

current or previous disciplinary action related to weapons, drugs, or serious bodily injury that has been taken against the child.

Discussion: It is important to clarify that the Act does not require the transmission of student disciplinary information when the child transfers from one school to another. Rather, section 613(i) of the Act allows each State to decide whether to require its public agencies to include disciplinary statements in student records and transmit such statements with student records when a child transfers from one school to another. The State's policy on transmitting disciplinary information must apply to both students with disabilities and students without disabilities.

Section 300.229(b) provides that if a State requires its public agencies to include disciplinary statements in student records, these disciplinary statements may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child; disciplinary actions taken against a child related to weapons, drugs, or serious bodily injury also could be included in these descriptions. If a State adopts such a policy, § 300.229(c) requires that the transmission of any of the child's student records include the child's current IEP and any statement of current or previous disciplinary action that has been taken against the child.

Therefore, with regard to the commenters' request that the transmission of student records include any statement of current or previous disciplinary action related to weapons, drugs, or serious bodily injury that has been taken against the child, this information would be transmitted only to the extent that disciplinary statements are included in, and transmitted with, the student records of nondisabled children.

Changes: None.

Comment: One commenter recommended requiring that the transmission of a student's records include functional behavioral assessments and behavior intervention plans.

Discussion: Any existing functional behavioral assessments and behavioral intervention plans would be part of the materials that must be transmitted under § 300.323(g). In addition, if a State requires student records to include disciplinary information and the child transfers from one school to another, § 300.229(c) requires that the

transmission of any of the child's student records include the child's current IEP. Functional behavioral assessments and behavior intervention plans are not required components of the IEP under § 300.320. However, if a State considers functional behavioral assessments and behavior intervention plans to be part of a student's IEP, this information would be required to be transmitted when the child transfers from one school to another, consistent with § 300.229(c).

Changes: None.

Subpart D—Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements

Parental Consent

Parental Consent (§ 300.300)

Comment: A few commenters noted that the terms, "consent," "informed consent," "agree," and "agree in writing" are used throughout the regulations and stated that differences between the terms should be clarified. One commenter recommended that the regulations include the term "informed" every time the term "parental consent" is used.

Discussion: The use of these terms throughout the regulations is consistent with their use in the Act. The definition of *consent* in § 300.9 includes the requirement that a parent be fully informed of all information relevant to the activity for which consent is sought. The definition also requires that a parent agree in writing to carrying out the activity for which the parent's consent is sought. Therefore, whenever the term "consent" is used in these regulations, it means that the consent is both "informed" and "written." Similarly, the terms "consent," "informed consent," "parental consent," and "written informed consent," as used in these regulations, all are intended to have the same meaning.

The meaning of the terms "agree" or "agreement" is not the same as "consent." "Agree" or "agreement" refer to an understanding between the parent and the LEA about a particular question or issue. There is no requirement that an agreement be in writing unless specifically stated in the Act and regulations.

Changes: None.

Comment: One commenter recommended that the regulations clarify what the required safeguards are if parents elect to receive notices electronically or provide electronic or digital signatures for consents, such as consent for an initial evaluation.

Discussion: Section 300.505, consistent with section 615(n) of the Act, permits parents to elect to receive prior written notices, procedural safeguards notices, and due process complaint notices by an electronic mail communication, if the public agency makes that option available. The Act does not specify documentation requirements if the public agency makes the electronic notice delivery option available to parents, and we believe that this is a matter that is best left to States and LEAs that choose to use the electronic communication option.

In addition, States that wish to utilize electronic or digital signatures for consent may do so if they choose. *Consent* under § 300.9(b) requires a parent to understand and agree in writing to the carrying out of the activity for which the parent's consent is sought. Therefore, States that permit the use of electronic or digital signatures for parental consent would need to take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process.

Changes: None.

Parental Consent for Initial Evaluation (§ 300.300(a))

Comment: One commenter recommended that the regulations require a public agency to conduct the following activities to obtain parental consent for an initial evaluation: identify the child's parents and their address and phone number; contact social service providers for children who are wards of the State; provide parents with copies of the Act; and inform parents of the consequences of withholding consent.

Discussion: The regulations already provide sufficient safeguards regarding consent, and we believe that the changes requested would be unduly burdensome. As a matter of practice, public agencies begin the process of obtaining parental consent by identifying the parent and contacting the parent by phone or through written correspondence, or speaking to the parent in parent-teacher conferences.

We do not believe it is necessary to regulate to require public agencies to contact social service agencies to obtain consent for children who are wards of the State because it may not always be necessary or appropriate, for example, when a child who is a ward of the State has a foster parent who can act as a parent, consistent with § 300.30(a)(2). Additionally, section 614(a)(1)(D)(iii)(I) of the Act provides that the public agency must make reasonable efforts to obtain informed parental consent for children who are wards of the State and

not residing with the parent. Public agencies are in the best position to determine, on a case-by-case basis, when it is necessary to contact social service providers to assist in obtaining parental consent for children who are wards of the State.

We also do not believe that additional regulations are necessary to require public agencies to inform parents of the consequences of withholding consent for an initial evaluation or to provide parents with copies of the Act. Section 300.503, consistent with section 615(c)(1) of the Act, already requires that prior written notice be provided to parents before an initial evaluation, which will explain, among other things, why the agency is proposing to conduct the evaluation; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for proposing to conduct the evaluation; and sources for the parent to contact to obtain assistance in understanding the provisions under the Act. Additionally, § 300.504(a)(1), consistent with section 615(d)(1)(A)(i) of the Act, requires the public agency to provide a copy of the procedural safeguards to parents upon initial referral for an evaluation, which provides information about parents' rights under the Act. Although we do not believe the recommended requirements should be added to the regulations, we will add the cross-references to the consent requirements in § 300.9, and the requirements for prior written notice and the procedural safeguards notice in §§ 300.503 and 300.504, respectively, to § 300.300(a).

Changes: We have added cross-references to §§ 300.9, 300.503, and 300.504 in § 300.300(a).

Comment: One commenter recommended revising § 300.300(a)(1)(ii) and using the statutory language in section 614(a)(1)(D)(i) of the Act to require that parental consent for evaluation may not be construed as consent for placement for receipt of special education and related services.

Discussion: We believe it is appropriate to use the phrase, "initial provision of services" in § 300.300(a)(1)(ii), rather than the statutory phrase "consent for placement for receipt of special education and related services," in section 614(a)(1)(D)(i) of the Act to clarify that consent does not need to be sought every time a particular service is provided to the child. In addition, the distinction between consent for an initial evaluation and consent for initial services is more clearly conveyed in § 300.300(a)(1)(ii) than in the statutory

language, and is consistent with the Department's longstanding position that "placement" refers to the provision of special education services, rather than a specific place, such as a specific classroom or specific school. We, therefore, decline to change the regulation, as requested by the commenter.

Changes: None.

Comment: One commenter recommended that the regulations clarify whether the reference to "parent" in § 300.300(a)(2) means "biological or adoptive parent" or anyone who meets the definition of *parent* in § 300.30.

Discussion: Section 300.300(a)(2) applies to circumstances in which the child is a ward of the State and is not residing with the child's parents, and requires the public agency to make reasonable efforts to obtain parental consent from the parent for an initial evaluation. The reference to "parent," in this context, refers to anyone who meets the definition of *parent* in § 300.30, consistent with section 614(a)(1)(D)(iii) of the Act.

Changes: None.

Comment: One commenter requested clarification on the interplay between new § 300.300(a)(2) (proposed § 300.300(a)(2)(ii)), regarding circumstances when the public agency is not required to obtain informed parental consent for an initial evaluation of a child who is a ward of the State, and the requirements in § 300.519(c), which require that a surrogate parent be appointed for a child who is a ward of the State.

Discussion: New § 300.300(a)(2) (proposed § 300.300(a)(2)(ii)), consistent with section 614(a)(1)(D)(iii)(II) of the Act, creates an exception to the parental consent requirements for initial evaluations for a child who is a ward of the State who is not residing with the child's parent if the public agency has made reasonable efforts to obtain the parent's consent, but is unable to discover the whereabouts of the parent, the rights of the parent of the child have been terminated under State law, or the rights of the parent to make educational decisions have been subrogated by a judge under State law and consent for the initial evaluation has been given by an individual appointed by the judge to represent the child. New § 300.300(a)(2) (proposed § 300.300(a)(2)(ii)) permits the public agency to proceed with the child's initial evaluation without first obtaining the requisite parental consent only in the circumstances detailed in § 300.300(a)(2). Therefore, when one or more of the circumstances in § 300.300(a)(2) are met and a surrogate

has not yet been appointed, the public agency need not postpone the child's evaluation to await the appointment of a surrogate. This is appropriate because in situations involving requests for initial evaluations, in most cases a surrogate parent has not yet been appointed and delaying an initial evaluation until after a surrogate is appointed and has given consent may not be in the best interests of the child. In contrast, in most situations involving consent for reevaluation, a surrogate parent should already have been appointed under § 300.519 if no parent can be identified, the public agency has been unable to locate a parent, the child is a ward of the State or the child is an unaccompanied homeless youth. Therefore, we do not think it is appropriate to apply the provisions in § 300.300(a)(2) to reevaluation situations.

Nothing in this section is intended to relieve a public agency of its obligation to ensure that the rights of a child who is a ward of the State are protected through the appointment of a surrogate parent in accordance with the procedures in § 300.519(b) through (h). Once a surrogate parent is appointed in accordance with the procedures in § 300.519(b) through (h), that person assumes the responsibilities of a parent under the Act, and the public agency must seek consent from that individual.

Moreover, if a child has a foster parent who can act as a *parent*, as defined in § 300.30(a)(2), or a person such as a grandparent or step-parent who is legally responsible for the child's welfare, and that person's whereabouts are known or the person can be located after reasonable efforts by the public agency, parental consent would be required for the initial evaluation.

We believe that the phrase "except as provided in paragraph (a)(2) of this section (regarding consent for wards of the State)" in proposed § 300.300(a)(1)(i) may incorrectly convey that a public agency is not required to make reasonable efforts to obtain informed consent from the parent of a child who is a ward of the State, or from a surrogate parent, foster parent, or other person meeting the definition of a *parent* in § 300.30(a). Therefore, we will remove the phrase. To clarify that the provisions in § 300.300(a)(2) apply only to initial evaluations, and not reevaluations, we will modify both §§ 300.300(a)(2) and (c)(1).

Changes: We have removed the phrase "except as provided in paragraph (a)(2) of this section (regarding consent for wards of the State)" in § 300.300(a)(1)(i), for clarity. We have also added introductory language to

§ 300.300(a)(2) to specify that it applies only to initial evaluations, and we have changed the cross-reference in § 300.300(c)(1) to refer to § 300.300(a)(1).

Comment: One commenter recommended that the regulations specify the minimum steps that public agencies must take to obtain consent for initial evaluations from parents of children who are wards of the State. Another commenter recommended that the regulations define “reasonable efforts,” as used in new § 300.300(a)(1)(iii) (proposed § 300.300(a)(2)(i)). One commenter recommended requiring LEAs to maintain documentation of their efforts to obtain parental consent for initial evaluations, including attempts to obtain consent by telephone calls, visits to the parent’s home, and correspondence in the parent’s native language. Several commenters requested that the requirements in current § 300.345(d) be included in new § 300.300(a)(2)(i) (proposed § 300.300(a)(2)(ii)(A)). Current § 300.345(d) requires a public agency to document the specific steps it has taken to arrange a mutually convenient time and place for an IEP Team meeting (e.g., detailed records of telephone calls, any correspondence sent to the parents, visits made to the parent’s home or place of employment) and it is cross-referenced in current § 300.505(c)(2) to identify documentation of the reasonable measures that an LEA took to obtain consent for a reevaluation.

Discussion: We believe it is important to emphasize that a public agency must make reasonable efforts to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability. This includes the parent of a child who is a ward of the State. Therefore, we will add a new paragraph (a)(1)(iii) to § 300.300 to make clear that a public agency must make reasonable efforts to obtain informed parental consent whenever a public agency seeks to conduct an initial evaluation of a child to determine whether the child is a child with a disability. This requirement applies to all children including children who are wards of the State. With the addition of this new paragraph, the requirement for public agencies to make reasonable efforts to obtain informed consent from the parent for an initial evaluation for children who are wards of the State in § 300.300(a)(2)(i) is no longer necessary and will be removed.

We also agree with the commenters that a public agency should document and make the same reasonable efforts to

obtain consent for an initial evaluation from a parent, including a parent of a child who is a ward of the State, that are required when a public agency attempts to arrange a mutually convenient time and place for an IEP Team meeting (e.g., detailed records of telephone calls, any correspondence sent to the parents, visits made to the parent’s home or place of employment), and will add a new paragraph (d)(5) to make this clear. We recognize that the statute uses both “reasonable measures” and “reasonable efforts” when referring to a public agency’s responsibility to obtain parental consent for an evaluation, initial services, and a reevaluation. We believe these two phrases, when used in this context, have the same meaning and, therefore, have used “reasonable efforts” throughout the regulations related to parental consent for consistency.

Changes: We have added a new paragraph (a)(1)(iii) to § 300.300 to require a public agency to make reasonable efforts to obtain informed parental consent for an initial evaluation. We will remove § 300.300(a)(2)(i) because it is redundant with the new paragraph. Section 300.300(a)(2) has been reformatted consistent with the removal of paragraph (a)(2)(i). We also have added a new paragraph (d)(5) to § 300.300 to require a public agency to document its attempts to obtain parental consent using the procedures in § 300.322(d).

Comment: A few commenters asked whether a public agency must obtain consent for an initial evaluation from the biological or adoptive parent of the child when there is another person who meets the definition of *parent* in § 300.30. Another commenter recommended the regulations clarify whether a public agency must seek informed consent for an initial evaluation from a biological or adoptive parent when a surrogate parent has already been appointed.

Discussion: Section 300.30(b)(1) provides that, when more than one party is qualified to act as a parent, the biological or adoptive parent, when attempting to act as the parent under the Act, must be presumed to be the parent, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

If a surrogate parent already has been appointed because the public agency, after reasonable efforts, could not locate a parent, the public agency would not have to again attempt to contact other individuals meeting the definition of *parent* in § 300.30 to seek consent.

Changes: None.

Comment: One commenter recommended that the regulations clarify whether the qualifications of a judge-appointed surrogate parent in § 300.519(c) would apply to new § 300.300(a)(2)(iii) (proposed § 300.300(a)(2)(ii)(C)), regarding consent for an initial evaluation for a child who is a ward of the State.

Discussion: Section 614(a)(1)(D)(iii)(II)(cc) of the Act, which is the basis for new § 300.300(a)(2)(iii) (proposed § 300.300(a)(2)(ii)(C)), provides that the public agency is not required to obtain informed consent from the parent for an initial evaluation of a child who is a ward of the State and is not living with the child’s parent if the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child. This is a special situation, limited only to children who are wards of the State not living with a parent and limited only to the situation of seeking consent for an initial evaluation. A person appointed under this provision is not a surrogate parent as that term is used in these regulations. The requirements of § 300.519(c) do not apply to persons authorized to provide consent for initial evaluations under this provision.

It is noteworthy that the provision in new § 300.300(a)(2)(iii) (proposed § 300.300(a)(2)(ii)(C)) is only a limited exception to the requirement to obtain informed parental consent for an initial evaluation. Most children will not have a surrogate parent already appointed at this stage of their involvement with services under the Act. However, if a child has a surrogate parent appointed under § 300.519(c), and the rights of that person to make educational decisions for the child have not been subrogated by a judge under State law, the public agency would have to seek informed parental consent from that person.

Changes: None.

Comment: One commenter recommended revising § 300.300(a)(3) to prohibit a public agency from pursuing an initial evaluation without parental consent. Another commenter recommended requiring a public agency to use the due process procedures to conduct an initial evaluation if the parent does not provide consent and the public agency believes that the child would not otherwise receive needed services. A few commenters stated that § 300.300(a)(3) is inconsistent with statutory language and opposed language stating that the public agency may, but is not required to, pursue the

initial evaluation of a child whose parents have refused to consent or failed to respond to a request for consent.

Discussion: Section 300.300(a)(3) is consistent with section 614(a)(1)(D)(ii) of the Act, which states that a public agency *may* pursue the initial evaluation of a child using the procedural safeguards if a parent does not provide consent or fails to respond to a request to provide consent for an initial evaluation. Consistent with the Department's position that public agencies should use their consent override procedures only in rare circumstances, § 300.300(a)(3) clarifies that a public agency is not required to pursue an initial evaluation of a child suspected of having a disability if the parent does not provide consent for the initial evaluation. State and local educational agency authorities are in the best position to determine whether, in a particular case, an initial evaluation should be pursued.

Changes: None.

Comment: A few commenters recommended clarifying the parental consent requirements for an initial evaluation. Many commenters recommended that LEAs maintain documentation that the parent has been fully informed and understands the nature and scope of the evaluation. One commenter recommended that the regulations require that informed parental consent for an initial evaluation be documented in writing.

Discussion: Section 300.300(a)(1)(i), consistent with section 614(a)(1)(D)(i)(I) of the Act, is clear that the public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must obtain consent from the parent of the child before conducting the evaluation. *Consent*, as defined in § 300.9, means that the parent has been fully informed in his or her native language, or other mode of communication, and understands and agrees *in writing* to the initial evaluation. The methods by which a public agency seeks to obtain parental consent for an initial evaluation (beyond the requirement that the public agency use the parent's native language or mode of communication) and how a public agency documents its efforts to obtain the parent's written consent are appropriately left to the discretion of SEAs and LEAs.

Changes: None.

Comment: A few commenters recommended that the regulations include language clarifying that a public agency is not in violation of the FAPE requirements if the public agency does not pursue an initial evaluation when

the parent refuses to consent or fails to respond to a request for consent. One commenter recommended adding language to the regulations to clarify that if a parent refuses to consent to an initial evaluation, the child would not be considered to be a child with a disability.

