children of those ages. We do not believe any further clarification is necessary.

Changes: None.

Comment: One commenter requested that language be added to § 300.106(b)(1)(i) to clarify that providing ESY services to a child with a disability beyond the normal school year includes, but is not limited to, before and after regular school hours, on weekends, and during regular school vacations.

Discussion: Typically, ESY services are provided during the summer months. However, there is nothing in § 300.106 that would limit a public agency from providing ESY services to a child with a disability during times other than the summer, such as before and after regular school hours or during school vacations, if the IEP Team determines that the child requires ESY services during those time periods in order to receive FAPE. The regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child.

Changes: None.

Comment: One commenter suggested adding language to § 300.106 clarifying that "recoupment and retention" should not be used as the sole criteria for determining the child's eligibility for ESY services.

Discussion: We do not believe the commenter's suggested change should be made. The concepts of "recoupment" and "likelihood of regression or retention" have formed the basis for many standards that States use in making ESY eligibility determinations and are derived from well-established judicial precedents. (See, for example, *Johnson v. Bixby Independent School District 4*, 921 F.2d 1022 (10th Cir. 1990); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983); *GARC v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983)). States may use recoupment and retention as their sole criteria but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations. However, whatever standard a State uses must be consistent with the individually-oriented requirements of the Act and may not limit eligibility for ESY services to children with a particular disability category or be applied in a manner that denies children with disabilities who

require ESY services in order to receive FAPE access to necessary ESY services.
Changes: None.

Nonacademic Services (§ 300.107)

Comment: One commenter recommended adding more specific language in § 300.107 regarding services and accommodations available for nonacademic activities to ensure that children with disabilities are fully included in nonacademic activities.

Discussion: We agree with the commenter. Section 300.107(a), as proposed, requires public agencies to take steps to provide nonacademic and extracurricular services and activities in a manner necessary to afford children with disabilities an equal opportunity to participate in those services and activities. In addition, § 300.320(a)(4)(ii), consistent with section 614(d)(1)(i)(IV)(bb) of the Act, clarifies that an IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the child to participate in extracurricular and other nonacademic activities. We will add language in § 300.107(a) to clarify that the steps taken by public agencies to provide access to nonacademic and extracurricular services and activities include the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team.

Changes: Additional language has been added in § 300.107(a) to clarify that the steps taken by public agencies to provide access to nonacademic and extracurricular services and activities include the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team.

Comment: One commenter expressed concern about including "nonacademic services" in § 300.107, because it is not in the Act. The commenter stated that services such as athletics, recreational activities and clubs, counseling, transportation and health services should not be included in the regulations because they may be costly and are usually available on a limited basis. One commenter stated that it is confusing to include related services in the examples of nonacademic services and recommended that they be removed.

Discussion: The list of nonacademic and extracurricular services and activities in § 300.107(b) is not exhaustive. The list provides public agencies with examples of services and activities that may afford children with disabilities an equal opportunity for participation in the services offered to

other children of the public agency. We disagree that the list of activities causes confusion with related services, as we think that the public can easily recognize the difference between academic counseling services, for example, that are offered to all children, and the type of counseling services that might be included in a child's IEP as a related service. For these reasons, we believe it is appropriate to maintain the list of nonacademic and extracurricular services and activities in § 300.107, including those services that are also *related services* in § 300.34.

Changes: None.

Physical Education (§ 300.108)

Comment: A few commenters stated that, in some States, physical education is not required for every nondisabled child every year and this creates situations in which children with disabilities are in segregated physical education classes. The commenters recommended that the regulations clarify the requirements for public agencies to make physical education available to children with disabilities when physical education is not available to children without disabilities.

Discussion: Section 300.108 describes two considerations that a public agency must take into account to meet the physical education requirements in this section. First, physical education must be made available equally to children with disabilities and children without disabilities. If physical education is not available to all children (*i.e.*, children with and without disabilities), the public agency is not required to make physical education available for children with disabilities (*e.g.*, a district may provide physical education to all children through grade 10, but not to any children in their junior and senior years). Second, if physical education is specially designed to meet the unique needs of a child with a disability and is set out in that child's IEP, those services must be provided whether or not they are provided to other children in the agency.

This is the Department's longstanding interpretation of the requirements in § 300.108 and is based on legislative history that the intent of Congress was to ensure equal rights for children with disabilities. The regulation as promulgated in 1977 was based on an understanding that physical education was available to all children without disabilities and, therefore, must be made available to all children with disabilities. As stated in H. Rpt. No. 94-332, p. 9, (1975):

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

We agree that § 300.108(a) could be interpreted to mean that physical education must be made available to all children with disabilities, regardless of whether physical education is provided to children without disabilities. We will, therefore, revise paragraph (a) to clarify that the public agency has no obligation to provide physical education for children with disabilities if it does not provide physical education to nondisabled children attending their schools.

Changes: Section 300.108(a) has been revised as described in the preceding paragraph.

Full Education Opportunity Goal (FEOG) (§ 300.109)

Comment: One commenter requested that the regulations clarify how a State communicates and monitors the progress of the State's FEOG.

Discussion: We do not believe it is appropriate to regulate how a State communicates and monitors its progress toward the State's FEOG. We believe the State should have the flexibility needed to implement the provisions of this section and the State is in the best position to make this determination.

Changes: None.

Program Options (§ 300.110)

Comment: A few commenters recommended revising § 300.110 to require States to ensure that each public agency have in effect policies, procedures, and programs to provide children with disabilities the variety of educational programs and services available to nondisabled children. The commenters stated that § 300.110 does not provide any guidance to educators. A few commenters stated that "vocational education is an outdated term" and proposed replacing it with "career-technical and adult education" or "career and technical education."

Discussion: We do not believe it is necessary to change § 300.110. Under this provision, States must ensure that public agencies take steps to ensure that children with disabilities have access to the same program options that are available to nondisabled children in the area served by the agency, whatever those options are, and we are not aware of any implementation problems with

this requirement. We believe that it is important that educators understand that children with disabilities must have access to the same range of programs and services that a public agency provides to nondisabled children and that the regulation conveys this point. We also do not believe it is necessary to replace the term “vocational education” with the language recommended by the commenter. The term is broad in its meaning and generally accepted and understood in the field and, therefore, would encompass such areas as “career-technical” and “technical education.”

Changes: None.

Comment: Several commenters requested that the regulations explicitly state that a child with a disability who has not yet received a regular high school diploma or “aged out” of special education may participate in dual enrollment programs and receive services in a postsecondary or community-based setting if the IEP Team decides it is appropriate.

Discussion: Section 300.110, consistent with section 612(a)(2) of the Act, requires States to ensure that public agencies take steps to ensure that children with disabilities have access to the same program options that are available to nondisabled children in the area served by the agency. This would apply to dual enrollment programs in post-secondary or community-based settings. Therefore, a State would be responsible for ensuring that a public agency that offered dual enrollment programs in post-secondary or community-based settings to a nondisabled student would have that option available to a student with disabilities whose IEP Team determined that such a program would best meet the student’s needs. However, we do not believe that the Act requires public agencies to provide dual enrollment programs in post-secondary or community-based settings for students with disabilities, if such programs are not available to nondisabled secondary school students. Therefore, we are not modifying the regulations.

Changes: None.

Child Find (§ 300.111)

Comment: Several commenters expressed confusion about the child find requirements in § 300.111 and the parental consent requirements in § 300.300, and requested clarification on whether child find applies to private school children and whether LEAs may use the consent override procedures for children with disabilities enrolled in private schools. Two commenters requested that § 300.111(a)(1)(i) specify that child find does not apply to private

school children whose parents refuse consent.

Discussion: This issue is addressed in the *Analysis of Comments and Changes* section for subpart D in response to comments on § 300.300.

Changes: None.

Comment: One commenter recommended retaining current § 300.125(b) to ensure that the child find requirements are retained for parentally-placed private school children.

Discussion: Current § 300.125(b) was removed from these regulations because, under the Act, States are no longer required to have State policies and procedures on file with the Secretary. Furthermore, the Department believes the requirements in §§ 300.111 and 300.131 adequately ensure that parentally-placed private school children are considered in the child find process.

Changes: None.

Comment: One commenter requested a definition of the term “private school,” as used in § 300.111.

Discussion: The term “private school” as used in § 300.111 means a private elementary school or secondary school, including a religious school. The terms elementary school and secondary school are defined in subpart A of these regulations. The term *private* is defined in 34 CFR Part 77, which applies to this program, and we see no need to include those definitions here.

Changes: None.

Comment: One commenter requested that the child find requirements in § 300.111(c)(2) include homeless children.

Discussion: Homeless children are already included in the child find requirements. Section 300.111(a)(1)(i) clarifies that the State must have policies and procedures to ensure that children with disabilities who are homeless and who are in need of special education and related services, are identified, located, and evaluated. No further clarification is needed.

Changes: None.

Comment: A few commenters recommended including in § 300.111 the requirements in current § 300.125(c), regarding child find for children from birth through age two when the SEA and lead agency for the Part C program are different. The commenters stated that this will ensure that children with disabilities from birth through age two are eligible to participate in child find activities when the Part C lead agency is not the SEA.

Discussion: The Department does not believe it is necessary to retain the language in current § 300.125(c). The child find requirements in § 300.111

have traditionally been interpreted to mean identifying and evaluating children beginning at birth. While child find under Part C of the Act overlaps, in part, with child find under Part B of the Act, the coordination of child find activities under Part B and Part C is an implementation matter that is best left to each State. Nothing in the Act or these regulations prohibits a Part C lead agency’s participation, with the agreement of the SEA, in the actual implementation of child find activities for infants and toddlers with disabilities.

Changes: None.

Comment: One commenter recommended removing § 300.111(c) because child find for children with developmental delays, older children progressing from grade to grade, and highly mobile children is not specifically required by the Act.

Discussion: The changes requested by the commenter cannot be made because they are inconsistent with the Act. Section 300.111(a)(1)(i), consistent with section 612(a)(3)(A) of the Act, explicitly requires that *all* children with disabilities residing in the State are identified, located, and evaluated. This includes children suspected of having developmental delays, as defined in section 602(3)(B) of the Act. We recognize that it is difficult to locate, identify, and evaluate highly mobile and migrant children with disabilities. However, we strongly believe it is important to stress in these regulations that the States’ child find responsibilities in § 300.111 apply equally to such children. We also believe it is important to clarify that a child suspected of having a disability but who has not failed, is making academic progress, and is passing from grade to grade must be considered in the child find process as any other child suspected of having a disability. As noted earlier in the discussion regarding § 300.101, paragraph (c)(1) of § 300.111 has been revised to clarify that children do not have to fail or be retained in a course or grade in order to be considered for special education and related services.

Changes: None.

Comment: One commenter requested that § 300.111 explicitly require that children in residential facilities be included in the public agency’s child find process.

Discussion: We believe § 300.111(a), consistent with section 612(a)(3)(A) of the Act, clarifies that the State must ensure that all children with disabilities residing in the State are identified, located, and evaluated. This would

include children in residential facilities. No further clarification is necessary.

Changes: None.

Individualized Education Programs (IEP) (§ 300.112)

Comment: One commenter objected to including the reference to § 300.300(b)(3)(ii) in § 300.112, stating that it is not necessary to ensure compliance with the requirement for an IEP or IFSP to be developed, reviewed, and revised for each child with a disability.

Discussion: Section 300.300(b)(3)(ii) states that if a parent refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency is not required to convene an IEP meeting or develop an IEP for the child. It is necessary to include this reference in § 300.112 to clarify the circumstances under which a public agency is not required to develop an IEP for an eligible child with a disability.

Changes: None.

Routine Checking of Hearing Aids and External Components of Surgically Implanted Medical Devices (§ 300.113)

Comment: None.

Discussion: New § 300.113 is addressed in the *Analysis of Comments and Changes* section for subpart A in response to comments on § 300.34(b).

Changes: We have added new § 300.113 to cover the routine checking of hearing aids and external components of surgically implanted medical 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).

Least Restrictive Environment (LRE)

LRE Requirements (§ 300.114)

Comment: One commenter recommended including language in the regulations that respects and safeguards parental involvement and protects the rights of children with disabilities to be educated in the least restrictive environment (LRE).

Discussion: We believe that the LRE requirements in §§ 300.114 through

300.120 address the rights of children with disabilities to be educated in the LRE, as well as safeguard parental rights. Section 300.114, consistent with section 612(a)(5) of the Act, requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. Further, § 300.116 ensures that a child's parent is included in the group of persons making the decision about the child's placement.

Changes: None.

Comment: A number of comments were received regarding § 300.114(a)(2)(ii), which requires each public agency to ensure that the removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that the education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Many commenters recommended replacing "regular educational environment" with "regular classroom" because "regular classroom" is less likely to be misinterpreted to mean any kind of contact with children without disabilities. A few commenters expressed concern that using the phrase "regular educational environment" weakens the LRE protections. Another commenter recommended the regulations clarify that the "regular educational environment" means the participation of children with disabilities with their nondisabled peers in regular classrooms and other educational settings including nonacademic settings.

Discussion: Section 300.114(a)(2)(ii) follows the specific language in section 612(a)(5)(A) of the Act and reflects previous regulatory language. This requirement is longstanding. We do not believe the language should be revised, as recommended by the commenters, because "regular educational environment" encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate.

Changes: None.

Comment: One commenter requested revising § 300.114(a)(2) to require a public agency to document and justify placements of children with disabilities in environments outside the general education classroom.

Discussion: The additional language requested by the commenter is not necessary and would impose unwarranted paperwork burdens on schools. Section 300.320(a)(5), consistent with section

614(d)(1)(A)(i)(V) of the Act, already requires a child's IEP to include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. As noted previously, parents are a part of the group making placement decisions. We believe these provisions provide sufficient safeguards on the placement process.

Changes: None.

Comment: One commenter stated that the LRE requirements are often misinterpreted to be a mandate to include all children who are deaf or hard of hearing in their local schools. The commenter stated that the placement decision for a child who is deaf or hard of hearing should be based on the child's communication needs and must be the environment that presents the fewest language and communication barriers to the child's cognitive, social, and emotional development. Some commenters cautioned that inclusive settings might be inappropriate for a child who is deaf and who requires communication support and stated that the LRE should be the place where a child can be educated successfully. A few commenters requested the regulations clarify that all placement options must remain available for children who are deaf.

One commenter recommended strengthening the requirement for a continuum of alternative placements and stated that a full range of placement options is necessary to meet the needs of all children with visual impairments. Another commenter urged the Department to ensure that children with low-incidence disabilities (including children who are deaf, hard of hearing, or deaf-blind) have access to appropriate educational programming and services at all times, including center-based schools, which may be the most appropriate setting for children with low-incidence disabilities.

Discussion: The LRE requirements in §§ 300.114 through 300.117 express a strong preference, not a mandate, for educating children with disabilities in regular classes alongside their peers without disabilities. Section 300.114(a)(2), consistent with section 612(a)(5)(A) of the Act, requires that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and

services cannot be achieved satisfactorily.

With respect to the recommendation that the placement for children who are deaf or hard of hearing be based on the child's communication needs, § 300.324(a)(2)(iv), consistent with section 614(d)(3)(B)(iv) of the Act, clarifies that the IEP Team, in developing the IEP for a child who is deaf or hard of hearing, must consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, and the child's academic level and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

With respect to strengthening the continuum of alternative placement requirements, nothing in the LRE requirements would prevent an IEP Team from making a determination that placement in the local school is not appropriate for a particular child. Section 300.115 already requires each public agency to ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. We believe this adequately addresses the commenter's concern.

The process for determining the educational placement for children with low-incidence disabilities (including children who are deaf, hard of hearing, or deaf-blind) is the same process used for determining the educational placement for all children with disabilities. That is, each child's educational placement must be determined on an individual case-by-case basis depending on each child's unique educational needs and circumstances, rather than by the child's category of disability, and must be based on the child's IEP. We believe the LRE provisions are sufficient to ensure that public agencies provide low-incidence children with disabilities access to appropriate educational programming and services in the educational setting appropriate to meet the needs of the child in the LRE.

Changes: None.

Comment: One commenter requested that the regulations clarify that children with disabilities who are suspended or expelled from school are entitled to be educated with children who are not disabled. The commenter stated that this clarification is necessary to reduce the use of home instruction as a placement option for these children.

Discussion: The Act does not require that children with disabilities

suspended or expelled for disciplinary reasons continue to be educated with children who are not disabled during the period of their removal. We believe it is important to ensure that children with disabilities who are suspended or expelled from school receive appropriate services, while preserving the flexibility of school personnel to remove a child from school, when necessary, and to determine how best to address the child's needs during periods of removal and where services are to be provided to the child during such periods of removals, including, if appropriate, home instruction. Sections 300.530 through 300.536 address the options available to school authorities in disciplining children with disabilities and set forth procedures that must be followed when taking disciplinary actions and in making decisions regarding the educational services that a child will receive and the location in which services will be provided. We believe including the language recommended by the commenter would adversely restrict the options available to school personnel for disciplining children with disabilities and inadvertently tie the hands of school personnel in responding quickly and effectively to serious child behaviors and in creating safe classrooms for all children.

Changes: None.

Additional Requirement—State Funding Mechanism (§ 300.114(b))

Comment: One commenter stated that § 300.114(b) does not adequately address the requirements for funding mechanisms relative to the LRE requirements and requested that note 89 of the Conf. Rpt. be included in the regulations.

Discussion: Section 300.114(b) incorporates the language from section 612(a)(5)(B) of the Act and prohibits States from maintaining funding mechanisms that violate the LRE provisions. We do not believe it is necessary to provide additional clarification in the regulations. While we agree with the commenter that note 89 of the Conf. Rpt. makes clear Congress' intent that State funding mechanisms support the LRE requirements and do not provide an incentive or disincentive for certain placement decisions, we believe the requirements in § 300.114(b) accurately capture the essence of the Conf. Rpt. and including additional language in this paragraph is not needed.

Changes: None.

Comment: One commenter urged the Department to impose financial sanctions on States that continue to base

their funding on certain placement decisions. A few commenters suggested changing the requirement in § 300.114(b)(2) for States to provide an assurance that the State will revise its funding mechanism "as soon as feasible" to "no later than the start of the 2006–2007 school year."

Discussion: Section 300.114(b)(2) incorporates the language in section 612(a)(5)(B)(ii) of the Act, and requires that if a State does not have policies and procedures to ensure that the State's funding mechanism does not violate the LRE requirements, the State must provide the Secretary an assurance that the State will revise its funding mechanism as soon as feasible. We do not believe it is necessary to include in these regulations a specific timeline for a State to revise its funding mechanism, if required to do so pursuant to 300.114(b)(2). We believe the statutory language "as soon as feasible," while providing flexibility as to how each State meets the requirement, is sufficient to ensure States' compliance with this requirement.

Further, we believe the enforcement options in § 300.604 give the Secretary sufficient means to address a State's noncompliance with the requirements in § 300.114(b)(2). Section 300.604 describes the enforcement options available to the Secretary if the Secretary determines that a State needs assistance or intervention implementing the requirements of Part B of the Act, or that there is a substantial failure to comply with any condition of an SEA's or LEA's eligibility under Part B of the Act. Enforcement options available to the Secretary include, among others, recovery of funds or withholding, in whole or in part, any further payments to the State under Part B of the Act.

Changes: None.

Continuum of Alternative Placements (§ 300.115)

Comment: One commenter recommended revising § 300.115 so that only the specific allowable alternative settings listed in the definition of *special education* in new § 300.39 (proposed § 300.38) (i.e., classroom, home, hospitals, institutions) are permitted.

Discussion: Section 300.115 requires each public agency to ensure that a continuum of alternative placements (including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) is available to meet the needs of children with disabilities for special education and related services. The list of placement options in this section only expands the settings

mentioned in new § 300.39 (proposed § 300.38) by recognizing the various types of classrooms and settings for classrooms in which special education is provided. This continuum of alternative placements is intended to ensure that a child with a disability is served in a setting where the child can be educated successfully in the LRE.

Changes: None.

Comment: One commenter suggested adding language to the regulations to clarify that difficulty recruiting and hiring qualified special education teachers does not relieve an LEA of its obligation to ensure a continuum of alternative placements and to offer a full range of services to meet the needs of children with disabilities.

Discussion: We do not believe it is necessary to include the language suggested by the commenter, because § 300.116 is sufficiently clear that placement decisions must be based on the individual needs of each child with a disability. Public agencies, therefore, must not make placement decisions based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff.

Changes: None.

Comment: A few commenters recommended revising § 300.115(a) to clarify that the continuum of alternative placements must be available to eligible preschool children with disabilities.

Discussion: It is not necessary to revise § 300.115(a) in the manner suggested by the commenters. Section 300.116 clearly states that the requirements for determining the educational placement of a child with a disability include preschool children with disabilities and that such decisions must be made in conformity with the LRE provisions in §§ 300.114 through 300.118. This includes ensuring that a continuum of services is available to meet the needs of children with disabilities for special education and related services.

Changes: None.

Placements (§ 300.116)

Comment: One commenter recommended the regulations clarify that the regular class must always be considered the first placement option.

Discussion: We do not believe it is necessary to include the clarification recommended by the commenter. Section 300.116 clarifies that placement decisions must be made in conformity with the LRE provisions, and § 300.114(a)(2) already requires that special classes, separate schooling or other removal of children with

disabilities from the regular education environment only occurs if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Changes: None.

Comment: A few commenters recommended revising § 300.116 to require that children with disabilities have access to, and make progress in, the general curriculum, and that children receive the special education and related services included in their IEPs.

Discussion: The issues raised by the commenters are already addressed elsewhere in the regulations. The IEP requirements in § 300.320(a), consistent with section 614(d) of the Act, clarify that children with disabilities must be provided special education and related services and needed supplementary aids and services to enable them to be involved in and make progress in the general curriculum. In addition, § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child's IEP. We believe that these regulations adequately address the commenters' concerns, and that no further clarification is necessary.

Changes: None.

Comment: One commenter stated that the placement requirements in § 300.116 encourage school districts to assign a child with a disability to a particular place or setting, rather than providing a continuum of increasingly individualized and intensive services. The commenter suggested requiring that the continuum of alternative placements include a progressively more intensive level of individualized, scientifically based instruction and related services, both with increased time and lower pupil-teacher ratio, in addition to regular instruction with supplementary aids and services.

Discussion: The overriding rule in § 300.116 is that placement decisions for all children with disabilities must be made on an individual basis and ensure that each child with a disability is educated in the school the child would attend if not disabled unless the child's IEP requires some other arrangement. However, the Act does not require that every child with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every child with a disability is reflected in the requirement that LEAs make available a range of placement options, known as a continuum of alternative placements, to

meet the unique educational needs of children with disabilities. This requirement for the continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each child with a disability. The options on this continuum must include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). These options must be available to the extent necessary to implement the IEP of each child with a disability. The group determining the placement must select the placement option on the continuum in which it determines that the child's IEP can be implemented in the LRE. Any alternative placement selected for the child outside of the regular educational environment must include appropriate opportunities for the child to interact with nondisabled peers, to the extent appropriate to the needs of the children, consistent with § 300.114(a)(2)(i).

Because placement decisions must be determined on an individual case-by-case basis depending on each child's unique educational needs and circumstances and based on the child's IEP, we do not believe it is appropriate to require in the regulations that the continuum of alternative placements include a progressively more intensive level of individualized scientifically based instruction and related services as suggested by the commenter.

Changes: None.

Comment: We received a number of comments regarding the phrase, "unless the parent agrees otherwise" in proposed § 300.116(b)(3) and (c). As proposed, § 300.116(b)(3) requires the child's placement to be as close as possible to the child's home, "unless the parent agrees otherwise;" and § 300.116(c) requires that, unless the child's IEP requires some other arrangement, the child must be educated in the school that he or she would attend if nondisabled, "unless the parent agrees otherwise." Many commenters requested removing the phrase "unless the parent agrees otherwise," because it is not included in section 612(a)(5) of the Act and is not necessary to clarify that a parent may place his or her child in a charter, magnet, or other specialized school without violating the LRE requirements. Other commenters suggested removing the phrase and clarifying that a decision by the child's parent to send the child to a charter, magnet, or other specialized

school is not a violation of the LRE requirements.

Several commenters stated that including the phrase undermines the statutory requirement for children with disabilities to be placed in the LRE based on their IEPs and allows more restrictive placements based on parental choice. Many commenters interpreted this phrase to mean that placement is a matter of parental choice even in public school settings and stated that a child's LRE rights should not be overridden by parental choice. One commenter stated that the phrase might intimidate parents into accepting inappropriate placements.

A few commenters stated that this phrase is unnecessary because the Act already requires parents to be involved in placement decisions, and expressed concern that including this phrase in the regulations could lead to confusion and litigation. One commenter stated that the phrase suggests that additional consent is required if the parent chooses to send the child to a charter, magnet, or other specialized school.

Discussion: The phrase "unless the parent agrees otherwise" in proposed § 300.116(b)(3) and (c) was added to clarify that a parent may send the child to a charter, magnet, or other specialized school without violating the LRE mandate. A parent has always had this option; a parent who chooses this option for the child does not violate the LRE mandate as long as the child is educated with his or her peers without disabilities to the maximum extent appropriate. However, we agree that this phrase is unnecessary, confusing, and may be misunderstood to mean that parents have a right to veto the placement decision made by the group of individuals in § 300.116(a)(1). We will, therefore, remove the phrase.

Changes: We have removed the phrase "unless the parent agrees otherwise" in § 300.116(b)(3) and (c).

Comment: One commenter disagreed with the requirement in § 300.116(b)(3) that placements be as close as possible to the child's home, stating that the requirement is administratively prohibitive and beyond the scope of the Act. The commenter stated that it is not possible for school districts to provide classes for children with all types and degrees of disabilities in each school building. The commenter stated that "placement" should be understood as the set of services outlined in a child's IEP, and recommended that school districts be permitted to provide these services in the school building that is most administratively feasible.

Discussion: We do not believe the requirement imposes unduly restrictive

administrative requirements. The Department has consistently maintained that a child with a disability should be educated in a school as close to the child's home as possible, unless the services identified in the child's IEP require a different location. Even though the Act does not mandate that a child with a disability be educated in the school he or she would normally attend if not disabled, section 612(a)(5)(A) of the Act presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a child with a disability can be placed outside of the regular educational environment, the full range of supplementary aids and services that could be provided to facilitate the child's placement in the regular classroom setting must be considered. Following that consideration, if a determination is made that a particular child with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that child could be placed in a setting other than the regular classroom.

Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities, the LEA has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the extent appropriate. In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.

Changes: None.

Comment: One commenter requested clarifying the difference, if any, between "placement" and "location." One commenter recommended requiring the child's IEP to include a detailed explanation of why a child's educational needs cannot be met in the location requested by the parent when the school district opposes the parent's request for services to be provided to the child in the school that the child would attend if the child did not have a disability.

Discussion: Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement. It also should be noted that, under section 615(b)(3) of the Act, a parent must be given written prior notice that meets the requirements of § 300.503 a reasonable time before a public agency implements a proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. Consistent with this notice requirement, parents of children with disabilities must be informed that the public agency is required to have a full continuum of placement options, as well as about the placement options that were actually considered and the reasons why those options were rejected. While public agencies have an obligation under the Act to notify parents regarding placement decisions, there is nothing in the Act that requires a detailed explanation in children's IEPs of why their educational needs or educational placements cannot be met in the location the parents' request. We believe including such a provision would be overly burdensome for school administrators and diminish their flexibility to appropriately assign a child to a particular school or classroom, provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement.

Changes: None.

Comment: One commenter recommended including in the regulations the Department's policy that a child's placement in an educational program that is substantially and materially similar to the former placement is not a change in placement.

Discussion: As stated by the commenter, it is the Department's longstanding position that maintaining a child's placement in an educational

program that is substantially and materially similar to the former placement is not a change in placement. We do not believe further clarification is necessary in the regulations, however, as the distinction seems to be commonly accepted and understood.

Changes: None.

Comment: Many commenters suggested requiring a public agency to pay all costs associated with providing FAPE for a child in a private preschool, including paying for tuition, transportation and such special education, related services and supplementary aids and services as the child needs, if an inclusive preschool is the appropriate placement for a child, and there is no inclusive public preschool that can provide all the appropriate services and supports.

Discussion: The LRE requirements in §§ 300.114 through 300.118 apply to all children with disabilities, including preschool children who are entitled to FAPE. Public agencies that do not operate programs for preschool children without disabilities are not required to initiate those programs solely to satisfy the LRE requirements of the Act. Public agencies that do not have an inclusive public preschool that can provide all the appropriate services and supports must explore alternative methods to ensure that the LRE requirements are met. Examples of such alternative methods might include placement options in private preschool programs or other community-based settings. Paying for the placement of qualified preschool children with disabilities in a private preschool with children without disabilities is one, but not the only, option available to public agencies to meet the LRE requirements. We believe the regulations should allow public agencies to choose an appropriate option to meet the LRE requirements. However, if a public agency determines that placement in a private preschool program is necessary as a means of providing special education and related services to a child with a disability, the program must be at no cost to the parent of the child.

Changes: None.

Comment: One commenter suggested clarifying that if a child's behavior in the regular classroom significantly impairs the learning of the child or others, that placement would not meet the child's needs and would not be appropriate for that child.

Discussion: Although the Act places a strong preference in favor of educating children with disabilities in the regular classroom with appropriate aids and supports, a regular classroom placement is not appropriate for every child with

a disability. Placement decisions are made on a case-by-case basis and must be appropriate for the needs of the child. The courts have generally concluded that, if a child with a disability has behavioral problems that are so disruptive in a regular classroom that the education of other children is significantly impaired, the needs of the child with a disability generally cannot be met in that environment. However, before making such a determination, LEAs must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the child in the regular educational environment to accommodate the unique needs of the child with a disability. If the group making the placement decision determines, that even with the provision of supplementary aids and services, the child's IEP could not be implemented satisfactorily in the regular educational environment, that placement would not be the LRE placement for that child at that particular time, because her or his unique educational needs could not be met in that setting. (*See Roncker v. Walter*, 700 F. 2d 1058 (6th Cir. 1983); *Devries v. Fairfax County School Bd.*, 882 F. 2d 876, 879 (4th Cir. 1989); *Daniel R.R. v. State Bd. of Educ.*, 874 F. 2d 1036 (5th Cir. 1989); and *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 163 (8th Cir. 1987).)

Changes: None.

Nonacademic Settings (§ 300.117)

Comment: One commenter requested that the regulations clarify that children with disabilities should receive the supplementary aids and services necessary to ensure their participation in nonacademic and extracurricular services and activities.

Discussion: Section 300.117, consistent with section 612(a)(5) of the Act, requires that children with disabilities participate in nonacademic and extracurricular services and activities with their nondisabled peers to the maximum extent appropriate to the needs of the child. The Act places great emphasis on ensuring that children with disabilities are educated, to the maximum extent appropriate, with children who are nondisabled and are included in nonacademic and extracurricular services and activities as appropriate to the needs of the child. We believe the public agency has an obligation to provide a child with a disability with appropriate aids, services, and other supports, as determined by the IEP Team, if necessary to ensure the child's participation in nonacademic and extracurricular services and activities.

Therefore, we will clarify in § 300.117 that each public agency must ensure that children with disabilities have the supplementary aids and services determined necessary by the child's IEP Team for the child to participate in nonacademic and extracurricular services and activities to the maximum extent appropriate to the needs of that child.

Changes: We have added language to § 300.117 to ensure that children with disabilities receive the supplementary aids and services needed to participate in nonacademic and extracurricular services and activities.

Technical Assistance and Training Activities (§ 300.119)

Comment: One commenter requested that the regulations define "training."

Discussion: The Department intends the term "training," as used in § 300.119, to have its generally accepted meaning. Training is generally agreed to be any activity used to enhance one's skill or knowledge to acquire, maintain, and advance knowledge, skills, and abilities. Given the general understanding of the term "training," we do not believe it is necessary to regulate on this matter.

Changes: None.

Children in Private Schools

Children With Disabilities Enrolled by Their Parents in Private Schools

General Comments

Comment: Many comments were received regarding the parentally-placed private school children with disabilities requirements in §§ 300.130 through 300.144. Many commenters supported the changes to the regulations and believed the regulations simplify the processes for both private schools and public schools. Numerous commenters, however, expressed concern regarding the implementation of the private school requirements.

Many of the commenters expressed concern with the requirement that the LEAs where private elementary schools and secondary schools are located are now responsible for child find, individual evaluations, and the provision of services for children with disabilities enrolled by their parents in private schools located in the LEA. These commenters described the private school provisions in the Act and the NPRM as burdensome and difficult to understand.

Discussion: The revisions to the Act in 2004 significantly changed the obligation of States and LEAs to children with disabilities enrolled by their parents in private elementary

schools and secondary schools. Section 612(a)(10)(A) of the Act now requires LEAs in which the private schools are located, rather than the LEAs in which the parents of such children reside, to conduct child find and provide equitable services to parentally-placed private school children with disabilities.

The Act provides that, in calculating the proportionate amount of Federal funds under Part B of the Act that must be spent on parentally-placed private school children with disabilities, the LEAs where the private schools are located, after timely and meaningful consultation with representatives of private elementary schools and secondary schools and representatives of parents of parentally-placed private school children with disabilities, must conduct a thorough and complete child find process to determine the number of parentally-placed children with disabilities attending private elementary schools and secondary schools located in the LEAs. In addition, the obligation of the LEA to spend a proportionate amount of funds to provide services to children with disabilities enrolled by their parents in private schools is now based on the total number of children with disabilities who are enrolled in private schools located in the LEA whether or not the children and their parents reside in the LEA.

We believe these regulations and the additional clarification provided in our responses to comments on §§ 300.130 through 300.144 will help States and LEAs to better understand their obligations in serving children with disabilities placed by their parents in private elementary schools and secondary schools. In addition, the Department has provided additional guidance on implementing the parentally-placed private school requirements on the Department's Web site. We also are including in these regulations *Appendix B to Part 300—Proportionate Share Calculation* to assist LEAs in calculating the proportionate amount of Part B funds that they must expend on parentally-placed private school children with disabilities attending private elementary schools and secondary schools located in the LEA.

Changes: We have added a reference to Appendix B in § 300.133(b).

Comment: Several commenters expressed concern that §§ 300.130 through 300.144 include requirements that go beyond the Act and recommended that any requirement beyond what is statutory be removed from these regulations.

Discussion: In general, the regulations track the language in section

612(a)(10)(A) of the Act regarding children enrolled in private schools by their parents. However, we determined that including clarification of the statutory language on parentally-placed private school children with disabilities in these regulations would be helpful. The volume of comments received concerning this topic confirm the need to regulate in order to clarify the statutory language and to help ensure compliance with the requirements of the Act.

Changes: None.

Comment: Some commenters requested that the regulations provide flexibility to States to provide services to parentally-placed private school children with disabilities beyond what they would be able to do with the proportionate share required under the Act. A few of these commenters requested that those States already providing an individual entitlement to special education and related services or providing a full range of special education services to parentally-placed private school children be deemed to have met the requirements in §§ 300.130 through 300.144 and be permitted to continue the State's current practices. One commenter specifically recommended allowing States that provide additional rights or services to parentally-placed private school children with disabilities (including FAPE under section 612 of the Act and the procedural safeguards under section 615 of the Act), the option of requesting that the Secretary consider alternate compliance with these requirements that would include evidence and supporting documentation of alternate procedures under State law to meet all the requirements in §§ 300.130 through 300.144.

A few commenters requested that the child find and equitable participation requirements should not apply in States with dual enrollment provisions where children with disabilities who are parentally-placed in private elementary schools or secondary schools are also enrolled in public schools for special education and have IEPs and retain their due process rights.

Discussion: The Act in no way prohibits States or LEAs from spending additional State or local funds to provide special education or related services for parentally-placed private school children with disabilities in excess of those required in § 300.133 and section 612(a)(10)(A) of the Act, consistent with State law or administrative procedures. The Act, however, does not provide the Secretary with the authority to waive, in whole or in part, the parentally-placed private

school requirements in §§ 300.130 through 300.144 for States or LEAs that spend State or local funds to provide special education or related services beyond those required under Part B of the Act. The Secretary, therefore, cannot consider alternative compliance with the parentally-placed private school provisions in the Act and these regulations or consider States and LEAs that use State and local funds to provide services to parentally-placed private school children with disabilities beyond the required proportionate share of Federal Part B funds, including providing FAPE to such children, to have met the statutory and regulatory requirements governing parentally-placed private school children with disabilities. States and LEAs must meet the requirements in the Act and these regulations.

With regard to the comment requesting that the child find and equitable participation requirements for parentally-placed private school children with disabilities not apply in States with dual enrollment, there is no exception in the Act to the child find and equitable participation requirements of section 612(a)(10)(A) for States that permit dual enrollment of a child at a parent's discretion. Therefore, there is no basis to regulate to provide such an exception. It would be a matter of State or local discretion to decide whether to have a dual enrollment policy and, if established, how it would be implemented. Whether dual enrollment alters the rights of parentally-placed private school children with disabilities under State law is a State matter. There is nothing, however, in Part B of the Act that would prohibit a State from requiring dual enrollment as a condition for a parentally-placed private school child with a disability to be eligible for services from a public agency. As long as States and LEAs meet the requirements in §§ 300.130 through 300.144, the local policy covering enrollment is a matter of State and local discretion.

Changes: None.

Comment: Several commenters expressed concern regarding the applicability of the child find and equitable participation requirements in §§ 300.130 through 300.144 for children with disabilities who reside in one State and are enrolled by their parents in private elementary schools or secondary schools located in another State. These commenters recommended that the regulations clarify whether the LEA in the State where the private elementary school or secondary school is located or the LEA in the State where the child

resides is responsible for conducting child find (including individual evaluations and reevaluations), and providing and paying for equitable services for children who are enrolled by their parents in private elementary schools or secondary schools.

Discussion: Section 612(a)(10)(A)(i)(II) of the Act provides that the LEA where the private elementary schools and secondary schools are located, after timely and meaningful consultation with private school representatives, is responsible for conducting the child find process to determine the number of parentally-placed children with disabilities attending private schools located in the LEA. We believe this responsibility includes child find for children who reside in other States but who attend private elementary schools and secondary schools located in the LEA, because section 612(a)(10)(A)(i)(II) of the Act is clear about which LEA is responsible for child find and the Act does not provide an exception for children who reside in one State and attend private elementary schools and secondary schools in other States.

Under section 612(a)(10)(A)(i) of the Act, the LEA where the private elementary schools and secondary schools are located, in consultation with private school officials and representatives of parents of parentally-placed private school children with disabilities, also is responsible for determining and paying for the services to be provided to parentally-placed private school children with disabilities. We believe this responsibility extends to children from other States who are enrolled in a private school located in the LEA, because section 612(a)(10)(A)(i) of the Act clarifies that the LEA where the private schools are located is responsible for spending a proportionate amount of its Federal Part B funds on special education and related services for children enrolled by their parents in the private schools located in the LEA. The Act does not provide an exception for out-of-State children with disabilities attending a private school located in the LEA and, therefore, out-of-State children with disabilities must be included in the group of parentally-placed children with disabilities whose needs are considered in determining which parentally-placed private school children with disabilities will be served and the types and amounts of services to be provided.

Changes: We have added a new paragraph (f) to § 300.131 clarifying that each LEA where private, including religious, elementary schools and secondary schools are located must, in

carrying out the child find requirements in this section, include parentally-placed private school children who reside in the State other than where the private schools they attend are located.

Comment: A few commenters recommended the regulations clarify the LEA's obligation under §§ 300.130 through 300.144 regarding child find and equitable participation for children from other countries enrolled in private elementary schools and secondary schools by their parents.

Discussion: The obligation to consider children with disabilities for equitable services extends to all children with disabilities in the State who are enrolled by their parents in private schools within each LEA's jurisdiction.

Changes: None.

Comment: Several commenters recommended the regulations clarify the applicability of the child find and equitable participation requirements in §§ 300.130 through 300.144 for children with disabilities, aged three through five, enrolled by their parents in private preschools or day care programs. Many commenters recommended the regulations clarify that preschool children with disabilities should be counted in determining the proportionate share of funds available to serve children enrolled in private elementary schools by their parents.

Discussion: If a private preschool or day care program is considered an elementary school, as defined in § 300.13, the child find and equitable services participation requirements in §§ 300.130 through 300.144, consistent with section 612(a)(10) of the Act, apply to children with disabilities aged three through five enrolled by their parents in such programs. Section 300.13, consistent with section 602(6) of the Act, defines an *elementary school* as a nonprofit institutional day or residential school, including a public elementary charter school, which provides elementary education, as determined under State law. We believe it is important to clarify in the regulations that children aged three through five are considered parentally-placed private school children with disabilities enrolled in private elementary schools only if they are enrolled in private schools that meet the definition of *elementary school* in § 300.13.

Changes: We have added a new § 300.133(a)(2)(ii) to clarify that children aged three through five are considered to be parentally-placed private school children with disabilities enrolled by their parents in private, including religious, elementary schools, if they are enrolled in a private school that meets

the definition of *elementary school* in § 300.13.

Definition of Parentally-Placed Private School Children With Disabilities (§ 300.130)

Comment: A few commenters recommended removing "or facilities" from the definition of parentally-placed private school children because it is not defined in the Act or the regulations. Another commenter recommended including a definition of "facilities."

Discussion: Under section 612(a)(10)(A) of the Act, the obligation to conduct child find and provide equitable services extends to children who are enrolled by their parents in private elementary schools and secondary schools. This obligation also applies to children who have been enrolled by their parents in private facilities if those facilities are elementary schools or secondary schools, as defined in subpart A of the regulations. Because facilities that meet the definition of elementary school or secondary school are covered under this section, we believe it is important to retain the reference to facilities in these regulations. We will, however, revise § 300.130 to clarify that children with disabilities who are enrolled by their parents in facilities that meet the definition of *elementary school* in § 300.13 or *secondary school* in new § 300.36 (proposed § 300.35) would be considered parentally-placed private school children with disabilities.

Changes: Section 300.130 has been revised to clarify that parentally-placed private school children with disabilities means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of an *elementary school* in § 300.13 or *secondary school* in § 300.36.

Child Find for Parentally-Placed Private School Children With Disabilities (§ 300.131)

Comment: A few commenters recommended permitting the LEA where private schools are located to request reimbursement from the LEA where the child resides for the cost of conducting an individual evaluation, as may be required under the child find requirements in § 300.131.

One commenter recommended that the LEA where private schools are located be responsible for locating and identifying children with disabilities enrolled by their parents in private schools and the LEA where the children reside be responsible for conducting individual evaluations.

Discussion: Section 300.131, consistent with section 612(a)(10)(A)(i) of the Act, requires that the LEA where private elementary schools and secondary schools in which the child is enrolled are located, not the LEA where the child resides, is responsible for conducting child find, including an individual evaluation for a child with a disability enrolled by the child's parent in a private elementary school or secondary school located in the LEA. The Act specifies that the LEA where the private schools are located is responsible for conducting both the child find process and the initial evaluation. Therefore, the LEA where private schools are located may not seek reimbursement from the LEA of residence for the cost of conducting the evaluation or to request that the LEA of residence conduct the evaluation. However, the LEA where the private elementary school or secondary school is located has options as to how it meets its responsibilities. For example, the LEA may assume the responsibility itself, contract with another public agency (including the public agency of residence), or make other arrangements.

Changes: None.

Comment: One commenter recommended permitting a parent who enrolled a child in a private elementary school or secondary school the option of not participating in child find required under § 300.131.

Discussion: New § 300.300(e)(4) clarifies that parents who enroll their children in private elementary schools and secondary schools have the option of not participating in an LEA's child find activities required under § 300.131. As noted in the *Analysis of Comments and Changes* section for subpart D, once parents opt out of the public schools, States and school districts do not have the same interest in requiring parents to agree to the evaluation of their children as they do for children enrolled in public schools, in light of the public agencies' obligation to educate public school children with disabilities. We further indicate in the discussion of subpart D that we have added new § 300.300(e)(4) (proposed § 300.300(d)) to clarify that if the parent of a child who is home schooled or placed in a private school by the child's parent at the parent's own expense does not provide consent for an initial evaluation or reevaluation, the public agency may not use the due process procedures in section 615 of the Act and the public agency is not required to consider the child for equitable services.

Changes: None.

Comment: Several commenters recommended permitting amounts

expended for child find, including individual evaluations, to be deducted from the required amount of funds to be expended on equitable services for parentally-placed private school children with disabilities.

Discussion: The requested changes would be inconsistent with the Act. There is a distinction under the Act between the obligation to conduct child find activities, including individual evaluations, for parentally-placed private school children with disabilities, and the obligation to use an amount of funds equal to a proportionate amount of the Federal Part B grant flowing to LEAs to provide special education and related services to parentally-placed private school children with disabilities. The obligation to conduct child find for parentally-placed private school children, including individual evaluations, is independent of the services provision. Further, § 300.131(d), consistent with section 612(a)(10)(A)(ii)(IV) of the Act, clarifies that the costs of child find activities for parentally-placed private school children, including individual evaluations, may not be considered in determining whether the LEA has spent an appropriate amount on providing special education and related services to parentally-placed private school children with disabilities.

Changes: None.

Comment: One commenter requested clarifying whether an LEA may exclude children suspected of having certain disabilities, such as those with specific learning disabilities, in conducting individual evaluations of suspected children with disabilities enrolled in private schools by their parents.

Discussion: The LEA where the private elementary schools and secondary schools are located must identify and evaluate all children suspected of having disabilities as defined under section 602(3) of the Act. LEAs may not exclude children suspected of having certain disabilities, such as those with specific learning disabilities, from their child find activities. The Department recommends that LEAs and private elementary schools and secondary schools consult on how best to implement the State's evaluation criteria and the requirements under this part for identifying children with specific learning disabilities enrolled in private schools by their parents. This is explained in more detail in the discussion of comments under § 300.307.

Changes: None.

Comment: A few commenters expressed concern that parents who place their children in private

elementary schools and secondary schools outside the district of residence, and who are determined by the LEA where the private schools are located, through its child find process, to be children with disabilities eligible for special education and related services, would have no knowledge of the special education and related services available for their children if they choose to attend a public school in their district of residence. A few commenters suggested clarifying the obligation of the LEA where the private school is located to provide the district of residence the results of an evaluation and eligibility determination of the parentally-placed private school child.

A few commenters recommended that the parent of a child with a disability identified through the child find process in § 300.131 be provided with information regarding an appropriate educational program for the child.

Discussion: The Act is silent on the obligation of officials of the LEA where private elementary schools and secondary schools are located to share personally identifiable information, such as individual evaluation information, with officials of the LEA of the parent's residence. We believe that the LEA where the private schools are located has an obligation to protect the privacy of children placed in private schools by their parents. We believe that when a parentally-placed private school child is evaluated and identified as a child with a disability by the LEA in which the private school is located, parental consent should be required before such personally identifiable information is released to officials of the LEA of the parent's residence. Therefore, we are adding a new paragraph (b)(3) to § 300.622 to make this clear. We explain this revision in more detail in the discussion of comments under § 300.622.

We believe the regulations adequately ensure that parents of children enrolled in private schools by their parents, who are identified as children with disabilities through the child find process, receive information regarding an appropriate educational program for their children. Section 300.138(b) provides that each parentally-placed private school child with a disability who has been designated to receive equitable services must have a services plan that describes the specific education and related services that the LEA where the private school is located has determined it will make available to the child and the services plan must, to the extent appropriate, meet the IEP content, development, review and revision requirements described in

section 614(d) of the Act, or, when appropriate, for children aged three through five, the IFSP requirements described in section 636(d) of the Act as to the services that are to be provided.

Furthermore, the LEA where the private school is located must, pursuant to § 300.504(a) and section 615(d) of the Act, provide the parent a copy of the procedural safeguards notice upon conducting the initial evaluation.

Changes: We have added a new paragraph (b)(3) to § 300.622 to require parental consent for the disclosure of records of parentally-placed private school children between LEAs.

Comment: A few commenters stated that § 300.131 does not address which LEA has the responsibility for reevaluations.

Discussion: The LEA where the private schools are located is responsible for conducting reevaluations of children with disabilities enrolled by their parents in private elementary schools and secondary schools located within the LEA. Reevaluation is a part of the LEA's child find responsibility for parentally-placed private school children under section 612(a)(10)(A) of the Act.

Changes: None.

Comment: One commenter expressed concern that the regulations permit a parent to request an evaluation from the LEA of residence at the same time the child is being evaluated by the LEA where the private elementary school or secondary school is located, resulting in two LEAs simultaneously conducting evaluations of the same child.

Discussion: We recognize that there could be times when parents request that their parentally-placed child be evaluated by different LEAs if the child is attending a private school that is not in the LEA in which they reside. For example, because most States generally allocate the responsibility for making FAPE available to the LEA in which the child's parents reside, and that could be a different LEA from the LEA in which the child's private school is located, parents could ask two different LEAs to evaluate their child for different purposes at the same time. Although there is nothing in this part that would prohibit parents from requesting that their child be evaluated by the LEA responsible for FAPE for purposes of having a program of FAPE made available to the child at the same time that the parents have requested that the LEA where the private school is located evaluate their child for purposes of considering the child for equitable services, we do not encourage this practice. We note that new § 300.622(b)(4) requires parental consent

for the release of information about parentally-placed private school children between LEAs; therefore, as a practical matter, one LEA may not know that a parent also requested an evaluation from another LEA. However, we do not believe that the child's best interests would be well-served if the parents requested evaluations of their child by the resident school district and the LEA where the private school is located, even though these evaluations are conducted for different purposes. A practice of subjecting a child to repeated testing by separate LEAs in close proximity of time may not be the most effective or desirable way of ensuring that the evaluation is a meaningful measure of whether a child has a disability or of providing an appropriate assessment of the child's educational needs.

Changes: None.

Comment: Some commenters requested the regulations clarify which LEA (the LEA of residence or the LEA where the private elementary schools or secondary schools are located) is responsible for offering FAPE to children identified through child find under § 300.131 so that parents can make an informed decision regarding their children's education.

Discussion: If a determination is made by the LEA where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child. We do not believe that a change to the regulations is necessary, as § 300.201 already clarifies that the district of residence is responsible for making FAPE available to the child. Accordingly, the district in which the private elementary or secondary school is located is not responsible for making FAPE available to a child residing in another district.

Changes: None.

Comment: One commenter requested clarification of the term "activities similar" in § 300.131(c). Another commenter recommended clarifying that these activities include, but are not limited to, activities relating to evaluations and reevaluations. One commenter requested that children with disabilities parentally-placed in private schools be identified and evaluated as quickly as possible.

Discussion: Section 300.131(c), consistent with section

612(a)(10)(A)(ii)(III) of the Act, requires that, in carrying out child find for parentally-placed private school children, SEAs and LEAs must undertake activities similar to those activities undertaken for their publicly enrolled or publicly-placed children. This would generally include, but is not limited to, such activities as widely distributing informational brochures, providing regular public service announcements, staffing exhibits at health fairs and other community activities, and creating direct liaisons with private schools. Activities for child find must be completed in a time period comparable to those activities for public school children. This means that LEAs must conduct child find activities, including individual evaluations, for parentally-placed private school children within a reasonable period of time and without undue delay, and may not wait until after child find for public school children is conducted. In addition, evaluations of all children suspected of having disabilities under Part B of the Act, regardless of whether they are enrolled by their parents in private elementary schools or secondary schools, must be conducted in accordance with the requirements in §§ 300.300 through 300.311, consistent with section 614(a) through (c) of the Act, which describes the procedures for evaluations and reevaluations for all children with disabilities. We believe the phrase "activities similar" is understood by SEAs and LEAs and, therefore, it is not necessary to regulate on the meaning of the phrase.

Changes: None.

Provision of Services for Parentally-Placed Private School Children With Disabilities—Basic Requirement (§ 300.132)

Comment: Several commenters expressed confusion regarding which LEA is responsible for paying for the equitable services provided to a parentally-placed private elementary school or secondary school child, the district of the child's residence or the LEA where the private school is located.

Discussion: We believe § 300.133, consistent with section 612(a)(10)(A) of the Act, is sufficiently clear that the LEA where the private elementary schools and secondary schools are located is responsible for paying for the equitable services provided to a parentally-placed private elementary school or secondary school child. These provisions provide that the LEA where the private elementary and secondary schools are located must spend a proportionate amount of its Federal funds available under Part B of the Act

for services for children with disabilities enrolled by their parents in private elementary schools and secondary schools located in the LEA. The Act does not permit an exception to this requirement. No further clarification is needed.

Changes: None.

Comment: One commenter recommended the regulations clarify which LEA in the State is responsible for providing equitable services to parentally-placed private school children with disabilities who attend a private school that straddles two LEAs in the State.

Discussion: The Act does not address situations where a private school straddles more than one LEA. However, the Act does specify that the LEA in which the private school is located is responsible for providing special education to children with disabilities placed in private schools by their parents, consistent with the number of such children and their needs. In situations where more than one LEA potentially could assume the responsibility of providing equitable services, the SEA, consistent with its general supervisory responsibility, determines which LEA in the State is responsible for ensuring the equitable participation of children with disabilities attending that private school. We do not believe that the situation is common enough to warrant a change in the regulations.

Changes: None.

Comment: A few commenters recommended revising the heading for § 300.132(b) to clarify that LEAs, not SEAs, are responsible for developing service plans.

Discussion: We agree with the commenters that the heading for § 300.132(b) should be changed to accurately reflect the requirement and to avoid confusion.

Changes: We have revised the heading for § 300.132(b) by removing the reference to SEA responsibility.

Comment: One commenter requested requiring in § 300.132(c) that data on parentally-placed private school children with disabilities be submitted to the Department. Another commenter agreed, stating that the data should be submitted the same day as the annual child count.

Discussion: The purpose of the child count under § 300.132(c) is to determine the amount of Federal funds that the LEA must spend on providing special education and related services to parentally-placed private school children with disabilities in the next fiscal year. We are not requiring States to submit these data to the Department

as the Department does not have a programmatic or regulatory need to collect this information at this time. Section 300.644 permits the SEA to include in its annual report of children served those parentally-placed private school children who are eligible under the Act and receive special education or related services. We believe this is sufficient to meet the Department's need to collect data on this group of children and we do not wish to place an unnecessary data collection and paperwork burden on States.

Changes: None.

Expenditures (§ 300.133)

Comment: One commenter requested the regulations clarify whether an LEA must spend its entire proportionate share for parentally-placed private school children with disabilities by the end of a fiscal year or could carry over any remaining funds into the next fiscal year.

Discussion: We agree with the commenter that a provision should be included in these regulations to clarify that, if an LEA has not expended for equitable services all of the proportionate amount of Federal funds to be provided for parentally-placed private school children with disabilities by the end of the fiscal year for which Congress appropriated the funds, the LEA must obligate the remaining funds for special education and related services (including direct services) to parentally-placed private school children with disabilities during a carry-over period of one additional year.

Changes: A new paragraph (a)(3) has been added to § 300.133 to address the carry over of funds not expended by the end of the fiscal year.

Comment: None.

Discussion: It has come to our attention that there is some confusion among States and LEAs between the count of the number of children with disabilities receiving special education and related services as required under section 618 of the Act, and the requirement under section 612(a)(10)(A)(i)(II) of the Act that each LEA conduct an annual count of the number of parentally-placed private school children with disabilities attending private schools in the LEA. We will, therefore, revise the heading (child count) for § 300.133(c) and the regulatory language in § 300.133(c) to avoid any confusion regarding the requirements in paragraph (c).

Changes: Section 300.133(c) has been revised as described above.

Comment: One commenter interpreted § 300.133(d) to require that: (1) LEAs provide services to parentally-

placed private school children with disabilities with funds provided under the Act and (2) LEAs no longer have the option of using local funds equal to, and in lieu of, the Federal pro-rated share amount. This commenter recommended that LEAs continue to be allowed to use local funds for administrative convenience.

Discussion: The commenter's interpretation is correct. The Act added the supplement, not supplant requirement in section 612(a)(10)(A)(i)(IV), which is included in § 300.133(d). This requirement provides that State and local funds may supplement, but in no case supplant the proportionate amount of the Federal Part B funds that must be expended under this provision. Prior to the change in the Act, if a State was spending more than the Federal proportional share of funds from State or local funds, then the State would not have to spend any Federal Part B funds. That is no longer permissible under the Act.

Changes: None.

Comment: A few commenters requested revising § 300.133 to include home-schooled children with disabilities in the same category as parentally-placed private school children with disabilities.

Discussion: Whether home-schooled children with disabilities are considered parentally-placed private school children with disabilities is a matter left to State law. Children with disabilities in home schools or home day cares must be treated in the same way as other parentally-placed private school children with disabilities for purposes of Part B of the Act only if the State recognizes home schools or home day cares as private elementary schools or secondary schools.

Changes: None.

Consultation (§ 300.134)

Comment: Some commenters recommended requiring, in § 300.134(e), that the LEA include, in its written explanation to the private school, its reason whenever: (1) The LEA does not provide services by a professional directly employed by that LEA to parentally-placed private school children with a disability when requested to do so by private school officials; and (2) the LEA does not provide services through a third party provider when requested to do so by the private school officials.