Discussion: While we agree that a public agency would not be in violation of the FAPE requirements for failing to pursue an initial evaluation through due process, we do not believe that a change to the regulations is necessary. The FAPE requirements in §§ 300.101 through 300.112, consistent with section 612(a) of the Act, apply only to a *child with a disability*, as defined in § 300.8 and section 602(3) of the Act. A child would not be considered a child with a disability under the Act if the child has not been evaluated in accordance with §§ 300.301 through 300.311 and determined to have one of the disabilities in § 300.8(a), and because of that disability, needs special education and related services.

Further, § 300.534(c)(1), consistent with section 615(k)(5)(C) of the Act, provides that a public agency would not be deemed to have knowledge that a child is a child with a disability, for disciplinary purposes, if a parent has not allowed the child to be evaluated or refuses services under the Act.

Changes: None.

Comment: A few commenters recommended that the regulations clarify that the public agency is not in violation of the child find requirements if the public agency does not pursue an initial evaluation when the parent refuses to consent or fails to respond to a request for consent.

Discussion: We agree that States and LEAs should not be considered to be in violation of their obligation to locate, identify, and evaluate children suspected of being children with disabilities under § 300.111 and section 612(a)(3) of the Act if they decline to pursue an evaluation (or reevaluation) to which a parent has refused or failed to consent. We will add language to the regulations to make this clear.

Changes: We have added language to § 300.300(a)(3) and (c)(1) to clarify that a State or public agency does not violate the requirements of § 300.111 and §§ 300.301 through 300.311 if it declines to pursue an evaluation or reevaluation to which a parent has refused or failed to consent.

Comment: A few commenters recommended that the regulations define "fails to respond" as used in § 300.300(a)(3).

Discussion: Section 300.300(a)(3), consistent with section 614(a)(1)(D)(ii)(I)

of the Act, states that if a parent of a child enrolled in public school, or seeking to be enrolled in public school, does not provide consent for an initial evaluation, or the parent "fails to respond" to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards, if appropriate, except to the extent inconsistent with State law relating to such parental consent. The meaning of "fails to respond," in this context, is generally understood to mean that, in spite of a public agency's efforts to obtain consent for an initial evaluation, the parent has not indicated whether the parent consents or refuses consent to the evaluation. We believe the meaning is clear in the regulations and, therefore, decline to define the phrase in these regulations.

Changes: None.

Comment: One commenter recommended that the regulations include language to require a public agency to provide the following information (in the parent's native language) to a parent who refuses consent or fails to respond to a request for consent for an initial evaluation: The reasons why the public agency believes the child may be eligible for special education; confirmation that the requested evaluation and any subsequent special education services will be provided at no cost and scheduled in cooperation with parents with transportation provided; The nature of the evaluations and credentials of evaluators; the types of special education services that the child could receive if eligible; and the risks of delaying an evaluation.

Discussion: The prior written notice requirements in § 300.503, consistent with section 615(c)(1) of the Act, address many of the concerns raised by the commenter. Consistent with § 300.503(b) and (c), prior notice must be given to the parents when a public agency proposes to evaluate a child and would explain why the public agency believes the child needs an evaluation to determine whether the child is a child with a disability under the Act; describe each evaluation procedure, assessment, record, or report the agency used as a basis for proposing that the child needs an evaluation; explain that the parents have protection under the Act's procedural safeguards; provide sources for parents to contact to obtain assistance in understanding the provisions of the Act; and describe other factors that are relevant to the agency's proposal to conduct the evaluation of the child.

In addition to the prior written notice, § 300.504(a)(1), consistent with section 615(d)(1)(A)(i) of the Act, requires that a copy of the procedural safeguards notice be given to parents upon an initial referral or parental request for an evaluation. Consistent with § 300.503(c) and § 300.504(d), the prior written notice and the procedural safeguards notice, respectively, must be written in language understandable to the general public and be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

As a matter of practice, public agencies provide parents with general information about the special education and related services that are available to eligible children with disabilities and inform the parent that the public agency's evaluation is provided at no cost. We believe that this information, along with the information provided in the prior written notice and procedural safeguards notice, will help a parent determine whether there are any risks of delaying an evaluation. Therefore, we do not believe additional regulations are necessary.

With regard to information regarding an evaluator's credentials, we do not believe it is necessary to require public agencies to provide this information to parents because § 300.304(c)(1)(v) and section 614(b)(3)(A)(iv) of the Act require the public agency to ensure that the evaluation is conducted by trained and knowledgeable personnel.

If transportation to an evaluation outside the school environment is necessary, the public agency would have to provide it, as a part of its obligation to ensure that all eligible children are located, identified, and evaluated. However, we do not believe that the parents need to be notified of this fact because, in most cases, children can be evaluated at school during the school day and there is no requirement that a parent be present during the evaluation. Thus, requiring that all parents be notified about transportation to evaluations would be unnecessarily burdensome.

Changes: None.

Parental Consent for Services (§ 300.300(b))

Comment: A few commenters requested that the Department address situations in which a child is receiving special education services and a parent wants to withdraw consent or refuse services because the parent believes the child no longer needs special education services. A few commenters stated that public agencies should not be allowed to use the procedural safeguards to

continue to provide special education and related services to a child whose parents withdraw consent for the continued provision of special education and related services.

Discussion: We are considering the question of whether parents who previously consented to the initiation of special education services should have the right to subsequently remove their child from special education services. We anticipate publishing a notice of proposed rulemaking in the near future seeking public comment on this issue.

Changes: None.

Comment: One commenter recommended changing the regulations to allow the public agency to provide services in anticipation of receiving parental consent when the public agency initiates a due process hearing to obtain parental consent for initial services.

Discussion: To implement the change requested by the commenter would be inconsistent with the Act. Section 614(a)(1)(D)(i)(II) of the Act requires a public agency to obtain informed parental consent before providing initial special education and related services to a child. In addition, a public agency may not initiate a due process hearing to provide special education and related services to a child when a parent refuses to consent to initial services, consistent with section 614(a)(1)(D)(ii)(II) of the Act. A child whose parent has refused consent for initial services would not be provided special education and related services and would continue to receive general education services.

Changes: None.

Comment: A few commenters requested that the regulations clarify the meaning of "initial provision of services" as used in § 300.300(b).

Discussion: We believe § 300.300(b) is clear that the "initial provision of services" means the first time a parent is offered special education and related services after the child has been evaluated in accordance with the procedures in §§ 300.301 through 300.311, and has been determined to be a child with a disability, as defined in § 300.8.

Changes: None.

Comment: One commenter requested that the regulations permit mediation when a parent of a child refuses to consent to the provision of special education and related services. A few commenters recommended revising the regulations to require a public agency to use the due process procedures, or other alternative dispute resolution procedures, if a parent refuses to consent to initial services.

Discussion: Section 300.300(b)(2), consistent with section 614(a)(1)(D)(ii)(II) of the Act, is clear that if a parent fails to respond or refuses to consent to initial services, the public agency may not use the mediation procedures in § 300.506 or the due process procedures in §§ 300.507 through 300.516 in order to obtain agreement or a ruling that the services may be provided to a child.

Changes: None.

Comment: One commenter stated that additional documentation is necessary if a parent does not provide consent for initial services and suggested adding language to the regulations to require public agencies to document the steps they have taken to obtain parental consent for initial services and to maintain them in the child's permanent file. Another commenter recommended requiring that the parent's refusal to consent for initial services occur during a properly convened IEP Team meeting. The commenter also suggested requiring that the documentation of a parent's refusal to provide consent include evidence that all options waived by the parent have been explained, that the parent has refused services, and the reasons for the parent's refusal.

Discussion: We believe that a public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child and will make this clear in § 300.300(b). We noted in our discussion regarding the reasonable efforts that a public agency must make to obtain parental consent for an initial evaluation to determine whether the child is a child with a disability, that we added a new paragraph (d)(5) to § 300.300 that provides that to meet the reasonable efforts requirement, a public agency must document its attempts to obtain consent using the procedures in § 300.322(d). We believe a public agency should make these same reasonable efforts to obtain parental consent for initial services, and will include this in new § 300.300(d)(5).

We do not believe it is necessary or appropriate to require a public agency to maintain additional documentation, beyond that required in new § 300.300(d)(5), of a parent's refusal to provide consent for initial services or to prescribe where this documentation must be obtained or maintained. Public agencies understand the importance of properly documenting a parent's refusal to consent to the initial provision of special education and related services and are in the best position to determine any additional documentation that is

necessary and where to obtain and maintain such documentation.

Changes: We have added a new paragraph (b)(2) to § 300.300 to clarify that the public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child. Subsequent paragraphs have been renumbered accordingly. We also have included a reference to new § 300.300(b)(2) in new § 300.300(d)(5) that requires a public agency to document its attempts to obtain consent using the procedures in § 300.322(d).

Comment: One commenter recommended adding language to clarify that if a parent does not consent to initial services, the child would be considered a part of the general education enrollment and subject to the same disciplinary provisions as nondisabled children.

Discussion: The language requested by the commenter is not necessary because section 615(k)(5)(C) of the Act already provides for situations in which a parent refuses consent for initial services and the child subsequently engages in behavior that violates a code of student conduct. Section 300.534(c)(1), consistent with section 615(k)(5)(C) of the Act, provides that a public agency would not be deemed to have knowledge that a child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to §§ 300.301 through 300.311, or has refused services under this part. Therefore, such a child would not be able to assert any of the protections provided to children with disabilities under the Act, and would be subject to the same disciplinary procedures as any other child.

Changes: None.

Comment: A few commenters recommended requiring a public agency to refer parents who do not provide consent for initial services to the State's PTI center so that the parents can be advised of the benefits of special education and their rights and responsibilities under the Act.

Discussion: We do not believe it would be appropriate to require a public agency to refer parents to a particular agency or program. Such matters are best left to States and LEAs to decide and should not be included in the regulations.

Changes: None.

Comment: One commenter recommended that the regulations require a public agency to report a parent for suspected child abuse or neglect to the appropriate agency if the public agency believes that the parent's

failure or refusal to consent to initial services meets the definition of child abuse or neglect under the State's mandatory reporting law.

Discussion: It is not necessary to include the requirement recommended by the commenter in these regulations, as the issue would already be addressed by State law, if under State law a parent's failure to consent to initial services under the Act was considered child abuse or neglect.

Changes: None.

Comment: Numerous commenters expressed concern about new § 300.300(b)(4)(ii) (proposed § 300.300(b)(3)(ii)), which provides that if a parent fails to consent for initial services or refuses to respond to a request for consent, the public agency is not required to convene an IEP Team meeting or develop an IEP for the child. A few commenters stated that this should be permitted only when a parent refuses services, but not when a parent fails to respond to a request for consent for initial services. A few commenters stated that the regulations should be revised to clarify that this applies only to subsequent IEP Team meetings, not the initial IEP Team meeting. One commenter recommended revising the regulations to require an IEP Team meeting to be held and an IEP developed to provide a basis for informed consent.

Discussion: New 300.300(b)(4)(ii) (proposed § 300.300(b)(3)(ii)) follows the specific language in section 614(a)(1)(D)(ii)(III)(bb) of the Act and reflects the new provision in the Act that relieves public agencies of any potential liability for failure to convene an IEP Team meeting or develop an IEP for a child whose parents have refused consent or failed to respond to a request for consent to the initial provision of special education and related services. It does not, however, prevent a public agency from convening an IEP Team meeting and developing an IEP for a child as a means of informing the parent about the services that would be provided with the parent's consent.

Changes: None.

Comment: A few commenters questioned how a parent could be adequately informed of the services the parent is refusing if the public agency is not required to develop an IEP when the parent refuses to consent to the initial provision of special education and related services.

Discussion: We understand the commenters' concern that a parent of a child with a disability who refuses to consent to the provision of special education and related services may not fully understand the extent of the

special education and related services their child would receive without the development of an IEP for their child. However, we do not view the consent provisions of the Act as creating the right of parents to consent to each specific special education and related service that their child receives. Instead, we believe that parents have the right to consent to the initial provision of special education and related services. "Fully informed," in this context, means that a parent has been given an explanation of what special education and related services are and the types of services that might be found to be needed for their child, rather than the exact program of services that would be included in an IEP.

Changes: None.

Comment: One commenter stated that the regulations should include sanctions for parents who repeatedly fail to respond to requests for consent from public agencies, such as paying the costs incurred by agencies attempting to obtain consent.

Discussion: The Act does not authorize sanctions against parents who fail to respond to requests for consent.

Changes: None.

Parental Consent for Reevaluations (§ 300.300(c))

Comment: Several commenters recommended allowing public agencies to use the due process procedures to override a parent's refusal to consent to a reevaluation.

Discussion: Override of parental refusal to consent to a reevaluation is already addressed in the regulations. Section 300.300(c) states that each public agency must obtain informed parental consent in accordance with § 300.300(a)(1) prior to conducting any reevaluation of a child with a disability. Section 300.300(a)(3) allows a public agency to override parental refusal to consent to an initial evaluation by utilizing the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516. The cross-reference in § 300.300(c)(1)(i) to the provision in § 300.300(a)(1) provides the basis for allowing a public agency to override the parent's refusal of consent to a reevaluation. However, we believe it is important to state this more directly and will, therefore, add language to § 300.300(c)(1) to clarify that if a parent refuses to consent to a reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the procedural safeguards in subpart E of this part.

Changes: We have restructured § 300.300(c)(1) and added a new

§ 300.300(c)(1)(ii) to clarify that a public agency may, but is not required to, pursue a reevaluation using the procedural safeguards.

Comment: One commenter requested that the regulations clarify a public agency's responsibilities for a reevaluation if the agency has taken reasonable measures to obtain consent and the parent has failed to respond.

Discussion: We do not believe that further clarification in the regulations is necessary. Section 300.300(c)(2), consistent with section 614(c)(3) of the Act, is clear that a public agency may conduct a reevaluation of a child with a disability, if the public agency can demonstrate that it has made reasonable efforts to obtain such consent and the child's parent has failed to respond to a request for consent.

Changes: None.

Comment: One commenter recommended that the regulations require a public agency to obtain parental consent for any tests needed for a reevaluation that were not used for the initial evaluation or previous reevaluations.

Discussion: We do not agree that a change should be made. Section 614(c)(3) of the Act, which is incorporated in § 300.300(c), already requires a public agency to obtain parental consent before conducting any tests needed for a reevaluation, regardless of whether the tests differ from tests used in previous evaluations of the child.

Changes: None.

Comment: Many commenters recommended retaining current § 300.505(c)(2), which requires a public agency to document the specific reasonable measures it has taken to obtain parental consent for a reevaluation, including detailed records of telephone calls made or attempted and the results of those calls; copies of any correspondence sent to the parents and any responses received; and detailed records of visits made to the parents' home or place of employment and the results of those visits. One commenter suggested that if the requirements in current § 300.505(c)(2) were not retained, the regulations should define reasonable measures as at least three good-faith attempts to contact a parent. Many commenters stated that current § 300.505(c)(2) must be retained because it is protected by section 607(b) of the Act, which provides that the Secretary may not publish final regulations that would procedurally or substantively lessen the protections provided to children with disabilities in the regulations that were in effect on July 20, 1983.

Discussion: We agree that the requirements in current § 300.505(c)(2) should be retained. We noted in our discussions regarding the reasonable efforts that a public agency must make to obtain parental consent for an initial evaluation and the initial provision of services, that we added a new paragraph (d)(5) to § 300.300 that provides that to meet the reasonable efforts requirement, a public agency must document its attempts to obtain consent using the procedures in § 300.322(d). These are the same procedures in current § 300.505(c)(2). Therefore, we will include a reference to § 300.300(c)(2)(i) in new § 300.300(d)(5).

Changes: We included a reference to § 300.300(c)(2)(i) in new § 300.300(d)(5).

Other Consent Requirements (§ 300.300(d))

Comment: Many commenters recommended that the regulations include language clarifying that a public agency is not authorized to override the lack of parental consent for an initial evaluation for children who are home schooled or placed in a private school by the parents at their own expense. One commenter recommended removing the phrase "public school or seeking to enroll in public school" in § 300.300(a)(3) to permit a public agency to override lack of parental consent for children who are home schooled or placed in a private school by parents at their own expense.

Discussion: We agree with the commenters who recommended that, for children who are home schooled or placed in a private school by their parents at their own expense, consent override should not be permitted. We will add a new paragraph (4) to § 300.300(d) to make this clear.

There are compelling policy reasons why the Act's consent override procedures should be limited to children who are enrolled, or who are seeking to enroll, in public school. Because the school district has an ongoing obligation to educate a public school child it suspects has a disability, it is reasonable for a school district to provide the parents with as much information as possible about their child's educational needs in order to encourage them to agree to the provision of special education services to meet those needs, even though the parent is free, ultimately, to reject those services. The school district is accountable for the educational achievement of all of its children, regardless of whether parents refuse the provision of educationally appropriate services. In addition, children who do not receive appropriate educational services may develop

behavioral problems that have a negative impact on the learning environment for other children.

By contrast, once parents opt out of the public school system, States and school districts do not have the same interest in requiring parents to agree to the evaluation of their children. In such cases, it would be overly intrusive for the school district to insist on an evaluation over a parent's objection. The Act gives school districts no regulatory authority over private schools. Moreover, the Act does not require school districts to provide FAPE to children who are home schooled or enrolled in private schools by their parents.

Public agencies do have an obligation to actively seek parental consent to evaluate children attending private schools (including children who are home schooled, if a home school is considered a private school under State law) who are suspected of being children with disabilities under the Act, in order to properly identify the number of private school children with disabilities and consider those children as eligible for equitable services under §§ 300.132 through 300.144. However, this obligation does not extend to overriding refusal of parental consent to evaluate parentally-placed private school children.