Discussion: Section 300.134(e) incorporates the language from section 612(a)(10)(A)(iii)(V) of the Act and requires the LEA to provide private school officials with a written explanation of the reasons why the LEA

chose not to provide services directly or through contract. We do not believe that the additional language suggested by the commenter is necessary because we view the statutory language as sufficient to ensure that the LEA meets its obligation to provide private school officials a written explanation of any reason why the LEA chose not to provide services directly or through a contract.

Changes: None.

Written Affirmation (§ 300.135)

Comment: Several commenters recommended requiring LEAs to forward the written affirmation to the SEA, because this information is important for the SEA to exercise adequate oversight over LEAs with respect to the participation of private school officials in the consultation process.

Discussion: Section 300.135, regarding written affirmation, tracks the language in section 612(a)(10)(A)(iv) of the Act. Including a requirement in the regulations that the LEA must submit a copy of signed written affirmations to the SEA would place reporting burdens on the LEA that are not required by the Act and that we do not believe are warranted in this circumstance. We expect that in most circumstances private school officials and LEAs will have cooperative relationships that will not need State involvement. If private school officials believe that there was not meaningful consultation, they may raise that issue with the SEA through the procedures in § 300.136. However, there is nothing in the Act or these regulations that would preclude a State from requiring LEAs to submit a copy of the written affirmation obtained pursuant to § 300.135, in meeting its general supervision responsibilities under § 300.149 or as a part of its monitoring of LEAs' implementation of Part B of the Act as required in § 300.600. Consistent with § 300.199(a)(2) and section 608(a)(2) of the Act, a State that chooses to require its LEAs to submit copies of written affirmations to the SEA beyond what is required in § 300.135 would have to identify, in writing, to the LEAs located in the State and to the Secretary, that such rule, regulation, or policy is a State-imposed requirement that is not required by Part B of the Act or these regulations.

Changes: None.

Compliance (§ 300.136)

Comment: One commenter recommended revising § 300.136 to permit an LEA to submit a complaint to the State if private school officials do

not engage in meaningful consultation with the LEA.

Discussion: Section 300.136, consistent with section 612(a)(10)(A)(v) of the Act, provides that a private school official has the right to complain to the SEA that the LEA did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official. The provisions in the Act and the regulations apply to the responsibilities of the SEA and its LEAs and not to private schools or entities. Because the requirements of the Act do not apply to private schools, we do not believe requiring SEAs to permit an LEA to submit a complaint to the SEA alleging that representatives of the private schools did not consult in a meaningful way with the LEA would serve a meaningful purpose. The equitable services made available under Part B of the Act are a benefit to the parentally-placed private school children and not services provided to the private schools.

Changes: None.

Comment: Several commenters recommended revising § 300.136 to allow States to determine the most appropriate procedures for a private school official to submit a complaint to the SEA that an LEA did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school officials. Many of these commenters stated that requiring such complaints be filed pursuant to the State complaint procedures in §§ 300.151 through 300.153 is not required by the Act and recommended we remove this requirement.

Discussion: We agree with the commenters that section 612(a)(10)(A)(v) of the Act does not stipulate how a private school official must submit a complaint to the SEA that the LEA did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official. We also agree with the commenters that the SEA should have flexibility to determine how such complaints will be filed with the State. We will, therefore, revise § 300.136(a) to remove the requirement that private school officials must file a complaint with the SEA under the State complaint procedures in §§ 300.151 through 300.153. States may, if they so choose, use their State complaint procedures under §§ 300.151 through 300.153 as the means for a private school to file a complaint under § 300.136.

Changes: Section 300.136 has been revised to remove the requirement that

a private school official submit a complaint to the SEA using the procedures in §§ 300.151 through 300.153.

Equitable Services Determined (§ 300.137)

Comment: One commenter recommended removing § 300.137(a), stating it is discriminatory and that parentally-placed private school children must receive the same amount of services as children with disabilities in public schools.

Discussion: Section 300.137(a) reflects the Department's longstanding policy, consistent with section 612(a)(10) of the Act, and explicitly provides that children with disabilities enrolled in private schools by their parents have no individual entitlement to receive some or all of the special education and related services they would receive if enrolled in the public schools. Under the Act, LEAs only have an obligation to provide parentally-placed private school children with disabilities an opportunity for equitable participation in the services funded with Federal Part B funds that the LEA has determined, after consultation, to make available to its population of parentally-placed private school children with disabilities. LEAs are not required to spend more than the proportionate Federal share on those services.

Changes: None.

Equitable Services Provided (§ 300.138)

Comment: Several commenters requested clarifying whether the requirement in § 300.138(a) that services provided to parentally-placed private school children with disabilities be provided by personnel meeting the same standards (*i.e.*, highly qualified teacher requirements) as personnel providing services in the public schools applies to private school teachers who are contracted by the LEA to provide equitable services.

Discussion: As discussed in the *Analysis of Comments and Changes* section, in the response to comments on § 300.18, it is 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. Further, it is the Department's position 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.

In addition to the revision we are making to new § 300.18(h) (proposed § 300.18(g)) to make this position clear, we also will revise § 300.138(a)(1) to clarify that private elementary school and secondary school teachers who are providing equitable services to parentally-placed private school children with disabilities do not have to meet the highly qualified special education teacher requirements.

Changes: We have revised § 300.138(a)(1) as indicated.

Comment: A few commenters requested clarifying the process for developing a services plan and explaining how a services plan differs from an IEP.

Discussion: We do not believe that additional explanation in the regulation is needed. Under § 300.138(b), each parentally-placed private school child with a disability who has been designated by the LEA in which the private school is located to receive special education or related services must have a services plan. The services plan must describe the specific special education and related services offered to a parentally-placed private school child with a disability designated to receive services. The services plan also must, to the extent appropriate, meet the IEP content, development, review, and revision requirements described in section 614(d) of the Act, or, when appropriate, for children aged three through five, the IFSP requirements described in section 636(d) of the Act as to the services that are to be provided. The LEA must ensure that a representative of the private school attends each meeting to develop the services plan and if the representative cannot attend, use other methods to ensure participation by the private school, including individual or conference telephone calls.

Children with disabilities enrolled in public schools or who are publicly-placed in private schools are entitled to FAPE and must receive the full range of services under Part B of the Act that are determined by the child's IEP Team to be necessary to meet the child's individual needs and provide FAPE. The IEPs for these children generally will be more comprehensive than the more limited services plans developed for parentally-placed private school children with disabilities designated to receive services.

Changes: None.

Comment: A few commenters recommended revising the definition of *services plan* to clarify that an IEP could serve as the services plan; otherwise, States that provide IEP services to parentally-placed private school

children with disabilities would be required to develop a services plan and an IEP.

Discussion: We do not believe it is appropriate to clarify in the regulations that the IEP can serve as the services plan because, as stated elsewhere in this preamble, a services plan should only describe the specific special education and related services offered to a parentally-placed private school child with a disability designated to receive services. We believe that using an IEP in lieu of a services plan for these children may not be appropriate in light of the fact that an IEP developed pursuant to section 614(d) of the Act will generally include much more than just those services that a parentally-placed private school child with a disability may receive, if designated to receive services. There is nothing, however, in these regulations that would prevent a State that provides more services to parentally-placed private school children with disabilities than they are required to do under the Act to use an IEP in place of a services plan, consistent with State law.

Changes: None.

Location of Services and Transportation (§ 300.139)

Comment: A few commenters asked for clarification as to how the location where services will be provided to parentally-placed private school children with disabilities is determined.

Discussion: Under § 300.134(d), how, where, and by whom special education and related services are provided to parentally-placed private school children with disabilities are subjects of the process of consultation among LEA officials, private school representatives, and representatives of parents of parentally-placed private school children with disabilities. Further, § 300.137(b)(2) clarifies that, after this consultation process, the final decision with respect to the services provided to eligible parentally-placed private school children with disabilities is made by the LEA.

Changes: None.

Comment: Some commenters recommended specifying that providing services on the premises of private elementary schools and secondary schools is the preferred means of serving parentally-placed private school children with disabilities. A few commenters recommended revising § 300.139(a) to stipulate that services "should" or "must" be provided on the premises of private schools, unless there is a compelling rationale for these services to be provided off-site. In contrast, several commenters objected to

the statement in the preamble to the NPRM that services should be provided on-site unless there is a compelling rationale to provide services off-site. A few of these commenters stated that the Act does not indicate a preference for one location of services over another and the Department has no authority to provide such a strong comment on this issue.

Discussion: Services offered to parentally-placed private school children with disabilities may be provided on-site at a child's private school, including a religious school, to the extent consistent with law, or at another location. The Department believes, in the interests of the child, LEAs should provide services on site at the child's private school so as not to unduly disrupt the child's educational experience, unless there is a compelling rationale for these services to be provided off-site. The phrase "to the extent consistent with law" is in section 612(a)(10)(A)(i)(III) of the Act. We interpret this language to mean that the provision of services on the premises of a private school takes place in a manner that would not violate the Establishment Clause of the First Amendment to the U.S. Constitution and would not be inconsistent with applicable State constitutions or law. We, therefore, do not have the statutory authority to require that services be provided on-site.

Changes: None.

Comment: A few commenters expressed concern that § 300.139(b), regarding transportation services, goes beyond the requirements in the Act and should be removed. A few commenters stated that transportation is a related service and should be treated as such with respect to parentally-placed children with disabilities in private schools.

Discussion: We do not agree that transportation services should be removed from § 300.139(b). If services are offered at a site separate from the child's private school, transportation may be necessary to get the child to and from that other site. Failure to provide transportation could effectively deny the child an opportunity to benefit from the services that the LEA has determined through consultation to offer its parentally-placed private school children with disabilities. In this situation, although transportation is not a *related service*, as defined in § 300.34, transportation is necessary to enable the child to participate and to make the offered services accessible to the child. LEAs should work in consultation with representatives of private school children to ensure that services are

provided at sites, including on the premises of the child's private school, so that LEAs do not incur significant transportation costs.

However, for some children with disabilities, special modifications in transportation may be necessary to address the child's unique needs. If the group developing the child's services plan determines that a parentally-placed private school child with a disability chosen to receive services requires transportation as a related service in order to receive special education services, this transportation service should be included as a related service in the services plan for the child.

In either case, the LEA may include the cost of the transportation in calculating whether it has met the requirement of § 300.133.

Changes: None.

Due Process Complaints and State Complaints (§ 300.140)

Comment: Several commenters expressed concern that the right of parents of children with disabilities enrolled by their parents in private elementary schools and secondary schools to file a due process complaint against an LEA is limited to filing a due process complaint that an LEA has failed to comply with the child find and evaluation requirements, and not an LEA's failure to provide special education and related services as required in the services plan. A few commenters recommended that the regulations clarify whether the parent should file a due process complaint with the LEA of residence or with the LEA where the private school is located.

Discussion: Section 615(a) of the Act specifies that the procedural safeguards of the Act apply with respect to the identification, evaluation, educational placement, or provision of FAPE to children with disabilities. The special education and related services provided to parentally-placed private school children with disabilities are independent of the obligation to make FAPE available to these children.

While there may be legitimate issues regarding the provision of services to a particular parentally-placed private school child with a disability an LEA has agreed to serve, the due process provisions in section 615 of the Act and §§ 300.504 through 300.519 do not apply to these disputes, because there is no individual right to these services under the Act. Disputes that arise about these services are properly subject to the State complaint procedures under §§ 300.151 through 300.153.

Child find, however, is a part of the basic obligation that public agencies

have to all children with disabilities, and failure to locate, identify, and evaluate a parentally-placed private school child would be subject to due process. Therefore, the due process provisions in §§ 300.504 through 300.519 do apply to complaints that the LEA where the private school is located failed to meet the consent and evaluation requirements in §§ 300.300 through 311.

In light of the comments received, we will clarify in § 300.140 that parents of parentally-placed private school children with disabilities may file a due process complaint with the LEA in which the private school is located (and forward a copy to the SEA) regarding an LEA's failure to meet the consent and evaluation requirements in §§ 300.300 through 300.311. We also will clarify that a complaint can be filed with the SEA under the State complaint procedures in §§ 300.151 through 300.153 that the SEA or LEA has failed to meet the requirements in §§ 300.132 through 300.135 and §§ 300.137 through 300.144. There would be an exception, however, for complaints filed pursuant to § 300.136. Complaints under § 300.136 must be filed in accordance with the procedures established by each State under § 300.136.

Changes: Proposed § 300.140(a)(2) has been redesignated as new paragraph (b). A new paragraph (b)(2) has been added to this section to clarify that any due process complaint regarding the evaluation requirements in § 300.131 must be filed with the LEA in which the private school is located, and a copy must be forwarded to the SEA. Proposed § 300.140(b) has been redesignated as new paragraph (c), and has been revised to clarify that a complaint that the SEA or LEA has failed to meet the requirements in §§ 300.132 through 300.135 and §§ 300.137 through 300.144 can be filed with the SEA under the State complaint procedures in §§ 300.151 through 300.153. Complaints filed pursuant to § 300.136 must be filed with the SEA under the procedures established under § 300.136(b).

Comment: A few commenters requested clarification as to whether a parent of a parentally-placed private school child should request an independent educational evaluation at public expense under § 300.502(b) with the LEA of residence or the LEA where the private school is located.

Discussion: We do not believe that this level of detail needs to be included in the regulation. If a parent of a parentally-placed child disagrees with an evaluation obtained by the LEA in which the private school is located, the parent may request an independent

educational evaluation at public expense with that LEA.

Changes: None.

Use of Personnel (§ 300.142)

Comment: Several commenters requested clarifying language regarding who must provide equitable services to parentally-placed private school children with disabilities.

Discussion: Under section 612(a)(10)(A)(vi)(I) of the Act, equitable services must be provided by employees of a public agency or through contract by the public agency with an individual, association, agency, organization, or other entity. Section 300.142(a) provides that an LEA may use Part B funds to make public school personnel available in other than public facilities to the extent necessary to provide equitable services for parentally-placed children with disabilities attending private schools and if those services are not otherwise provided by the private school to children as a benefit provided to all children attending that school. Under § 300.142(b), an LEA may use Part B funds to pay for the services of an employee of a private school to provide equitable services if the employee performs the services outside of his or her regular hours of duty and the employee performs the services under public supervision and control. We believe that the regulation is sufficiently clear on this point.

Changes: None.

Property, Equipment, and Supplies (§ 300.144)

Comment: A few commenters requested clarification as to whether private school officials may purchase equipment and supplies with Part B funds to provide services to parentally-placed private school children with disabilities designated to receive services.

Discussion: We do not believe the additional clarification suggested by the commenters is necessary. Section 300.144, consistent with section 612(a)(10)(A)(vii) of the Act, already requires that the LEA must control and administer the funds used to provide special education and related services to parentally-placed private school children with disabilities, and maintain title to materials, equipment, and property purchased with those funds. Thus, the regulations and the Act prevent private school officials from purchasing equipment and supplies with Part B funds.

Changes: None.

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

Applicability of §§ 300.146 Through 300.147 (§ 300.145)

Comment: One commenter stated that §§ 300.145 through 300.147 are unnecessary and solely administrative, because these sections are addressed in the Act and the proposed regulations provide no additional information on the application of the statutory requirements.

Discussion: We do not agree with the commenter that the provisions in §§ 300.146 through 300.147 are unnecessary and solely administrative. We believe it is necessary to retain these requirements in the regulations, consistent with section 612(a)(10)(B) of the Act, to ensure that public agencies are fully aware of their obligation to ensure that children with disabilities who are placed in or referred to a private school or facility by public agencies are entitled to receive FAPE to the same extent as they would if they were placed in a public agency school or program.

Changes: None.

Responsibility of SEA (§ 300.146)

Comment: Many commenters disagreed with the exception to the “highly qualified teacher” requirements in paragraph (b) of this section and stated that the “highly qualified teacher” requirements should apply to private school teachers of children with disabilities placed or referred by public agencies. Several commenters stated that these children are likely to have more severe disabilities and, therefore, have a greater need for highly qualified teachers than children served in public schools.

Several commenters stated that exempting teachers in private schools from the requirement to be “highly qualified” in situations where children with disabilities are publicly-placed in order to receive FAPE is not consistent with the requirement that the education provided to children in such settings meet the standards that apply to children served by public agencies, or with the ESEA and the goal in the Act of helping all children with disabilities achieve high standards.

A few commenters supported the exception to “highly qualified teacher” requirements. One commenter stated that States should make their own decisions in this area in light of resource constraints.

One commenter opposed the expenditure of public school funds for the education of publicly-placed private

school children by teachers who do not meet the “highly qualified” requirements.

Discussion: Section 602(10) of the Act states that “highly qualified” has the meaning given the term in section 9101 of the ESEA, which clarifies that the requirements regarding highly qualified teachers apply to public school teachers and not teachers teaching as employees of private elementary schools and secondary schools. As we stated in the *Analysis of Comments and Changes* section regarding § 300.138 in this subpart and § 300.18 in subpart A, it is the Department’s position that the highly qualified 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. We agree with the commenters that, in many instances, a public agency may choose to place a child with a severe disability and with more intensive educational needs in a private school or facility as a means of providing FAPE. When the public agency chooses to place a child with a significant disability, or any child with a disability, in a private school as a means of providing FAPE, the public agency has an obligation to ensure that the child receives FAPE to the same extent the child would if placed in a public school, irrespective of whether the private school teachers meet the highly qualified teacher requirements in §§ 300.18 and 300.156(c). FAPE includes not just the special education and related services that a child with a disability receives, but also includes an appropriate preschool, elementary and secondary school education in the State involved. The required special education and related services must be provided at public expense, at no cost to the parent, in accordance with an IEP, and the education provided to the child must meet the standards that apply to educational services provided by the SEA and LEA (except for the highly qualified teacher requirements in §§ 300.18 and 300.156(c)). In addition, the SEA must ensure that the child has all the rights of a child with a disability who is served by a public agency.

We do not agree with the premise of the commenters that not requiring private school teachers who provide services to publicly-placed children with disabilities to meet the highly qualified teacher requirements means that the education provided to these children in the private school setting does not meet the standards that apply to children with disabilities served by the public agency. States have flexibility

in developing standards that meet the requirements of the Act. The standards that SEAs apply to private schools that contract with public agencies to provide FAPE to children with disabilities, are, so long as they meet the requirements of Part B of the Act and its regulations, a State matter. Federal law does not encourage or prohibit the imposition of additional requirements as a condition of placing these children in the private school.

With regard to the comment opposing the use of public school funds for the education of publicly-placed private school children by teachers who do not meet the highly qualified teacher requirements, a State or public agency may use whatever State, local, Federal, and private sources of support that are available in the State to meet the requirements of the Act. We believe restricting the use of public school funds as requested by the commenter would not only be inconsistent with the Act, but also may unnecessarily limit a public agency’s options for providing FAPE to its publicly-placed children with disabilities.

Changes: None.

Comment: A few commenters recommended requiring States to have rules, regulations, and contracts requiring private schools that accept publicly-placed children with disabilities to guarantee that children with disabilities receive FAPE and their parents retain all of the protections mandated for public schools, including the right to pendency placements if the parents challenge the decisions of the private school to terminate the children’s placements. One commenter recommended that the regulations clarify that private schools serving children placed by a public agency are not exempt from the obligation to provide FAPE.

Discussion: The Act does not give States and other public agencies regulatory authority over private schools and does not place requirements on private schools. The Act imposes requirements on States and public agencies that refer to or place children with disabilities in private schools for the purposes of providing FAPE to those children because the public agency is unable to provide FAPE in a public school or program. The licensing and regulation of private schools are matters of State law. The Act requires States and public agencies, including LEAs, to ensure that FAPE is made available to all children with disabilities residing in the State in mandatory age ranges, and that the rights and protections of the Act are extended to eligible children and their parents. If the State or public

agency has placed children with disabilities in private schools for purposes of providing FAPE to those children, the State and the public agency must ensure that these children receive the required special education and related services at public expense, at no cost to the parents, in accordance with each child's IEP. It is the responsibility of the public agency to determine whether a particular private school in which the child with a disability will be placed for purposes of providing FAPE meets the standards that apply to the SEA and LEA and that a child placed by a public agency be afforded all the rights, including FAPE, that the child would otherwise have if served by the public agency directly.

Changes: None.

Comment: One commenter stated that, in cases where the public agency places a child in a private school or residential treatment facility for the purposes of providing FAPE, the public agency should be required to determine and inform the private school or residential treatment facility about the person or persons who have the legal authority to make educational decisions for the child.

Discussion: The change requested by the commenter is not needed because the public agency, not the private agency, is responsible for providing FAPE to a child who is placed by the public agency in a private school. Consistent with § 300.146 and section 612(a)(10)(B) of the Act, a public agency that places a child with a disability in a private school or facility as a means of carrying out the requirements of Part B of the Act, must ensure that the child has all the rights of a child with a disability who is served by a public agency, which includes ensuring that the consent requirements in § 300.300 and sections 614(a)(1)(D) and 614(c) of the Act are followed. A public agency must, therefore, secure the needed consent from the person or persons who have the legal authority to make such decisions, unless the public agency has made other arrangements with the private school or facility to secure that consent. We do not believe it is necessary or appropriate to require the public agency to inform the private school or facility of the persons or persons who have the legal authority to make educational decisions for the child because this will depend on the specific arrangements made by the public agency with a private school or facility and, should, therefore, be determined by the public agency on a case by case basis.

Changes: None.

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

Placement of Children by Parents When FAPE Is at Issue (§ 300.148)

Comment: Several commenters recommended retaining in these regulations the requirement in current § 300.403(b) that disagreements between a parent and the LEA regarding the availability of a FAPE and the question of financial responsibility, are subject to the due process procedures in section 615 of the Act.

Discussion: The provision in current § 300.403(b) was in the 1983 regulations and, therefore, should have been included in the NPRM in light of section 607(b) of the Act. Section 607(b) of the Act provides that the Secretary cannot publish final regulations that would procedurally or substantively lessen the protections provided to children with disabilities in the regulations that were in effect on July 20, 1983. We will revise § 300.148 to include the requirement in current § 300.403(b).

Changes: Section 300.148 has been revised to include the requirement in current § 300.403(b) that disagreements between a parent and a public agency regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to the due process procedures in §§ 300.504 through 300.520.

Comment: One commenter requested revising the regulations to eliminate financial incentives for parents to refer children for special education and then unilaterally placing their child in private schools without first receiving special education and related services from the school district. The commenter stated that it should be clear that a unilateral placement in a private school without first receiving special education and related services from the LEA does not require the public agency to provide reimbursement for private school tuition.

One commenter stated that proposed § 300.148(b) goes beyond the Act and only applies if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to enrollment in the private school. The commenter stated that a determination that a placement is "appropriate," even if it does not meet the State standards that apply to education provided by the SEA or LEAs, conflicts with the SEA's or LEA's responsibility to ensure FAPE to children with disabilities.

Discussion: The provision in § 300.148(b) that a parental placement does not need to meet State standards in

order to be "appropriate" under the Act is retained from current § 300.402(c) to be consistent with the Supreme Court's decisions in *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985) (*Burlington*) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) (*Carter*). Under the Supreme Court's decision in *Carter*, a court may order reimbursement for a parent who unilaterally withdraws his or her child from a public school that provides an inappropriate education under the Act and enrolls the child in a private school that provides an education that is otherwise proper under the Act, but does not meet the State standards that apply to education provided by the SEA and LEAs. The Court noted that these standards apply only to public agencies' own programs for educating children with disabilities and to public agency placements of children with disabilities in private schools for the purpose of providing a program of special education and related services. The Court reaffirmed its prior holding in *Burlington* that tuition reimbursement is only available if a Federal court concludes "both that the public placement violated IDEA, and that the private school placement was proper under the Act." (510 U.S. at 12). We believe LEAs can avoid reimbursement awards by offering and providing FAPE consistent with the Act either in public schools or in private schools in which the parent places the child. However, a decision as to whether an LEA's offer or provision of FAPE was proper under the Act and any decision regarding reimbursement must be made by a court or hearing officer. Therefore, we do not believe it is appropriate to include in these regulations a provision relieving a public agency of its obligation to provide tuition reimbursement for a unilateral placement in a private school if the child did not first receive special education and related services from the LEA.

This authority is independent of the court's or hearing officer's authority under section 612 (a)(10)(C)(ii) of the Act to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

Changes: None.

SEA Responsibility for General Supervision and Implementation of Procedural Safeguards

SEA Responsibility for General Supervision (§ 300.149)

Comment: One commenter requested that the Department clarify in these

regulations how the requirements for SEA responsibility in § 300.149 apply with respect to children attending BIA-funded schools who are sent to State prisons, including whether the Office of Indian Education Programs in the Department of the Interior can delegate the responsibility of ensuring that the requirements of Part B of the Act are met by the State prison. The commenter further requested clarification regarding tribally controlled detention facilities that incarcerate a student from a different reservation than the reservation where the student attended a BIA-funded school.

Discussion: As a general matter, for educational purposes, students who were enrolled in a BIA-funded school and are subsequently convicted as an adult and incarcerated in a State run adult prison are the responsibility of the State where the adult prison is located. Section 612(a)(11)(C) of the Act and § 300.149(d) allow flexibility to States in that the Governor, or another individual pursuant to State law, can designate a public agency in the State, other than the SEA, as responsible for ensuring that FAPE is made available to eligible students with disabilities who are convicted under State law and incarcerated in the State's adult prisons. This provision does not apply to the Secretary of the Interior. Therefore, the Office of Indian Education Programs cannot delegate the responsibility of ensuring that the requirements of Part B of the Act are met by the State prison. The Act does not specifically address who is responsible for education of students with disabilities in tribally controlled detention facilities. However, the Secretary of the Interior is only responsible for students who are enrolled in schools operated or funded by the Department of the Interior.

Changes: None.

Comment: One commenter recommended adding a heading prior to § 300.149 to separate this section from the regulations governing private schools.

Discussion: We agree with the commenter that a heading should be added to separate the private school provisions from other State eligibility requirements.

Changes: We have added a heading before § 300.149 to separate the private school provisions from the provisions relating to the SEA's responsibility for general supervision and implementation of procedural safeguards.

State Complaint Procedures (§§ 300.151 through 300.153)

Comment: We received several comments questioning the statutory

basis for the State complaint provisions in §§ 300.151 through 300.153. One commenter stated that the Act includes only two statutory references to State complaints and both references (sections 612(a)(14)(E) and 615(f)(3)(F) of the Act) immediately follow statutory prohibitions on due process remedies.

One commenter stated that Congress did not require SEAs to create a complaint system and that section 1232c(a) of the General Education Provisions Act, 20 U.S.C. 1232c(a) (GEPA), provides only that the Department may require a State to investigate and resolve all complaints received by the State related to the administration of an applicable program. The commenter stated that the permissive wording of this provision suggests that the Secretary or the Department can choose not to require a complaint investigation and resolution mechanism, particularly when such mechanism is unnecessary or, as in the case of the Act, effectively preempted by more specific requirements in the Act governing the applicable program.

Another commenter concluded that there is no basis for the State complaint procedures in §§ 300.151 through 300.153 because the Act only allows complaints to be filed with the State in two situations: (1) By private school officials, regarding consultation and child find for parentally-placed private school children pursuant to section 612(a)(10)(A)(i) and (10)(A)(iii) of the Act, and (2) by parents, regarding personnel qualifications in section 612(a)(14)(E) of the Act. The commenter stated that in both cases, the Act does not detail a complaint process.

Discussion: Although Congress did not specifically detail a State complaint process in the Act, we believe that the State complaint process is fully supported by the Act and necessary for the proper implementation of the Act and these regulations. We believe a strong State complaint system provides parents and other individuals an opportunity to resolve disputes early without having to file a due process complaint and without having to go to a due process hearing. The State complaint procedures are referenced in the following three separate sections of the Act: (1) Section 611(e)(2)(B)(i) of the Act, which requires that States spend a portion of the amount of Part B funds that they can use for State-level activities on complaint investigations; (2) Section 612(a)(14)(E) of the Act, which provides that nothing in that paragraph creates a private right of action for the failure of an SEA or LEA staff person to be highly qualified or prevents a parent from filing a

complaint about staff qualifications with the SEA, as provided for under this part; and (3) Section 615(f)(3)(F) of the Act, which states that "[n]othing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency." Paragraph (f)(3) is titled "Limitations on Hearing" and addresses issues such as the statute of limitations and that hearing issues are limited to the issues that the parent has raised in their due process notice. The Senate Report explains that this provision clarifies that "nothing in section 615 shall be construed to affect a parent's right to file a complaint with the State educational agency, including violations of procedural violations" (S. Rpt. No. 108-185, p. 41).