Section 300.300(a)(3) provides that a public agency may override parental consent for an initial evaluation only for children who are enrolled in public school or seeking to be enrolled in public school, so we are not making the suggested change in § 300.300(a)(3).

Changes: We have added a new paragraph (4) to § 300.300(d) to clarify that consent override is not permitted for children who are home schooled or placed in private schools by their parents.

Evaluations and Reevaluations

Initial Evaluations (§ 300.301)

Request for Initial Evaluation (§ 300.301(b))

Comment: Several commenters recommended that teachers and related services providers be included as individuals who can refer a child for an initial evaluation. A few commenters requested clarification as to whether States can authorize other individuals who are acting on behalf of a public agency (e.g., family court, probation officers, staff from other public agencies) to refer a child for an initial evaluation, and whether individuals responsible for protecting the welfare of a child who are not acting on behalf of an SEA or LEA, such as physicians and

social workers, can refer a child for an initial evaluation.

Discussion: Section 614 (a)(1)(A) of the Act provides that an SEA, other State agency, or LEA shall conduct a full and individual evaluation of a child before the provision of special education and related services. In § 300.301(a), we interpret this language as requiring *public agencies*, as that term is defined in § 300.33, to conduct evaluations, because those are the only agencies in the State responsible for providing FAPE to eligible children. The same language is used in section 614(a)(1)(B) of the Act to describe the agencies that may initiate a request for an initial evaluation to determine if a child is a child with a disability. We similarly interpret this language to be referring to the entities that are public agencies under § 300.33. Therefore, § 300.301(b) states that either a parent or a public agency may initiate a request for an initial evaluation. The language does not include employees of SEAs or LEAs (e.g., teachers and related services providers), unless they are acting for the SEA or LEA, or of other State agencies (e.g., probation officers, social workers, or staff from State agencies that are not public agencies as defined in § 300.33).

The requirements in § 300.301(b) pertain to the initiation of an evaluation under §§ 300.301 through 300.305 and should not be confused with the State's child find responsibilities in § 300.111 and section 612(a)(3) of the Act. The child find requirements permit referrals from any source that suspects a child may be eligible for special education and related services. Child find activities typically involve some sort of screening process to determine whether the child should be referred for a full evaluation to determine eligibility for special education and related services. Therefore, persons such as employees of the SEA, LEA, or other public agencies responsible for the education of the child may identify children who might need to be referred for an evaluation. However, it is the parent of a child and the public agency that have the responsibility to initiate the evaluation procedures in §§ 300.301 through 300.311 and section 614 of the Act.

Changes: None.

Comment: Several commenters stated that the regulations should clarify that the 60-day timeframe in § 300.301(c) to complete an evaluation does not begin if a parent requests an initial evaluation, the LEA denies the request, and the parent challenges the LEA's decision in a due process hearing.

Discussion: We believe the regulations already address the commenters' concern. Section 300.301(b) provides

that a parent may initiate a request for an initial evaluation to determine if the child is a child with a disability. If the public agency agrees to conduct the evaluation, § 300.304(a) requires the public agency to provide notice to the parents, in accordance with § 300.503, that describes any evaluation procedures that the agency proposes to conduct. The public agency must obtain informed consent for the evaluation, consistent with §§ 300.9 and 300.300, prior to conducting the evaluation. The 60-day timeframe begins when the public agency receives the consent for evaluation.

If, however, the public agency does not suspect that the child has a disability and denies the request for an initial evaluation, the public agency must provide written notice to the parents, consistent with § 300.503(b) and section 615(c)(1) of the Act, which explains, among other things, why the public agency refuses to conduct an initial evaluation and the information that was used as the basis to make that decision. The parent may challenge such a refusal by requesting a due process hearing, but the timeline for conducting the evaluation does not begin prior to parental consent for evaluation. A parent would not be able to give consent under this part without knowing what specific evaluation procedures the public agency is proposing to conduct.

Changes: None.

Comment: A few commenters recommended that the regulations clarify whether a public agency has the right to deny a parent's request for an initial evaluation.

Discussion: The regulations are sufficiently clear on this point. Section 300.503(a), consistent with section 615(b)(3) of the Act, provides that a public agency may refuse to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, if the public agency provides written notice. This includes situations in which a public agency wishes to deny a parent's request for an initial evaluation. The written notice must meet the requirements in § 300.503(b). Thus, for situations in which a public agency wishes to deny a parent's request for an initial evaluation, the written notice would provide, among other things, an explanation of why the public agency refuses to conduct an initial evaluation and the information that was used to make that decision. A parent may challenge the public agency's refusal to conduct an initial evaluation by requesting a due process hearing.

Changes: None.

Procedures for Initial Evaluation (§ 300.301(c))

Comment: Numerous commenters requested that the regulations clarify when the 60-day timeframe for a public agency to conduct an initial evaluation begins. One commenter requested that the 60-day timeframe include completing both the evaluation and eligibility determination.

Several commenters recommended reducing the timeframe for evaluations from 60 days to 30 days. Some commenters recommended that the 60-day timeframe be 60 school days. A few commenters stated that the timeframe for evaluation should be longer if additional time is required for specific assessments, such as behavioral assessments or other assessments based on scientific practices.

Discussion: It would be inconsistent with the Act to reduce the timeframe from 60 days to 30 days, require the 60-day timeframe to be 60 school days, extend the timeframe for particular types of assessments, or require that the 60-day timeframe cover both the evaluation and determination of eligibility. Section 614(a)(1)(C)(i)(I) of the Act requires an initial evaluation to be conducted within 60 days of receiving parental consent for the evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. The regulations in § 300.301(c) reflect this requirement.

Changes: None.

Comment: A few commenters asked whether a State could establish a timeframe of more than 60 days to complete an initial evaluation. A significant number of commenters recommended that if a State establishes its own timeframe within which an evaluation must be conducted, that the timeframe be less, but not more, than 60 days. Several commenters recommended that if a State has its own timeframe for evaluation, the timeframe should be reasonable and "reasonable" should be defined. Some commenters recommended that if a State's timeframe is greater than 60 days, the Department should provide guidance to the State and to parents in that State. One commenter recommended that if a State establishes its own timeframe, the State must offer parents an adequate opportunity to assert their procedural rights.

Discussion: Section 300.301(c), consistent with section 614(a)(1)(C)(i)(I) of the Act, requires an initial evaluation to be completed within 60 days of receiving parental consent for evaluation or, if the State establishes a

timeframe within which the evaluation must be conducted, within such timeframe. The Department declines to require that a State-established timeframe be less than 60 days or to place additional requirements on States with timeframes of greater than 60 days because the Act gives States the authority to establish different timeframes and imposes no restrictions on State exercise of that authority. We believe this is evidence of an intent to permit States to make reasoned determinations of the appropriate period of time in which evaluations should be conducted based on particular State circumstances.

Changes: None.

Comment: Numerous commenters requested clarification regarding the timeframe to complete an initial evaluation and convene the IEP Team. A few commenters stated that the timeframe from referral to IEP development could be as long as 120 calendar days (30 days from referral to consent; 60 days from consent to the eligibility determination; and 30 days from the eligibility determination to development of the IEP), and recommended that this timeframe be 60 days.

One commenter recommended that public agencies provide consent forms to parents promptly after a referral for evaluation has been made so that the child's evaluation is not delayed. A few commenters asked how promptly an LEA must seek parental consent following a referral for evaluation, and whether an LEA can wait until September to obtain consent if a referral is made in June or July.

Discussion: We cannot change the timeframe for an initial evaluation specified in section 614(a)(1)(C) of the Act. Section 614(a)(1)(C) of the Act requires that an initial evaluation be conducted within 60 days of receiving parental consent for the evaluation, or within the timeframe established by the State. Section 300.323(c) is a longstanding requirement that a meeting be held to develop the child's IEP within 30 days of determining that a child needs special education and related services. We decline, however, to specify the timeframe from referral for evaluation to parental consent, or the timeframe from the completion of an evaluation to the determination of eligibility, as we are not in a position to determine the maximum number of days that should apply to these periods in all circumstances.

However, it has been the Department's longstanding policy that evaluations be conducted within a reasonable period of time following the

agency's receipt of parental consent, if the public agency agrees that an initial evaluation is needed to determine whether a child is a child with a disability. Likewise, the Department believes that eligibility decisions should be made within a reasonable period of time following the completion of an evaluation.

The child find requirements in § 300.111 and section 612(a)(3)(A) of the Act require that all children with disabilities in the State who are in need of special education and related services be identified, located, and evaluated. Therefore, it would generally not be acceptable for an LEA to wait several months to conduct an evaluation or to seek parental consent for an initial evaluation if the public agency suspects the child to be a child with a disability.

If it is determined through the monitoring efforts of the Department or a State that there is a pattern or practice within a particular State or LEA of not conducting evaluations and making eligibility determinations in a timely manner, this could raise questions as to whether the State or LEA is in compliance with the Act.

With regard to the total timeframe from referral to IEP development, this will vary based on a number of factors, including the timing of parental consent following referral for an evaluation and whether a State establishes its own timeframe to conduct an initial evaluation. Given such factors, we do not believe it is feasible to further regulate on this timeframe.

Changes: None.

Comment: Numerous commenters recommended that an initial evaluation be conducted in an expedited timeframe for children who are homeless or in the custody of a child welfare agency. The commenters stated that public agencies should take into consideration the date on which the child was first referred for evaluation by any public agency.

Discussion: Congress recognized the unique problems homeless children face and included several new provisions in the Act to ensure that homeless children and youth with disabilities have access to the same services and supports as all other children with disabilities. The Department recognizes that the high mobility rates of some homeless children with disabilities (as well as other children, including some children who are in the custody of a State child welfare agency) pose unique challenges when a child is referred for an evaluation, but moves to another district or State before an evaluation can be initiated or completed. In such cases, the Department believes it is important that the evaluations be completed as

expeditiously as possible, taking into consideration the date on which the child was first referred for evaluation in any LEA. However, the high mobility rate of these children and their potential range of evaluation needs means that any specific expedited timeframe could be both too long to ensure that all children are evaluated before they move, and too short to be reasonable in all circumstances. There is nothing, however, in Part B of the Act or these regulations that would prohibit a State from establishing its own policies to address the needs of homeless children, including adopting a timeframe for initial evaluations that is less than 60 days.

Changes: None.

Exception (§ 300.301(d))

Comment: Numerous commenters requested clarification regarding whether the 60-day timeframe for initial evaluations could be extended by mutual agreement between the parent and the public agency. A few commenters asked whether the 60-day timeframe could be extended for reasons other than the exceptions listed in § 300.301(d), and whether a State could include other exceptions in its State policies and procedures.

Discussion: Congress was clear in limiting the exceptions to the 60-day timeframe to the situations in section 614(a)(1)(C)(ii) of the Act. Therefore, we do not believe it is appropriate to include in the regulations other exceptions, such as permitting a parent and a public agency to mutually agree to extend the 60-day timeframe or to include exceptions to the timeframe, that would be in addition to those in the Act and listed in § 300.301(d). However, the Act gives States considerable discretion with a State-adopted timeframe. A State could adopt a timeframe of 60 days or some other number of days, with additional exceptions.

Changes: None.

Comment: A number of comments were received requesting clarification on the provision in § 300.301(d)(1), which allows an extension of the 60-day or State-established timeframe to complete an initial evaluation if the parent of a child repeatedly fails or refuses to produce the child for an evaluation. A few commenters asked whether the exception applies when a child is not available because of absences on the days the evaluation is scheduled. Several commenters stated that "produce" does not necessarily mean the child's physical presence in school. Other commenters requested that the regulations define "repeatedly

fails" and "refuses to produce" so that LEAs do not have to engage in exhaustive efforts to obtain access to the child to complete the evaluation.

One commenter recommended that the regulations clarify that an LEA must document that it has made several attempts to address the parent's concerns and clarify any confusion the parent may have about the evaluation, as well as address issues that make it difficult for the parent to bring the child to a scheduled evaluation, such as lack of transportation and childcare.

Discussion: Section 300.301(d) follows the specific language in section 614(a)(1)(C)(ii)(I) of the Act. We do not believe it is appropriate or reasonable to define "repeatedly fails" or "refuses to produce" because the meaning of these phrases will vary depending on the specific circumstances in each case. For example, situations in which a child is absent on the days the evaluation is scheduled because the child is ill would be treated differently than if a parent repeatedly fails to keep scheduled appointments. Similarly, situations in which a parent fails to keep scheduled appointments when a public agency repeatedly schedules the evaluation to accommodate the parent's schedule would be treated differently than situations in which a public agency makes no attempt to accommodate a parent's schedule.

We do not believe it is necessary to clarify that an LEA must document that it has made several attempts to address a parent's concerns and issues about the evaluation. As a matter of practice, LEAs attempt to address parent's concerns and issues prior to scheduling an evaluation because repeated cancellations of appointments or repeated failures to produce the child for an evaluation are costly in terms of staff time and effort.

Changes: None.

Comment: Numerous commenters recommended that there be an exception to the 60-day timeframe when a child transfers to a new school before an evaluation is completed.

Discussion: The exception referred to by the commenters is already in the regulations. Section 300.301(d)(2), consistent with section 614(a)(1)(C)(ii)(I) of the Act, states that the 60-day or State-established timeframe does not apply when a child transfers to a new school before an evaluation is completed, if the new public agency is making sufficient progress to ensure prompt completion of the evaluation, and the parent and new public agency agree to a specific time when the evaluation will be completed. While the exception to the 60-day timeframe, as

stated in section 614(a)(1)(C)(ii)(I) of the Act and paragraph (d)(2) of this section, only applies when a child transfers to a school located in another public agency, we do not believe the language in paragraph (d)(2), as proposed in the NPRM, is necessarily clear on this matter. We, therefore, have added language in paragraph (d)(2) to provide additional clarity. We believe it is important that it is understood that the 60-day or State-established timeframe does not apply when a child transfers from one school to another school in the same public agency. When a child transfers from one school to another school in the same public agency, we expect that an initial evaluation will be conducted within 60 days of receiving parental consent for the evaluation, or within the State-established timeframe.

Changes: We have added language to § 300.301(d)(2) to clarify that the exception to the 60-day or State-established timeframe only applies when a child transfers to a new school located in another public agency.

Comment: Several comments were received on the provision in new § 300.301(e) (proposed § 300.301(d)(2)(ii)) that allows an exception to the 60-day or State-established timeframe, only if the new public agency is making sufficient progress to ensure a prompt completion of the evaluation and the parent and new public agency agree to a specific time when the evaluation will be completed. One commenter stated that schools would be unable to meet the 60-day timeframe for children who transfer from another public agency if the new public agency has not been notified of the evaluation timeframe. Another commenter recommended that exceptions to the 60-day timeframe should not be permitted because the term "sufficient progress" is not defined. A few commenters requested that the regulations define "sufficient progress."

One commenter stated that there might be legitimate reasons for not completing an evaluation within the 60-day timeframe, such as differences in the assessment instruments used in the previous and new public agency, and requested that the regulations provide guidance on how a public agency should determine if appropriate progress is being made.

One commenter recommended that if there is no date certain when an evaluation must be completed when a child transfers public agencies, the new public agency should conduct an evaluation within 60 days of the enrollment date of the child; make reasonable efforts to obtain evaluation

information from the previous public agency; and consider any available evaluation information from the previous public agency.

One commenter recommended requiring the new public agency to contact the previous public agency within five days to request a report of any actions taken to transfer the child's records, copies of completed evaluations, a copy of the child's file, and an estimate as to when the information will be sent. The commenter stated that public agencies should be required to keep records of such attempts to inform parents of all actions through written communication. The commenter stated that if the information is not received within 15 days, the new public agency should be required to begin a new evaluation and complete it within the 60-day or State-established timeframe.

Discussion: The exceptions to the 60-day or State-established timeframe must be permitted because they are statutory. Section 614(a)(1)(C)(ii)(I) of the Act, which is incorporated in § 300.300(d)(2), provides that the 60-day or State-established timeframe does not apply if a child enrolls in a school served by the public agency after the relevant timeframe has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability. The exception applies only if the subsequent public agency is making sufficient progress to ensure prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.

We do not believe it is necessary to define the phrase "sufficient progress" because the meaning will vary depending on the specific circumstances in each case. As one commenter noted, there may be legitimate reasons for not completing the evaluation within the 60-day timeframe, such as differences in assessment instruments used in the previous and new public agencies, and the length of time between a child leaving one school and enrolling in the next school. Therefore, we believe that whether a new public agency is making sufficient progress to ensure prompt completion of an evaluation is best left to the discretion of State and local officials and parents to determine.

It would be over-regulating to specify the number of days within which a new public agency must request a child's records from the previous public agency or to require the new public agency to document its attempts to obtain the records and keep parents informed of all

actions through written communication. We note, however, that § 300.304(c)(5), consistent with section 614(b)(3)(D) of the Act, requires each public agency to ensure that the evaluations of children with disabilities who transfer from one school district to another school district in the same school year are coordinated with the children's prior and subsequent schools, as necessary, and as expeditiously as possible, to ensure prompt completion of full evaluations.

Additionally, new § 300.323(g) (proposed § 300.323(e)(2)), consistent with section 614(d)(2)(C)(ii) of the Act, requires the new school in which the child enrolls to take reasonable steps to promptly obtain the child's records (including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child) from the previous public agency in which the child was enrolled. The previous public agency in which the child was enrolled must also take reasonable steps to promptly respond to the request from the new public agency. We believe that these requirements will help to ensure that a child's records are promptly received by the new public agency.

The Act does not require the evaluation of a child who is transferring to a new school to be completed within 60 days of the enrollment date of the child, as recommended by one commenter, and we do not believe that such a requirement should be included in the regulations. The completion of evaluations for children who transfer to another school are subject to multiple factors and we decline to regulate on a specific timeframe that would apply in all circumstances.