Furthermore, the State complaint procedures were a part of the initial Part B regulations in 1977 (45 CFR 121a.602). These regulations were moved into part 76 of the Education Department General Administrative Regulations (EDGAR) in the early 1980s, and were returned to the Part B regulations in 1992 (after the Department decided to move the regulations out of EDGAR and place them in program regulations for the major formula grant programs). Although the State complaint procedures have changed in some respects in the years since 1977, the basic right of any individual or organization to file a complaint with the SEA alleging any violation of program requirements has remained the same. For these reasons, we believe the State complaint procedures should be retained in the regulations.

Changes: None.

Comment: Several commenters stated that use of the term "complaint" in reference to due process complaints and State complaint procedures is confusing. One commenter requested that we use the phrase "due process hearing request" instead of "due process complaint" in the regulations to avoid confusion between the two processes.

Discussion: Section 615 of the Act uses the term "complaint" to refer to due process complaints. We have used the phrase "due process complaint" instead of the statutory term "complaint" throughout these regulations to provide clarity and reduce confusion between due process complaints in section 615 of the Act and complaints under the State complaint procedures in §§ 300.151 through 300.153. We believe this distinction is sufficient to reduce confusion and it is not necessary to add further clarification regarding the use of the term "complaint" in these regulations.

The regulations for State complaints under §§ 300.151 through 300.153 provide for the resolution of any complaint, including a complaint filed by an organization or an individual from another State alleging that the public agency violated a requirement of Part B of the Act or of part 300. The public agency must resolve a State complaint within 60 days, unless there is a time extension as provided in § 300.152(b). Due process complaints, as noted in § 300.507, however, may be filed by a parent or a public agency, consistent with §§ 300.507 through 300.508 and §§ 300.510 through 300.515.

Changes: None.

Adoption of State Complaint Procedures (§ 300.151)

Comment: Many commenters recommended that only issues related to violations of the law should be subject to the State complaint process. One commenter stated that the State complaint procedures should be used only for systemic violations that reach beyond the involvement of one child in a school.

A few commenters requested that the regulations clarify that the State complaint procedures can be used for the denial of appropriate services and the failure to provide FAPE in accordance with a child's IEP. However, some commenters requested that the regulations clarify that disputes involving appropriateness of services and whether FAPE was provided should be dealt with in a due process hearing. One commenter stated that the State complaint procedures should be used to investigate whether required procedures were followed and not to determine if evaluation data and student-specific data support the IEP Team's determination of what is appropriate for the child. The commenter went on to state that the procedures for administrative hearings permit the examination and cross-examination of expert witnesses and establishing the credibility of the testimonies, which are the functions of a hearing officer, not SEA complaint specialists.

Discussion: Some commenters, as noted above, seek to limit the scope of the State complaint system. We believe the broad scope of the State complaint procedures, as permitted in the regulations, is critical to each State's exercise of its general supervision responsibilities. The complaint procedures provide parents, organizations, and other individuals with an important means of ensuring that the educational needs of children with disabilities are met and provide the SEA with a powerful tool to identify

and correct noncompliance with Part B of the Act or of part 300. We believe placing limits on the scope of the State complaint system, as suggested by the commenters, would diminish the SEA's ability to ensure its LEAs are in compliance with Part B of the Act and its implementing regulations, and may result in an increase in the number of due process complaints filed and the number of due process hearings held.

We do not believe it is necessary to clarify in the regulations that the State complaint procedures can be used to resolve a complaint regarding the denial of appropriate services or FAPE for a child, since § 300.153 is sufficiently clear that an organization or individual may file a written complaint that a public agency has violated a requirement of Part B of the Act or part 300. The State complaint procedures can be used to resolve any complaint that meets the requirements of § 300.153, including matters concerning the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child.

We believe that an SEA, in resolving a complaint challenging the appropriateness of a child's educational program or services or the provision of FAPE, should not only determine whether the public agency has followed the required procedures to reach that determination, but also whether the public agency has reached a decision that is consistent with the requirements in Part B of the Act in light of the individual child's abilities and needs. Thus, the SEA may need to review the evaluation data in the child's record, or any additional data provided by the parties to the complaint, and the explanation included in the public agency's notice to the parent as to why the agency made the determination regarding the child's educational program or services. If necessary, the SEA may need to interview appropriate individuals, to determine whether the agency followed procedures and applied standards that are consistent with State standards, including the requirements of Part B of the Act, and whether the determination made by the public agency is consistent with those standards and supported by the data. The SEA may, in its effort to resolve a complaint, determine that interviews with appropriate individuals are necessary for the SEA to obtain the relevant information needed to make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of part 300. However, such interviews conducted by the SEA, as part of its effort to resolve a State complaint, are

not intended to be comparable to the requirement in section 615(h)(2) of the Act, which provides any party to a due process hearing the right to present evidence and confront, cross-examine, and compel the attendance of witnesses.

In addition, a parent always has the right to file a due process complaint and request a due process hearing on any matter concerning the identification, evaluation, or educational placement of his or her child, or the provision of FAPE and may seek to resolve their disputes through mediation. It is important to clarify that when the parent files both a due process complaint and a State complaint on the same issue, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process hearing must be resolved using the State complaint procedures in § 300.152, including using the time limit and procedures in paragraphs (b) and (d) of § 300.152. (See § 300.152(c)(1)). Under the Act, the decision reached through the due process proceedings is the final decision on those matters, unless a party to the hearing appeals that decision by requesting State-level review, if applicable, or by bringing a civil action in an appropriate State or Federal court.

Changes: None.

Comment: A few commenters requested amending § 300.151(a)(2) to specifically include school personnel and teacher organizations in the list of entities to whom the SEA must disseminate the State complaint procedures. Another commenter requested that representatives of private schools or residential treatment facilities be included on the list of entities to whom the State must disseminate complaint procedures.

Discussion: Section 300.151(a)(2) already requires the State to widely disseminate the State complaint procedures in §§ 300.151 through 300.153 to parents and other interested parties, including parent training and information centers, protection and advocacy organizations, independent living centers, and other appropriate entities. There is nothing in these regulations that would prevent a State from disseminating information about the State complaint procedures to school personnel, teacher organizations, or representatives of private schools or residential facilities. However, we believe this decision is best left to the States. We do not believe that there is a need to add these entities to the mandatory distribution as individuals involved in the education of children

with disabilities are generally acquainted with these procedures.

Changes: None.

Remedies for Denial of Appropriate Services (§ 300.151(b))

Comment: Many commenters requested retaining current § 300.660(b)(1), regarding the awarding of monetary reimbursement as a remedy for denial of appropriate services. One commenter stated that the regulations should clarify that States continue to have authority to award monetary reimbursement, when appropriate. A few commenters stated that the regulations should clarify that monetary reimbursement is not appropriate for a majority of State complaints. Some commenters stated that removing current § 300.660(b)(1) creates ambiguity and may result in increased litigation because parents may choose to use the more costly and time-consuming due process system if they believe that monetary relief is not available to them under the State complaint system. Some commenters stated that removing current § 300.660(b)(1) implies that monetary reimbursement is never appropriate. A few commenters stated that removing the monetary reimbursement provision in current § 300.660(b)(1) suggests that the Department no longer supports the use of this remedy. A few commenters requested that the regulations clarify that compensatory services are an appropriate remedy when the LEA has failed to provide appropriate services.

Discussion: The SEA is responsible for ensuring that all public agencies within its jurisdiction meet the requirements of the Act and its implementing regulations. In light of the SEA's general supervisory authority and responsibility under sections 612(a)(11) and 616 of the Act, we believe the SEA should have broad flexibility to determine the appropriate remedy or corrective action necessary to resolve a complaint in which the SEA has found that the public agency has failed to provide appropriate services to children with disabilities, including awarding monetary reimbursement and compensatory services. To make this clear, we will change § 300.151 to include monetary reimbursement and compensatory services as examples of corrective actions that may be appropriate to address the needs of the child.

Changes: We have added "compensatory services or monetary reimbursement" as examples of corrective actions in § 300.151(b)(1).

Comment: One commenter stated that the remedies available in § 300.151(b)

are silent about whether the complainant may be reimbursed for attorneys' fees and requested clarification as to whether reimbursement is permissible for State complaints. Another commenter requested that the language in section 615(i)(3)(B) of the Act, regarding the awarding of attorneys' fees for due process hearings, be included in the State complaint procedures as a way to limit repetitive, harassing complaints.

Discussion: The awarding of attorneys' fees is not addressed in § 300.151(b) because the State complaint process is not an administrative proceeding or judicial action, and, therefore, the awarding of attorneys' fees is not available under the Act for State complaint resolutions. Section 615(i)(3)(B) of the Act clarifies that a court may award attorneys' fees to a prevailing party in any action or proceeding brought under section 615 of the Act. We, therefore, may not include in the regulations the language from section 615(i)(3)(B) of the Act, as suggested by the commenters, because State complaint procedures are not an action or proceeding brought under section 615 of the Act.

Changes: None.

Minimum State Complaint Procedures (§ 300.152)

Time Limit; Minimum Procedures (§ 300.152(a))

Comment: One commenter suggested changing § 300.152(a)(1), to include situations when the SEA is the subject of a complaint. Another commenter recommended that the State complaint procedures include how the SEA should handle a complaint against the SEA for its failure to supervise the LEA or failure to provide direct services when given notice that the LEA has failed to do so.

Discussion: We do not believe it is necessary to specify in the regulations how the SEA should handle a complaint filed against the SEA because § 300.151 clarifies that, if an organization or individual files a complaint, pursuant to §§ 300.151 through 300.153, that a public agency has violated a requirement of Part B of the Act or part 300, the SEA must resolve the complaint. Pursuant to § 300.33 and section 612(a)(11) of the Act, the term *public agency* includes the SEA. The SEA must, therefore, resolve any complaint against the SEA pursuant to the SEA's adopted State complaint procedures. The SEA, however, may either appoint its own personnel to resolve the complaint, or may make arrangements with an outside party to

resolve the complaint. If it chooses to use an outside party, however, the SEA remains responsible for complying with all procedural and remediation steps required in part 300.

Changes: None.

Comment: One commenter suggested that the regulations include language requiring an on-site investigation unless the SEA determines that it can collect all evidence and fairly determine whether a violation has occurred with the evidence provided by the complainant and a review of records.

Discussion: We do not believe the regulations should require the SEA to conduct an on-site investigation in the manner suggested by the commenter because we believe § 300.152(a)(1) is sufficient to ensure that an independent on-site investigation is carried out if the SEA determines that such an investigation is necessary to resolve a complaint. The minimum State complaint procedures in § 300.152 are intended to be broad in recognition of the fact that States operate differently and standards appropriate to one State may not be appropriate in another State. Therefore, the standards to be used in conducting an on-site investigation are best determined by the State.

Changes: None.

Comment: One commenter stated that § 300.152 would allow an unlimited period of time to resolve complaints and requested that the regulations limit the complaint resolution process to 30 days, similar to the procedures when a due process hearing is requested. A few commenters requested that the 60-day time limit be lengthened to 90 days, given that many complaints involve complex issues and multiple interviews with school administrators.

Discussion: Section 300.152 does not allow an unlimited period of time to resolve a complaint. Paragraph (a) of this section provides that an SEA has a time limit of 60 days after a complaint is filed to issue a written decision to the complainant that addresses each allegation in the complaint (unless, under paragraph (b) of this section, there is an extension for exceptional circumstances or the parties agree to extend the timeline because they are engaged in mediation or in other alternative means of dispute resolution, if available in the State). We believe the right of parents to file a complaint with the SEA alleging any violation of Part B of the Act or part 300 to receive a written decision within 60 days is reasonable in light of the SEA's responsibilities in resolving a complaint pursuant to its complaint procedures, and is appropriate to the interest of resolving allegations promptly. In

addition, the 60-day time limit for resolving a State complaint is a longstanding requirement and States have developed their State complaint procedures based on the 60-day time limit. We believe altering this timeframe would be unnecessarily disruptive to States' developed complaint procedures. For these reasons, we do not believe it is appropriate to change the time limit as recommended by the commenters.

Changes: None.

Comment: One commenter expressed concern that the regulations are silent as to how an amended State complaint should be handled. One commenter expressed concern about resolving complaints within the 60-day time limit when the complainant submits additional information about the complaint and amends the complaint. The commenter requested that in such cases, the regulations should allow the 60-day time limit to begin from the date the State receives the amended complaint.

Discussion: Section 300.152 provides that the complaint must be resolved 60 days after a complaint is filed and that the complainant must be given an opportunity to submit additional information, either orally or in writing, about the allegations in the complaint. Generally, if the additional information a parent submits is on the same or related incident, it would be part of the amended complaint. If the information submitted by the complainant is on a different or unrelated incident, generally, the new information would be treated as a separate complaint. On the other hand, if the information submitted by the complainant were on the same incident, generally, the new information would be treated as an amendment to the original complaint. It is, ultimately, left to each State to determine whether the new information constitutes a new complaint or whether it is related to a pending complaint. We believe the decision regarding whether the additional information is a new complaint or an amendment to an existing complaint, is best left to the State. The State must have the flexibility to make this determination based on the circumstances of a particular complaint and consistent with its State complaint process and, therefore, we do not believe it is appropriate to regulate further on this matter.

There are no provisions in Part B of the Act or in these regulations that permit the 60-day time limit to begin from the date the State receives an amended complaint, if additional information submitted by the complainant results in an amendment to the complaint. However, § 300.152(b)

permits an extension of the 60-day time limit if exceptional circumstances exist or the parent and the public agency agree to extend the time limit to attempt to resolve the complaint through mediation.

Changes: None.

Comment: One commenter requested clarification regarding the time limit for a public agency to respond with a proposal to resolve the complaint.

Discussion: The 60-day time limit to resolve a complaint does not change if a public agency decides to respond to the complaint with a proposal to resolve the complaint. However, § 300.152(b)(2) permits the 60-day time limit to be extended under exceptional circumstances or if the parent and public agency agree to engage in mediation or in other alternative means of dispute resolution, if available in the State.

Changes: None.

Comment: One commenter expressed concern that § 300.152(a) could limit the SEA's investigation of a complaint to an exchange of papers since the SEA is not required to conduct an on-site investigation.

Discussion: Section 300.152 provides that the SEA must review all relevant information and, if it determines it to be necessary, carry out an independent on-site investigation in order to make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or part 300. We believe the SEA is in the best position, and should have the flexibility, to determine what information is necessary to resolve a complaint, based on the facts and circumstances of the individual case. It is true that, in some cases, a review of documents provided by the parties may be sufficient for the SEA to resolve a complaint and that conducting an on-site investigation or interviews with staff, for example, may be unnecessary. The SEA, based on the facts in the case, must decide whether an on-site investigation is necessary. We also believe requiring an on-site investigation for each State complaint would be overly burdensome for public agencies and unnecessary.

Changes: None.

Comment: A few commenters requested adding language to proposed § 300.152(a)(3) to allow an SEA to provide opportunities for resolving the complaint through mediation and other informal mechanisms for dispute resolution with any party filing a complaint, not only the parents. Some commenters requested that the regulations clarify that mediation is the appropriate method to resolve State

complaints regarding the denial of appropriate services.

A few commenters expressed concern that the phrase "[w]ith the consent of the parent" in proposed § 300.152(a)(3) implies that complaints are disagreements between parents and public agencies, rather than allegations of violations of a child's or a parent's rights under the Act.

A few commenters supported the use of mediation to resolve a complaint, but requested that alternative means of dispute resolution be deleted. Other commenters expressed concern that providing yet another means of initiating mediation or other dispute resolution is unnecessary because these options are already available to parties who wish to use them. A few commenters requested that the regulations define alternative means of dispute resolution.

Discussion: Section 300.152(a)(3) was proposed to encourage meaningful, informal, resolution of disputes between the public agency and parents, organizations, or other individuals by providing an opportunity for parties to resolve disputes at the local level without the need for the SEA to resolve the matter. We believe that, at a minimum, the State's complaint procedures should allow the public agency that is the subject of the complaint the opportunity to respond to a complaint by proposing a resolution and provide an opportunity for a parent who has filed a complaint and the public agency to resolve a dispute by voluntarily engaging in mediation. However, we do not believe that the SEA should be required to offer other alternative means of dispute resolution, and so will remove the reference to these other alternatives from the minimum procedures in § 300.152(a)(3).

We believe it is important to retain the provision in § 300.152(a)(3)(ii) (proposed § 300.152(a)(3)(B)), with modification, to reinforce the use of voluntary mediation as a viable option for resolving disputes between the public agency and the parents at the local level prior to the SEA investigating, if necessary, and resolving a dispute. Resolving disputes between parties at the local level through the use of mediation, or other alternative means of dispute resolution, if available in the State, will be less adversarial and less time consuming and expensive than a State complaint investigation, if necessary, or a due process hearing and, ultimately, children with disabilities will be the beneficiaries of a local level resolution.

Requiring that the public agency provide an opportunity for the parent

who has filed a complaint and the public agency to voluntarily engage in mediation in an effort to resolve a dispute is an appropriate minimum requirement and consistent with the statutory provision in section 615(e) of the Act that voluntary mediation be made available to parties (*i.e.*, parent and public agency) to disputes involving any matter under Part B of the Act, including matters arising prior to the filing of a due process complaint. However, the statute does not require that mediation be available to other parties, and we believe it would be burdensome to expand, through regulation, new § 300.152(a)(3)(ii) (proposed § 300.152(a)(3)(B)) to require that States offer mediation to non-parents. Although we do not believe we should regulate to require that mediation be offered to non-parents, there is nothing in the Act or these regulations that would preclude an SEA from permitting the use of mediation, or other alternative dispute resolution mechanisms, if available in the State, to resolve a State complaint filed by an organization or individual other than a parent, and we will add language to § 300.152(b)(1)(ii) to permit extensions of the timeline if the parties are voluntarily engaged in any of these dispute resolution procedures. In fact, we encourage SEAs and their public agencies to consider alternative means of resolving disputes between the public agency and organizations or other individuals, at the local level, consistent with State law and administrative procedures. It is up to each State, however, to determine whether non-parents can use mediation or other alternative means of dispute resolution.

Section 615(e) of the Act makes clear that mediation is a voluntary mechanism for resolving disputes and may not be used to delay or deny a parent's right to a due process hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act. In light of the fact that mediation is a voluntary process, the parties only need to agree to engage in mediation and it is not necessary to obtain parental written consent to engage in this voluntary process. We will, therefore, change new § 300.152(a)(3)(ii) (proposed § 300.152(a)(3)(B)) by removing the phrase "[w]ith the consent of the parent" and adding a reference to § 300.506.

We do not believe it is necessary to include in the regulations a definition of the term "alternative means of dispute resolution" because the term is generally understood to refer to other procedures and processes that States

have found to be effective in resolving disputes quickly and effectively but does not include those dispute resolution processes required under the Act or these final regulations.

Changes: We have changed new § 300.152(a)(3)(ii) (proposed § 300.152(a)(3)(B)) by removing "with the consent of the parent" and "or other alternative means of dispute resolution" and adding a reference to § 300.506. We have also amended § 300.152(b)(1)(ii), as stated above, to clarify that a public agency's State complaint procedures must permit an extension of the 60-day time limit if a parent (or individual or organization, if mediation, or other alternative means of dispute resolution is available to the individual or organization under State procedures) who has filed a complaint and the public agency voluntarily agree to extend the time to engage in mediation or other alternative means of dispute resolution, if available in the State.

Comment: A few commenters stated that the agreement to extend the 60-day time limit (to allow the parties to engage in mediation, or alternative means of dispute resolution, or both) should meet the consent requirements in § 300.9. One commenter requested an extension of the 60-day time limit to resolve complaints when mediation is underway.

Discussion: We do not agree that consent, as defined in § 300.9, should be required to extend the 60-day time limit because it would add burden and is not necessary. It is sufficient to require agreement of the parties. At any time that either party withdraws from mediation or other alternative means of dispute resolution, or withdraws agreement to the extension of the time limit, the extension would end. We believe § 300.152(b) is sufficiently clear that an extension of the 60-day time limit is permissible if exceptional circumstances exist with respect to a particular complaint, or if the parent and the public agency agree to extend the time to engage in mediation. We also believe it would be permissible to extend the 60-day time limit if the public agency and an organization or other individual agree to engage in an alternative means of dispute resolution, if available in the State, and the parties agree to extend the 60-day time limit. We will revise § 300.152(b)(1)(ii) to include this exception.

Changes: We have revised § 300.152(b)(1)(ii) to clarify that it would be permissible to extend the 60-day time limit if the parties agree to engage in other alternative means of dispute resolution, if available in the State.

Comment: Several commenters requested that § 300.152(a) be modified to include language allowing parents, in addition to the public agency, an opportunity to submit a proposal to resolve the complaint.

Discussion: We do not believe it is necessary to include the language in § 300.152(a) as suggested by the commenter because § 300.153(b)(4)(v) already requires that the signed written complaint submitted to the SEA by the complainant include a proposed resolution to the problem. A parent who is a complainant must include a proposed resolution to the problem to the extent known and available to the parent at the time the complaint is filed.

Changes: None.

Complaints Filed Under This Section and Due Process Hearings Under § 300.507 or §§ 300.530 Through 300.532 (§ 300.152(c))

Comment: A few commenters requested that the regulations include a provision to allow parents to use the State complaint process to enforce agreements reached in mediation and resolution sessions. One commenter expressed concern that if an SEA does not have authority to enforce agreements arising from mediation and resolution sessions, the burden will be on a parent to incur costs necessary to file a petition with a court to have the agreement enforced.

Discussion: The Act provides that the enforcement and implementation of agreements reached through mediation and resolution sessions may be obtained through State and Federal courts. Section 300.506(b)(7), consistent with section 615(e)(2)(F)(iii) of the Act, states that a written, signed mediation agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States. Similarly, § 300.510(c)(2), consistent with section 615(f)(1)(B)(iii)(II) of the Act, states that a written settlement agreement resulting from a resolution meeting is enforceable in any State court of competent jurisdiction or in a district court of the United States.

However, as noted in the *Analysis of Comments and Changes* for subpart E, we have added new § 300.537 that allows, but does not require, a State to have mechanisms or procedures that permit parties to mediation or resolution agreements to seek enforcement of those agreements and decisions at the SEA level. We believe this provision is sufficient to allow States the flexibility to determine what mechanisms or procedures, if any, may be appropriate to enforce such agreements, including utilizing their

State complaint procedures, if they choose to do so, so long as the mechanisms or procedures are not used to deny or delay a parent's right to seek enforcement through State and Federal courts.

Changes: None.

Comment: Numerous commenters requested that current § 300.661(c)(3), regarding the SEA's responsibility to resolve complaints alleging a public agency's failure to implement due process decisions, be retained. Many commenters raised concerns that removing this language will lead to more litigation. One commenter stated that parents would be forced to litigate due process decisions, which will prolong the denial of FAPE to children. Another commenter stated that not allowing States to enforce a hearing officer's decision encourages litigation because it is the only avenue for relief. Several commenters stated that parents are placed at a disadvantage because they may not have the resources to file in State or Federal court.

Discussion: The SEA's obligation to implement a final hearing decision is consistent with the SEA's general supervisory responsibility, under sections 612(a)(11) and 616 of the Act, over all education programs for children with disabilities in the State, which includes taking necessary and appropriate actions to ensure that the provision of FAPE and all the requirements in Part B of the Act and part 300 are carried out. However, we agree that the requirements from current § 300.661(c)(3) should be retained for clarity.

Changes: We have added the requirement in current § 300.661(c)(3) as new § 300.152(c)(3).

Comment: Numerous commenters requested retaining current § 300.661(c)(1), which requires that any issue in the complaint that is not a part of a due process complaint be resolved using the applicable State complaint timelines and procedures. One commenter stated that § 300.152(c)(1) requires the State to set aside an entire complaint if due process proceedings commence with respect to any subject that is raised in the complaint. A few commenters expressed concern that if issues in a State complaint, which are not part of a due process complaint, are not investigated until the due process complaint is resolved, children may go without FAPE for extended periods of time. These commenters also stated that parents are likely to file for due process on every issue of concern, rather than using the more expeditious and less expensive State complaint procedures.

Discussion: We agree that language in current § 300.661(c), requiring that States set aside any part of a State complaint that is being addressed in a due process hearing, until the conclusion of the hearing and resolve any issue that is not a part of the due process hearing, should be retained.

Changes: We have revised § 300.152(c)(1) by adding the requirements in current § 300.661(c)(1) to the regulations.

Comment: One commenter stated that the regulations do not address the disposition of a complaint if a parent and a public agency come to a resolution of a complaint through mediation. One commenter recommended that the regulations provide guidance on how an SEA should handle a complaint that is withdrawn. Another commenter requested clarification on what should occur if an SEA does not approve of the agreement reached between the parent and the public agency.

Discussion: We do not believe it is necessary to regulate on these matters, as recommended by the commenters. Section 615(e)(2)(F) of the Act and § 300.506(b)(7) clarify that an agreement reached through mediation is a legally binding document enforceable in State and Federal courts. Therefore, an agreement reached through mediation is not subject to the SEA's approval. We strongly encourage parties to resolve a complaint at the local level without the need for the SEA to intervene. If a complaint is resolved at the local level or is withdrawn, no further action is required by the SEA to resolve the complaint.

Changes: None.

Comment: One commenter suggested including language in the regulations that would require parties to provide evidence under threat of perjury. Another commenter stated that the State complaint process should be non-adversarial and that neither party should have the right to review the other's submissions or to cross-examine the other party.

Discussion: We do not believe it is appropriate to include the language suggested by the commenters because we believe requiring parties to provide evidence under the threat of perjury, permitting parties to review submissions, and allowing one party to cross-examine the other party are contrary to the intent of the State complaint process. The State complaint process is intended to be less adversarial than the more formal filing of a due process complaint and possibly going to a due process hearing. To make the changes requested by the

commenters will serve only to make the State complaint process more adversarial and will not be in the best interest of the child. The State complaint procedures in §§ 300.151 through 300.153 do not require parties to provide evidence, nor do they require that a State allow parties to review the submissions of the other party or to cross-examine witnesses.

Changes: None.

Filing a Complaint (§ 300.153)

Comment: One commenter recommended the regulations include a limit on the number of times that an individual may file a State complaint against a public agency.

Discussion: An SEA is required to resolve any complaint that meets the requirements of § 300.153, including complaints that raise systemic issues, and individual child complaints. It would be inconsistent with the Act's provisions in section 616 regarding enforcement and the Act's provisions in section 612 regarding general supervision for an SEA to have a State complaint procedure that removes or limits a party's right to file a complaint that a public agency has violated a requirement of Part B of the Act or part 300, including limiting the number of times a party can file a complaint with the SEA. Therefore, it is not appropriate to include in the regulations the language suggested by the commenter, nor should the SEA include in its State complaint procedures any restriction on the number of times a party can file a complaint, as long as the complaint meets the requirements of § 300.153.

Changes: None.

Comment: Many commenters requested retaining current § 300.662(c), which permits a complaint to be filed about a violation that occurred more than one year prior to the date the complaint is received if the violation is continuing or the complainant is requesting compensatory services for a violation that occurred more than three years prior to the date the complaint is received.

Some commenters requested that the regulations permit a parent to have as much time to file a State complaint as a parent would have to file a due process complaint (two years, unless provided otherwise by State law). One commenter stated that extensions of the statute of limitations should be granted when circumstances warrant an extension.

Another commenter suggested adding language providing that the timeline begins when a parent first learns about the violation. A few commenters stated that parents need a longer statute of

limitations for State complaints because they do not always know about violations when they occur and may not fully understand how the violation affects their child's education.

Several commenters stated that Congress did not intend to create a one-year statute of limitations for State complaints when it created a two-year statute of limitations for due process hearings. Several commenters stated that there is no evidence that Congress intended to change the current three-year statute of limitations on the parents' right to file a State complaint when the violation is ongoing or compensatory services are being requested.

Discussion: We believe a one-year timeline is reasonable and will assist in smooth implementation of the State complaint procedures. The references to longer periods for continuing violations and for compensatory services claims in current § 300.662(c) were removed to ensure expedited resolution for public agencies and children with disabilities. Limiting a complaint to a violation that occurred not more than one year prior to the date that the complaint is received will help ensure that problems are raised and addressed promptly so that children receive FAPE. We believe longer time limits are not generally effective and beneficial to the child because the issues in a State complaint become so stale that they are unlikely to be resolved. However, States may choose to accept and resolve complaints regarding alleged violations that occurred outside the one-year timeline, just as they are free to add additional protections in other areas that are not inconsistent with the requirements of the Act and its implementing regulations. For these reasons, we do not believe it is necessary to retain the language in current § 300.662(c).

We do not believe it is appropriate to change the timeline to begin when a parent first learns about the violation, as suggested by the commenter, because such a provision could lead to some complaints being filed well beyond one year from the time the violation actually occurred. This also would make the issue of the complaint so stale that the SEA would not be able to reasonably resolve the complaint and recommend an appropriate corrective action.

As we stated earlier in the *Analysis of Comments and Changes* for this subpart, Congress did not specifically address or detail a State complaint process in the Act; nor did Congress express an opinion regarding the time limit for filing a complaint under a State's complaint process.

Changes: None.

Comment: Several commenters stated that § 300.153(c) appears to indicate that if a State complaint, is also the subject of a due process complaint, the time period to file the complaint is two years, rather than the one-year time limit applicable for all other State complaints. Several commenters stated that this provision should be removed and that a one-year limitation should apply to all State complaints, regardless of whether a request for a due process hearing is filed on the issue(s) in the complaint.

Discussion: If a State complaint contains multiple issues of which one or more is part of a due process hearing, the one-year statute of limitations would apply to the issues that are resolved under the State complaint procedures; the State due process statute of limitations would apply to the issues that are the subject of the due process hearing. We agree that the language in § 300.153 is confusing and will amend the language to remove the reference to the due process complaint.

Changes: We have removed the phrase, "Except for complaints covered under § 300.507(a)(2)" in § 300.153(c).

Comment: Some commenters recommended removing the requirement in § 300.153(d) that requires the party filing the complaint to forward a copy of the complaint to the LEA or public agency serving the child at the same time the party files the complaint with the SEA. One commenter stated that filing a complaint is onerous enough for parents, without including an extra step of requiring a copy of the complaint to be forwarded to the school. One commenter stated that this poses an unnecessary paperwork burden on parents. A few commenters stated that forwarding a copy of the complaint to the LEA should be the responsibility of the SEA, not the parents.

One commenter expressed concern that requiring the party filing the complaint to forward a copy of the complaint to the LEA or public agency serving the child will discourage parents or school personnel whistle blowers from filing a complaint and recommended instead, that the regulations require SEAs to provide the LEA with a concise statement of fact upon which the complaint is based and the provisions of laws and rules that are at issue. A few commenters requested including language in § 300.153(d) giving the SEA discretion to protect the confidentiality of the complainant. A few commenters recommended removing the requirement in § 300.153(b)(3) for the written complaint to include the signature and contact information for the complainant.

Discussion: The purpose of requiring the party filing the complaint to forward a copy of the complaint to the LEA or public agency serving the child, at the same time the party files the complaint with the SEA, is to ensure that the public agency involved has knowledge of the issues and an opportunity to resolve them directly with the complaining party at the earliest possible time. The sooner the LEA knows that a complaint is filed and the nature of the issue(s), the quicker the LEA can work directly with the complainant to resolve the complaint. We believe the benefit of having the complainant forward a copy of the complaint to the LEA or public agency far outweigh the minimal burden placed on the complainant because it will lead to a faster resolution of the complaint at the local level. For these reasons, we also do not believe it is more efficient to have the SEA forward the complaint to the public agency or provide the public agency with a statement summarizing the complaint.

We do not believe that the complaint procedures should provide for the confidentiality of the complainant. The complainant should not remain unknown to the public agency that is the subject of the complaint because that public agency needs to know who the complainant is and something about the complaint (consistent with § 300.153) before it can be expected to resolve the issues. We believe it is reasonable to require a party to file a signed complaint and provide contact information to the SEA in order to ensure the credibility of the complaint and provide the SEA with the basic contact information necessary for the SEA to handle complaints expeditiously. If the SEA receives a complaint that is not signed, as required in § 300.153, the SEA may choose to dismiss the complaint.

Changes: None.

Comment: One commenter expressed concern that a parent must have legal knowledge in order to correctly file a State complaint.

Discussion: Contrary to the commenter's assertion that a parent must have legal knowledge to file a complaint, we believe the State complaint procedures, which are under the direct control of the SEA, provide the parent and the school district with mechanisms that allow them to resolve differences without having to resort to a more costly and cumbersome due process complaint, which, by its nature, is litigious. We believe if a State effectively implements its State complaint procedures, both parents and public agencies will generally find the

process efficient and easy to initiate. We further believe that the requirement in § 300.509 that each SEA must develop model forms to assist parents in filing a State complaint in accordance with §§ 300.151 through 300.153, and in filing a due process complaint in accordance with §§ 300.507(a) and 300.508(a) through (c), will make the process of filing such complaints much easier for parents and others.

Changes: We have made a minor wording change in § 300.153(b)(4) for clarity.

Comment: One commenter stated that the complainant should not have to propose a resolution to the problem, as required in § 300.153(b)(4)(v), in order to have the State investigate a complaint.

Discussion: Section 300.153(b)(4)(v) requires the complainant to propose a resolution to the complaint only to the extent known and available to the complainant at the time the complaint is filed. We believe this proposed resolution is necessary because it gives the complainant an opportunity to state what he or she believes to be the problem and how the complainant believes it can be resolved. This is important because it gives the complainant an opportunity to tell the public agency what is wrong and what it would take to fix the problem from the complainant's point of view. It also will give the LEA an opportunity to choose either to do as the complainant requests or propose a solution that it believes would resolve the issue raised by the complainant. Thus, if successful, the parties will avoid an adversarial relationship and possibly the expense of a due process hearing.

Changes: None.

Comment: One commenter requested that § 300.153(d) include language allowing an LEA to appeal an SEA finding to an administrative hearing or the courts. Another commenter expressed concern that the State complaint procedures lack an appeals process for parties that lose under the State complaint procedures.

Discussion: The regulations neither prohibit nor require the establishment of procedures to permit an LEA or other party to request reconsideration of a State complaint decision. We have chosen to be silent in the regulations about whether a State complaint decision may be appealed because we believe States are in the best position to determine what, if any, appeals process is necessary to meet each State's needs, consistent with State law.

If a State chooses, however, to adopt a process for appealing a State complaint decision, such process may

not waive any of the requirements in §§ 300.151 through 300.153. Section 300.152 requires that the SEA issue a final decision on each complaint within 60 calendar days after the complaint is filed, unless the SEA extends the timeline as provided in § 300.152(b).

This means that, absent an appropriate extension of the timeline for a particular complaint, the State must issue a final decision within 60 calendar days.

However, if after the SEA's final decision is issued, a party who has the right to request a due process hearing (that is, the parent or LEA) and who disagrees with the SEA's decision may initiate a due process hearing, provided that the subject of the State complaint involves an issue about which a due process hearing can be filed and the two-year statute of limitations for due process hearings (or other time limit imposed by State law) has not expired.

Changes: None.

Method of Ensuring Services (§ 300.154) Establishing Responsibility for Services (§ 300.154(a))

Comment: One commenter suggested posting interagency agreements on SEA Web sites and in public buildings, and making them available upon request.

Discussion: There is nothing in the Act or these regulations that would prohibit an SEA from posting interagency agreements on Web sites, in public buildings, or making them available upon request. However, we believe that it would be unnecessarily burdensome to require SEAs to do so and any decision regarding posting interagency agreements is best left to the States' discretion.

Changes: None.

Comment: One commenter stated that interagency agreements are important because agencies other than SEAs (e.g., mental health agencies that place children in residential facilities) are responsible for providing special educational services. The commenter requested that the regulations specify that residential facilities be allowed reimbursement for providing educational services and that children in these facilities are entitled to FAPE.

Discussion: We do not believe it is necessary to further clarify in the regulations that children with disabilities who are placed in residential facilities by public agencies are entitled to FAPE because § 300.146, consistent with section 612(a)(10)(B) of the Act, provides that SEAs must ensure that children with disabilities receive FAPE when they are placed in or referred to private schools or facilities by public agencies. Whether residential

facilities can receive reimbursement for educational services will depend on how States have apportioned financial responsibility among State agencies and we do not believe that regulating on this issue is appropriate or necessary.

Changes: None.

Obligation of Noneducational Public Agencies (§ 300.154(b))

Comment: One commenter expressed concern that § 300.154(b) allows LEAs to discontinue services when there is a dispute with other agencies and requested the regulations require LEAs to bear the ultimate responsibility for providing services.

Discussion: We do not believe it is necessary to further clarify that the LEA is ultimately responsible for providing services because § 300.154(b)(2) sufficiently requires that if a public agency other than an educational agency fails to provide or pay for the special education and related services in § 300.154(b)(1), the LEA or State agency responsible for developing the child's IEP must provide or pay for these services to the child in a timely manner. Disagreements about the interagency agreements should not stop or delay the receipt of the services described in the child's IEP. Section 300.103(c) also addresses timely services and clarifies that, consistent with § 300.323(c), the State must ensure there is no delay in implementing a child's IEP, including any situation in which the source for providing or paying for the special education or related services to a child is being determined. Section 612(a)(12)(A)(i) of the Act provides that the financial responsibility of public agencies (other than an educational agency), including Medicaid and other public insurers obligated under Federal or State law or assigned responsibility under State policy, must precede financial responsibility of the LEA.

Changes: None.

Children With Disabilities Who Are Covered by Public Benefits or Insurance (§ 300.154(d))

Comment: One commenter expressed concern regarding the use of a parent's public benefits or insurance to pay for services required under Part B of the Act because co-payments and other out-of-pocket expenses would be a hardship to low-income families. A few commenters stated that services paid for by public benefits or insurance would count against a child's lifetime cap.

Discussion: The commenters' concerns are addressed in § 300.154(d)(2)(ii) and (d)(2)(iii). Section 300.154(d)(2)(ii) states that a public agency may not require parents to incur

an out-of-pocket expense, such as the payment of a deductible or co-pay amount, in filing a claim for services, and may pay from funds reserved under the Act, the cost that the parent would otherwise be required to pay. In addition, § 300.154(d)(2)(iii) states that a public agency may not use a child's benefits under a public benefits or insurance program if that use would decrease lifetime coverage or any other insured benefit; result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school; increase premiums or lead to the discontinuation of benefits or insurance; or risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.

Changes: None.

Comment: One commenter suggested changing "parental consent" to "informed parental consent." One commenter recommended requiring public agencies to obtain parental consent each time the public agency seeks to access the parent's public benefits or insurance. Some commenters recommended removing the requirement to obtain parental consent to use Medicaid benefits to pay for services required under Part B of the Act. A few commenters opposed requiring parental consent, stating the process is an administrative burden. Other commenters recommended waiving the requirement for consent if the agency has taken reasonable measures to obtain such consent or the parent's consent was given to the State Medicaid Agency.

Discussion: In order for a public agency to use the Medicaid or other public benefits or insurance program in which a child participates to provide or pay for services required under the Act, the public agency must provide the benefits or insurance program with information from the child's education records (e.g., services provided, length of the services). Information from a child's education records is protected under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232(g) (FERPA), and section 617(c) of the Act. Under FERPA and section 617(c) of the Act, a child's education records cannot be released to a State Medicaid agency without parental consent, except for a few specified exceptions that do not include the release of education records for insurance billing purposes. Parental consent requires, among other things, that the parent be fully informed in his or her native language, or other mode of

communication, consistent with § 300.9. Thus, there is no need to change "parental consent" to "informed consent," as recommended by one commenter. However, we believe it would avoid confusion for the references to "consent" in paragraphs (d) and (e) in § 300.154 to be consistent. Therefore, we will add a reference to § 300.9 in § 300.154(d)(2)(iv)(A) and delete "informed" from § 300.154(e)(1).

We believe obtaining parental consent each time the public agency seeks to use a parent's *public* insurance or other public benefits to provide or pay for a service is important to protect the privacy rights of the parent and to ensure that the parent is fully informed of a public agency's access to his or her public benefits or insurance and the services paid by the public benefits or insurance program. Therefore, we will revise § 300.154(d)(2)(iv) to clarify that parental consent is required each time the public agency seeks to use the parent's *public* insurance or other public benefits. We do not believe that it would be appropriate to include a provision permitting waiver of parental consent in this circumstance, even where a public agency makes reasonable efforts to obtain the required parental consent. However, we agree with the commenter that a public agency could satisfy parental consent requirements under FERPA and section 617(c) of the Act if the parent provided the required parental consent to the State Medicaid agency, and the consent satisfied the Part B definition of *consent* in § 300.9.

We also believe that it is important to let parents know that their refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. We will, therefore, add a new paragraph (B) to § 300.154(d)(2)(iv) to make this clear.

Finally, because we have referenced the definition of *consent* in § 300.9 throughout the rest of these regulations, rather than the consent provisions in § 300.622, we have removed the reference to § 300.622.

Changes: Section 300.154(d)(2)(iv) has been changed to clarify that consent must be obtained each time the public agency seeks to access a parent's *public* benefits or insurance and to clarify that a parent's refusal to allow access to the parent's public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parent. The reference to § 300.622 has been removed and we have added "consistent with § 300.9" following "parental consent" in

§ 300.154(d)(2)(iv)(A). For consistency, we have removed "informed" before "consent" in § 300.154(e)(1).

Comment: One commenter stated that LEAs and agencies that, by law, must provide educational services should not be allowed to use public benefits or insurance to pay for these programs. One commenter suggested that the Act be more closely aligned with the Medicaid laws. One commenter requested requiring public benefits or insurance agencies, when paying for special education, to meet the standards of the Act, and not the standards for medical environments.

Discussion: We disagree with the comment that LEAs and other public agencies responsible for providing special education and related services to children with disabilities should not be allowed to use public benefits or insurance to pay for these services. Pursuant to section 612(a)(12) of the Act, if a child is covered by a public benefits or insurance program and there is no cost to the family or the child in using the benefits of that program to support a service included in a child's IEP, the public agency is encouraged to use the public benefits or insurance to the extent possible. We believe public benefits or insurance are important resources for LEAs and other public agencies to access, when appropriate, to assist in meeting their obligation to make FAPE available to all children who are eligible to receive services.

Section 300.103 retains the Department's longstanding provision that clarifies that each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of part 300. Nothing in part 300 relieves an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a child with a disability.

The Act does not give the Department the authority to impose the standards of the Act on public benefits or insurance agencies, when paying for special education. If, however, a third party provider, such as a public benefits or insurance company, is unable to provide funding for services outside a clinical setting or other specific setting, the public agency cannot use the third party provider's inability to provide such funding as an appropriate justification for not providing a child with a disability FAPE in the LRE. Nothing in part 300 alters the requirements imposed on a State Medicaid agency, or any other agency administering a public benefits or insurance program by Federal statute, regulation, or policy under Title XIX or

Title XXI of the Social Security Act, 42 U.S.C. 1396 through 1396(v) and 42 U.S.C. 1397aa through 1397jj, or any other public benefits or insurance program. See section 612(a)(12) and (e) of the Act.

We believe the regulations are sufficiently aligned with the Medicaid program and consistent with the Act and no further clarification is necessary.

Changes: None.

Comment: One commenter requested clarifying that a child cannot be denied Medicaid-supported medical services merely because he or she receives educational services funded by Medicaid.

Discussion: We do not believe further clarification is necessary because § 300.154(d)(2) is sufficiently clear that the child's receipt of Medicaid-funded educational services, consistent with the Act and these regulations, should not deny the child receipt of other services for which he or she may be eligible under Medicaid or other noneducational programs. Further, § 300.103(b) provides that nothing in part 300 relieves an insurer or third party from an otherwise valid obligation to pay for services provided to a child with a disability.

Changes: None.

Comment: One commenter stated that LEAs and agencies that, by law, must provide educational services should not be allowed to use public benefits or insurance to pay for these programs. One commenter suggested that the Act be more closely aligned with the Medicaid laws. One commenter requested requiring public benefits or insurance agencies, when paying for special education, to meet the standards of the Act, and not the standards for medical environments.

Discussion: We disagree with the comment that LEAs and other public agencies responsible for providing special education and related services to children with disabilities should not be allowed to use public benefits or insurance to pay for these services. Pursuant to section 612(a)(12) of the Act, if a child is covered by a public benefits or insurance program and there is no cost to the family or the child in using the benefits of that program to support a service included in a child's IEP, the public agency is encouraged to use the public benefits or insurance to the extent possible. We believe public benefits or insurance are important resources for LEAs and other public agencies to access, when appropriate, to assist in meeting their obligation to make FAPE available to all children who are eligible to receive services.

Section 300.103 retains the Department's longstanding provision

that clarifies that each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of part 300. Nothing in part 300 relieves an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a child with a disability.

The Act does not give the Department the authority to impose the standards of the Act on public benefits or insurance agencies, when paying for special education. If, however, a third party provider, such as a public benefits or insurance company, is unable to provide funding for services outside a clinical setting or other specific setting, the public agency cannot use the third party provider's inability to provide such funding as an appropriate justification for not providing a child with a disability FAPE in the LRE. Nothing in part 300 alters the requirements imposed on a State Medicaid agency, or any other agency administering a public benefits or insurance program by Federal statute, regulation, or policy under Title XIX or Title XXI of the Social Security Act, 42 U.S.C. 1396 through 1396(v) and 42 U.S.C. 1397aa through 1397jj, or any other public benefits or insurance program. See section 612(a)(12) and (e) of the Act.

We believe the regulations are sufficiently aligned with the Medicaid program and consistent with the Act and no further clarification is necessary.

Changes: None.

Comment: One commenter requested clarifying that a child cannot be denied Medicaid-supported medical services merely because he or she receives educational services funded by Medicaid.

Discussion: We do not believe further clarification is necessary because § 300.154(d)(2) is sufficiently clear that the child's receipt of Medicaid-funded educational services, consistent with the Act and these regulations, should not deny the child receipt of other services for which he or she may be eligible under Medicaid or other noneducational programs. Further, § 300.103(b) provides that nothing in part 300 relieves an insurer or third party from an otherwise valid obligation to pay for services provided to a child with a disability.

Changes: None.

Personnel Qualifications (§ 300.156)

Comment: One commenter requested that § 300.156 use the term "standards" when referring to personnel qualifications.

Discussion: We are not changing § 300.156 because its language follows

the specific language in section 612(a)(14) of the Act. Current § 300.136 refers to "personnel standards" but was removed consistent with the changes in section 612(a)(14) of the Act.

Changes: None.

Comment: Some commenters requested that the personnel qualification requirements in § 300.156 apply to personnel who provide travel instruction and teachers of children with visual impairments. Other commenters requested that personnel who provide therapeutic recreation services be required to meet the personnel qualifications. Some commenters requested that the personnel qualifications apply to preschool special education teachers.

Discussion: It is not necessary to list the specific personnel who provide services to children with disabilities under the Act and to whom the requirements in § 300.156 apply because the regulations are sufficiently clear that all needed personnel are covered. This includes personnel who provide travel instruction or therapeutic recreation services; teachers of children with visual impairments, if such personnel are necessary to carry out the purposes of this part; and preschool teachers in States where preschool teachers are considered elementary school teachers. Section 300.156(a), consistent with section 612(a)(14)(A) of the Act, requires each SEA to establish and maintain personnel qualification requirements to ensure that personnel necessary to carry out the purposes of Part B of the Act and part 300 are appropriately and adequately prepared and trained, and have the content knowledge and skills to serve children with disabilities.

Changes: None.

Comment: One commenter stated that the regulations should define what it means to be qualified to provide services to children with disabilities under the Act. The commenter stated that the regulations do not include any requirements for general education teachers or administrators who are involved in providing instruction and services for children in special education.

Discussion: It is not necessary to change the regulations to define what it means to be qualified to provide services because we believe that, aside from the "highly qualified" requirements for teachers and special education teachers in ESEA and the Act, other personnel qualifications are appropriately left to the States, in light of the variability in State circumstances. Further, § 300.156, consistent with section 612(a)(14) of the Act, makes it clear that it is the responsibility of the

SEA, not the Federal government, to establish and maintain qualifications for personnel who provide services to children with disabilities under the Act.

Changes: None.

Comment: One commenter objected to the removal of the requirements for a comprehensive system of personnel development in current § 300.135. The commenter also stated that regular education teachers need to be trained to work with children with disabilities to ensure that their inclusion in the regular classroom is successful.

Discussion: Current § 300.135 required States to have in effect a system of personnel development to ensure an adequate supply of qualified special education, regular education, and related services personnel. Section 612(a)(14) of the Act removed this requirement. The removal of current § 300.135, however, does not diminish the responsibility of each State to establish and maintain qualifications to ensure that personnel (including regular education teachers) necessary to carry out the purposes of the Act are appropriately and adequately prepared and trained, consistent with § 300.156.

Changes: None.

Comment: Some commenters recommended that the regulations include language from note 97 of the Conf. Rpt., p. 192, which requires SEAs to establish rigorous qualifications for related services providers to ensure that children with disabilities receive the appropriate quality and quantity of care. Several commenters requested that the regulations require SEAs to consult with LEAs, other State agencies, the disability community, and professional organizations regarding appropriate qualifications for related services providers and different service delivery models (e.g., consultative, supervisory, and collaborative models).

Discussion: We believe that States already have sufficient incentive to ensure that related services providers provide services of appropriate quality so that children with disabilities can achieve to high standards and that further regulation in this area is not necessary. Section 300.156(b), consistent with section 612(a)(14)(B) of the Act, includes the qualifications for related services personnel. There is nothing in the Act that requires SEAs to consult with LEAs, other State agencies, or other groups and organizations to determine the appropriate qualifications for related services providers and the use of different service delivery models, and while we agree that this is good practice and encourage SEAs to participate in such consultation, we do not believe that we should regulate in

this manner. States should have the flexibility, based on each State's unique circumstances, to determine how best to establish and maintain standards for all personnel who are providers of special education and related services.

Changes: None.

Comment: Numerous commenters objected to § 300.156(b) and the removal of the requirement in current § 300.136 for State professional requirements to be based on the highest requirements in the State. The commenters stated that the removal of this requirement relaxes the qualification standards for speech-language pathologists and other related services personnel. Several commenters stated that speech-language professionals should be required to have advanced degrees (i.e., master's level) because a bachelor's degree does not provide adequate preparation. Many commenters expressed concern that the requirements in § 300.156(b) will lead to a decline in the quality of related services provided to children with disabilities in public schools. Other commenters expressed concern that increasing the standards will exacerbate the shortage of related services personnel experienced by large urban school districts.

Discussion: We are not changing § 300.156 because it reflects the specific language in section 612(a)(14) of the Act, which was intended to provide greater flexibility to SEAs to establish appropriate personnel standards, including the standards for speech-language pathologists. As indicated in note 97 of the Conf. Rpt., p. 192, section 612(a)(14) of the Act removes the requirement for State professional requirements to be based on the highest requirements in the State because of concerns that the previous law, regarding the qualifications of related services providers, established an unreasonable standard for SEAs to meet, and as a result, led to a shortage of related services providers for children with disabilities. We believe that States can exercise the flexibility provided in § 300.156 and section 612(a)(14) of the Act while ensuring appropriate services for children with disabilities without additional regulation.

Changes: None.

Comment: Many commenters expressed concern that § 300.156(b) establishes qualifications for related services providers in public schools that are less rigorous than the qualifications for related services providers who provide Medicaid services or services in other public settings, such as hospitals. The commenters stated that less rigorous qualifications would result in a two-tiered system in which related

services providers in public schools will be less qualified than related services providers in other public agencies. Another commenter expressed concern that the relaxation of standards for speech-language pathologists would cause LEAs to lose Medicaid funds that are used to assist children with disabilities.

Discussion: Section 300.156, consistent with section 612(a)(14)(B)(i) of the Act, clarifies that it is up to each SEA to establish qualifications for personnel to carry out the purposes of the Act. This will require weighing the various policy concerns unique to each State. The qualifications of related services providers required under Medicaid, or in hospitals and other public settings, and the fact that Medicaid will not pay for providers who do not meet Medicaid provider qualifications should serve as an incentive for States that want to bill for medical services on children's IEPs to impose consistent requirements for qualifications of related services providers.

Changes: None.

Comment: Some commenters stated that related services personnel should be considered to have met the qualifications in § 300.156(b)(1), regarding State-recognized certification, licensing, registration or other comparable requirements, if such personnel hold an academic degree consistent with their profession's national certification or State license to practice; demonstrate satisfactory progress toward full certification in the schools as prescribed by the State; and assume related services personnel functions for a specified period not to exceed three years.

A few commenters objected to the requirement that related services personnel must not have had certification or licensure requirements waived. One commenter stated that emergency, temporary, or provisional certificates are necessary for professionals relocating from different States or different countries, and predicted that professionals with emergency, temporary, or provisional certification would work for contract agencies to bypass the requirements.

Discussion: We believe the provisions in § 300.156(b) that State qualifications for related services personnel must include qualifications that are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services, are

sufficient to ensure related services personnel are qualified to provide appropriate services to children with disabilities while maintaining the States' flexibility to establish appropriate personnel standards for related services personnel. We do not believe, therefore, that it is necessary to include additional regulation as suggested by commenters.

Section 300.156(b)(2)(ii) tracks the statutory requirement in section 612(a)(14)(B)(ii) of the Act, which requires that related services personnel not have certification or licensure requirements waived on an emergency, temporary, or provisional basis. We do not believe this provision unnecessarily hinders States from hiring professionals from other States or countries. States, in examining the credentials of prospective related services personnel from other States or countries, may find that their existing certification or licensure requirements are ones that these related services personnel could readily meet. Because each State has full authority to define and enforce its own requirements that personnel must meet in order to receive full State certification or licensure, States that employ related services personnel from other States or countries may, consistent with State law and policy, consider establishing a separate category of certification that would differ from emergency, temporary, or provisional certification in that the State would not be waiving any training or experiential requirements.

Changes: None.

Comment: One commenter recommended using nationally recognized standards to determine the qualifications of related services personnel. Another commenter recommended requiring SEAs to consider current professional standards in establishing appropriate qualifications for related services personnel. One commenter requested adding language to the regulations to prevent professional organizations from establishing personnel standards for related services personnel that override standards set by the SEA.

Discussion: We do not believe it is necessary to regulate as suggested by the commenters because these matters are better left to States to decide as States are in the best position to determine appropriate professional requirements for their States. There is nothing in the Act that requires an SEA to determine qualifications of related services personnel based on nationally recognized standards or current professional standards. Professional organizations may establish personnel

standards for related services personnel that differ from the standards established by a State, but section 612(a)(14) of the Act clarifies that the State is responsible for establishing and maintaining personnel qualifications to ensure that related services personnel have the knowledge and skills to serve children with disabilities under the Act.

Changes: None.

Comment: A few commenters requested that the regulations specify that an SEA, and not the State, has the authority to establish certification and licensure qualifications of related services personnel.

Discussion: We do not believe it is necessary to change the regulation because § 300.156(b), which follows the language in section 612(a)(14)(B) of the Act, clarifies that the SEA must establish qualifications for related services personnel that are consistent with State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to related services personnel.

Changes: None.

Comment: Some commenters requested that the regulations require related services providers who do not meet existing State standards to be supervised by qualified personnel.

Discussion: Related services providers who do not meet the personnel qualifications established by the SEA would not be considered qualified to serve children with disabilities under the Act even with supervision by qualified personnel. Section 300.156(d), consistent with section 612(a)(14)(D) of the Act, clarifies that each State must ensure that LEAs take measurable steps to recruit, hire, train, and retain highly qualified special education personnel to provide special education and related services to children with disabilities under the Act.

Changes: None.

Comment: Some commenters recommended that the regulations require high standards for paraprofessionals. Several commenters requested guidance on the appropriate use of paraprofessionals to ensure that paraprofessionals and assistants are not used as a means of circumventing certification and licensing requirements for related services providers. A few commenters requested language clarifying that the elimination of the requirement that State professional requirements be based on the highest requirements in the State in current § 300.136(b) must not be used to justify the inappropriate use of paraprofessionals or related services providers. Another commenter asked that the regulations require States to

ensure that paraprofessionals are properly supervised at all times. One commenter stated that the regulations should clarify the use of State standards for speech-language pathology paraprofessionals.

Discussion: We believe the provisions in § 300.156, consistent with section 612(a)(14) of the Act, are sufficient to ensure that paraprofessionals meet high standards and that including additional requirements in these regulations is unnecessary. These provisions require an SEA to establish and maintain qualifications to ensure that personnel, including paraprofessionals, are appropriately and adequately prepared and trained, and have the content knowledge and skills to serve children with disabilities; and require 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 working in a program supported by title I of the ESEA, 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>.

With regard to the commenter requesting that the regulations clarify the use of State standards for speech-language paraprofessionals, we do not believe it is appropriate to include clarification regarding a specific discipline in these regulations because the Act requires States to establish and maintain qualifications to ensure that paraprofessionals, including speech-language paraprofessionals, are

appropriately and adequately prepared and trained.