Changes: None.

Comment: One commenter recommended sanctions against a new public agency that fails to make an effort to complete an evaluation of a child who transfers to another school that was begun by a previous public agency. The commenter stated that the previous public agency should also be sanctioned for failure to cooperate with a new public agency or for otherwise impeding the ability of the new public agency to complete the evaluation promptly.

Discussion: As part of its general supervisory responsibilities in § 300.149 and section 612(a)(11) of the Act, each SEA is responsible for ensuring that the requirements of Part B of the Act are followed, including the requirements for children who transfer from one public agency to another public agency within the school year. Whether sanctions against a particular LEA are appropriate should be determined by the SEA in the

first instance, as they are in the best position to determine what sanctions, technical assistance, or combination of the two are likely to lead to future compliance. For that reason, we decline to regulate with more specificity in this area.

Changes: None.

Screening for Instructional Purposes Is Not Evaluation (§ 300.302)

Comment: One commenter requested clarification on the difference between screening and evaluation and recommended that the regulations include specific examples of what constitutes screening, including testing instruments that are appropriate to be used for screening to determine appropriate instructional strategies. Many commenters recommended permitting States to determine the screening process for identifying appropriate instructional strategies.

One commenter stated that "screening" is too loosely defined and may be confused with State regulations that require screening for a child's entrance into school. The commenter recommended that the regulations address issues such as the need for parental consent prior to screening and a timeframe for screening subsequent to a request.

Discussion: An "evaluation," as used in the Act, refers to an individual assessment to determine eligibility for special education and related services, consistent with the evaluation procedures in §§ 300.301 through 300.311. "Screening," as used in § 300.302 and section 614(a)(1)(E) of the Act, refers to a process that a teacher or specialist uses to determine appropriate instructional strategies. Screening is typically a relatively simple and quick process that can be used with groups of children. Because such screening is not considered an evaluation under §§ 300.301 through 300.311 to determine eligibility for special education services, parental consent is not required.

Section 300.302 does not address screening for a child's entrance into school under a State's rules. Screening required under a State's rules for a child's entrance into school is the responsibility of the State and is not within the purview of the Act. We believe that the provisions in §§ 300.301 through 300.311, regarding evaluations, and § 300.302, regarding screening for instructional purposes, are clear, and therefore, we do not believe it is necessary to add language to the regulations.

We decline to provide specific examples of testing instruments to

determine appropriate instructional strategies because this will vary based on the age of the child and the subject matter, and is best left to State and local officials to determine. Likewise, the process for screening, including the timeframe to complete the screening process, is a decision that is best left to State and local officials to determine, based on the instructional needs of the children.

Changes: None.

Comment: One commenter asked whether the provisions in § 300.302, regarding screening, apply to a child with a disability, as well as a child who has not been identified as a child with a disability. One commenter noted that § 300.302 refers to screening of a child by a teacher or a specialist and asked who would be considered a specialist. Another commenter requested clarification regarding the term "instructional strategies for curriculum implementation," as used in § 300.302.

Discussion: Section 300.302, consistent with section 614(a)(1)(E) of the Act, states that the screening of a child by a teacher or specialist to determine appropriate instructional strategies is not considered an evaluation for purposes of determining eligibility for special education and related services. This applies to a child with a disability, as well as a child who has not been identified as a child with a disability. Such screening, therefore, could occur without obtaining informed parental consent for screening.

We believe the determination of who is considered a "specialist" should be left to the discretion of the public agency and should not be specified in the regulations. The term, "instructional strategies for curriculum implementation" is generally used to refer to strategies a teacher may use to more effectively teach children.

Changes: None.

Comment: One commenter recommended clarification regarding whether States can develop and implement policies that permit screening of children to determine if evaluations are necessary.

Discussion: There is nothing in the Act that requires a State to, or prohibits a State from, developing and implementing policies that permit screening children to determine if evaluations are necessary. However, screening may not be used to delay an evaluation for special education and related services. If a child is referred for an evaluation to determine eligibility for special education and related services, the public agency must implement the requirements in §§ 300.301 through 300.311 and adhere to the 60-day or the

State-established timeframe to complete the evaluation.

Changes: None.

Reevaluations (§ 300.303)

Comment: A few commenters recommended clarifying that a parent is not required to provide a reason for requesting a reevaluation. Several commenters recommended that the regulations require a public agency to provide prior written notice if a parent requests a reevaluation within a year and the public agency refuses the request.

Discussion: Section 300.303(b), consistent with section 614(a)(2)(A)(ii) of the Act, states that a reevaluation may occur if the child's parent or teacher requests a reevaluation. There is no requirement that a reason for the reevaluation be given and we agree that a reevaluation cannot be conditioned on the parent providing a reason for requesting a reevaluation.

Section 300.303(b), consistent with section 614(a)(2)(B) of the Act, provides that a reevaluation may occur not more than once a year and must occur at least once every three years, unless the parent and the public agency agree otherwise. If a parent requests more than one reevaluation in a year and the public agency does not believe a reevaluation is needed, we believe the regulations are clear that the public agency must provide the parents with written notice of the agency's refusal to conduct a reevaluation, consistent with § 300.503 and section 615(c)(1) of the Act. We do not believe additional regulations are necessary to address this specific instance of a public agency's refusal to initiate a reevaluation and the written notice requirements in § 300.503.

Changes: None.

Comment: A few commenters requested clarification regarding whether an evaluation that assesses skills that were not previously assessed in the same related services area would be considered an evaluation or reevaluation. One commenter, asked, for example, if a speech-language evaluation was conducted to assess a child's speech impairment one year, would an evaluation the following year to assess the child's language abilities be considered an evaluation or reevaluation?

Discussion: An initial evaluation of a child is the first complete assessment of a child to determine if the child has a disability under the Act, and the nature and extent of special education and related services required. Once a child has been fully evaluated, a decision has been rendered that a child is eligible for services under the Act, and the required

services have been determined, any subsequent evaluation of a child would constitute a reevaluation. In the example provided by the commenter, the second evaluation would be considered a reevaluation.

Changes: None.

Comment: One commenter recommended that reevaluations be required at least once every three years because a child's mental and physical profile changes in three years, and thus, so would the child's educational needs. Another commenter recommended requiring LEAs to inform parents that information from the most recent evaluation, which could be three or more years old if the parent agrees that a reevaluation is unnecessary, will be used in the development of a child's IEP.

A few commenters recommended an accountability process for LEAs that do not conduct reevaluations at least every three years. The commenters recommended requiring LEAs to report to the State the number of children with disabilities who qualified for, but were not given a three-year reevaluation; provide prior written notice to parents if the LEA determines that a three-year reevaluation is not necessary, including the justification for such determination; and inform the parent in writing in the parent's language that a three-year reevaluation will be conducted if the parent disagrees with the LEA's determination.

One commenter recommended requiring an LEA that does not conduct a reevaluation at least once every three years to justify the reasons in writing, especially if there is evidence that the child is not meeting the State's academic achievement standards.

Discussion: Section 300.303(b)(2), consistent with section 614(a)(2)(B)(ii) of the Act, requires a reevaluation to occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary.

It would be overly burdensome to require an LEA to report to the State the number of children with disabilities who qualified for, but were not given a three-year reevaluation. Similarly, it would be overly burdensome to require LEAs to inform parents that information from the most recent evaluation will be used to develop a child's IEP or to justify to the parent in writing the LEA's reasons for not conducting a reevaluation every three years if the parent and the agency have already agreed that a reevaluation is unnecessary.

If a parent requests a reevaluation and the public agency disagrees that a reevaluation is needed, the public

agency must provide prior written notice to the parent, consistent with § 300.503, that explains, among other things, why the agency refuses to conduct the reevaluation and the parent's right to contest the agency's decision through mediation or a due process hearing.

In situations where a public agency believes a reevaluation is necessary, but the parent disagrees and refuses consent for a reevaluation, new § 300.303(c)(1)(ii) is clear that the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in § 300.303(a)(3).

Changes: None.

Comment: One commenter recommended the following requirements for the reevaluation of a child with the most significant cognitive disabilities who is assessed based on alternate achievement standards: (a) Prohibiting the public agency from automatically determining that a three-year reevaluation is not needed; (b) requiring the public agency to consider whether the child has been correctly identified to be assessed against alternate achievement standards; and (c) requiring a review of evaluation data to determine whether the child is, to the extent possible, being educated in the general curriculum and assessed with instruments aligned with that curriculum.

Discussion: We do not believe changes to the regulations are necessary to address the commenter's concerns. The Act does not include any special requirements for the reevaluation of a child with the most significant cognitive disabilities who is assessed against alternate achievement standards. It would be inconsistent with the individualized evaluation and reevaluation procedures in section 614(b) and (c) of the Act for a public agency to automatically determine that reevaluations are unnecessary for a specific group of children. In determining whether a reevaluation is needed, the parent and the public agency must consider the child's educational needs, which may include whether the child is participating in the general education curriculum and being assessed appropriately.

Changes: None.

Comment: One commenter recommended clarifying that parents have the right to prevent the over-testing of their child and that the requirements for reevaluations do not diminish the rights of parents to make decisions regarding the reevaluation. Several commenters recommended that the regulations require States to establish

additional procedural safeguards to ensure that parents who agree that a reevaluation is unnecessary are aware of the implications of their decision.

Discussion: There is nothing in the Act to suggest that the requirements for reevaluations in § 300.303 diminish the rights of parents. As stated in § 300.303, consistent with section 614(a)(2) of the Act, a parent can request a reevaluation at any time, and can agree with the public agency to conduct a reevaluation more frequently than once a year. Likewise, a parent and a public agency can agree that a reevaluation is not necessary. We believe that in reaching an agreement that a reevaluation is unnecessary, as provided for in § 300.303(b), the parent and public agency will discuss the advantages and disadvantages of conducting a reevaluation, as well as what effect a reevaluation might have on the child's educational program. Therefore, we do not agree with the commenter that additional procedural safeguards are necessary to ensure that parents who agree that a reevaluation is unnecessary are aware of the implications of their decision.

Changes: None.

Comment: Many commenters requested that the opportunity to waive a reevaluation occur only after the IEP Team has reviewed extant data to determine whether additional data are needed to determine the child's eligibility and the educational needs of the child.

Discussion: The review of existing data is part of the reevaluation process. Section 300.305(a), consistent with section 614(c)(1) of the Act, is clear that, as part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must review existing evaluation data, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child. Therefore, the opportunity for a parent and the public agency to agree that a reevaluation is unnecessary occurs before a reevaluation begins. It would be inconsistent with the Act to implement the commenters' recommendation.

Changes: None.

Comment: One commenter recommended that the regulations clarify that waiving a three-year reevaluation must not be adopted as routine agency policy or practice and should only be used in exceptional circumstances. Another commenter recommended that the regulations require the LEA to offer parents a reevaluation at least annually when a

parent agrees that a three-year reevaluation is not needed. Another commenter recommended that the regulations clarify that a reevaluation may be warranted more than once a year if the child's condition changes or new information becomes available that has an impact on the child's educational situation.

Discussion: It is not necessary to add language clarifying that waiving three-year reevaluations must not be a routine agency policy or practice because the regulations are clear that this is a decision that is made individually for each child by the parent of the child and the public agency. Section 300.303(b)(2), consistent with section 614(a)(2)(B)(ii) of the Act, states that a reevaluation must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. When a parent and a public agency agree that a three-year reevaluation is unnecessary, there is no requirement that the public agency offer the parent a reevaluation each year. We do not believe that it is necessary to have such a requirement because if parents who have waived a three year reevaluation later decide to request an evaluation, they can do so. Also, public agencies have a continuing responsibility to request parental consent for a reevaluation if they determine that the child's educational or related services needs warrant a reevaluation.

We do not believe additional regulations are needed to clarify that a reevaluation can occur more than once a year. Section 300.303(b)(1), consistent with section 614(a)(2)(B)(i) of the Act, already provides that a reevaluation can occur more than once a year if the parent and the public agency agree that a reevaluation is needed.

Changes: None.

Comment: One commenter asked whether the agreement between the parent and the public agency that a reevaluation is unnecessary is the same as parental consent in § 300.9.

Discussion: An agreement between a parent and a public agency is not the same as parental consent in § 300.9. Rather, an agreement refers to an understanding between a parent and the public agency and does not need to meet the requirements for parental consent in § 300.9.

Changes: None.

Comment: One commenter recommended that the regulations clarify that when a parent obtains an independent educational evaluation (IEE) and provides new information to the public agency, a reevaluation could be conducted more than once a year so

that the public agency can verify the results of the IEE.

Discussion: The changes recommended by the commenter are unnecessary. Section 300.303(b)(1), consistent with section 614(a)(2)(B)(i) of the Act, is clear that a reevaluation can be conducted more than once a year if the parent and the public agency agree that it is necessary. Therefore, in the situation presented by the commenter, if the results of an IEE provide new information that the public agency and the parent agree warrant a reevaluation, the parent and the public agency could agree to conduct a reevaluation.

Changes: None.

Comment: One commenter asked whether an IEE is considered a reevaluation and whether an IEE is prohibited within less than a year of the public agency's most recent evaluation.

Discussion: An IEE would be considered as a potential source of additional information that the public agency and parent could consider in determining whether the educational or related services needs of the child warrant a reevaluation, but it would not be considered a reevaluation. There is no restriction on when a parent can request an IEE.

Changes: None.

Evaluation Procedures (§ 300.304)

Notice (§ 300.304(a))

Comment: Numerous commenters recommended that the regulations clarify that the requirement for prior written notice to parents in § 300.304(a) is satisfied if the public agency notifies the parent of the type(s) of assessment(s) that will be conducted. One commenter stated that the prior written notice requirements for evaluations should be satisfied if the public agency notifies the parent of the type(s) of assessment(s) that will be conducted, the method(s) of assessment, and the persons who will conduct the assessment(s).

Discussion: It would be inconsistent with the Act for a public agency to limit the contents of the prior written notice in the manner requested by the commenters. In addition to describing the evaluation procedures the agency proposes to use, as required in § 300.303(a), section 615(c)(1) of the Act requires the prior written notice to include an explanation of why the agency proposes to evaluate the child; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for requesting the evaluation; a statement that the parents have protection under the procedural safeguards of the Act, and if this notice is not an initial referral for

evaluation, the means by which a copy of the procedural safeguards can be obtained; sources for the parents to contact to obtain assistance in understanding the provisions of the Act; a description of other options that were considered and why these reasons were rejected; and a description of other factors that are relevant to the agency's proposal to request consent for an evaluation.

Changes: None.

Comment: A few commenters stated that the notice to parents regarding the evaluation procedures the agency proposes to use must be provided in the native language of the parents, and recommended that this requirement be clarified in § 300.304.

Discussion: Information regarding the evaluation procedures the agency proposes to use, as required in § 300.303(a), is included in the prior written notice required in § 300.503(c)(1)(ii). Section 300.503(c)(1)(ii) requires, that the prior written notice to parents be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. We see no need to repeat these requirements in § 300.304 and believe that doing so could cause confusion about the status of other applicable requirements that would not be repeated in this section.

Changes: None.

Conduct of Evaluation (§ 300.304(b))

Comment: One commenter asked whether the "procedure" referred to in § 300.304(b)(2) is the same as the "measure or assessment" referred to in section 614(b)(2)(B) of the Act. Another commenter recommended changing § 300.304(b)(2) to follow the statutory language.

Discussion: Section 300.304(b)(2), as proposed, states that the public agency may not use any single "procedure" as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. Section 614(b)(2)(B) of the Act states that in conducting an evaluation, the LEA must not use any single "measure or assessment" as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child. We agree that the statutory language should be used in § 300.304(b)(2) because use of the term "procedure," rather than "measurement or assessment," could be confusing.

Changes: We have changed "procedure" to "measurement or

assessment" in § 300.304(b)(2), consistent with the statutory language.

Comment: One commenter recommended adding the word "always" to § 300.304(b) to state that the public agency must "always" conduct an evaluation in accordance with the requirements in § 300.304(b)(1) through (b)(3).

Discussion: Adding the word "always" to § 300.304(b) would not change the requirements for conducting an evaluation consistent with § 300.304(b). The regulation already requires a public agency to conduct the evaluation in accordance with § 300.304(b)(1) through (b)(3) and there are no exceptions to that requirement. Therefore, we decline to change § 300.304(b) in the manner recommended by the commenter.

Changes: None.

Comment: One commenter recommended that the regulations define "technically sound instruments" and "relative contribution" in § 300.304(b)(3). Another commenter recommended that the instruments used in reevaluations to determine whether the child continues to have a disability should be based on scientific research methods.

Discussion: Section 300.304(b)(3) follows the specific language in section 614(b)(2)(C) of the Act and requires that the evaluation of a child use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors. "Technically sound instruments" generally refers to assessments that have been shown through research to be valid and reliable. Therefore, it would be redundant to add language requiring that instruments used in reevaluations be based on scientific research methods, as recommended by one commenter. The phrase "relative contribution," as used in § 300.304(b)(3), generally means that assessment instruments that allow the examiner to determine the extent to which a child's behavior is a result of cognitive, behavioral, physical, or developmental factors may be used in evaluating a child in accordance with § 300.304. Because the meaning of "relative contribution" is context specific, we do not believe it should be defined in these regulations.

Changes: None.

Other Evaluation Procedures (§ 300.304(c))

Comment: One commenter recommended clarifying that differences in language and socialization practices must be considered when determining eligibility for special education and

related services, including biases related to the assessment.

Discussion: We do not believe that the clarification requested by the commenter is necessary. The Act and these regulations recognize that some assessments may be biased and discriminatory for children with differences in language and socialization practices. Section 614(b)(3)(A)(i) of the Act requires that assessments and other evaluation materials used to assess a child under the Act are selected and administered so as not to be discriminatory on a racial or cultural basis. Additionally, in interpreting evaluation data for the purpose of determining eligibility of a child for special education and related services, § 300.306(c) requires each public agency to draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, as well as information regarding a child's physical condition, social or cultural background, and adaptive behavior. We believe that these provisions provide adequate protection for the concerns raised by the commenter.

Changes: None.

Comment: One commenter requested that the regulations clarify that a public agency should not use the "not clearly feasible" exception in § 300.304(c)(1)(ii) to improperly limit a child's right to be evaluated in the child's native language or other mode of communication.

Discussion: Section 300.304(c)(1)(ii) of the Act, requires that assessments and other evaluation materials used to assess a child be provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do, unless it is clearly not feasible to so provide or administer. We agree that this provision should not be improperly used to limit evaluations in a child's native language, but we do not believe that a change to the regulations is necessary or that it would prevent inappropriate application of the existing rule.

Changes: None.

Comment: One commenter recommended including "behavior" in the list of areas to be evaluated in § 300.304(c)(4). Another commenter recommended requiring a functional behavioral assessment to be part of a child's evaluation whenever any member of the IEP Team requests it or raises concerns about the child's behavior. One commenter asked why physical assessments were not included

in the list of assessments that should be conducted.

Discussion: Section 300.304(c)(4) requires the public agency to ensure that the child is assessed in all areas related to the suspected disability. This could include, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. This is not an exhaustive list of areas that must be assessed. Decisions regarding the areas to be assessed are determined by the suspected needs of the child. If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted. No further clarification is necessary.

Changes: None.

Comment: Many commenters recommended that the evaluation report include a description of the extent to which an assessment varied from standard conditions because there are few assessments that produce valid and reliable information for English language learners suspected of having a disability. Several commenters stated that it is standard practice for professionals administering assessments to include information in their reports when assessments are conducted using nonstandard conditions. One commenter recommended that the regulations require all evaluation reports to clearly indicate the language or other mode of communication used in assessing a child and a determination of whether using such language or other mode of communication yielded accurate information.

Discussion: As stated by several commenters, it is standard test administration practice to include in the evaluation report the extent to which an assessment varied from standard conditions, including the language or other mode of communication that was used in assessing a child. It is, therefore, unnecessary to include this requirement in the regulations.

Changes: None.

Comment: Many commenters recommended that the regulations require public agencies to provide parents with evidence that the assessments to be used are reliable and valid for their particular use, as well as assurances that the assessments will be administered in the child's primary language or mode of communication. The commenters also recommended that public agencies be required to provide parents with information regarding the assumptions being made about the tests and the inferences that can be drawn from the test results.

Discussion: Section 300.304(a), consistent with section 614(b)(1) of the Act, requires the public agency to provide notice to the parents of a child with a disability, in accordance with § 300.503, that describes the evaluation procedures the agency proposes to conduct. To require public agencies to provide all parents with the specific information recommended by the commenters would be burdensome for public agencies, and could be overwhelming for some parents, and therefore, we decline to add such a requirement to the regulations. While we understand that some parents will want the detailed information mentioned by the commenter, parents can always request such additional information before providing informed written consent for the evaluation or reevaluation.

Changes: None.

Comment: A few commenters recommended that the regulations require comprehensive psychological and educational evaluations to rule out alternate causes of functional impairments in academic achievement.

Discussion: We believe the regulations already address the commenters' concerns and we do not believe any further clarification is necessary. Section 300.304(c)(6) requires that evaluations are sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been identified. In addition, § 300.306(b), consistent with section 614(b)(5) of the Act, states that a child must not be determined to be a child with a disability if the determinant factor for that determination is lack of appropriate instruction in reading or math, or limited English proficiency.

Changes: None.

Comment: Several commenters recommended that the requirements in new § 300.301(d)(2) and (e) (proposed § 300.301(d)(2)(i) and (ii)), regarding children who transfer to another public agency before an initial evaluation is completed, should be cross-referenced in § 300.304(c)(5).

Discussion: We agree that a cross-reference in § 300.304(c)(5) is appropriate.

Changes: We have added "consistent with § 300.301(d)(2) and (e)," following "possible" in § 300.304(c)(5).

Comment: None.

Discussion: In reviewing § 300.304(c)(5), we determined that § 300.304(c)(5) should be amended to refer to children with disabilities who transfer to another public agency "in the

same school year" rather than "in the same academic year" because that is the term most commonly understood by parents and school officials.

Changes: We have changed "academic year" to "school year" in § 300.304(c)(5).

Comment: One commenter recommended adding language regarding scientifically based special education and related services to § 300.304(c)(6).

Discussion: Section 300.304(c)(6) requires that the evaluation of a child with a disability be sufficiently comprehensive to identify all the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. We believe that the focus on providing scientifically based special education and related services is clear in the Act and these regulations and do not believe it is necessary to refer to "scientifically based" services each time we refer to special education and related services. Therefore, we decline to add this language in § 300.304(c)(6), as requested by the commenter.

Changes: None.

Additional Requirements for Evaluations and Reevaluations (§ 300.305)

Review of Existing Evaluation Data (§ 300.305(a))

Comment: One commenter stated that a comma should be added after "current classroom-based" in § 300.305(a)(1)(ii) to clarify that a review of existing evaluation data for a child must include, as appropriate, data from three types of assessments: Current classroom-based, local, or State assessments.

Discussion: We agree with the commenter and will revise the language consistent with the commenter's suggestion and consistent with section 614(c)(1)(A)(ii) of the Act. The changes will clarify that a review of existing evaluation data on a child must include, as appropriate, current classroom-based, local, or State assessment data.

Changes: We have inserted a comma following "classroom based" and "local" in § 300.305(a)(1)(ii), consistent with the statutory language.

Comment: One commenter asked whether a public agency must conduct a reevaluation when a reevaluation is requested to determine the child's educational and functional needs, but the child's eligibility for special education and related services is not in question.

Discussion: Section 300.305(a)(2), consistent with section 614(c)(1)(B) of

the Act, states that one of the purposes of a reevaluation is to determine the educational needs of the child, including whether any additions or modifications to the special education and related services are needed to enable the child to meet the child's IEP goals and to participate in the general education curriculum. Thus, if a reevaluation is requested to determine the child's educational needs when the child's continued eligibility is not in question, the public agency must either conduct the reevaluation or provide notice to the parents as to why the public agency believes a reevaluation is unnecessary.

Changes: None.

Requirements if Additional Data Are Not Needed (§ 300.305(d))

Comment: One commenter requested that the regulations define or remove the phrase "qualified professionals, as appropriate" in § 300.305(d)(1).

Discussion: Section 300.305(d)(1) follows the specific language in section 614(c)(1) of the Act and refers to the decision made by the IEP Team and "other qualified professionals, as appropriate" regarding whether additional data are needed to determine whether a child continues to be a child with a disability and the child's educational needs. The phrase, "qualified professionals, as appropriate" is used to provide flexibility for public agencies to include other professionals who may not be a part of the child's IEP Team in the group that determines if additional data are needed to make an eligibility determination and determine the child's educational needs. We believe that public agencies should have flexibility in determining how to define "qualified professionals" and we do not believe a definition should be included in the regulations.

Changes: None.

Evaluations Before Change in Eligibility (Proposed Evaluations Before Change in Placement) (§ 300.305(e))

Comment: One commenter stated that the heading for § 300.305(e), "Evaluations before change in placement" should be changed because the regulations that follow do not deal with changes in placement. Another commenter requested clarification regarding the meaning of the term "placement." The commenter stated that § 300.305(e) uses the term to mean that special education services are no longer required, but that this is not the meaning when used in the context of alternative educational placements. The commenter also asked whether moving a child from a self-contained classroom

to a resource room is a change of placement.

Discussion: We agree that the heading for § 300.305(e) should be changed to more accurately reflect the requirements in this subsection. We will, therefore, change the heading to "Evaluations before change in eligibility," which is consistent with the heading in section 614(c)(5) of the Act.

With regard to the commenter's question about whether moving a child from a self-contained classroom to a resource room would be a change of placement, we believe that it would be, as it would change the child's level of interaction with his or her nondisabled peers. However, as noted previously, the term "change of placement" should not have been used in connection with this regulation.

In the example provided by the commenter, generally, if a child is moved from a self-contained classroom to a resource room, it is likely that the child's current IEP cannot be implemented in the resource room, because the educational program in the resource room is likely to be substantially and materially different than the educational program in the self-contained classroom or the educational program in the resource room would change the level of interaction with nondisabled peers. Therefore, this situation would likely be a change of placement under the Act.

Changes: We have removed the heading "Evaluations before change in placement" in § 300.305(e) and replaced it with "Evaluations before change in eligibility" for clarity and consistency with the heading in section 614(c)(5) of the Act.

Comment: Many commenters recommended that evaluations for other institutions (e.g., vocational rehabilitation agencies, colleges and universities) should be required before a child graduates from secondary school with a regular diploma or exceeds the age limit for FAPE. However, a number of commenters disagreed and stated that public agencies should not be required to conduct evaluations that will be used to meet the entrance or eligibility requirements of another institution or agency. One commenter requested clarification regarding whether schools must provide updated evaluations for college testing and admissions purposes and recommended including language in the regulations that explicitly states that public agencies are not required to conduct tests that are needed for admission to postsecondary programs. Another commenter recommended that the regulations clarify that LEAs have responsibility for providing the

postsecondary services that are included in the summary of the child's academic achievement and functional performance.

One commenter requested requiring a reevaluation before a child exits the school system. Another commenter recommended clarifying that a comprehensive evaluation is not required for children aging out of special education.

A number of commenters provided recommendations on the information that should be included in the summary of a child's academic and functional performance required in § 300.305(e)(3). Commenters suggested that the summary report should include information about the child's disability; the effect of the disability on the child's academic and functional performance (sufficient to establish eligibility under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, if appropriate); any needed modifications or adaptations essential to the child's success; the child's most recent evaluations by professionals, including the child's academic achievement and functional performance levels; assistive technology and other supports used by the child; and any modifications and supports that would facilitate the child's successful transition to postsecondary education or employment.

Discussion: We do not believe that the regulations should require public agencies to conduct evaluations for children to meet the entrance or eligibility requirements of another institution or agency because to do so would impose a significant cost on public agencies that is not required by the Act. While the requirements for secondary transition are intended to help parents and schools assist children with disabilities transition beyond high school, section 614(c)(5) in the Act does not require a public agency to assess a child with a disability to determine the child's eligibility to be considered a child with a disability in another agency, such as a vocational rehabilitation program, or a college or other postsecondary setting. The Act also does not require LEAs to provide the postsecondary services that may be included in the summary of the child's academic achievement and functional performance. We believe it would impose costs on public agencies not contemplated by the Act to include such requirements in the regulations.

It would be inconsistent with the Act to require public agencies to conduct evaluations for children who are exiting the school system because they exceed the age for eligibility under State law. Section 300.305(e)(2), consistent with

section 614(c)(5)(B)(i) of the Act, is clear that an evaluation in accordance with §§ 300.304 through 300.311 is not required before the termination of a child's eligibility under the Act due to graduation from secondary school with a regular diploma or due to exceeding the age eligibility for FAPE under State law.

Section 300.305(e)(3), consistent with section 614(c)(5)(B)(ii) of the Act, states that the summary required when a child graduates with a regular diploma or exceeds the age eligibility under State law must include information about the child's academic achievement and functional performance, as well as recommendations on how to assist the child in meeting the child's postsecondary goals. The Act does not otherwise specify the information that must be included in the summary and we do not believe that the regulations should include a list of required information. Rather, we believe that State and local officials should have the flexibility to determine the appropriate content in a child's summary, based on the child's individual needs and postsecondary goals.

Changes: None.

Comment: One commenter stated that public agencies should not be required to conduct an evaluation of a child who graduates with a regular diploma because a regular diploma means that the child has met the same requirements and achieved the same or similar level of competency as the child's nondisabled classmates. The commenter also requested that the regulations define a regular diploma to mean that the child has reached a comparable level of achievement as the child's nondisabled classmates.

Discussion: Section 300.305(e)(2) specifically states that a public agency does not need to evaluate a child with a disability who graduates with a regular diploma. In addition, as noted in the *Analysis of Comments and Changes* section for subpart B, we have clarified in § 300.101(a)(3)(iv) that a regular diploma does not include alternate degrees, such as a general educational development (GED) credential. We do not believe that any further clarification with respect to the definition of "regular diploma" is necessary.

Changes: None.

Determination of Eligibility (§ 300.306)

Comment: One commenter recommended that the regulations require public agencies to provide parents with copies of all evaluations at no cost. However, another commenter stated that evaluations are often lengthy and requested clarification as to

whether public agencies must provide copies of evaluations to parents at no cost.

Discussion: Section 300.306(a)(2), consistent with section 614(b)(4)(B) of the Act, requires that a copy of the evaluation report and the documentation of determination of eligibility be given to the parent. We have added language to § 300.306(a)(2) to clarify that the public agency must provide these copies at no cost to the parent.

With regard to providing parents with copies of all evaluations, § 300.501(a), consistent with section 615(b)(1) of the Act, affords parents an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child, and the provision of a FAPE to the child. Specific procedures for access to records are contained in the confidentiality provisions in §§ 300.610 through 300.627.

Section 300.613 requires a public agency to permit a parent to inspect and review any education records relating to their child that are collected, maintained, or used by the agency under the Act. The right to inspect and review records includes the right to a response from the agency to reasonable requests for explanations and interpretations of the records; the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and the right to have a representative of the parent inspect and review the records. To the extent that the commenters may have been concerned about free copies of evaluation documents that would not be provided under the above regulations, we decline to regulate further, as we believe that the cited provisions adequately balance the interests of the parents for free copies and the public agencies in controlling costs.

Changes: We have added language to § 300.306(a)(2) to clarify that the evaluation report and the documentation of determination of eligibility must be provided at no cost to the parent.

Comment: One commenter recommended that parents receive evaluation reports prior to an IEP Team meeting because the reports may have information that parents need to participate in making decisions about the IEP. The commenter stated that, if parents receive reports at meetings, rather than before the meetings, they cannot be active participants. Another

commenter stated that parents should be provided with copies of documents related to the determination of eligibility at least five days prior to the eligibility determination meeting.

Discussion: The Act does not establish a timeline for providing a copy of the evaluation report or the documentation of determination of eligibility to the parents and we do not believe that a specific timeline should be included in the regulations because this is a matter that is best left to State and local discretion. It is, however, important to ensure that parents have the information they need to participate meaningfully in IEP Team meetings, which may include reviewing their child's records. Section 300.613(a) requires a public agency to comply with a parent request to inspect and review existing education records, including an evaluation report, without unnecessary delay and before any meeting regarding an IEP, and in no case more than 45 days after the request has been made. This includes the right to a response from the public agency to reasonable requests for explanations and interpretations of records, consistent with § 300.613(b)(1).

While it would be appropriate for parents to review documents related to the determination of eligibility prior to the eligibility determination, there is no requirement that eligibility be determined at an IEP Team meeting and it would not be appropriate for a public agency to provide documentation of the determination of eligibility prior to discussing a child's eligibility for special education and related services with the parent. Section 300.306(a)(1) and section 614(b)(4)(A) of the Act require that a group of qualified professionals and the parent determine whether the child is a child with a disability. Therefore, providing documentation of the eligibility determination to a parent prior to a discussion with the parent regarding the child's eligibility would indicate that the public agency made its determination without including the parent and possibly, qualified professionals, in the decision.

Changes: None.

Special Rule for Eligibility Determination (§ 300.306(b))

Comment: A number of commenters recommended other factors that should be ruled out before a child is determined to be a child with a disability. Many commenters stated that a child should not be determined to be a child with a disability if the determinant factor is lack of instruction in English language development or lack of access to State content standards. A

few commenters expressed concern regarding subjective judgments about the definition of “appropriate instruction.” One commenter stated that determining the quality of reading instruction that children received in the past might be difficult, if not impossible, especially when children are referred for an evaluation after they enter middle school or are highly mobile.

Discussion: We agree that a child should not be determined to be a child with a disability if the determinant factor is lack of access to State content standards, and we believe this is implicit in section 614(b)(5) of the Act, which states that a child must not be determined to be a child with a disability if the determinant factor is lack of appropriate instruction in reading (including the essential components of reading instruction, as defined in the ESEA) or lack of instruction in math.

During the Department’s internal review of these regulations, we noted that, while § 300.306(b)(1)(i) refers to lack of “appropriate” instruction in reading, there is no similar qualifier for math. We believe it is equally important that a child not be determined to be a child with a disability if the determinant factor is the lack of “appropriate” instruction in math. Therefore, we will revise § 300.306(b)(1)(ii) to make this clear.

We are unclear what the commenter means by lack of instruction in English language development. However, if a child’s low achievement is a result of limited English proficiency or lack of access to instruction in reading, the child must not be determined to be a child with a disability, consistent with section 614(b)(5) of the Act.

Whether a child has received “appropriate instruction” is appropriately left to State and local officials to determine. While information regarding the quality of instruction a child received in the past may be helpful in determining whether a child is eligible for special education services, it is not essential. Schools, however, must ensure that the determinant factor in deciding that a child is a child with a disability is not a lack of appropriate instruction in reading and math.

Changes: We have added “appropriate” in § 300.306(b)(1)(ii) to refer to a “lack of appropriate instruction in math.”

Comment: Some commenters requested that we include in the regulations the essential components of reading instruction defined in the ESEA.

Discussion: For reasons set forth elsewhere in this preamble, we are not adding definitions to these regulations from statutes other than the Act. However, the definition of the essential components of reading instruction from section 1208(3) of the ESEA is included here for reference.

Essential Components of Reading Instruction—The term “essential components of reading instruction” means explicit and systematic instruction in—

- (A) Phonemic awareness;
- (B) Phonics;
- (C) Vocabulary development;
- (D) Reading fluency, including oral reading skills; and
- (E) Reading comprehension strategies.