Section 300.156(b)(2)(iii), consistent with section 612(a)(14)(B)(iii) of the Act, does specifically allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, to assist in providing special education and related services to children with disabilities under the Act. However, this provision should not be construed to permit or encourage the use of paraprofessionals as a replacement for teachers or related services providers who meet State qualification standards. To the contrary, using paraprofessionals and assistants as teachers or related services providers would be inconsistent with the State's duty to ensure that personnel necessary to carry out the purposes of Part B of the Act are appropriately and adequately prepared and trained. Paraprofessionals in public schools are not directly responsible for the provision of special education and related services to children with disabilities; rather, these aides provide special education and related services to children with disabilities only under the supervision of special education and related services personnel. We believe the provision in § 300.156(b)(2)(iii) sufficiently ensures that paraprofessionals and assistants are adequately supervised and further clarification in these regulations is unnecessary.

The Act makes clear that the use of paraprofessionals and assistants who are appropriately trained and supervised must be contingent on State law, regulation, and written policy giving States the option of determining whether paraprofessionals and assistants can be used to assist in the provision of special education and related services under Part B of the Act, and, if so, to what extent their use would be permissible. However, it is critical that States that use paraprofessionals and assistants to assist in providing special education and related services to children with disabilities do so in a manner that is consistent with the rights of children with disabilities to FAPE under Part B of the Act. There is no need to provide additional guidance on how States and LEAs should use paraprofessionals and assistants because States have the flexibility to determine whether to use them, and, if so, to determine the scope of their responsibilities.

Changes: None.

Comment: One commenter recommended different requirements for paraprofessionals who perform routine tasks and those who perform specific

activities to assist in the provision of special education and related services.

Discussion: We do not see the need to make a change to the regulations as suggested by the commenter because, under § 300.156, consistent with section 612(a)(14) of the Act, SEAs have the responsibility for establishing and maintaining qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained. Furthermore, SEAs and LEAs have the flexibility to determine the tasks and activities to be performed by paraprofessionals and assistants, as long as they are consistent with the rights of children with disabilities to FAPE.

It should be kept in mind, however, that the ESEA has different requirements for paraprofessionals, including special education paraprofessionals, who assist in instruction in title I schools versus paraprofessionals in title I schools who do not provide instructional support, such as special education paraprofessionals who solely provide personal care services.

Changes: None.

Comment: A number of comments were received on the qualifications for special education teachers in § 300.156(c) that were similar to the comments received regarding the definition of *highly qualified special education teacher* in § 300.18.

Discussion: We combined and responded to these comments with the comments received in response to the requirements in § 300.18.

Changes: None.

Comment: Some commenters requested that the regulations allow alternative routes to certification for related services personnel and other non-teaching personnel, just as such routes are allowed for highly qualified teachers.

Discussion: As we stated earlier in this section, section 612(a)(14)(B) of the Act, clarifies that the SEA must establish qualifications for related services personnel that are consistent with State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to related services personnel. While the Act does not address alternative routes to certification programs for related services personnel or other non-teaching personnel, there is nothing in the Act or the regulations that would preclude a State from providing for alternate routes for certification for related services personnel or other non-teaching personnel. It is, however, up to a State to determine whether related services or

non-teaching personnel participating in alternative routes to certification programs meet personnel requirements established by the State, consistent with the requirements in § 300.156 and section 612(a)(14) of the Act.

Changes: None.

Comment: Many commenters recommended that § 300.156 provide more guidance to ensure that States and LEAs implement proven strategies for recruiting and retaining qualified personnel. A few commenters stated that this is especially important for speech-language pathologists because large caseloads, increased paperwork, and lack of time for planning and collaboration have been shown to contribute to their burn out and attrition. Several commenters recommended that strategies to recruit and retain qualified personnel include reasonable workloads, improved working conditions, incentive programs, salary supplements, loan forgiveness, tuition assistance, signing bonuses, streamlined application processes, State and national advertising venues, school and university partnerships, release time for professional development, certification reciprocity between States, grants to LEAs for recruitment and retention programs, alternate professional preparation models, caseload size standards, and classroom size standards.

One commenter requested that the requirements to recruit, hire, train, and retain highly qualified personnel in § 300.156(d) apply to paraprofessionals who provide special education and related services.

Discussion: The list of strategies recommended by the commenters includes many strategies that may be effective in recruiting and retaining highly qualified personnel; however, we do not believe it is appropriate to include these or other strategies in our regulations because recruitment and retention strategies vary depending on the unique needs of each State and LEA. States and LEAs are in the best position to determine the most effective recruitment and retention strategies for their location.

With regard to the comment regarding the applicability of § 300.156(d) to paraprofessionals who provide special education and related services, § 300.156(d), consistent with section 612(a)(14)(C) of the Act, applies to all personnel who provide special education and related services under the Act, including paraprofessionals.

Changes: None.

Comment: A few commenters stated that the rule of construction in § 300.156(e) is inconsistent with the rule

of construction in the definition of highly qualified teacher in proposed § 300.18(e). Some commenters requested that the regulations clarify that the rule of construction in § 300.156(e) is applicable to both administrative and judicial actions.

A few commenters requested that the regulations specify that a parent may file a State complaint with the State regarding failure of their child to receive FAPE because staff is not highly qualified. However, several commenters stated that parents should not be allowed to file a State complaint under §§ 300.151 through 300.153 regarding staff qualifications.

Discussion: We agree that the rules of construction in both proposed § 300.156(e) and proposed § 300.18(e) must be revised so that both rules are the same. The changes will 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 State 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. We believe that this is appropriate given the wording of section 612(a)(14)(E) of the Act “ * * * or to prevent a parent from filing a complaint about staff qualifications with the State educational agency” and incorporated in the regulations in § 300.156(e) and new § 300.18(f) (proposed § 300.18(e)). By incorporating the wording from the construction clause in section 612(a)(14)(E) of the Act in the regulations as previously noted, parents and other interested parties, may seek compliance through the State complaint process.

Changes: We have added “or a class of students” to § 300.156(e) to clarify that a judicial action on behalf of a class of students may not be filed for failure of a particular SEA or LEA employee to be highly qualified. We have substituted the word, “employee” for “staff person” to be more precise and for consistency with the rule of construction in new § 300.18(f) (proposed § 300.18(e)). We have also reformatted § 300.156(e).

Comment: Some commenters recommended adding language to the regulations restricting a parent’s right to file a complaint regarding an LEA’s failure to take measurable steps to

recruit, hire, train, and retain highly qualified personnel.

Discussion: We believe the regulations do not need clarification. Section § 300.151(a) is sufficiently clear that an organization or individual may file a State complaint under §§ 300.151 through 300.153 alleging a violation of a requirement of Part B of the Act or of this part. This includes the requirement that an LEA take measurable steps to recruit, hire, train, and retain highly qualified personnel consistent with section 612(a)(14)(D) of the Act.

Changes: None.

Comment: Some commenters requested that the regulations clarify that, unless the State has statutory control over district staffing, parents cannot obtain compensatory damages or services or a private school placement based on the lack of highly qualified personnel.

Discussion: We do not agree that the exception requested by the commenter should be added to the regulations because new § 300.18(f) (proposed § 300.18(e)), and § 300.156(e) are sufficiently clear that nothing in part 300 shall be construed to create a right of action on behalf of an individual child for the failure of a particular SEA or LEA staff person to be highly qualified.

Changes: None.

Comment: One commenter recommended that the qualifications of all personnel should be made a matter of public record.

Discussion: To do as the commenter recommends would add burden for local school personnel and it is not required under the Act. In contrast, title I of the ESEA required that LEAs receiving title I funds provide parents, at their request, the qualifications of their children’s classroom teachers. There is nothing in the Act or these regulations, however, which would prevent an SEA or LEA from adopting such a policy should it wish to do so. In the absence of a congressional requirement in the Act, such policies are matters best left to State law.

Section 1111(h)(6) of the ESEA requires LEAs to inform parents about the professional qualifications of their children’s classroom teachers. The ESEA requires that at the beginning of each school year, an LEA that accepts title I, part A funding must notify parents of students in title I schools that they can request information regarding their children’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 each parent 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 special education teachers who teach core academic subjects in Title I schools.

Changes: None.

Performance Goals and Indicators (§ 300.157)

Comment: Several commenters recommended that the regulations retain current § 300.137(a)(2), which requires that States have goals for the performance of children with disabilities in the State that are consistent, to the maximum extent appropriate, with other goals and standards for all children established by the State. The commenters specifically objected to the removal of the word “maximum” before “extent appropriate;” and the removal of the word “all” before “children” in § 300.157(a)(4).

Discussion: Section 612(a)(15)(A)(iv) of the Act specifically removed the words in current § 300.137(a)(2) that the comment references. Therefore, we believe that it would be contrary to the intent of the statutory drafters to restore these words to the regulatory provision.

Changes: None.

Comment: A few commenters requested that the regulations in § 300.156(b) require States to involve parent centers in establishing the performance goals and indicators and measurable annual objectives for children with disabilities.

Discussion: We encourage broad stakeholder involvement in the development of performance goals, indicators, and annual objectives for children with disabilities, including the involvement of parent centers. We see no need to single out a particular group, however. The regulations in § 300.165(a) already require specific public participation in the adoption of policies and procedures needed to demonstrate eligibility under Part B, including this requirement.

Changes: None.

Participation in Assessments (Proposed § 300.160)

Comment: None.

Discussion: Participation in assessments is the subject of a notice of proposed rulemaking published in the **Federal Register** on December 15, 2005 (70 FR 74624) to amend the regulations governing programs under title I of the ESEA and Part B of the Act, regarding additional flexibility for States to measure the achievement of children with disabilities based on modified achievement standards.

Changes: Therefore, we are removing proposed § 300.160 and designating the section as “Reserved.”

Supplementation of State, Local, and Other Federal Funds (§ 300.162)

Comment: One commenter disagreed with the removal of current § 300.155, which requires that States have policies and procedures on file with the Secretary to ensure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B.

Discussion: Current § 300.155 was removed from these regulations consistent with section 612(a)(17) of the Act. The removal of this requirement is also consistent with section 612(a) of the Act, which requires a State to submit a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the requirements of the Act rather than submitting the actual policies and procedures to the Department. To alleviate burden, Congress removed the statutory provisions which required that States have policies and procedures on file with the Secretary to ensure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B. OSEP continues to have responsibility to ensure that States are properly implementing the Act. Given the statutory change that Congress made to remove the prior requirement, we believe it would be inappropriate to include it in these regulations.

Changes: None.

Maintenance of State Financial Support (§ 300.163)

Comment: One commenter requested that § 300.163(c)(1), regarding waivers for maintenance of State financial support for exceptional or uncontrollable circumstances, provide examples of what would be considered a precipitous and unforeseen decline in the State’s financial resources.

Discussion: We decline to limit the Secretary’s discretion in these matters in

the abstract. The Secretary makes the determinations regarding these waivers on a case-by-case basis and given the facts and circumstances at the time such a request is made.

Changes: None.

Public Participation (§ 300.165)

Comment: Several commenters objected to the removal of current §§ 300.280 through 300.284, regarding public participation, and recommended that all provisions, including those related to public hearings, comment periods, and review of public comments be restored.

Discussion: We do not believe it is necessary to retain in the regulations the requirements in current §§ 300.280 through 300.284 because the provisions in § 300.165 and GEPA, in 20 U.S.C. 1232d(b)(7), provide sufficient opportunities for public participation. We also believe retaining the requirements in §§ 300.280 through 300.284 would place unnecessary regulatory burden on States. Section 300.165(a) incorporates the language in section 612(a)(19) of the Act, regarding public participation in the adoption of policies and procedures to implement Part B of the Act, and requires States to ensure that there are public hearings, adequate notice of hearings, and an opportunity for comment available to the general public. Furthermore, paragraph (b) of this section requires States to comply with the public participation requirements of GEPA, in 20 U.S.C. 1232d(b)(7), before submitting a State plan under this part. In accordance with the GEPA requirement, the State must assure that it will provide reasonable opportunities for participation by local agencies, representatives of the class of individuals affected by programs under this part and other interested institutions, organizations, and individuals in the planning for the operation of programs under this part. GEPA also requires that the State publish each proposed State plan under this part, in a manner that will ensure circulation throughout the State, at least 60 days prior to the date on which the State plan is submitted to the Secretary or on which the State plan becomes effective, whichever occurs earlier, with an opportunity for public comments on such plan to be accepted for at least 30 days. In addition, the State must comply with any State-specific public participation requirements in adopting policies and procedures related to Part B of the Act.

Changes: None.

Comment: One commenter requested that the regulations define the meaning

of “adequate notice” as it is used in § 300.165(a) to ensure that there is adequate notice of public hearings prior to adopting any policies and procedures needed to comply with Part B of the Act.

Discussion: We do not think it is appropriate or necessary to include in the regulations a definition of “adequate notice” because what constitutes “adequate notice” will vary depending on the unique circumstances in each State and we believe States should have the flexibility of determining and applying a workable and reasonable standard that meets their circumstances to ensure public participation at public hearings. We believe it would be reasonable for the State to assume that it provided adequate notice if, at its public hearings, there were sufficient representatives of the general public, including individuals with disabilities and parents of children with disabilities, in attendance.

Changes: None.

Comment: One commenter requested that the regulations require States to provide notices of public hearings in multiple languages and alternative formats.

Discussion: It is unnecessary to include regulations requiring States to provide notice of public hearings in multiple languages and alternative formats. Public agencies are required by other Federal statutes to take appropriate actions to ensure that the public has access, in alternative formats and languages other than English, to public hearings. The other Federal statutory provisions that apply in this regard are section 504 of the Rehabilitation Act of 1973 and its implementing regulations in 34 CFR part 104 (prohibiting discrimination on the basis of disability by recipients of Federal financial assistance), title II of the Americans With Disabilities Act and its implementing regulations in 28 CFR part 35 (prohibiting discrimination on the basis of disability by public entities, regardless of receipt of Federal funds), and title VI of the Civil Rights Act of 1964 and its implementing regulations in 34 CFR part 100 (prohibiting discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance).

Changes: None.

Comment: One commenter requested that the regulations require States to work with the parent centers to identify appropriate locations and times for public hearings.

Discussion: There is nothing in the Act or these regulations that would prohibit a State from working with the parent centers to identify appropriate

locations and times for public hearings, but we see no need to require States to do so. We believe that this matter should be left to State discretion.

Changes: None.

Rule of Construction (§ 300.166)

Comment: One commenter requested clarification regarding the use of Federal funds to offset decreases in State formula allocations to LEAs that use attendance, enrollment, or inflation as elements of the State funding formula for special education.

Discussion: Section 300.166 was added to incorporate language in section 612(a)(20) of the Act. It specifies that States with laws that require a specific level of funding to their LEAs cannot use Federal Part B funds for this purpose.

Changes: None.

State Advisory Panel

State Advisory Panel (§ 300.167)

Comment: One commenter stated that §§ 300.167 through 300.169 are unnecessary and do not add any requirements beyond those in section 612(a)(21) of the Act. The commenter recommended removing these requirements and stated that they can be adequately implemented through guidance provided by the Department and not through regulation.

Discussion: The requirements of the State advisory panel in §§ 300.167 through 300.169 reflect the specific language in section 612(a)(21) of the Act. We believe it is necessary to include these statutory requirements in the regulations to provide parents, public agencies, and others with information on the requirements applicable to State advisory panels.

Changes: None.

Comment: Several commenters recommended retaining the procedures to govern State advisory panels in current § 300.653 and strengthening the requirements of notice and opportunity for public comment at State advisory panel meetings by mandating publication of meeting dates, agendas, and minutes on Web sites. A few commenters stated that eliminating the notice requirements and the opportunity to participate in meetings in current § 300.653(d) and (e) will result in fewer low income, hearing-impaired, and foreign-language speaking parents attending State advisory panel meetings. One commenter expressed concern that the removal of current § 300.653 will result in less panel visibility, less public participation, and that State advisory panels will become “rubber-stamps” for positions taken by State officials. One

commenter stated that the removal of the requirements in current § 300.653 weakens the protection of children with disabilities, and, therefore, violates section 607(b) of the Act.

Discussion: The requirements in current § 300.653 were removed to provide greater State flexibility in the operation of advisory panels. We do not believe the removal of current § 300.653 will mean that the States will not ensure that State advisory panel meetings are announced in advance and open to the public because States generally have adequate sunshine laws that ensure public access to governmental agency meetings. We do not believe it is necessary to require that information regarding State advisory panel meetings be posted on State Web sites because sunshine laws generally contain provisions regarding meeting notices, agendas, and the availability of minutes of public meetings. However, it is important that individuals consult the laws governing their State and locality on the issue of open meetings and public access.

Section 607(b)(2) of the Act provides that the Secretary may not implement, or publish in final form, any regulation pursuant to the Act that procedurally or substantively lessens the protections provided to children with disabilities as embodied in regulations in effect on July 20, 1983. We do not believe removing from these regulations the requirements in current § 300.653 procedurally or substantively lessens the protections provided to children with disabilities pursuant to section 607(b)(2) of the Act because we do not view public notice of advisory committee meetings to be a protection provided to children with disabilities.

Changes: None.

Membership (§ 300.168)

Comment: We received numerous, specific requests to revise § 300.168 to add to the list of individuals who can serve as members of the State advisory panels. Some commenters recommended requiring State advisory panels to include representatives from the Parent Training and Information Centers and Community Parent Resource Centers funded by the Department under sections 671 and 672 of the Act because their representation would ensure a diverse group of people experienced with children with different disabilities on the panels. One commenter expressed concern that, without representation from these groups, panel members would make recommendations based solely on their individual circumstances and backgrounds. A few commenters

requested including school psychologists and other student support staff on State advisory panels. One commenter suggested including a representative of a residential treatment facility as a member on State advisory panels because children in these facilities are a growing population and have specialized needs. A few commenters requested adding representatives from centers for independent living because these individuals are experienced in advocating for people with disabilities. One commenter suggested including State coordinators for education of homeless children and youth. A few commenters suggested including disabled high school and postsecondary students on the list because the intended beneficiaries of the Act are often denied a voice. A few commenters proposed requiring each State advisory panel to be racially, culturally, linguistically, and socio-economically representative of the State. One commenter expressed concern that the new regulations could lead States to abruptly replace current panel members causing discontinuity and decreasing expertise, and recommended phasing in the new requirements and allowing panel members to complete their terms of office.

Discussion: The membership of State advisory panels is described in section 612(a)(21)(B) and (C) of the Act and the Department does not agree that there is a need to require additional representatives or to change the panel composition. However, nothing in the Act or these regulations would prevent the appointment of additional representatives, if a State elected to add these individuals. With respect to the request to include State coordinators for education of homeless children on the panels, State and local officials who carry out activities under the McKinney-Vento Homeless Assistance Act are already included in the list of individuals identified to serve on the State advisory panels in § 300.168(a)(5).

Section 612(a)(21)(B) of the Act, as reflected in § 300.168, requires the State advisory panel to be representative of the State population and be composed of individuals involved in, or concerned with, the education of children with disabilities. Also, the Act and these regulations require a majority of the panel members to be individuals with disabilities or parents of children with disabilities (ages birth through 26). We also do not believe there is a need to phase in the new requirements, as those members that do not need to change should provide sufficient continuity of panel functions.

Changes: None.

Duties (§ 300.169)

Comment: A few commenters recommended requiring States to submit any rules or regulations related to children with disabilities to the State advisory panel for consideration before the rules are finalized. One commenter requested requiring panel members to take positions on State proposed rules and regulations regarding the education of children with disabilities and offer their views to the appropriate State agencies.

Discussion: Section 612(a)(21)(D) of the Act clearly specifies the duties of the State advisory panel and these duties are accurately reflected in § 300.169. Paragraph (b) of this section clarifies that the advisory panel must comment publicly on any State proposed rules or regulations regarding the education of children with disabilities. We believe § 300.169(b) is sufficient to ensure that the advisory panel has the opportunity to consider any State rules or regulations before they are final and, accordingly, further regulatory language is unnecessary. Further, we believe it is inappropriate to require that panel members “take positions” on proposed rules and regulations because to do so would be overly controlling of the advisory panel and may impact the panel’s ability to effectively meet its statutory responsibility of providing public comment on State proposed rules and regulations.

Changes: None.

Comment: Many commenters suggested retaining current § 300.652(b), which requires State advisory panels to provide advice for educating students with disabilities in adult correctional facilities. A few of these commenters noted that students in adult correctional facilities are members of one of the most vulnerable populations.

Discussion: Given the breadth of the State advisory panel’s statutory responsibilities we removed from the regulations all nonstatutory mandates on the State advisory panel, including the provision in current § 300.652(b), regarding advising on the education of eligible students with disabilities who have been convicted as adults and have been incarcerated in adult prisons. We believe placing such nonstatutory mandates on the State advisory panel may hinder the advisory panel’s ability to effectively provide policy guidance with respect to special education and related services for children with disabilities in the State. There is nothing, however, that would prevent a State from assigning other

responsibilities to its State advisory panel, as long as those other duties do not prevent the advisory panel from carrying out its responsibilities under the Act.

Changes: None.

Access to Instructional Materials (§ 300.172)

Comment: One commenter recommended including the National Instructional Materials Accessibility Standard (NIMAS) in these regulations.

Discussion: We agree with the commenter. The final NIMAS was published in the **Federal Register** on July 19, 2006 (71 FR 41084) and will be included as *Appendix C to Part 300—National Instructional Materials Accessibility Standard* of these regulations. We will add language in § 300.172(a) to refer to this location and to reference the publication date of the NIMAS in the **Federal Register**.

Changes: The final NIMAS has been added as appendix C to part 300. We have added language in § 300.172(a) to refer to the location of the NIMAS in these regulations and the publication date of the NIMAS in the **Federal Register**.

Comment: Several commenters expressed concern that the language requiring States to adopt the NIMAS “in a timely manner” is ambiguous and could lead to delays in providing instructional materials to children with disabilities, inconsistencies across States, and increased litigation. Several commenters requested that the regulations specify a timeline for States to adopt the NIMAS. Some commenters recommended requiring all States to adopt the NIMAS by December 3, 2006. However, one commenter stated that States should not be given a deadline to adopt the NIMAS.

A number of commenters requested that the regulations define the meaning of “adopt” in § 300.172(a) and specify what States must do to adopt the NIMAS. Several commenters recommended defining “adopt” to mean that the State, through regulatory or legislative procedures, designates NIMAS as the only required source format for publishers to convert print instructional materials into specialized formats for children with disabilities. One commenter urged the Department to define “adopt” to mean that a State must accept a NIMAS file as satisfying the publisher’s legal obligation to provide accessible instructional materials. Other commenters recommended that the regulations clearly state that adoption of the NIMAS means that SEAs and LEAs must accept and use electronic copies of

instructional materials in the NIMAS format that are provided by the publishers.

Discussion: Section 300.172(a), consistent with section 612(a)(23)(A) of the Act, requires States to adopt the NIMAS in a timely manner after the publication of the NIMAS in the **Federal Register** for the purpose of providing instructional materials to blind or other persons with print disabilities. As noted in the discussion to the previous comment, the NIMAS is included as *Appendix C to Part 300—National Instructional Materials Accessibility Standard* and was published in the **Federal Register** on July 19, 2006 (71 FR 41084). The Department believes that States should make every effort to adopt the NIMAS in a timely manner following the publication of the NIMAS in the **Federal Register**, recognizing that the timelines and requirements for adopting new rules, policies, or procedures vary from State to State. States choosing to coordinate with the NIMAC must, consistent with section 612(a)(23)(C) of the Act and § 300.172(c) of these regulations, not later than December 3, 2006, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, enter into a written contract with the publisher of the print instructional materials to: (1) Require the publisher to prepare and, on or before delivery of the print instructional materials, provide the NIMAC with electronic files containing the content of the print instructional materials using the NIMAS; or (2) purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats. Clearly, we would expect that these States would have adopted the NIMAS by December 3, 2006. We decline to require a specific adoption date for all States, however, given the lack of specificity in the Act. We also decline to include a definition of “adopt” in these regulations because requirements for adopting new rules and policies may vary from State to State. The Department’s view is that it is inherent in the adoption requirement that, at a minimum, upon “adoption” of the NIMAS, a State must accept and use electronic copies of instructional materials in the NIMAS format for the purpose of providing instructional materials to blind or other persons with print disabilities. Under § 300.172(a), adopting the NIMAS is a State responsibility and does not impose any legal obligations on publishers of instructional materials.

Changes: We have made technical changes in § 300.172(c). For clarity, we have replaced the phrase “not later than” with “as of.” We have removed the phrase “two years after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004” because it is unnecessary.

Comment: One commenter recommended requiring States to comply with the requirements for public hearings and public comment in section 612(a)(19) of the Act before adopting policies and procedures to implement the requirements in § 300.172 related to access to instructional materials. The commenter stated that all interested members of the public, including parents of children with disabilities, are entitled to participate in designing the plan for implementing these policies and procedures.

Discussion: Section 300.165(a), consistent with section 612(a)(19) of the Act, requires States to hold public hearings and receive public comment before implementing any policies and procedures needed to comply with Part B of the Act. These public hearing and public comment requirements apply to the policies and procedures needed to implement the requirements in § 300.172.

Changes: None.

Comment: One commenter requested clarification on whether the NIMAS is limited to print materials on the medium of paper or also includes the iconic representation of letters and words.

Discussion: The NIMAS is the standard established by the Secretary to be used in the preparation of electronic files of print instructional materials so they can be more easily converted to accessible formats, such as Braille. In addition to print materials, the NIMAS provides standards for textbooks and related core materials where icons replace text. Materials with icons will be available if they are in printed textbooks and related printed core materials that are written and published primarily for use in elementary school and secondary school instruction and are required by an SEA or LEA for use by children in the classroom, consistent with section 674(e)(3)(C) of the Act.

Changes: None.

Comment: A few commenters recommended clarifying that providing materials in accessible formats includes changes in the depth, breadth, and complexity of materials. Some commenters stated that § 300.172 should include language regarding universal design of instructional materials.

Discussion: Section 300.172 is consistent with section 612(a)(23) of the Act and focuses specifically on providing access to print instructional materials using the NIMAS. The NIMAS is designed to improve the quality and consistency of print instructional materials converted into accessible formats for persons who are blind and persons with print disabilities, not to alter the content (e.g., the depth, breadth, or complexity) of the print instructional materials. While the NIMAS is designed to make print instructional materials more readily and easily accessible to persons who are blind and persons with print disabilities, it is not intended to provide materials that are universally designed. Therefore, while the Department acknowledges the importance of universal design, it would be inappropriate to reference universal design in this section.

The NIMAS Development Center has been charged with examining the need for future changes in the NIMAS. This Center, funded by the Department, is looking at a variety of issues, including the extent to which universal design features should be incorporated into future iterations of the NIMAS. Information about the NIMAS Development Center can be found at: <http://nimas.cast.org/>.

Changes: None.

Comment: One commenter recommended that books on tape be made available in the same manner as print materials.

Discussion: The conversion of text to speech for digital talking books is one of the accessible formats that can be generated from a NIMAS file. The NIMAS makes it possible for such talking books to be generated more efficiently so that children who need them will receive them more quickly than in the past. Such audio formats will be made available for printed textbooks and related printed core materials that are written and published primarily for use in elementary school and secondary school instruction and are required by an SEA or LEA for use by children in the classroom, consistent with section 674(e)(3)(C) of the Act. The NIMAS does not pertain to books on tape that are produced in sound studios.

Changes: None.

Comment: Many commenters requested that the regulations specify that providing instructional materials to children with disabilities in a timely manner means providing these materials at the same time they are provided to children without disabilities. One commenter recommended defining “in a timely manner” as the start of the school

year or, for children who transfer schools after the start of the school year, within 30 days of the start of the school year, regardless of whether a State chooses to coordinate with the NIMAC.

Discussion: The Department agrees that States should make every effort to provide children with disabilities accessible instructional materials at the same time as other children receive their instructional materials. The Department’s position is consistent with S. Rpt. No. 108–185, p. 19, which states, “The committee feels strongly that instructional materials should be provided to blind and print disabled students at the same time their fellow students without print disabilities are receiving the same materials.” This position also is consistent with H. Rpt. No. 108–77, pp. 97–98.

However, the Department recognizes that this may not be possible in all circumstances, for example, when a child with a disability transfers to a new school in the middle of a school year. Additionally, there could be circumstances beyond the control of the public agency that could prevent children with disabilities who need instructional materials in accessible formats from receiving them at the same time as instructional materials are provided to other children, such as if the public agency’s contractor is unable to produce the instructional materials in an accessible format because of some unforeseen circumstance. In situations such as these, it is understandable that the accessible format materials may not be immediately available. Therefore, we will add a provision to the regulations to specify that in order to meet their obligation to provide accessible format instructional materials in a timely way, public agencies must take all reasonable steps to make those instructional materials available at the same time as instructional materials are provided to other children. Reasonable steps, for example, would include requiring publishers or other contractors to provide instructional materials in accessible formats by the beginning of the school year for children whom the public agency has reason to believe will be attending its schools. Reasonable steps also might include having a means of acquiring instructional materials in accessible formats as quickly as possible for children who might transfer into the public agency in the middle of the year. Reasonable steps would not include withholding instructional materials from other children until instructional materials in accessible formats are available. To clarify that the obligation to make instructional materials available in a timely manner applies even to

States that coordinate with the NIMAC, we are adding a new provision to that effect. We also are clarifying that the definitions in § 300.172(e) apply to each State and LEA, whether or not the State or LEA chooses to coordinate with the NIMAC.