Changes: None.

Procedures for Determining Eligibility and Educational Need (Proposed Procedures for Determining Eligibility and Placement) (§ 300.306(c))

Comment: None.

Discussion: During the review of these regulations, we noted that section 614(b)(4) of the Act refers to procedures for determining eligibility and “educational need,” rather than procedures for determining eligibility and “placement,” as in the heading for proposed § 300.306(c). Therefore, we will change the heading in § 300.306(c) to be consistent with section 614(b)(4) of the Act.

Changes: We have replaced “placement” with “educational need” in the heading to § 300.306(c), consistent with section 614(b)(4) of the Act.

Additional Procedures for Identifying Children With Specific Learning Disabilities

Specific Learning Disabilities (§ 300.307)

Comment: Numerous commenters supported proposed § 300.307(a)(1), which allowed States to prohibit LEAs from using a severe discrepancy between IQ and achievement (discrepancy models) to determine eligibility under the specific learning disability (SLD) category. However, many commenters supported the use of discrepancy models and requested that the regulations allow discrepancy models to continue to be used. Numerous commenters stated that § 300.307(a)(1) exceeds statutory authority and that LEAs should be permitted to use discrepancy models.

Many commenters cited Conf. Rpt. 108–779 and stated that Congress did not intend to prohibit LEAs from using discrepancy models.

Discussion: The Department agrees that proposed § 300.307(a)(1) should be removed. We believe this will improve the clarity of the regulations and make it easier for parents and professionals to understand. With respect to permitting LEAs to use discrepancy models, even with the removal of § 300.307(a)(1), States are responsible for developing criteria to determine whether a child is a child with a disability, as defined in § 300.8 and section 602(3) of the Act, including whether a particular child meets the criteria for having an SLD. Under section 614(b)(6) of the Act, States are free to prohibit the use of a discrepancy model. States, including States that did not use a discrepancy model prior to the Act, are not required to develop criteria that permit the use of a discrepancy model.

Changes: We have removed § 300.307(a)(1) and redesignated the subsequent provisions in § 300.307.

Comment: Many commenters stated that response to intervention (RTI) should be considered one component of the evaluation process and not the sole component. Another commenter stated that neither a discrepancy model nor an RTI model alone can correctly identify children with SLD and that other data are needed, such as informal and formal assessments, histories, and observations. One commenter stated that all relevant and available evaluation data, such as the nature and type of evaluation, evaluator qualifications, and outcome data should be considered. One commenter recommended that RTI be tied to the general evaluation procedures. Another commenter recommended referencing the evaluation procedures in § 300.309 to clarify that RTI must be used as one component of the evaluation process to determine eligibility for special education and related services. Several commenters stated that relying solely on an RTI model would result in larger numbers of children being identified with an SLD.

Discussion: Consistent with § 300.304(b) and section 614(b)(2) of the Act, the evaluation of a child suspected of having a disability, including an SLD, must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services. This requirement applies to all children suspected of having a disability, including those suspected of having an SLD.

To simplify new § 300.307(a)(2) (proposed § 300.307(a)(3)) and remove unnecessary repetition, we will: (a) Remove the phrase “as part of the

evaluation procedures described in § 300.304;” and (b) replace “process that determines if the child responds to scientific, research-based intervention” with “process based on the child’s response to scientific, research-based intervention.” Section 300.311(a)(7) will also be revised, consistent with this language.

Changes: We have revised new § 300.307(a)(2) (proposed § 300.307(a)(3)) and § 300.311(a)(7) for clarity.

Comment: Several commenters recommended changing new § 300.307(a)(2) (proposed § 300.307(a)(3)) to require that State criteria “may” rather than “must” permit a process that determines if a child responds to research-based intervention in order to be consistent with section 614(b)(6)(B) of the Act.

Discussion: Making the requested change to new § 300.307(a)(2) (proposed § 300.307(a)(3)) would be inconsistent with the Act. Section 614(b)(6)(B) of the Act gives LEAs the option of using a process that determines if a child responds to research-based interventions.

Changes: None.

Comment: Several commenters recommended that the regulations include a statement that discrepancy models have been discredited and that there is no evidence that they can be applied in a valid and reliable manner. Several commenters recommended that the Department urge States, at least through guidance, to eliminate provisions under State laws that permit the use of discrepancy models.

Discussion: We do not believe it is appropriate to add language in the regulations discouraging the use of discrepancy models to identify children with SLD. We removed current § 300.541(a)(2), which required States to use a discrepancy model to determine whether a child has an SLD, because section 614(b)(6) of the Act now specifies that an LEA shall not be required to consider a severe discrepancy in determining whether a child has an SLD. New § 300.307(a)(2) (proposed § 300.307(a)(3)) requires States to permit the use of a process that examines whether the child responds to scientific, research-based interventions as part of the information reviewed to determine whether a child has an SLD. The regulations reflect the Department’s position on the identification of children with SLD and our support for models that focus on assessments that are related to instruction and promote intervention for identified children.

Changes: None.

Comment: One commenter recommended that any guidance the Department issues on RTI models should emphasize that RTI represents a shift in how children are identified for special education services and not just an additional task that special education teachers must do.

Discussion: Consensus reports and empirical syntheses indicate a need for major changes in the approach to identifying children with SLD. Models that incorporate RTI represent a shift in special education toward goals of better achievement and improved behavioral outcomes for children with SLD because the children who are identified under such models are most likely to require special education and related services. We will consider addressing this issue in future guidance.

Changes: None.

Comment: Many commenters stated that the elimination of discrepancy models would result in an inability to identify children with SLD who are gifted. One commenter stated that a scatter of scores should be used to identify children with SLD who are gifted.

Discussion: Discrepancy models are not essential for identifying children with SLD who are gifted. However, the regulations clearly allow discrepancies in achievement domains, typical of children with SLD who are gifted, to be used to identify children with SLD.

Changes: None.

Comment: Many commenters opposed the use of RTI models to determine whether a child has an SLD, stating that there is a lack of scientific evidence demonstrating that RTI models correctly identify children with SLD. One commenter stated that RTI is a subjective method of determining whether treatment is effective and is not a treatment itself. A few commenters requested additional research demonstrating the efficacy of the wide-scale use of RTI models. Some commenters stated that research on the use of RTI models has been conducted only in the area of reading in the primary grades and pointed to the lack of scientific data on achievement gains or long-term success. One commenter stated that there is no evidence that RTI is effective for non-native speakers of English and minority populations. Another commenter stated that RTI would fail to identify young children with SLD. One commenter stated that when a child fails to respond to an intervention, it is unclear why the child failed (*e.g.*, inappropriate intervention, ineffective teaching, unreasonable expectations). One commenter stated that longitudinal data are needed to

determine if children who succeed in an RTI process later become eligible under the category of SLD based on reading fluency and comprehension difficulties, or difficulties in other academic areas, such as mathematics problem-solving or written expression.

Discussion: The Act requires that LEAs be permitted to use a process that determines if a child responds to research-based interventions. Further, there is an evidence base to support the use of RTI models to identify children with SLD on a wide scale, including young children and children from minority backgrounds. These include several large-scale implementations in Iowa (the Heartland model; Tilly, 2002); the Minneapolis public schools (Marston, 2003); applications of the Screening to Enhance Equitable Placement (STEEP) model in Mississippi, Louisiana, and Arizona (VanDerHeyden, Witt, & Gilbertson, in press); and other examples (NASDE, 2005).¹ While it is true that much of the research on RTI models has been conducted in the area of reading, 80 to 90 percent of children with SLD experience reading problems. The implementation of RTI in practice, however, has included other domains. RTI is only one component of the process to identify children in need of special education and related services. Determining why a child has not responded to research-based interventions requires a comprehensive evaluation.

Changes: None.

Comment: One commenter expressed concern about how LEAs will conduct evaluations for children suspected of having an SLD who attend private schools because requiring an RTI process could become entangled with the private school’s instructional practices. The commenter recommended clarifying that child find does not require an LEA to use RTI to

¹ Tilly III, W. D. (2002). School psychology as a problem solving enterprise. In A. Thomas & J. Grimes (Eds.), *Best Practices in School Psychology IV*. Washington D.C.: National Association of School Psychologists; VanDerHeyden, A.M, Witt, J.C, & Gilbertson, D. (in press). Effect of a problem solving intervention on the accurate identification of children. *Journal of School Psychology*; Marston, D., Muyskens, P., Lau, M., & Canter, A. (2003). Problem-solving model for decision making with high incidence disabilities: The Minneapolis experience. *Learning Disabilities Research and Practice*, 18, 187–200; Gresham, F., VanDerHeyden, A.M, & Witt, J.C. (in press). Response to intervention in the identification of learning disabilities: Empirical support and future challenges. *School Psychology Review*; National Association of State Directors of Special Education (2005). Response to intervention: policy considerations and implementations. Alexandria VA: Author.

identify children with SLD who are attending private schools.

Discussion: An RTI process does not replace the need for a comprehensive evaluation. A public agency must use a variety of data gathering tools and strategies even if an RTI process is used. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures required under §§ 300.304 and 300.305. As required in § 300.304(b), consistent with section 614(b)(2) of the Act, an evaluation must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services.

It is up to each State to develop criteria to determine whether a child has a disability, including whether a particular child has an SLD. In developing their criteria, States may wish to consider how the criteria will be implemented with a child for whom systematic data on the child's response to appropriate instruction is not available. However, many private schools collect assessment data that would permit a determination of how well a child responds to appropriate instruction. The group making the eligibility determination for a private school child for whom data on the child's response to appropriate instruction are not available may need to rely on other information to make their determination, or identify what additional data are needed to determine whether the child is a child with a disability. However, under § 300.306(b), a public agency may not identify any public or private school child as a child with a disability if the determinant factor is lack of appropriate instruction in reading or math.

Changes: None.

Comment: One commenter stated that adoption of new procedures for evaluating children suspected of having an SLD should not penalize or declassify children who under prior procedures were found to have an SLD. The commenter recommended using the requirements in § 300.305, rather than data from a child's response to a scientific, research-based intervention process, to consider whether a child continues to have an SLD.

Discussion: An RTI process does not replace the need for a comprehensive evaluation, and a child's eligibility for special education services cannot be changed solely on the basis of data from an RTI process. Consistent with § 300.303 and section 614(a)(2) of the Act, a child with a disability must be reevaluated if the public agency

determines that the educational or related services needs of the child warrant a reevaluation or if the child's parent or teacher requests a reevaluation. A reevaluation must occur no more than once a year, unless the parent and the public agency agree otherwise, and at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary, to determine whether the child continues to have a disability and to determine the educational needs of the child. Reevaluations must be conducted in accordance with §§ 300.304 through 300.311. In addition, as noted in § 300.305(e)(1), except for children at the end of their secondary school career, a reevaluation must be done before determining that a child is no longer a child with a disability. In conducting a reevaluation, as noted in § 300.305, consistent with section 614(c) of the Act, the IEP Team and other qualified professionals must review existing evaluation data on the child including evaluations provided by the parents of the child; current classroom-based, local, or State assessments and classroom-based observations; and observations by teachers and related services providers.

The results of an RTI process may be one component of the information reviewed as part of the reevaluation process. It is up to each State to develop criteria to determine whether a child continues to have a disability, including whether a particular child has an SLD.

States that change their eligibility criteria for SLD may want to carefully consider the reevaluation of children found eligible for special education services using prior procedures. States should consider the effect of exiting a child from special education who has received special education and related services for many years and how the removal of such supports will affect the child's educational progress, particularly for a child who is in the final year(s) of high school. Obviously, the group should consider whether the child's instruction and overall special education program have been appropriate as part of this process. If the special education instruction has been appropriate and the child has not been able to exit special education, this would be strong evidence that the child's eligibility needs to be maintained.

Changes: None.

Alternative Research-Based Procedures (New § 300.307(a)(3)) (Proposed § 300.307(a)(4))

Comment: Many commenters expressed support for allowing the use

of alternative research-based procedures to determine whether a child has an SLD. However, a few commenters stated that the use of alternative research-based procedures should be removed because there is no indication that these procedures will assist in identifying a child with an SLD and because the Act does not use this term.

Discussion: New § 300.307(a)(3) (proposed § 300.307(a)(4)) recognizes that there are alternative models to identify children with SLD that are based on sound scientific research and gives States flexibility to use these models. For example, a State could choose to identify children based on absolute low achievement and consideration of exclusionary factors as one criterion for eligibility. Other alternatives might combine features of different models for identification. We believe the evaluation procedures in section 614(b)(2) and (b)(3) of the Act give the Department the flexibility to allow States to use alternative, research-based procedures for determining whether a child has an SLD and is eligible for special education and related services.

Changes: None.

Comment: One commenter stated that alternative research-based procedures are not based on scientific research and should therefore be removed.

Discussion: The Department does not support the use of identification procedures that are not based on scientific research. Models or procedures that claim to assist in identifying a child with an SLD, but which are not based on sound scientific research, are not appropriate and should not be adopted by LEAs or States.

Changes: None.

Comment: A few commenters stated that the meaning of alternative research-based procedures is unclear and should be defined. One commenter stated that there would be inappropriate interventions and procedures without further clarification as to the meaning of alternative research-based procedures.

Discussion: As noted in the *Analysis of Comments and Changes* section for subpart A, we have added the definition of *scientifically based research* from section 9101(37) of the ESEA to the definitions section of these regulations. This definition is the most appropriate definition to include in these regulations, given the importance Congress placed on aligning the Act with the ESEA. The Department does not intend to dictate how extensive the research must be or who, within an LEA or State, should determine that the research is of high quality. We believe that this is a matter best left to State and

local officials because determining the presence of an appropriate instructional process is part of the State-adopted criteria. This addition should provide the clarity requested by the commenters.

Changes: We have added a definition of *scientifically based research* to § 300.35, giving the term the definition in section 9101(37) of the ESEA.

Consistency With State Criteria (§ 300.307(b))

Comment: Several commenters expressed concern about allowing States to decide on the approach to determining whether a child has an SLD, and requested the Department develop criteria to be used across the nation. However, numerous commenters supported the development of State criteria and requiring public agencies to use the State criteria to determine whether a child has an SLD. Many commenters stated that this requirement is necessary to prevent inconsistent eligibility requirements among LEAs in a State. Other commenters stated that the requirement exceeds statutory authority and that LEAs should be allowed to make decisions about the criteria and methods to identify children with SLD.

Discussion: The Department believes that eligibility criteria must be consistent across a State to avoid confusion among parents and school district personnel. The Department also believes that requiring LEAs to use State criteria for identifying children with disabilities is consistent with the State's responsibility under section 612(a)(3) of the Act to locate, identify, and evaluate all eligible children with disabilities in the State. We believe this provides the Department with the authority to require a public agency to use State criteria in determining whether a child has an SLD, consistent with §§ 300.307 through 300.311.

Changes: None.

Comment: A few commenters requested requiring States to adopt and implement only one model to determine whether a child has an SLD. However, several commenters requested that States and LEAs have the flexibility to use more than one model. One commenter noted that States need flexibility to determine eligibility criteria until there is greater understanding of the effectiveness of evidence-based protocols in identifying children with SLD.

Discussion: There is nothing in the Act that would require a State to use one model of identification to identify a child with an SLD. We do not believe the regulations should include such a requirement, because section 614(b)(6)

of the Act indicates that some flexibility in the selection of models of identification by LEAs can be appropriate, if permitted by the State.

Changes: None.

Comment: One commenter recommended that the Department require States to develop a plan to implement Statewide eligibility criteria that includes dissemination of research-based models, collecting data on the use of such models, providing professional development on the State's criteria, and implementing appropriate services and instruction.

Discussion: We agree that it could be helpful for States to develop a plan to implement any new SLD criteria, as recommended by the commenter. However, we do not believe States should be required to adopt such a plan, as this is a matter that is best left to individual States to decide.

Changes: None.

Group Members (§ 300.308)

Comment: Several commenters requested an explanation of the use of "group members" rather than "team members" to describe the group that determines whether a child suspected of having an SLD is a child with a disability. One commenter stated that the eligibility determination is an IEP Team function and, therefore, using the term "group members" is inappropriate. One commenter stated that § 300.308 is confusing because the group seems to be the same as the IEP Team.

Discussion: The change from "team members" to "group members" was made in the 1999 regulations to distinguish this group from the IEP Team, because the team of qualified professionals and the parent in § 300.306(a)(1) that makes the eligibility determination does not necessarily have the same members as an IEP Team. In some States, this group of professionals may have the same individuals as the IEP Team, but in other States, this is not the case. We inadvertently referred to "team members" in 300.309(a)(2)(ii) and, therefore, will change this to "group."

Changes: We have changed "team members" to "group" in § 300.309(a)(2)(ii) to be consistent with § 300.306(a)(1).

Comment: Several commenters stated that the requirements for the qualifications of the group members in proposed § 300.308(a) are unnecessary and should be removed because they are not included in the Act, are overly prescriptive, and add another set of procedural requirements. On the other hand, a number of commenters recommended additional or different

qualifications that should be required of the group members in § 300.308. Several commenters recommended that the group members be qualified to conduct assessments in the area of "cognition" rather than "intellectual development" to ensure that specific cognitive abilities are assessed, rather than global intellectual abilities.

Several commenters recommended that proposed § 300.308(a)(2), requiring group members to apply "critical analysis" to the data, be changed to require group members to apply "clinical" analysis to the data. One commenter stated that clinical analysis should be defined and suggested a definition that includes professional judgment informed by empirical research, training, and experience, and guided by interpretation of patterns in evaluation findings from a number of sources (e.g., test scores; interviews; work samples; observational data; and information from parents, school personnel, and other related services providers).

A few commenters recommended requiring evaluations to be completed by certified speech-language pathologists and school psychologists to ensure that qualified professionals conduct the assessments. One commenter recommended that the examples of the areas for diagnostic assessments be preceded by "such as" to avoid a misinterpretation that a speech-language pathologist, for example, is mandated to participate in every SLD determination.

Several commenters agreed with the professional competencies for the group members described in § 300.308(a). However, one commenter stated that "collectively qualified" is too broad a term and should be more narrowly defined. Another commenter stated that there is no way to ensure that the group members possess the necessary expertise unless there is a mechanism to determine whether the group members have the specified competencies in proposed § 300.308(a).

One commenter stated that, although professionals from more than one discipline may be qualified to administer certain assessments, they do not bring the same expertise to the process. One commenter asked if a special education teacher, a regular education teacher, and parent were all that would be necessary if they collectively met the competency requirements.

Several commenters stated that the list of professionals in proposed § 300.308(b) for the eligibility group should be removed and decisions about group members left to schools and

districts. Other commenters stated that the requirements for the eligibility group should be the same as those for the group that determines the eligibility of children suspected of all other disabilities.

Many commenters recommended that additional or different professionals should be included in the group. Numerous commenters recommended including speech-language pathologists in the group because of their expertise in reading and conducting individual diagnostic assessments in the areas of speech and language.

A few commenters stated that a school psychologist should be a required member of the group, rather than listed as "if appropriate." One of these commenters stated that, even if school psychologists are no longer required to administer assessments to determine whether there is a discrepancy between the child's achievement and ability, school psychologists conduct assessments related to cognitive functioning, behavior, and other issues that may affect a child's learning.

Numerous commenters recommended requiring the special education teacher who is part of the eligibility group to have expertise in the area of SLD. However, one commenter stated that it is unnecessary for a special education teacher to be part of the group because the teacher would not have any instructional experience with the yet-to-be identified child and nothing in the Act requires special education teachers to possess any diagnostic expertise in the area of SLD.

One commenter recommended that the group include a teacher with experience in teaching children who are failing or at-risk for failing, in addition to a general education and special education teacher. Several commenters recommended adding a reading specialist as a required member. A few commenters recommended including a social worker as a required member, stating that it is important that one of the members examine the child's home and community environment to rule out environmental and economic factors as a primary source of the child's learning difficulties. Another commenter recommended adding a guidance counselor as a required member. One commenter recommended including a school nurse and stated that a school nurse can contribute information about educationally relevant medical findings.

One commenter stated that a reading teacher and an educational therapist should always be included in the group. A few commenters were not familiar with the role of an educational therapist

and requested a definition or elimination of the term from the list of "other professionals." One commenter stated that two of the three professionals listed as "other professionals" (school psychologist, reading teacher, educational therapist) are not credentialed and questioned why they were included in the group.

Discussion: The Department has considered the diversity of comments received and, given the lack of consensus about which individuals should be included in the group that makes eligibility determinations for children suspected of having an SLD, believes that the requirements in current § 300.540 should be retained. Current § 300.540 states that the eligibility group for children suspected of having SLD must include the child's parents and a team of qualified professionals, which must include the child's regular teacher (or if the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age) or for a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist or remedial reading teacher. We believe this allows decisions about the specific qualifications of the members to be made at the local level, so that the composition of the group may vary depending on the nature of the child's suspected disability, the expertise of local staff, and other relevant factors. For example, for a child suspected of having an SLD in the area of reading, it might be important to include a reading specialist as part of the eligibility group. However, for a child suspected of having an SLD in the area of listening comprehension, it might be appropriate for the group to include a speech-language pathologist with expertise in auditory processing disorders. Current § 300.540 provides flexibility for schools and districts, and ensures that the group includes individuals with the knowledge and skills necessary to interpret the evaluation data and make an informed determination as to whether the child is a child with an SLD, and the educational needs of the child.

Changes: Section 300.308 has been changed to include the requirements from current § 300.540.

Determining the Existence of a Specific Learning Disability (§ 300.309)

Comment: One commenter stated that there is no authority in the Act for the

SLD eligibility requirements outlined in § 300.309.

Discussion: We agree that the statutory language is broad and does not include the specific requirements to determine whether a child suspected of having an SLD is a child with a disability. The purpose of these regulations, however, is to provide details to assist States in the appropriate implementation of the Act. We believe the requirements in § 300.309 are necessary to ensure that States have the details necessary to implement the Act.

Changes: None.

Comment: One commenter stated that RTI was Congress' preference for determining eligibility under SLD, and therefore, the criteria for RTI should be the first paragraph of § 300.309 (Determining the existence of a specific learning disability).

Discussion: The Department believes that the criteria in § 300.309 are presented in a logical order and are consistent with the Act.

Changes: None.

Comment: One commenter stated that a discrepancy between intellectual ability and achievement can differentiate between children with disabilities and children with general low achievement, and noted that the problems with discrepancy models have been in implementation, rather than in the concept itself for identifying children with SLD.

Discussion: There is a substantial research base summarized in several recent consensus reports (Donovan & Cross, 2002; Bradley et al., 2003) and meta-analyses (Hoskyn & Swanson, 2000; Steubing et al., 2002) that does not support the hypothesis that a discrepancy model by itself can differentiate children with disabilities and children with general low achievement.² Therefore, we disagree with the comment because such a differentiation is not possible with any single criterion, including RTI.

Changes: None.

Comment: One commenter requested retaining the language in current § 300.541, regarding the use of discrepancy models.

² Donovan, M.S., & Cross, C.T. (2002). *Minority students in special and gifted education*. Washington, DC: National Academy Press; Bradley, L., Danielson, & Hallahan, D.P. (Eds.). Identification of learning disabilities: Research to practice. Mahway, NJ: Erlbaum; Hoskyn, M., & Swanson, H.L. (2000). Cognitive processing of low achievers and children with reading disabilities: A selective meta-analytic review of the published literature. *The School Psychology Review*, 29, 102-119; Steubing, K.K., Fletcher, J.M., LeDoux, J.M., Lyon, G.R., Shaywitz, S.E., & Shoywitz B.A. (2002). Validity of IQ-discrepancy, classifications of reading disabilities: A meta-analysis. *American Educational Research Journal*, 39, 469-518.

Discussion: Section 614(b)(6) of the Act prohibits States from requiring a discrepancy approach to identify children with SLD. Current § 300.541 requires a discrepancy determination and is, therefore, inconsistent with the Act.

Changes: None.

Comment: One commenter requested that the eligibility group be allowed to consider the results from standardized, individualized testing (not just criterion-based testing or functional assessments) in the eligibility determination.

Discussion: Nothing in the Act or these regulations would preclude the eligibility group from considering results from standardized tests when making eligibility determinations.

Changes: None.

Comment: Many commenters recommended adding the concept of psychological processing disorders to the eligibility criteria in § 300.309. Several commenters noted that the criteria in § 300.309 do not fully address the definition of SLD in § 300.8(c)(10), which includes a processing disorder in one or more of the basic psychological processes. Several commenters stated that, without requiring documentation of a basic psychological processing disorder, the number of children identified with SLD will significantly increase and the use of assessment tools that have the potential to significantly guide instruction will decrease. Several commenters stated that failure to consider individual differences in cognitive processing skills reverses more than 20 years of progress in cognitive psychology and developmental neuroscience. One commenter stated that identifying a basic psychological processing disorder would help ensure that children identified with an SLD are not simply victims of poor instruction. One commenter stated that the shift away from requiring diagnostic assessments in the area of cognition would make it conceptually impossible to document that a child has a disorder in one or more of the basic psychological processes, as required in the definition of SLD in § 300.8(c)(10).

Discussion: The Department does not believe that an assessment of psychological or cognitive processing should be required in determining whether a child has an SLD. There is no current evidence that such assessments are necessary or sufficient for identifying SLD. Further, in many cases, these assessments have not been used to make appropriate intervention decisions. However, § 300.309(a)(2)(ii) permits, but does not require,

consideration of a pattern of strengths or weaknesses, or both, relative to intellectual development, if the evaluation group considers that information relevant to an identification of SLD. In many cases, though, assessments of cognitive processes simply add to the testing burden and do not contribute to interventions. As summarized in the research consensus from the OSEP Learning Disability Summit (Bradley, Danielson, and Hallahan, 2002), “Although processing deficits have been linked to some SLD (e.g., phonological processing and reading), direct links with other processes have not been established. Currently, available methods for measuring many processing difficulties are inadequate. Therefore, systematically measuring processing difficulties and their link to treatment is not yet feasible * * *. Processing deficits should be eliminated from the criteria for classification * * *.” (p. 797).³ Concerns about the absence of evidence for relations of cognitive discrepancy and SLD for identification go back to Bijou (1942;⁴ see Kavale, 2002)⁵. Cronbach (1957)⁶ characterized the search for aptitude by treatment interactions as a “hall of mirrors,” a situation that has not improved over the past few years as different approaches to assessment of cognitive processes have emerged (Fletcher *et al.*, 2005; Reschly & Tilly, 1999)⁷.

Changes: None.

Comment: Several commenters requested that the regulations include a definition of “intellectual development.”

Discussion: We do not believe it is necessary to define “intellectual development” in these regulations. Intellectual development is included in § 300.309(a)(2)(ii) as one of three

³ Bradley, R., Danielson, L., & Hallahan, D.P. (Eds.). (2002). *Identification of learning disabilities: Research to practice*. Mahwah, NJ: Erlbaum.

⁴ Bijou, S.W. (1942). The psychometric pattern approach as an aid to clinical assessment—a review. *American Journal of Mental Deficiency*, 46, 354–362.

⁵ Kavale, K. (2002). Discrepancy models in the identification of learning disabilities. In R. Bradley, L. Danielson, & D.P. Hallahan (Eds.), *Identification of learning disabilities: Research to practice* (pp. 370–371). Mahwah, NJ: Erlbaum.

⁶ Cronbach, L.J. (1957). The two disciplines of scientific psychology. *American Psychologist*, 12, 671–684.

⁷ Fletcher, J.M., Denton, C., & Francis, D.J. (2005). Validity of alternative approaches for the identification of LD: Operationalizing unexpected underachievement. *Journal of Learning Disabilities*, 38, 545–552; Reschly, D.J., & Tilly, W.D. (1999). Reform trends and system design alternatives. In D.J. Reschly, W.D. Tilly, III, and J.P. Grimes (Eds.), *Special education in transition: Functional assessment and noncategorical programming*. Longmont, CO: Sopris West.

standards of comparison, along with age and State-approved grade-level standards. The reference to “intellectual development” in this provision means that the child exhibits a pattern on strengths and weaknesses in performance relative to a standard of intellectual development such as commonly measured by IQ tests. Use of the term is consistent with the discretion provided in the Act in allowing the continued use of discrepancy models.

Changes: None.

Comment: Several commenters stated that intra-individual differences, particularly in cognitive functions, are essential to identifying a child with an SLD and should be included in the eligibility criteria in § 300.309.

Discussion: As indicated above, an assessment of intra-individual differences in cognitive functions does not contribute to identification and intervention decisions for children suspected of having an SLD. The regulations, however, allow for the assessment of intra-individual differences in achievement as part of an identification model for SLD. The regulations also allow for the assessment of discrepancies in intellectual development and achievement.

Changes: None.

Comment: One commenter requested guidance on how to determine whether a child was provided with learning experiences appropriate for the child’s age, as required in § 300.309(a)(1).

Discussion: While such guidance might be helpful, we believe SEAs and LEAs are in the best position to provide guidance on age-appropriate learning experiences.

Changes: None.

Comment: Several commenters expressed support for the requirements in § 300.309(a)(1) and stated that the first element of determining eligibility for an SLD is a finding that the child does not achieve commensurate with the child’s age in one or more of the eight areas when provided with learning experiences appropriate to the child’s age. However, several commenters requested requiring that eligibility determinations for an SLD include evidence that the child’s achievement level is not commensurate with the child’s age *and* ability (emphasis added). One commenter indicated that knowledge of a child’s ability level is important to ensure that a determination is not based on deficits in areas not related to cognitive processing (e.g., lack of opportunity to learn, social or emotional disturbances), and to prevent misdiagnosis of children with mental

retardation and SLD. One commenter stated that § 300.309(a)(1) would allow any child who failed to achieve commensurate with his or her age to be considered to have an SLD, and this will increase the number of children referred for special education and related services.

Several commenters expressed concern that the eligibility determination for SLD is based on whether the child achieves commensurate with his or her age because current practice uses normative data that are based on grade level. These commenters recommended clarifying that grade level or classmate performance should also be considered.

Discussion: The first element in identifying a child with SLD should be a child's mastery of grade-level content appropriate for the child's age or in relation to State-approved grade-level standards, not abilities. This emphasis is consistent with the focus in the ESEA on the attainment of State-approved grade-level standards for all children. State-approved standards are not expressed as "norms" but represent benchmarks for all children at each grade level. The performance of classmates and peers is not an appropriate standard if most children in a class or school are not meeting State-approved standards. Furthermore, using grade-based normative data to make this determination is generally not appropriate for children who have not been permitted to progress to the next academic grade or are otherwise older than their peers. Such a practice may give the illusion of average rates of learning when the child's rate of learning has been below average, resulting in retention. A focus on expectations relative to abilities or classmates simply dilutes expectations for children with disabilities.

We will modify § 300.309(a)(1) to clarify that, as a first element in determining whether a child has an SLD, the group must determine that the child does not demonstrate achievement that is adequate for the child's age or the attainment of State-approved grade-level standards, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards in one or more of the areas listed in § 300.309(a)(1). The reference to "State-approved grade-level standards" is intended to emphasize the alignment of the Act and the ESEA, as well as to cover children who have been retained in a grade, since age level expectations may not be appropriate for these children. The reference to "instruction" will be added to emphasize that children may not be

identified as having SLD if there is no documentation of appropriate instruction, consistent with the Act and the ESEA. Consistent with this change, we will add a reference to "State-approved grade-level standards" in §§ 300.309(a)(2)(i) and (ii). We will also combine proposed § 300.311(a)(5) and (6) into § 300.311(a)(5) to ensure consistency with the requirements in § 300.309(a).

Changes: We have modified § 300.309(a)(1) and §§ 300.309(a)(2)(i) and (ii), and combined proposed § 300.311(a)(5) and (6) into § 300.311(a)(5) to ensure consistency with the requirements in § 300.309(a).

Comment: Several commenters expressed support for including reading fluency in the list of areas to be considered when determining whether a child has an SLD. However, several commenters recommended removing reading fluency from the list in § 300.309(a)(1), stating that a weakness in reading fluency, in isolation, does not indicate a reading disability.

Discussion: No assessment, in isolation, is sufficient to indicate that a child has an SLD. Including reading fluency in the list of areas to be considered when determining whether a child has an SLD makes it more likely that a child who is gifted and has an SLD would be identified. Fluency assessments are very brief and highly relevant to instruction. We, therefore, do not believe that reading fluency should be removed from § 300.309(a)(1).

Changes: None.

Comment: Many commenters stated that eligibility criteria based on RTI models will result in dramatic increases in referrals, special education placements, and legal problems. One commenter stated that the eligibility criteria in § 300.309 do not provide sufficient checks and balances to ensure that only those children who truly require special education are identified as having SLD. A few commenters stated that using an RTI model would result in incorrectly identifying underachieving children as having SLD.

Discussion: We do not believe that eligibility criteria based on RTI models will result in dramatic increases in referrals and special education placements. Well-implemented RTI models and models that identify problems early and promote intervention have reduced, not increased, the number of children identified as eligible for special education services and have helped raise achievement levels for all children

in a school.⁸ We believe that the regulations do provide sufficient checks to ensure that only children who need special education and related services are identified as having SLD.

Changes: None.

Comment: Several commenters stated that the language in § 300.309(a)(2)(ii) is very confusing and should be rewritten. Many commenters stated that the word "or" instead of "and" should be used between § 300.309(a)(2)(i) and § 300.309(a)(2)(ii), because otherwise a child could be identified with an SLD because he or she failed to meet passing criteria on a State assessment, and failure to make sufficient progress on a State-approved assessment alone is not grounds for a determination that a child has an SLD. Several commenters stated that the phrase, "pattern of strengths and weaknesses in performance, achievement, or both" is a typographical error because it is repeated twice.

Discussion: We do not agree that "and" should be used instead of "or" between § 300.309(a)(2)(i) and (ii), because this would subject the child to two different identification models. We agree that failing a State assessment alone is not sufficient to determine whether a child has an SLD. However, failing a State assessment may be one factor in an evaluation considered by the eligibility group. As required in § 300.304(b)(1), consistent with section 614(b)(2)(A) of the Act, the evaluation must use a variety of assessment tools and strategies to gather relevant information about the child. Further, § 300.304(b)(2), consistent with section 614(b)(2)(B) of the Act, is clear that determining eligibility for special education and related services cannot be based on any single measure or assessment as the sole criterion for determining whether a child is a child with a disability.

We agree that § 300.309(a)(2)(ii) could be stated more clearly and will rewrite it to state that the eligibility group can determine that a child has an SLD if the child meets the criteria in § 300.309(a)(1) and exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age and State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of an SLD.

Changes: We have changed § 300.309(a)(2)(ii) for clarity.

⁸ Burns, M., Appleton, J., Stehouwer, J. (2005). Meta-analytic review of responsiveness-to-intervention research: Examining field-based and research-implemented models. *Journal of Psychoeducational Assessment*, 23, 381-394.

Comment: Several commenters requested a definition of "State-approved results." One commenter stated that the language was extremely confusing and that "State-approved results" could be interpreted to mean approved results that are equivalent to proficiency on State assessments under the ESEA, and this could lead to eligibility determinations for a very large group of older children with poor reading performance for whom it would be nearly impossible to make sufficient progress to become proficient readers. This commenter recommended changing the language to refer to a child's failure to achieve a rate of learning to make sufficient progress based on "State-defined criteria." Another commenter recommended substituting "State achievement standards" for "State approved results."