Changes: We have amended paragraph (b) in § 300.172 by adding a new paragraph (b)(4) requiring the SEA to ensure that all public agencies take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials. We have reorganized paragraph (c) and added a new paragraph (c)(2) requiring States that coordinate with the NIMAC to provide accessible materials in a timely manner. We have also amended paragraph (e) by adding a new paragraph (e)(2) to clarify that the definitions in § 300.172(e)(1) apply to each SEA and LEA whether or not the SEA or LEA chooses to coordinate with the NIMAC. We have made technical changes to § 300.172(e) and renumbered § 300.172(e) to be consistent with this change.

Comment: Many commenters expressed concern that the regulations fail to ensure timely access to instructional materials for children with other types of disabilities besides print disabilities. One commenter recommended clarifying that children do not have to be blind or have print disabilities to fit into the description of children who need accessible materials. However, another commenter stated that § 300.172(b)(3), which require SEAs to be responsible for providing accessible materials for children for whom assistance is not available from the NIMAC, should be removed because the Act does not include these requirements.

A few commenters requested adding a regulation to clarify that the requirements in § 300.172 do not apply if an SEA is not responsible for purchasing textbooks. The commenters stated that if an SEA cannot purchase textbooks, it has no legal relationship with textbook publishers and cannot comply with the requirements in § 300.172.

Discussion: Timely access to appropriate and accessible instructional materials is an inherent component of a public agency's obligation under the Act to ensure that FAPE is available for children with disabilities and that children with disabilities participate in the general curriculum as specified in their IEPs. Section 300.172(b)(3) provides that nothing relieves an SEA of

its responsibility to ensure that children with disabilities who need instructional materials in accessible formats, but who do not fall within the category of children who are eligible to receive materials produced from NIMAS files obtained through the NIMAC, receive those instructional materials in a timely manner. Therefore, we do not believe that any further clarification is necessary. Even SEAs that are not directly responsible for purchasing textbooks have this responsibility. In short, we believe these regulations are necessary to fully implement the Act.

Changes: None.

Comment: One commenter stated that all children with disabilities should receive assistance from the NIMAC.

Discussion: We disagree with the commenter. Section 674(e) of the Act limits the authority of the NIMAC to provide assistance to SEAs and LEAs in acquiring instructional materials for children who are blind, have visual disabilities, or are unable to read or use standard print materials because of physical limitations, and children who have reading disabilities that result from organic dysfunction, as provided for in 36 CFR 701.6. Clearly, SEAs and LEAs that choose to use the services of the NIMAC will be able to assist blind persons or other persons with print disabilities who need accessible instructional materials through this mechanism. However, SEAs and LEAs still have an obligation to provide accessible instructional materials in a timely manner to other children with disabilities who also may need accessible materials even though their SEA or LEA may not receive assistance from the NIMAC, as provided in §§ 300.172(b)(3) and 300.210(b).

Changes: None.

Rights and Responsibilities of SEAs (§ 300.172(b))

Comment: Many commenters expressed concern about allowing States to choose not to coordinate with the NIMAC. A few commenters stated that coordination with the NIMAC should be mandatory for all States. One commenter recommended that the Department strongly encourage States to coordinate with the NIMAC, because it may be difficult for States to provide the assurances required in § 300.172(b)(2) if they choose not to coordinate with the NIMAC. A few commenters recommended that States that cannot demonstrate a past history of providing instructional materials to children with disabilities in a timely manner should be required to coordinate with the NIMAC.

Discussion: It would be inconsistent with section 612(a)(23)(B) of the Act to make coordination with the NIMAC mandatory for all States or to require certain States to coordinate with the NIMAC (e.g., States that do not have a history of providing instructional materials to children with disabilities in a timely manner), as suggested by the commenters. Section 612(a)(23)(B) of the Act provides that nothing in the Act shall be construed to require any SEA to coordinate with the NIMAC.

Changes: None.

Comment: Several commenters requested that the regulations clearly define the process for a State to choose not to coordinate with the NIMAC. A few commenters requested additional details on what assurances States must provide if they choose not to coordinate with the NIMAC. Other commenters requested that State assurances provide the public with information to evaluate the capacity of the State to provide materials to children who are blind or have print disabilities. Some commenters stated that the assurances provided by States that choose not to coordinate with the NIMAC should be done annually and in writing.

Several commenters requested that the regulations provide a means for the public to obtain information about which States choose not to coordinate with the NIMAC. A few commenters requested that the Department publish the assurances made by SEAs that choose not to coordinate with the NIMAC. Some commenters stated that SEAs that choose to coordinate with the NIMAC should be required to provide information to the Department on the LEAs in the State that elect not to coordinate with the NIMAC.

Discussion: Section 300.172(b)(2), consistent with section 612(a)(23)(B) of the Act, requires SEAs that choose not to coordinate with the NIMAC to provide an assurance to the Secretary that the agency will provide instructional materials to blind persons and other persons with print disabilities in a timely manner. As part of a State's application for Part B funds, § 300.100 and section 612(a) of the Act require States to provide assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the conditions of eligibility. (The Part B Annual State Application for 2006, OMB No. 1820-0030, can be found at: <http://www.ed.gov/fund/grant/apply/osep/2006apps.html>.)

Therefore, the Department will compile a list of the States that choose to coordinate with the NIMAC and those that do not, and will make this list

available on OSEP's monitoring Web site at: <http://www.ed.gov/policy/speced/guid/idea/monitor/index.html>.

Section 612(a)(23)(B) of the Act does not mandate that States coordinate with the NIMAC or place conditions on which States can choose to coordinate with the NIMAC. Therefore, it is unnecessary to require a State's assurance to include information on its capacity to provide instructional materials to children who are blind or have print disabilities, as commenters recommended.

We do not believe it is appropriate to regulate to require States to provide information to the Department on the LEAs in the State that elect not to coordinate with the NIMAC. Under § 300.149 and section 612(a)(11) of the Act, States are responsible for ensuring that LEAs in the State meet the requirements of the Act, including providing instructional materials to blind persons or other persons with print disabilities in a timely manner. As stated in § 300.210 and section 613(a)(6)(B) of the Act, if an LEA chooses not to coordinate with the NIMAC, the LEA must provide an assurance to the SEA that the LEA will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

Changes: None.

Comment: Some commenters proposed that the regulations require States that choose not to coordinate with the NIMAC to annually report to the public on when children with disabilities receive their materials, how print materials are provided in a timely manner, and the steps the State has taken to ensure that materials will be provided at the same time as materials are provided to children without disabilities. One commenter stated that, if a State chooses not to coordinate with the NIMAC, the State should be required to submit data to the Department on the number of children with print disabilities served by the State and when those children received the accessible version of print instructional materials compared with when other children received their materials. Other commenters recommended that States choosing not to coordinate with the NIMAC should be required to develop and publish their policies and procedures that govern how they maintain and distribute NIMAS files.

Discussion: It would be unfair to impose additional data collection and reporting requirements, such as those requested by the commenters, only on those States that choose not to coordinate with the NIMAC. All States,

regardless of whether they choose to coordinate with the NIMAC, must ensure that children with disabilities who need instructional materials in accessible formats receive instructional materials in a timely manner, consistent with § 300.172(b)(3).

Furthermore, even States that choose to coordinate with the NIMAC will need to take steps to ensure that the instructional materials for children eligible to receive print instructional materials derived from NIMAS files are received in a timely manner. As provided in section 674(e)(3)(A) of the Act, the NIMAC is a distribution center for NIMAS files obtained from publishers, SEAs, and LEAs. Section 612(a)(23) of the Act requires SEAs that choose to coordinate with the NIMAC to enter into written contracts with publishers to require the publishers to provide electronic files using the NIMAS to the NIMAC on, or before, delivery of the print instructional materials to the SEA.

The NIMAC is not responsible for converting NIMAS files to the accessible formats needed by the children eligible to receive print instructional materials derived from NIMAS files. All States will need to arrange to have the NIMAS files converted to student-ready versions of instructional materials in the accessible formats needed by these children.

Changes: None.

Comment: One commenter requested that the Department provide information and training to States and LEAs on the NIMAC so that they can make an informed choice regarding whether to coordinate with the NIMAC. Another commenter recommended that the Department provide written guidance for States and LEAs regarding the NIMAS and the NIMAC.

Discussion: The Department recognizes the need to provide information to SEAs and LEAs regarding the NIMAS and the NIMAC and will provide technical assistance through the NIMAS Technical Assistance Center after the Department has approved the NIMAC procedures.

Changes: None.

Preparation and Delivery of Files (§ 300.172(c))

Comment: One commenter recommended that the regulations require instructional materials provided to children with disabilities to be complete and accurate. Another commenter requested requiring publishers to provide copies of the original books to the NIMAC along with the electronic files, because a copy of the original book is necessary for

alignment of page numbers and descriptions of pictures.

Discussion: We understand and appreciate the importance of having a copy of the original material to ensure accuracy of the files. However, the NIMAC is not responsible for ensuring the accuracy of materials, aligning page numbers, or describing pictures. Rather, the NIMAC is a distribution center for NIMAS files obtained from publishers, SEAs, and LEAs. Consistent with section 674(e)(3)(A) of the Act, the duties of the NIMAC are to receive and maintain a catalog of print instructional materials prepared in the NIMAS format and made available to the NIMAC by the textbook publishing industry, SEAs, and LEAs. Accessible, student-ready versions of instructional materials are created from NIMAS source files by national third-party conversion organizations; regional or State conversion sources; desktop applications created by software developers; or curriculum publishers that produce accessible alternate format versions for direct sale to SEAs and LEAs. The Act does not authorize the Department to impose obligations on such entities to provide accurate materials. States and LEAs that contract with such entities, however, may wish to require the accuracy of such materials, including the alignment of page numbers and descriptions of pictures, as part of their agreements.

Changes: None.

Comment: One commenter suggested that the regulations permit an SEA to receive assistance from the NIMAC, even if the SEA is not formally coordinating with the NIMAC.

Discussion: The Act does not require the NIMAC to provide assistance to SEAs if the SEA has chosen not to coordinate with the NIMAC. However, there is nothing in the Act that would prevent the NIMAC from doing so. As stated in section 674(e)(2)(B) of the Act, the NIMAC must provide access to print instructional materials, including textbooks, in accessible media, free of charge, to blind or other persons with print disabilities in elementary and secondary schools, in accordance with such terms and procedures as the NIMAC may prescribe. Providing this access could include assisting an SEA, even if the SEA has chosen not to coordinate with the NIMAC.

Changes: None.

Comment: One commenter recommended that the regulations include an accountability mechanism so that parents and schools know whether the State or LEA is responsible for the timely delivery of instructional materials.

Discussion: Whether instructional materials are purchased by the State or LEA is a State matter. The Act does not authorize the Department to impose obligations on States or LEAs with respect to the process for timely delivery of instructional materials.

Changes: None.

Comment: One commenter emphasized the need to track the progress and monitor the advancement of accessible materials on a national and regional level. Another commenter stated that there is a need to establish SEA and LEA baseline data regarding the timeliness, quality, and quantity of alternate formats in schools. One commenter stated that States should be required to publicize information regarding whether the State is meeting its responsibilities to provide accessible materials to persons who are blind or other persons with print disabilities in a timely manner.

Discussion: We believe that it would be overly burdensome to require States to collect and report data on the timeliness, quality, and quantity of alternate formats provided to children with disabilities in order to track the availability of accessible materials for children with disabilities on a regional or national level. Under the State complaint procedures, States are responsible for resolving complaints alleging violations of requirements under the Act, including this one.

Changes: None.

Comment: One commenter requested information on the scope of the NIMAC's responsibilities.

Discussion: The duties of the NIMAC are specified in section 674(e)(2) of the Act and include: (a) receiving and maintaining a catalog of print instructional materials prepared in the NIMAS format; (b) providing access to print instructional materials in accessible media, free of charge to blind or other persons with print disabilities in elementary schools and secondary schools; and (c) developing, adopting, and publishing procedures to protect against copyright infringement, with respect to print instructional materials provided under sections 612(a)(23) and 613(a)(6) of the Act.

Section 674(c) of the Act provides that NIMAC's duties apply to print instructional materials published after July 19, 2006, the date on which the final rule establishing the NIMAS is published in the **Federal Register** (71 FR 41084). The Department interprets "publish" to have the plain meaning of the word, which is to issue for sale or distribution to the public. The NIMAC's duties, therefore, apply to print instructional materials made available

to the public for sale after the NIMAS is published in the **Federal Register**. However, this does not relieve SEAs and LEAs of their responsibility to provide accessible instructional materials in a timely manner, regardless of when the instructional materials were "published."

Changes: None.

Comment: A few commenters expressed concern that the regulations do not specify the structure and operation of the NIMAC. One commenter requested that the Department provide more information about the operation of the NIMAC. Another commenter recommended that the NIMAC's management board include representatives of authorized entities. One commenter requested information on the legal protections that the Department will provide to the NIMAC. Another commenter requested specific information on the process and timing of the funding of the NIMAC. One commenter recommended a timeline with a series of activities (e.g., establishment of a cooperative agreement, cost projections) to ensure that the NIMAC is operational. Another commenter recommended that the Department develop a process to ensure that the files included in the NIMAC are NIMAS compliant, complete, and of the highest quality. One commenter expressed concern about how NIMAS files will be bundled and delivered to the NIMAC.

Discussion: We do not believe that regulations on the structure, operation, or budget of the NIMAC are necessary. Section 674(e) of the Act establishes the NIMAC through the American Printing House for the Blind (APH) and allows the NIMAC to prescribe terms and procedures to perform its duties under the Act. The Department's Office of Special Education Programs (OSEP) will oversee the administration of the NIMAC through a cooperative agreement with the APH and will work with the NIMAC to establish its structure, operating procedures, and budget. The NIMAC procedures will be available on the NIMAC Web site at: <http://www.nimac.us>.

Changes: None.

Comment: One commenter stated that the duties of the NIMAC to receive and maintain electronic files of instructional materials provided by publishers should not be misconstrued as imposing a duty on the NIMAC itself to use the NIMAS files to reproduce the instructional materials in accessible formats for children with print disabilities.

Discussion: The Act clarifies that the NIMAC is not responsible for producing instructional materials in accessible

formats. As stated in section 674(e)(2) of the Act, the NIMAC receives and maintains a catalog of print instructional materials prepared in the NIMAS, and made available to the NIMAC by the textbook publishing industry, SEAs, and LEAs.

Changes: None.

Comment: One commenter expressed concern about clear guidance regarding electronic rights. Another commenter recommended that the regulations require the NIMAC to develop a user agreement that any entity seeking access to a NIMAS file must sign. The commenters stated that the agreement should detail the entities that are eligible under Federal copyright law and the Act to access the NIMAS files, the alternate formats that may be produced, and any other restrictions on the dissemination and use of NIMAS files.

One commenter stated that the regulations should require that the authorized entities have full, complete, and immediate access to deposited files and clarify that the authorized entities are responsible for reproducing the instructional materials in an accessible format and therefore, the files housed by the NIMAC should be free of charge. Another commenter stated that the Department should ensure that NIMAS books are available to all authorized entities and the appropriate State organizations within five days after the books are deposited in the NIMAC.

Discussion: We do not believe it is appropriate or necessary to regulate on the authorized entities eligible to have access to the NIMAS files. Under section 674(e)(2)(C) of the Act, the NIMAC is required to develop, adopt, and publish procedures to protect against copyright infringement, with respect to the print instructional materials produced using the NIMAS and provided by SEAs and LEAs to blind persons or other persons with print disabilities. Such procedures will address, for example, information regarding the authorized entities that are eligible to have access to NIMAS files, responsibilities of such authorized entities, and how and when access will be provided. The NIMAC procedures will be available on the NIMAC Web site at: <http://www.nimac.us>.

Changes: None.

Comment: One commenter suggested several changes in the process to make Braille copies of instructional materials including constructing directions for choosing answers in universal terms, such as "write the correct response," rather than "circle" or "underline;" describing, in writing, visuals that cannot be easily interpreted; using hard

paper for Braille and raised drawings, rather than thermoform; using hard-bound binders for text, rather than plastic spiral binders; using audio formats as supplemental materials; and using simple graphics with easy access to map keys on the same page.

Discussion: Procedures for Braille transcribers and for conversion entities are the responsibility of SEAs and LEAs and, as such, are beyond the scope of these regulations.

Changes: None.

Comment: One commenter recommended that software companies routinely create desktop publishing programs that contain text to speech capabilities.

Discussion: It is beyond the Department's authority to impose requirements on software companies.

Changes: None.

Comment: One commenter recommended that a NIMAS style guide be developed that is textbook specific.

Discussion: The NIMAS Technical Assistance Center will develop a best practices Web page with exemplars and a style guide. This technical assistance resource will be available at: <http://nimas.cast.org>.

Changes: None.

Assistive Technology (§ 300.172(d))

Comment: A few commenters requested that the regulations clarify that the "assistive technology programs," referred to in § 300.172(d), are the programs established in each State pursuant to the Assistive Technology Act of 1998, as amended.

Discussion: Section 300.172(d) and section 612(a)(23)(D) of the Act provide that in carrying out the requirements in § 300.172, the SEA, to the maximum extent possible, must work collaboratively with the State agency responsible for assistive technology programs. Section 612(a)(23)(D) of the Act does not refer to any particular assistive technology program. Therefore, we interpret broadly the phrase "State agency responsible for assistive technology programs" to mean the agency determined by the State to be responsible for assistive technology programs, which may include programs established under section 4 of the Assistive Technology Act of 1998, as amended.

Changes: None.

Definitions (§ 300.172(e))

Comment: Several commenters requested that § 300.172(e) include the full definition of terms, rather than the citations to the definitions in the laws. A number of commenters requested that

the regulations include a definition of "persons with print disabilities."

Discussion: We have published the NIMAS as *Appendix C to Part 300—National Instructional Materials Accessibility Standard* of these regulations, which will include the definition of NIMAS from section 674(e)(3)(B) of the Act.

The definition of the NIMAC in new § 300.172(e)(1)(ii) (proposed § 300.172(e)(2)) and section 612(a)(23)(E)(i) of the Act refers to the center established pursuant to section 674(e) of the Act. Paragraph (e)(1) in section 674 of the Act establishes the center at the APH and paragraph (e)(2) outlines the duties of the NIMAC. We do not believe it is necessary to include this information in the regulations in order to implement the requirements of the Act, but will include it here for the convenience of the readers.

National Instructional Materials Access Center or NIMAC means the center established pursuant to section 674(e) of the Act. Section 674(e) of the Act provides, in part, that—

(1) *In general.* The Secretary shall establish and support, through the American Printing House for the Blind, a center to be known as the "National Instructional Materials Access Center" not later than one year after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004.

(2) *Duties.* The duties of the NIMAC are the following:

(A) To receive and maintain a catalog of print instructional materials prepared in the NIMAS, as established by the Secretary, made available to such center by the textbook publishing industry, State educational agencies, and local educational agencies.

(B) To provide access to print instructional materials, including textbooks, in accessible media, free of charge, to blind or other persons with print disabilities in elementary schools and secondary schools, in accordance with such terms and procedures as the NIMAC may prescribe.

(C) To develop, adopt and publish procedures to protect against copyright infringement, with respect to the print instructional materials provided under sections 612(a)(23) and 613(a)(6).

The definitions of *blind persons* or *other persons with print disabilities* and *specialized format* both refer to statutes other than the Act. For the reasons set forth earlier in this notice, we are referencing the definitions of terms in § 300.172(e), rather than adding them to these regulations. However, we will include them here for the convenience of the readers.

The Library of Congress regulations (36 CFR 701.6(b)(1)) related to the Act to Provide Books for the Adult Blind (approved March 3, 1931, 2 U.S.C. 135a) provide that *blind persons* or *other persons with print disabilities* include:

(i) Blind persons whose visual acuity, as determined by competent authority, is 20/200 or less in the better eye with correcting glasses, or whose widest diameter if visual field subtends an angular distance no greater than 20 degrees.

(ii) Persons whose visual disability, with correction and regardless of optical measurement, is certified by competent authority as preventing the reading of standard printed material.

(iii) Persons certified by competent authority as unable to read or unable to use standard printed material as a result of physical limitations.

(iv) Persons certified by competent authority as having a reading disability resulting from organic dysfunction and of sufficient severity to prevent their reading printed material in a normal manner.

Competent authority is defined in 36 CFR 701.6(b)(2) as follows:

(i) In cases of blindness, visual disability, or physical limitations "competent authority" is defined to include doctors of medicine, doctors of osteopathy, ophthalmologists, optometrists, registered nurses, therapists, professional staff of hospitals, institutions, and public or welfare agencies (e.g., social workers, case workers, counselors, rehabilitation teachers, and superintendents).

(ii) In the case of a reading disability from organic dysfunction, competent authority is defined as doctors of medicine who may consult with colleagues in associated disciplines.

Specialized formats has the meaning given the term in section 121(d)(4) of title 17, United States Code:

(A) Braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities.

(B) With respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.

Changes: As noted earlier, we have amended paragraph (e) of § 300.172 by adding a new paragraph (e)(2) to clarify that the definitions in § 300.172(e)(1) apply to each SEA and LEA whether or not the SEA or LEA chooses to coordinate with the NIMAC. We have made technical changes to § 300.172(e) and renumbered § 300.172(e) to be consistent with this change.

Prohibition on Mandatory Medication (§ 300.174)

Comment: A few commenters expressed concern that the regulations do not provide sufficient guidance on what school personnel can communicate to parents regarding medication. The commenters stated that in the absence of additional guidance, the regulations have the unintended effect of preventing school personnel from speaking openly with parents regarding classroom behavior, options for addressing behavior problems, and the impact of a child's medication on classroom behavior. Further, the commenters requested that the regulations do more to encourage school personnel to recommend evaluations for children with behavior problems and communicate openly with parents about the effectiveness of treatment, and protect school personnel. Other commenters recommended requiring school personnel to inform parents if they suspect that a child's behavior may be related to a disability.

Discussion: We believe that § 300.174 provides sufficient guidance on what school personnel can and cannot communicate to parents regarding a child's medication. Paragraph (a) clarifies that school personnel cannot require parents to obtain a prescription for medication for a child as a condition of attending school, receiving an evaluation to determine if a child is eligible for special education services, or receiving special education and related services under the Act. Paragraph (b) clearly permits classroom personnel to speak with parents or guardians regarding a child's academic and functional performance, behavior in the classroom or school, or the need for an evaluation to determine the need for special education or related services.

We do not believe that further regulations are needed to encourage school personnel to recommend evaluations for children with behavior problems or to require school personnel to inform parents if they suspect a child's behavior may be related to a disability. The child find requirements in § 300.111 clarify that States must have in effect policies and procedures to ensure that all children with disabilities residing in a State and who are in need of special education and related services, are identified, located, and evaluated.

Changes: None.

States' Sovereign Immunity (New § 300.177)

Comment: None.

Discussion: In developing the proposed regulations, we incorporated

those provisions of subpart A that apply to States. We inadvertently omitted the provisions in section 604 of the Act, regarding States' sovereign immunity. We have added these to the regulations in new § 300.177. In paragraph (a), we have clarified that the statutory language means that a State must waive immunity in order to receive Part B funds. This is the longstanding interpretation of the Department and is consistent with Federal Circuit Courts' decisions interpreting this statutory language. (See, e.g., *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005); *M.A. ex rel. E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335 (3rd Cir. 2003); *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816 (8th Cir. 1999); *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997).)

Changes: We have added the provisions in section 604 of the Act, regarding States' sovereign immunity, to new § 300.177.

Department Procedures (§§ 300.178 Through 300.186)

Comment: One commenter stated that the requirements in §§ 300.179 through 300.183, regarding the notice and hearing procedures before the Secretary determines a State is not eligible to receive a grant under Part B of the Act, are unnecessary and go beyond what is required in section 612(d) of the Act. The commenter recommended removing §§ 300.179 through 300.183 and including additional language in § 300.178 clarifying that the Secretary has the authority to develop specific administrative procedures to determine if States meet statutory requirements for eligibility under Part B of the Act and that such procedures must include notification of eligibility or non-eligibility, an opportunity for a hearing, and an opportunity for appeal of the hearing decision.

Discussion: The Department does not agree with the commenter that the notification and hearing procedures included in §§ 300.179 through 300.183 are unnecessary and go beyond what is required in section 612(d) of the Act. Section 612(d)(2) of the Act states that the Secretary shall not make a final determination that a State is not eligible to receive a grant under this part until after providing the State with reasonable notice and an opportunity for a hearing. When the Secretary proposes to deny a State's eligibility to receive a grant under Part B of the Act, withhold funds, or take other enforcement action, it is important to all parties that the process through which those issues will be decided is clearly described, so that time, money, and effort are not spent

resolving procedural questions instead of the underlying issues. For these reasons, we believe it is important to retain §§ 300.179 through 300.183 in the regulations.

Changes: None.

Judicial Review (§ 300.184)

Comment: One commenter requested that we clarify in the regulations the status of a State's operation of a program or eligibility to receive a grant under Part B of the Act while a final judicial decision is pending with respect to the State's eligibility under section 612 of the Act.

Discussion: Under section 612(a) of the Act, States must meet certain conditions in order to be eligible for a grant under the Part B program. Under section 612(d) of the Act, if the Secretary, after notice and an opportunity for a hearing, makes a final determination that a State is not eligible for a grant, the Secretary may not award funds to the State. The procedures in §§ 300.179 through 300.183 detail the process through which the Secretary notifies a State of a proposed ineligibility determination, the hearing available to the State to dispute this proposal, and the process through which the Secretary makes a final determination. The Secretary's final determination may be appealed through the judicial review procedure described in section 616(e)(8) of the Act and § 300.184. We decline to address this issue more specifically in the regulations, however, as we think the regulations already adequately convey the idea that only States that the Secretary determines to be eligible can receive a grant.

Changes: None.

By-Pass for Children in Private Schools (§§ 300.190 through 300.198)

Comment: One commenter stated that §§ 300.190 through 300.198 are unnecessary because the Act gives sufficient authority for the Secretary to implement a by-pass for children with disabilities enrolled in private elementary schools and secondary schools.

Discussion: Section 300.190 retains the authority for a by-pass in current § 300.480 and includes additional authority for a by-pass, consistent with section 612(f)(1) of the Act, in cases where the Secretary determines that an SEA, LEA, or public agency has substantially failed, or is unwilling, to provide for equitable participation of parentally-placed private school children with disabilities. When the Secretary authorizes a by-pass it is important that all parties understand the

process by which the Secretary determines the funds that will be deducted from the State's allocation under Part B of the Act to provide services, as well as the actions that are required before the Secretary takes any final action to implement a by-pass. When such processes and procedures are clearly described, time, money, and effort are not spent resolving procedural questions. The requirements in §§ 300.190 through 300.198 provide this information and we believe are necessary to clarify and ensure effective implementation of the by-pass provisions in the Act. We are making one change to § 300.191(d) to clarify that the Secretary deducts amounts the Secretary determines necessary to implement a by-pass from the State's allocations under sections 611 and 619 of the Act.

Changes: In § 300.191(d) we have substituted a reference to sections 611 and 619 of the Act for a reference to Part B of the Act.

Show Cause Hearing (§ 300.194)

Comment: One commenter opposed allowing a lawyer for the SEA or LEA to present oral and written evidence and arguments at a show cause hearing because parents are often intimidated by having to face a lawyer.

Discussion: Section 300.194(a)(3) provides an opportunity for an SEA, LEA, or other public agency, and representatives of private elementary schools and secondary schools to be represented by legal counsel and to submit oral or written evidence or arguments at a hearing to show cause why a by-pass should not be implemented. Parents are not parties to this hearing and generally would not appear before the show cause hearing officer, and would, therefore, not be intimidated by a participating lawyer. We believe that it is only fair that the party to the hearing (SEA, LEA, or other public agency, and representatives of private schools) be provided the option to be represented by legal counsel because legal counsel will generally represent the Department, as a party to the hearing.

Changes: None.

State Administration (§ 300.199)

Comment: One commenter indicated that § 300.199 is improperly placed in the regulations under the general heading "By-pass for Children in Private Schools."

Discussion: We agree with the commenter that § 300.199 does not belong under the general heading "By-Pass for Children in Private Schools."

Changes: A new undesignated center heading entitled "State Administration" will be added immediately preceding § 300.199 to separate that section from the regulations related to implementation of the by-pass provisions of the Act.

Comment: One commenter recommended including in § 300.199 a requirement that States may not eliminate from their rules, regulations, and policies any provisions required by Part B of the Act and its implementing regulations.

Discussion: Section 300.199 incorporates the requirement in section 608 of the Act that any rulemaking related to the Act conducted by the State conform to the purposes of the Act. Consistent with section 608 of the Act, § 300.199 makes clear that each State that receives funds under Part B of the Act must ensure that any State rules, regulations, and policies relating to 34 CFR part 300 conform to the provisions of 34 CFR part 300. We do not believe it is necessary to add a provision in § 300.199 prohibiting States from eliminating from their rules, regulations, and policies any provisions required by Part B of the Act and its implementing regulations, as requested by the commenter. If a State were to do so, the State's rules, regulations, and policies would not conform to the provisions in 34 CFR part 300. Under this provision, a State, and not the Secretary, determines whether a particular rule, regulation, or policy conforms to the purposes of the Act.

Changes: None.

Comment: Some commenters expressed concern that the mandate to minimize State rules and regulations might discourage States from developing beneficial programs, and, therefore, should not pertain to policies that promote best practices, increased parental involvement, educating children in the least restrictive environment, and improving access to the general curriculum. One commenter recommended including a statement in the regulations that a State would not be penalized for exceeding the minimum requirements of the Act. A few commenters stated that the services provided by the Act were intended to be a "floor," rather than a "ceiling" and recommended a pilot program to encourage States to adopt rules that best serve the needs of children with disabilities.

Discussion: We do not agree that the regulations discourage States from developing beneficial programs or establishing rules that best serve the needs of children with disabilities. In fact, § 300.199(b), consistent with

section 608(b) of the Act, requires State rules, regulations, and policies under the Act to support and facilitate LEA and school-level system improvement designed to enable children with disabilities to meet challenging State student academic achievement standards.

Section 300.199(a), consistent with section 608(a) of the Act, is intended to minimize the number of rules, regulations, and policies to which LEAs and schools are subject under the Act, and to identify in writing any rule, regulation, or policy that is State-imposed and not required under the Act and its implementing regulations. The Department's position is consistent with S. Rpt. No. 108-185, p. 10, which states "Through section 608(a), the committee is in no way attempting to reduce State input or State practice in this area, but intends to make clear what is a Federal obligation and what is a State or local educational agency requirement for the Act." We believe it is important for parents, teachers, school administrators, State lawmakers, and others to understand what is required under the Act, and, therefore, do not believe that § 300.199 should be changed.

Changes: None.

Subpart C—Local Educational Agency Eligibility

Consistency With State Policies (§ 300.201)

Comment: Some commenters recommended requiring LEAs to seek input from parents of children with disabilities in the development of LEA policies, procedures, and programs.

Discussion: Section 300.201, consistent with section 613(a)(1) of the Act, requires each LEA to have in effect policies, procedures, and programs that are consistent with State policies and procedures. It is up to each State and its LEAs to determine the manner in which LEAs develop their policies, procedures, and programs, consistent with State law and procedures. The Act does not authorize the Department to impose additional obligations on States or LEAs with respect to the development of LEA policies, procedures, and programs.

Changes: None.

Maintenance of effort (§§ 300.202 through 300.205)

Comment: A few commenters stated that the maintenance of effort requirements are complicated and unnecessary and should be eliminated or simplified.

Discussion: Sections 300.202 through 300.205, regarding maintenance of effort and the LEA's use of funds received

under Part B of the Act, reflect the specific statutory requirements in section 613(a)(2) of the Act, as well as necessary information regarding the implementation of these requirements. Much of the additional information in §§ 300.202 through 300.205 was included in various sections throughout the current regulations. We continue to believe that this information is necessary for the proper implementation of the Act. Section 300.204(e), which has been newly added to the regulations, includes the assumption of costs by the high cost fund as an additional condition under which an LEA may reduce its level of expenditures. We believe this provision is necessary because LEAs should not be required to maintain a level of fiscal effort based on costs that are assumed by the SEA's high cost fund.

In short, we have tried to present the regulations relating to LEA maintenance of effort in a clear manner, while being consistent with the language of the Act (which we do not have the authority to change) and including only as much additional information as is necessary to ensure proper implementation of the Act.

Changes: None.

Comment: One commenter stated that LEAs should be permitted to use a reasonable amount of their Part B funds to meet the Act's requirements relating to student assessment, outcomes, complaints, compliance monitoring, mediation, and due process hearings.

Discussion: With one exception, nothing in the Act or these regulations would prevent an LEA from using its Part B allotment for the activities noted by the commenter, so long as the expenditures meet the other applicable requirements under the Act and regulations.

LEAs may not use their Part B funds to support the mediation process described in § 300.506. Consistent with section 615(e)(2)(D) of the Act, § 300.506(b)(4) requires the State (not the LEA) to bear the cost of that mediation process. Although LEAs may not use their Part B funds to support the mediation process required under § 300.506(b)(4), they may use their Part B funds to support alternative mediation processes that they offer. Some LEAs (and States) offer alternative mediation processes, in addition to the mediation process required under section 615 of the Act. These alternative mediation processes generally were established prior to the Federal mandate for mediation and some LEAs (and States) continue to offer parents the option of using these alternative mediation processes to resolve disputes. Therefore,

if an LEA has an alternative mediation process, it may use its Part B funds for this process, so long as parents are provided access to the required mediation process under section 615 of the Act and are not required to use an alternative mediation process in order to engage in the mediation process provided under section 615 of the Act.

Changes: None.

Comment: Several commenters requested clarifying that "per capita" in § 300.203(b) means the amount per child with a disability in an LEA.

Discussion: We do not believe it is necessary to include a definition of "per capita" in § 300.203(b) because we believe that, in the context of the regulations, it is clear that we are using this term to refer to the amount per child with a disability served by the LEA.

Changes: None.

Exception to Maintenance of Effort (§ 300.204)

Comment: One commenter recommended expanding the exceptions to the maintenance of effort requirements in § 300.204(a) to include negotiated reductions in staff salaries or benefits so that LEAs are not penalized for being proactive in reducing costs. Another commenter recommended revising § 300.204 to allow LEAs to apply for a waiver of the maintenance of effort requirements in cases of fiscal emergencies.

Discussion: Section 300.204(a) through (d) reflects the language in section 613(a)(2)(B) of the Act and clarifies the conditions under which LEAs may reduce the level of expenditures below the level of expenditures for the preceding year. Nothing in the Act permits an exception for negotiated reductions in staff salaries or benefits or financial emergencies. Accordingly, to expand the exceptions to the maintenance of effort requirements, as recommended by the commenters, would be beyond the authority of the Department.

Changes: None.

Comment: Some commenters requested clarification as to whether the exceptions to the maintenance of effort requirements apply to an LEA that uses funds from its SEA's high cost fund under § 300.704(c) during the preceding year.

Discussion: We do not believe further clarification is necessary because § 300.204(e) clearly states that the assumption of costs by a State-operated high cost fund under § 300.704(c) would be a permissible reason for reducing local maintenance of effort. This provision was included in the proposed

regulations in recognition that the new statutory authority in section 611(e)(3) of the Act that permits States to establish a fund to pay for some high costs associated with certain children with disabilities could logically and appropriately result in lower expenditures for some LEAs.

Changes: None.

Adjustments to Local Fiscal Efforts in Certain Fiscal Years (§ 300.205)

Comment: A few commenters stated that the link between early intervening services and reductions in maintenance of effort in § 300.205(d) is not in the Act. Some commenters expressed concern that this requirement forces an LEA to choose between providing early intervening services and directing local funds toward nondisabled children. One commenter stated that linking the use of funds for early intervening services to reduction in maintenance of effort in § 300.205 is not logical and was not the intent of Congress.

Discussion: The link between reductions in local maintenance of effort (reflected in § 300.205(d)) and the amount of Part B funds that LEAs may use to provide early intervening services (reflected in § 300.226) is established in the Act. Section 300.205(d) tracks the statutory language in section 613(a)(2)(C)(iv) of the Act and § 300.226(a) tracks the statutory language in section 613(f)(1) of the Act. Section 300.205(d) states that the amount of funds expended by an LEA for early intervening services under § 300.226 counts toward the maximum amount of expenditures that an LEA may reduce in its local maintenance of effort. Section 300.226(a) clearly states that the amount of Part B funds an LEA may use to provide early intervening services may not exceed 15 percent of the funds the LEA receives under Part B of the Act less any amount reduced by the LEA under § 300.205.

As noted in the NPRM, the Department believes it is important to caution LEAs that seek to reduce their local maintenance of effort in accordance with § 300.205(d) and use some of their Part B funds for early intervening services under § 300.226 because the local maintenance of effort reduction provision and the authority to use Part B funds for early intervening services are interconnected. The decision that an LEA makes about the amount of funds that it uses for one purpose affects the amount that it may use for the other. *Appendix D to Part 300—Maintenance of Effort and Early Intervening Services* includes examples that illustrate how §§ 300.205(d) and 300.226(a) affect one another.

Changes: We have added a reference to Appendix D in § 300.226(a).

Schoolwide Programs Under Title I of the ESEA (§ 300.206)

Comment: A few commenters recommended specifying in § 300.206(b) that LEAs can use only funds provided under section 611 of the Act (and not section 619 of the Act) to carry out a schoolwide program under section 1114 of the ESEA. The commenters stated that this change is necessary so that the per capita amount of Federal Part B funds used to carry out a schoolwide program is not artificially inflated by including preschool grant funds that are used to serve children ages three through five who are not placed in a title I school.

Discussion: Section 613(a)(2)(D) of the Act specifically provides that an LEA may use any funds it receives under Part B of the Act to carry out schoolwide programs under title I of the ESEA. Part B funds include any funds an LEA receives under sections 611 and 619 of the Act.

Changes: None.

Personnel Development (§ 300.207)

Comment: A few commenters suggested requiring LEAs to train their personnel through research-based practices in order to ensure that personnel are appropriately and adequately prepared to implement Part B of the Act.

Discussion: We believe the regulations already address the commenters' concern and reflect the Department's position that high-quality professional development, including the use of scientifically based instructional practices, is important to ensure that personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities. Section 300.207, consistent with section 613(a)(3) of the Act, requires each LEA to ensure that all personnel necessary to carry out Part B of the Act are appropriately prepared, subject to the requirements in § 300.156 and section 2122 of the ESEA.

Section 300.156(a), consistent with section 612(a)(14) of the Act, clearly states that each State must establish and maintain qualifications to ensure that personnel are appropriately and adequately prepared and trained, and have the content knowledge and skills to serve children with disabilities. Further, section 2122(b)(1)(B) of the ESEA requires an LEA's application to the State for title II funds (Preparing, training, and recruiting high quality teachers and principals) to address how

the LEA's activities will be based on a review of scientifically based research.

Changes: None.

Purchase of Instructional Materials (§ 300.210)

Comment: One commenter recommended requiring LEAs to hold public hearings that meet the requirements in section 612(a)(19) of the Act before adopting its policies and procedures to purchase instructional materials. The commenter stated that all interested members of the public, including parents of children with disabilities, are entitled to participate in designing the plan to meet the requirements in § 300.210.

Discussion: The Act does not require LEAs to hold public hearings before implementing new policies and procedures. This is a matter for each State to determine, based on its rules governing public hearings and public comment. Therefore, we do not believe it is appropriate for these regulations to require LEAs to hold public hearings and receive public comment on the LEA's purchase of instructional materials, as requested by the commenter.

Changes: None.

Comment: One commenter stated that the requirements in § 300.210(b)(3) are unnecessary and should be removed because the Act does not require LEAs to provide accessible materials for children with disabilities for whom assistance is not available from the NIMAC.

Discussion: We believe that § 300.210(b)(3) is necessary because timely access to appropriate and accessible instructional materials is an inherent component of an LEA's obligation under the Act to ensure that FAPE is available for all children with disabilities and that children with disabilities participate in the general curriculum as specified in their IEPs. Because the NIMAC is not required to serve all children with disabilities who need accessible materials, we believe it is important that the regulations make clear that LEAs are still responsible for ensuring that children with disabilities who need instructional materials in accessible formats, but who do not fall within the definition of children who are eligible to receive materials produced from NIMAS files obtained through the NIMAC, receive them in a timely manner. We, therefore, decline to delete § 300.210(b)(3).

Changes: None.

Comment: A significant number of commenters expressed concern about allowing LEAs to choose not to coordinate with the NIMAC. A few

commenters stated that coordination with the NIMAC should be mandatory for all LEAs. Other commenters recommended that LEAs that cannot demonstrate a history of providing instructional materials to children with disabilities in a timely manner should be required to coordinate with the NIMAC.

Discussion: It would be inconsistent with section 613(a)(6)(B) of the Act to make coordination with the NIMAC mandatory for all LEAs or to require certain LEAs to coordinate with the NIMAC (e.g., LEAs that do not have a history of providing instructional materials to children with disabilities in a timely manner). Section 613(a)(6)(B) of the Act provides that nothing in the Act shall be construed to require any LEA to coordinate with the NIMAC.

Changes: None.

Comment: Several commenters requested that the regulations clearly define the process LEAs must go through if they choose not to coordinate with the NIMAC. A few commenters requested additional details on what assurances LEAs must provide if they choose not to coordinate with the NIMAC. A few commenters requested that LEA assurances provide the public with information to evaluate the capacity of the LEA to provide materials to children who are blind or have print disabilities. Some commenters stated that the assurances provided by LEAs that choose not to coordinate with the NIMAC should be done annually and in writing.

Several commenters requested that the regulations provide a means for the public to obtain information about which LEAs choose not to coordinate with the NIMAC. A few commenters recommended requiring LEAs to report to the Department whether they choose to coordinate with the NIMAC. Some commenters requested that the Department publish the assurances made in accordance with § 300.210(b) by LEAs that choose not to coordinate with the NIMAC.

Discussion: The process by which LEAs choose not to coordinate with the NIMAC and the assurances that LEAs must provide if they choose not to coordinate with the NIMAC are determined by each State. Section 300.210(b)(2), consistent with section 613(a)(6)(B) of the Act, states that, if an LEA chooses not to coordinate with the NIMAC, the LEA must provide an assurance to the SEA that the LEA will provide instructional materials to blind persons or other persons with print disabilities in a timely manner. Therefore, it would be unnecessary and burdensome to require LEAs to provide

assurances to the Department or to require LEAs to report to the Department whether they choose to coordinate with the NIMAC. Each State has its own mechanisms and processes for obtaining assurances from its LEAs, and we believe it would be inappropriate for these regulations to define the process by which LEAs inform the SEA that they choose not to coordinate with the NIMAC or to specify the content of the assurances that LEAs must provide to the SEA if they choose not to coordinate with the NIMAC. Similarly, it is up to each State to determine whether and how the State will provide information to the public about LEAs in the State that choose not to coordinate with the NIMAC.

Changes: None.

Comment: Some commenters proposed that the regulations require LEAs that choose not to coordinate with the NIMAC to annually report to the public on when children with disabilities receive their materials, how print materials are provided in a timely manner, and the steps the LEA has taken to ensure that materials are provided at the same time as materials are provided to children without disabilities. Other commenters recommended requiring LEAs that choose not to coordinate with the NIMAC to develop and publish their policies and procedures that govern how they maintain and distribute NIMAS files.

Discussion: We believe that imposing additional data collection and reporting requirements, such as those requested by the commenters, on LEAs that choose not to coordinate with the NIMAC is a matter that is best left to the States. States are responsible for ensuring that accessible instructional materials are provided in a timely manner to all children with disabilities who need them, and are, therefore, in the best position to know what controls, if any, are needed in their State to ensure that LEAs comply with the requirements in § 300.210(b)(3). All LEAs, regardless of whether they choose to coordinate with the NIMAC, must ensure that children with disabilities who need instructional materials in accessible formats receive them in a timely manner, consistent with § 300.210(b)(3).

Changes: None.

Comment: A few commenters requested that the Department provide information to LEAs on the NIMAC and the NIMAS so that LEAs can make an informed choice regarding whether to coordinate with the NIMAC.

Discussion: The Department recognizes the need to provide information to LEAs regarding the

NIMAC and the NIMAS. The Department has already provided numerous informational sessions on the NIMAC and NIMAS and more are planned following the publication of the regulations and approval of the NIMAC procedures. Information about the NIMAC Technical Assistance Center is available at the following Web site: <http://www.aph.org/nimac/index.html>. Information on the NIMAS can be obtained at: <http://nimas.cast.org>.

Changes: None.

Early Intervening Services (§ 300.226)

Comment: One commenter recommended clarifying that early intervening services should not be used to delay the evaluation of children suspected of having a disability.

Discussion: We believe that § 300.226(c), which states that nothing in § 300.226 will be construed to delay appropriate evaluation of a child suspected of having a disability, makes clear that early intervening services may not delay an appropriate evaluation of a child suspected of having a disability.

Changes: None.

Comment: One commenter expressed concern that the requirements for early intervening services do not adequately protect the child's right to FAPE and recommended that the requirements include provisions regarding notice, consent, and withdrawal of consent, as well as guidelines for referrals for evaluation.

Discussion: Children receiving early intervening services do not have the same rights and protections as children identified as eligible for services under sections 614 and 615 of the Act. Section 300.226(c), consistent with section 613(f)(3) of the Act, is clear that early intervening services neither limit nor create a right to FAPE.

Changes: None.

Comment: Some commenters recommended that the regulations specify how long a child may receive early intervening services before an initial evaluation for special education services under § 300.301 is conducted.

Discussion: We do not believe it is appropriate or necessary to specify how long a child can receive early intervening services before an initial evaluation is conducted. If a child receiving early intervening services is suspected of having a disability, the LEA must conduct a full and individual evaluation in accordance with §§ 300.301, 300.304 and 300.305 to determine if the child is a child with a disability and needs special education and related services.

Changes: None.

Comment: A few commenters suggested clarifying that Part B funds for early intervening services should not be used for any child previously identified as being a child with a disability.

Discussion: A child previously identified as being a child with a disability who currently does not need special education or related services would not be prevented from receiving early intervening services. For example, a child who received special education services in kindergarten and had services discontinued in grade 1 (because the public agency and the parent agreed that the child was no longer a child with a disability), could receive early intervening services in grade 2 if the child was found to be in need of additional academic and behavioral supports to succeed in the general education environment. We believe that language should be added to § 300.226 to clarify that early intervening services are for children who are not currently identified as needing special education or related services.

Changes: We have modified § 300.226(a) to clarify that early intervening services are available to children who currently are not identified as needing special education or related services.

Comment: One commenter recommended specifying that unless LEAs have significant over-identification and over-representation of minority students in special education, LEAs may not use Federal Part B funds for early intervening services unless they can demonstrate that all eligible children are receiving FAPE. Another commenter suggested prohibiting the use of Part B funds for early intervening services if an LEA is not providing FAPE to all eligible children.

Discussion: The Act does not restrict the use of funds for early intervening services only to LEAs that can demonstrate that all eligible children with disabilities are receiving FAPE. Section 613(f)(1) of the Act generally permits LEAs to use funds for early intervening services for children in kindergarten through grade 12 (with a particular emphasis on children in kindergarten through grade 3) who have not been identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment. No other restrictions on this authority, such as a requirement that the LEA first demonstrate that it is providing FAPE to all eligible children, are specified or appropriate. The authority to use some Part B funds for early intervening

services has the potential to benefit special education, as well as the education of other children, by reducing academic and behavioral problems in the regular educational environment and reducing the number of referrals to special education that could have been avoided by relatively simple regular education interventions. Therefore, we believe the use of Part B funds for early intervening services should be encouraged, rather than restricted.

In one instance, however, the Act requires the use of funds for early intervening services. Under section 618(d)(2)(B) of the Act, LEAs that are identified as having significant disproportionality based on race and ethnicity with respect to the identification of children with disabilities, the placement of children with disabilities in particular educational settings, and the incidence, duration, and type of disciplinary actions taken against children with disabilities, including suspensions and expulsions, are required to reserve the maximum amount of funds under section 613(f)(1) of the Act to provide early intervening services to children in the LEA, particularly to children in those groups that were significantly over-identified. This requirement is in recognition of the fact that significant disproportionality in special education may be the result of inappropriate regular education responses to academic or behavioral issues.

Changes: None.

Comment: One commenter recommended permitting LEAs to spend funds for early intervening services on literacy instruction programs that target at-risk limited English proficient students.

Discussion: There is nothing in the Act that would preclude LEAs from using Part B funds for early intervening services, including literacy instruction, that target at-risk limited English proficient students who have not been identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.

Changes: None.

Comment: One commenter requested clarification as to whether ESAs or other public institutions or agencies, in addition to LEAs, have the authority to provide early intervening services.

Discussion: We do not believe any clarification is necessary because § 300.226, consistent with section 613(f) of the Act, states that LEAs may use Part B funds to develop and implement coordinated early intervening services. As defined in § 300.28(b), *local*

educational agency or *LEA* includes ESAs and any other public institution or agency having administrative control and direction of a public elementary school or secondary school, including a public nonprofit charter school that is established as an LEA under State law.

Changes: None.

Comment: Some commenters suggested modifying the regulations to permit children age 3 through 21 to receive early intervening services. The commenters stated that this change would allow schools to provide early academic and behavioral supports to preschool children.

Discussion: Early intervening services may not be used for preschool children. Section 300.226(a) tracks the statutory language in section 613(f)(1) of the Act, which states that early intervening services are for children in kindergarten through grade 12, with a particular emphasis on children in kindergarten through grade 3.

Changes: None.

Comment: One commenter recommended clarifying in the regulations that early intervening services are not equivalent to early intervention services.

Discussion: We do not believe any changes are necessary to the regulations to clarify the difference between early intervening services provided under Part B of the Act and early intervention services provided under Part C of the Act. Following is a description of the two types of services:

Early intervening services provided under section 613(f) of the Act are services for children in kindergarten through grade 12 (with a particular emphasis on children in kindergarten through grade 3) who have not been identified as needing special education and related services, but who need additional academic and behavioral support to succeed in a general education environment.

Early intervention services, on the other hand, are services for children birth through age two that are designed to meet the developmental needs of infants and toddlers with disabilities under section 632 in Part C of the Act. Section 632(5)(A) of the Act defines *infant or toddler with a disability* as a child under the age of three years who (a) is experiencing developmental delays in one or more of the areas of cognitive development, physical development, communication development, social or emotional development, and adaptive development, or (b) has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay. In addition, some

States also provide early intervention services to infants and toddlers who are at risk of having a developmental delay. The Part C regulations will address, in detail, the early intervention services provided under section 632 of the Act.

Changes: None.

Comment: One commenter asked whether the reference to scientifically based academic and behavioral interventions in § 300.226(b) means that such interventions must be aligned with recommended practices and peer-reviewed research.

Discussion: Section 300.226(b) follows the specific language in section 613(f)(2) of the Act and requires that in implementing coordinated, early intervening services, an LEA may provide, among other services, professional development for teachers and other personnel to enable such personnel to deliver scientifically based academic and behavioral interventions. The use of the term scientifically based in § 300.226(b) is intended to be consistent with the definition of the term *scientifically based research* in section 9101(37) of the ESEA. Because this definition of *scientifically based research* is important to the implementation of Part B of the Act, a reference to section 9101(37) of the ESEA has been added in new § 300.35, and the full definition of the term has been included in the discussion of new § 300.35. Under the definition, scientifically based research must be accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review. We expect that the professional development activities authorized under § 300.226(b)(1) will be derived from scientifically based research. The statute and regulations do not refer to “recommended practices,” which is a term of art that, generally, refers to practices that the field has adopted as “best practices,” and which may or may not be based on evidence from scientifically based research.

Changes: None.

Comment: Several commenters requested including related services personnel, including speech pathologists and school psychologists, in the development and delivery of educational and behavioral evaluations, services, and supports for teachers and other school staff to enable them to deliver coordinated, early intervening services.

Discussion: State and local officials are in the best position to make decisions regarding the provision of early intervening services, including the specific personnel to provide the

services and the instructional materials and approaches to be used. Nothing in the Act or regulations prevents States and LEAs from including related services personnel in the development and delivery of educational and behavioral evaluations, services, and supports for teachers and other school staff to enable them to deliver coordinated, early intervening services.

Changes: None.

Comment: Several commenters recommended revising the regulations to allow public agencies to use Part B funds for early intervening services to purchase supplemental instructional materials to support the activities in § 300.226(b).

Discussion: We agree that supplemental instructional materials may be used, where appropriate, to support early intervening activities. The Conf. Rpt. in note 269 provides that

[E]arly intervening services should make use of supplemental instructional materials, where appropriate, to support student learning. Children targeted for early intervening services under IDEA are the very students who are most likely to need additional reinforcement to the core curriculum used in the regular classroom. These are in fact the additional instructional materials that have been developed to supplement and therefore strengthen the efficacy of comprehensive core curriculum.

We believe the terms “services” and “supports” in § 300.226(b)(2) are broad enough to include the use of supplemental instructional materials. Accordingly, we believe that it is unnecessary to add further clarification regarding the use of supplemental instructional materials in § 300.226. Of course, use of funds for this purpose is subject to other requirements that apply to any use of funds, such as the limitation on purchase of equipment in section 605 of the Act and applicable requirements in 34 CFR Parts 76 and 80.

Changes: None.

Comment: Several commenters requested requiring LEAs to provide parents with written notice regarding their child’s participation in early intervening services, the goals for such services, and an opportunity to refuse services. Some commenters requested requiring LEAs to inform parents of their child’s progress in early intervening services at reasonable intervals.

Discussion: Section 300.226, consistent with section 613(f) of the Act, gives LEAs flexibility to develop and implement coordinated, early intervening services for children who are not currently receiving special education services, but who require additional academic and behavioral

support to succeed in a regular education environment. Early intervening services will benefit both the regular and special education programs by reducing academic and behavioral problems in the regular education program and the number of inappropriate referrals for special education and related services. It would be overly restrictive and beyond the Department’s authority to modify the regulations to include the additional requirements suggested by the commenters.

Changes: None.

Comment: One commenter stated that data should be collected regarding the effectiveness of early intervening services. Several commenters requested requiring LEAs to report to the SEA, and make available to the public, the number of children receiving early intervening services, the length of time the children received the services, the impact of the services, and the amount of Federal Part B funds used for early intervening services.

Discussion: Section 300.226(d), consistent with section 613(f)(4) of the Act, requires LEAs that develop and maintain coordinated, early intervening services to annually report to their SEA on the number of children receiving early intervening services and the number of those children who eventually are identified as children with disabilities and receive special education and related services during the preceding two year period (i.e., the two years after the child has received early intervening services). We believe that these data are sufficient to provide LEAs and SEAs with the information needed to determine the impact of early intervening services on children and to determine if these services reduce the number of referrals for special education and related services. Requiring LEAs to collect and report data on the implementation of early intervening services beyond what is specifically required in section 613(f)(4) of the Act is unnecessary and would place additional paperwork burdens on LEAs and SEAs.

Changes: None.

Comment: Some commenters requested that the meaning of the terms “subsequently” and “preceding two year period” in § 300.226(d)(2) be clarified.

Discussion: Section 300.226(d)(2), consistent with section 613(f)(4)(B) of the Act, requires LEAs to report on the number of children who are provided early intervening services who subsequently receive special education and related services under Part B of the Act during the preceding two years to

determine if the provision of these services reduces the number of overall referrals for special education and related services. The Department intends for LEAs to report on children who began receiving special education services no more than two years after they received early intervening services. For the preceding two year period, the LEA would report on the number of children who received both early intervening services and special education services during those two years.

Changes: None.

Direct Services by the SEA (§ 300.227)

Comment: Some commenters requested that the regulations specify that SEAs providing direct services must make placement decisions based on the child’s individual needs and must comply with all requirements for providing FAPE in the LRE.

Discussion: We do not believe any changes to the regulations are necessary because § 300.227(b), consistent with section 613(g)(2) of the Act, clearly states that SEAs providing direct special education and related services must do so in accordance with Part B of the Act. Accordingly, the special education and related services provided under § 300.227 would be subject to the placement requirements in § 300.116 and the LRE requirements in § 300.114 and section 612(a)(5) of the Act.

Changes: None.

Disciplinary Information (§ 300.229)

Comment: One commenter recommended clarifying that not all student disciplinary records can be transmitted by public agencies.

Discussion: We believe that § 300.229 is clear that not all student disciplinary records can be transmitted by public agencies. Section 300.229(a) provides that public agencies can transmit disciplinary information on children with disabilities only to the extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children. Section 300.229(b) specifies the disciplinary information that may be transmitted, which includes a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

Changes: None.

Comment: Some commenters requested that the required transmission of student records include both the child’s current IEP and any statement of