Discussion: The intention is to refer to State assessments approved under the ESEA. We have changed "State-approved results" to "State-approved grade-level standards." We believe this change adequately addresses the commenters concerns.

Changes: We have removed "State-approved results" and inserted in its place "State-approved grade-level standards" in § 300.309 and § 300.311.

Comment: One commenter stated that including "State-approved results" in § 300.309(a)(2)(i) means that there is no Federal definition of SLD.

Discussion: States must develop criteria for determining whether a child has an SLD that are consistent with the Federal requirements in §§ 300.307 through 300.311 and the definition of SLD in § 300.8(c)(10).

Changes: None.

Comment: A few commenters stated that using the criteria in § 300.309(a)(2), a child could meet State standards and still be identified as a child with an SLD.

Discussion: We agree with the commenters. Accelerated growth toward, and mastery of, State-approved grade-level standards are goals of special education. Furthermore, as stated in § 300.101, the fact that a child is advancing from grade to grade does not make a child with a disability ineligible for special education and related services. However, consistent with § 300.8, the group making the eligibility determination must conclude both that the child has an SLD and, that, because of that disability, the child needs special education and related services.

Changes: None.

Comment: Many commenters requested more detail and specific guidelines on RTI models, such as

information on who initiates the RTI process and who should be involved in the process; how one ensures there is a strong leader for the RTI process; the skills needed to implement RTI models; the role of the general education teacher; how to determine that a child is not responsive to instruction, particularly a child with cultural and linguistic differences; the number of different types of interventions to be tried; the responsibility for monitoring progress; the measurement of treatment integrity; and ways to document progress. One commenter stated that it is imperative that the regulations allow the flexibility necessary to accommodate the array of RTI models already in use.

Several commenters requested that the Department define and set a standard for responsiveness that calls for demonstrated progress and improvement in the rate of learning, to indicate that a child can function in the classroom. Several commenters stated that there would be a dramatic increase in the number of children identified with an SLD without a clearly defined system in place.

Discussion: There are many RTI models and the regulations are written to accommodate the many different models that are currently in use. The Department does not mandate or endorse any particular model. Rather, the regulations provide States with the flexibility to adopt criteria that best meet local needs. Language that is more specific or prescriptive would not be appropriate. For example, while we recognize that rate of learning is often a key variable in assessing a child's response to intervention, it would not be appropriate for the regulations to set a standard for responsiveness or improvement in the rate of learning. As we discussed earlier in this section, we do not believe these regulations will result in significant increases in the number of children identified with SLD.

Changes: None.

Comment: One commenter stated that, without additional clarity, eligibility criteria will vary substantially among States and that States will have definitions that are suited to their individual preferences, rather than a universal sense of what constitutes eligibility under SLD based on the research and national standards of professional practice.

Discussion: State eligibility criteria must meet the requirements in §§ 300.307 through 300.311 and LEAs must use these State-adopted criteria. We believe that, although these provisions allow States some flexibility in how children with SLD are

identified, the requirements in these provisions will ensure that SLD criteria do not vary substantially across States.

Changes: None.

Comment: One commenter stated that, without more clarity in the requirements for RTI models, there would be an increase in the number of eligibility disputes between parents and school districts.

Discussion: We do not believe more clarity in the requirements for RTI models is necessary. States can avoid disputes over eligibility determinations by developing clear criteria, consistent with the regulatory parameters, and providing staff with the necessary guidance and support to implement the criteria.

Changes: None.

Comment: One commenter urged the Department to encourage States to convene a group of education, disability, and parent stakeholders to discuss and design a model approach to early identification of children with SLD.

Discussion: The Department agrees that it is important to identify children with SLD early and to provide the necessary instruction and supports to avoid referrals to special education. The extent to which States involve other interested parties (e.g., disability groups, parent groups) in the design or development of such a system is a decision that should be made by each State.

Changes: None.

Comment: A few commenters stated that professional development requirements to implement RTI models should be incorporated into the regulations so RTI models are not haphazardly implemented. One commenter stated that before RTI can be used systematically as part of the special education identification process, school districts must have administrative support at all levels, ongoing professional development for all staff, and coordination with institutions of higher education. Several commenters recommended encouraging States to develop efficient, collaborative evaluation systems. One commenter recommended requiring regular education teachers to address the needs of children with different learning styles, identify early and appropriate interventions for children with behavioral challenges, and understand and use data and assessments to improve classroom practices and learning.

Discussion: We agree that administrative support, professional development, and coordination with teacher training programs would be

helpful in the effective implementation of RTI models. We also agree that efficient and collaborative evaluation systems should be developed, and that all teachers, including regular education teachers, should be trained to address the needs of children with different learning styles, identify early and appropriate interventions for children with behavioral challenges, and understand and use data and assessments to improve classroom practices and learning. However, professional development requirements are a State responsibility, consistent with § 300.156 and section 612(a)(14) of the Act, and it would be inappropriate for the Department to include specific professional development requirements in these regulations.

Changes: None.

Comment: One commenter stated that if a State prohibits the use of a discrepancy model, there would not be sufficient time or funds necessary to effectively train staff. Several commenters asked that there be a transition period so that personnel can be adequately trained in RTI or other forms of assessment and observation.

Discussion: It is not necessary for these regulations to require a transition period for implementing RTI models, particularly because there are many schools and districts currently implementing RTI models. Under the requirements in section 614(b)(6) of the Act, which took effect July 1, 2005, States should have developed mechanisms to permit LEAs to use RTI models. States may need to make adjustments based on these final regulations. Nothing in these regulations requires an LEA to drop current practices in favor of a new model with no transition. Obviously, a plan would need to be developed when changing to an RTI model, including strategies for implementation and professional development.

Changes: None.

Comment: Many commenters stated that the use of RTI models would be costly, requiring massive staff training and resources. Many commenters recommended ways in which the Department could support States in improving identification and interventions for children with SLD. Commenters' recommendations included the following: long-term, Statewide pilot studies on assessments and interventions for children with SLD; methods to increase the use of RTI; guidance on establishing appropriate timelines for instructional interventions; and information on new scientifically based approaches to identifying children with SLD.

Discussion: The Department recognizes the need for technical assistance and training to implement RTI models and is directing technical assistance funds under Part D of the Act, administered by the Department's Office of Special Education Programs (OSEP), toward this effort. OSEP plans to develop and disseminate an RTI resource kit and devote additional resources to technical assistance providers to assist States in implementing RTI models. OSEP will also continue to identify and develop model RTI implementation sites and evaluate SLD identification models in math and reading. In addition, the Comprehensive Center on Instruction, jointly funded by OSEP and the Office of Elementary and Secondary Education (OESE), will provide technical assistance to States on RTI implementation.

Changes: None.

Comment: Many commenters supported examining the pattern of strengths and weaknesses in determining whether a child is considered to have an SLD. A number of commenters stated that it is important that groups use a process to determine whether a child responds to scientific, research-based interventions, as well as consider relevant, empirically validated patterns of strengths and weaknesses in achievement, performance, or both, relative to intellectual development. One commenter stated that "pattern of strengths and weaknesses in performance" in § 300.309(a)(2)(ii) is insufficiently defined and without a clearer definition of "pattern," schools will continue the wait-to-fail model. One commenter recommended clarifying the meaning of "weakness," stating that weakness does not mean failure, and that there may be specific actions that could address weaknesses in performance that would result in failure if left alone.

Discussion: Patterns of strengths and weaknesses commonly refer to the examination of profiles across different tests used historically in the identification of children with SLD. We believe that the meaning of "pattern of strengths and weaknesses" is clear and does not need to be clarified in these regulations.

Changes: None.

Comment: Some commenters stated that using a pattern of strengths and weaknesses in a child's performance to identify a child with an SLD could be misinterpreted to identify children, other than children with disabilities, who are underperforming due to cultural factors, environmental or economic disadvantage, or low effort.

Discussion: Section 300.309(a)(3) is clear that children should not be identified with SLD if the underachievement is primarily the result of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; or environmental or economic disadvantage. The eligibility group makes the determination after the evaluation of the child is completed. Therefore, we believe that there is minimal risk that a child who is underachieving due to these factors will be identified as having an SLD.

Changes: None.

Comment: Some commenters recommended using "cognitive ability" in place of "intellectual development" because "intellectual development" could be narrowly interpreted to mean performance on an IQ test. One commenter stated that the term "cognitive ability" is preferable because it reflects the fundamental concepts underlying SLD and can be assessed with a variety of appropriate assessment tools. A few commenters stated that the reference to identifying a child's pattern of strengths and weaknesses that are not related to intellectual development should be removed because a cognitive assessment is critical and should always be used to make a determination under the category of SLD.

Discussion: We believe the term "intellectual development" is the appropriate reference in this provision. Section 300.309(a)(2)(ii) permits the assessment of patterns of strengths and weakness in performance, including performance on assessments of cognitive ability. As stated previously, "intellectual development" is included as one of three methods of comparison, along with age and State-approved grade-level standards. The term "cognitive" is not the appropriate reference to performance because cognitive variation is not a reliable marker of SLD, and is not related to intervention.

Changes: None.

Comment: One commenter reviewed the list of factors in § 300.309(a)(3) that must be ruled out as primary reasons for a child's performance and asked whether children with other health impairments (OHI), traumatic brain injury (TBI), or speech impairments would overlap with the SLD definition. Several commenters noted that many children with hearing, visual, or motor disabilities; mental retardation; or emotional disturbances (ED) also have concomitant learning disabilities that go unidentified, and that these children end up with lower academic and functional achievement levels than they

should because an important contributing factor to their learning problems has not been addressed. Several commenters recommended adding language to the regulations stating that a child with a disability other than an SLD may also be identified with an SLD.

Discussion: Children with one of the disabilities in § 300.8 should be identified as a child with a disability using the category that is most appropriate for the child. Other children may be identified under other disability categories, such as OHI, TBI, ED, or speech impairment, and may also have low achievement and even meet SLD criteria. Services must meet the child's needs and cannot be determined by the child's eligibility category. We believe it is unnecessary to add language regarding SLD as a concomitant disability.

Changes: None.

Comment: One commenter asked what kind of assessment identifies culture as a primary cause of academic performance deficits and recommended removing the requirement in § 300.309(a)(3)(iv) unless there are objective methods to determine whether a child's low performance is a result of cultural factors.

Discussion: The identification of the effect of cultural factors on a child's performance is a judgment made by the eligibility group based on multiple sources of information, including the home environment, language proficiency, and other contextual factors gathered in the evaluation. The Department believes that the identification of children with SLD will improve with models based on systematic assessments of a child's response to appropriate instruction, the results of which are one part of the information reviewed during the evaluation process to determine eligibility for special education and related services. States and public agencies must follow the evaluation procedures in §§ 300.304 and 300.305 and section 614(b) of the Act, including using assessments and other evaluation materials that do not discriminate on a racial or cultural basis, consistent with § 300.304(c)(1)(i) and section 614(b)(3)(A)(i) of the Act.

Changes: None.

Comment: Many commenters recommended that limited English proficiency be among the factors that the eligibility group must rule out as a primary factor affecting a child's performance.

Discussion: Section 300.306(b)(1)(iii), consistent with section 614(b)(5)(C) of the Act, is clear that a child must not

be identified as a child with a disability if the determinant factor for that determination is limited English proficiency. However, we agree that it is important to re-emphasize this requirement in § 300.309 and will add this to the list of factors that the eligibility group must rule out as a primary factor affecting a child's performance.

Changes: We have added a new paragraph (vi) to § 300.309(a)(3) to include "limited English proficiency" in the list of factors that must be ruled out as a primary factor affecting a child's performance before determining that a child is eligible for special education services under the category of SLD.

Comment: Numerous commenters supported the requirement in § 300.309(b)(1) for data demonstrating that a child suspected of having an SLD has been provided with high-quality, research-based instruction in regular education settings delivered by qualified personnel. Several commenters stated that this requirement should apply to all children and asked why this requirement is confined to only children suspected of having SLD. One commenter stated that if schools would use proven best practices, there would be fewer children in need of special education in the later grades. However, one commenter stated that it is incorrect to assume that any child who is not responding to interventions must have an SLD when there are a myriad of reasons why children may not be responding to instruction. One commenter recommended adding "to the extent practicable" to acknowledge that scientific research-based interventions are not available in many areas, particularly in mathematics. One commenter recommended decreasing the emphasis on research-based instruction.

Discussion: Sections 300.306(b)(1)(i) and (ii), consistent with section 614(b)(5)(A) and (B) of the Act, specifically state that children should not be identified for special education if the achievement problem is due to lack of appropriate instruction in reading or mathematics. This issue is especially relevant to SLD because lack of appropriate instruction in these areas most commonly leads to identifying a child as having an SLD. All children should be provided with appropriate instruction provided by qualified personnel. This is an important tenet of the Act and the ESEA. Both the Act and the ESEA focus on doing what works as evidenced by scientific research and providing children with appropriate instruction delivered by qualified teachers.

Changes: None.

Comment: We received a number of comments concerning the requirement for high-quality, research-based instruction provided by qualified personnel. One commenter stated that it would be difficult for rural school districts to meet this requirement because of staffing requirements in the regular education setting. Several commenters stated that the requirement for high-quality, research-based instruction exceeds statutory authority and should be removed, because it provides a basis for challenging any determination under the category of SLD. One commenter asked for clarification regarding the legal basis for providing high-quality, research-based instruction if the child is not determined eligible for special education. Another commenter stated that attorneys will read § 300.309(b) as providing a legal entitlement to ESEA, research-based instruction and data-based documentation for every child considered for eligibility under the category of SLD, and that when this standard is not met, will bring the matter to a due process hearing and request compensatory education.

Numerous commenters requested a definition of high-quality, research-based instruction. One commenter asked who validates that the research meets the highest quality. Another commenter asked that the regulations specify how much research a program must undergo before it is deemed to be research-based. One commenter stated that the Department must address how States determine whether a child has been provided with a high-quality, research-based instructional program; whether appropriate classroom interventions were delivered; and whether an intervention has been successful. One commenter stated that the absence of additional clarification would result in great disparity in States' policies and lead to inappropriate interventions and procedures. One commenter recommended that there be evidence that the instruction is effective for the child's age and cultural background.

A few commenters recommended that children who are not progressing because they have not received research-based instruction by a qualified teacher should immediately receive intensive, high-quality, research-based instruction by qualified personnel. One commenter expressed concern that § 300.309(b) restricts referrals to only those children who have received high-quality, research-based instruction from qualified teachers. One commenter stated that a child's eligibility to receive

special education services under the category of SLD appears to be contingent on the LEA's commitment to providing effective regular education services by qualified staff, and, as such, a child with an SLD is held hostage by a system that is not working. One commenter asked whether the eligibility group can make a determination that a child has an SLD in the absence of a child's response to high-quality research-based instruction.

Several commenters stated that the lack of research-based instruction by a qualified teacher should not limit a child's eligibility for services. Another commenter recommended clarifying that a child should not be found ineligible under the category of SLD because the child either did not respond to a scientific, research-based intervention during a truncated evaluation, or because the child was not provided an opportunity to respond to such an intervention.

Discussion: Watering down a focus on appropriate instruction for any children, including children with disabilities or children living in rural areas would be counter to both the Act and the ESEA. However, we agree that the requirement for high quality, research-based instruction exceeds statutory authority. The Act indicates that children should not be eligible for special education if the low achievement is due to lack of appropriate instruction in reading or math. Therefore, we will change the regulations to require that the eligibility group consider evidence that the child was provided appropriate instruction and clarify that this means evidence that lack of appropriate instruction was the source of underachievement.

The eligibility group should not identify a child as eligible for special education services if the child's low achievement is the result of lack of appropriate instruction in reading or math. Eligibility is contingent on the ability of the LEA to provide appropriate instruction. Determining the basis of low achievement when a child has been given appropriate instruction is the responsibility of the eligibility group.

Whether a child has received "appropriate instruction" is appropriately left to State and local officials to determine. Schools should have current, data-based evidence to indicate whether a child responds to appropriate instruction before determining that a child is a child with a disability. Children should not be identified as having a disability before concluding that their performance deficits are not the result of a lack of appropriate instruction. Parents of

children with disabilities have due process rights that allow them to file a complaint on any matter that relates to the identification, evaluation, and educational placement of their child with a disability, and the provision of FAPE to their child.

Changes: We have revised the introductory material in § 300.309(b) to emphasize that the purpose of the review is to rule out a lack of appropriate instruction in reading or math as the reason for a child's underachievement. We have also revised § 300.309(b)(1) to refer to appropriate instruction rather than high-quality, research-based instruction, and removed the cross reference to the ESEA.

Comment: One commenter stated that many reading programs claim to be research-based, but lack credible evidence of the program's effectiveness.

Discussion: Programs that claim to be research-based, but which are not based on sound scientific research, should not be considered research-based instruction by a State or LEA.

Changes: None.

Comment: One commenter asked what criteria should be used to determine that the child was provided with appropriate high quality, research-based instruction, especially when the child has been home schooled or attends a private school. One commenter asked about children referred for evaluation from charter schools and expressed concern that these children would not be eligible under the category of SLD because they did not have instruction delivered by qualified personnel.

Discussion: As part of the evaluation, the eligibility group must consider whether the child received appropriate instruction from qualified personnel. For children who attend private schools or charter schools or who are home-schooled, it may be necessary to obtain information from parents and teachers about the curricula used and the child's progress with various teaching strategies. The eligibility group also may need to use information from current classroom-based assessments or classroom observations. On the basis of the available information, the eligibility group may identify other information that is needed to determine whether the child's low achievement is due to a disability, and not primarily the result of lack of appropriate instruction. The requirements for special education eligibility or the expectations for the quality of teachers or instructional programs are not affected, and do not differ, by the location or venue of a child's instruction.

Changes: None.

Comment: Many commenters requested a definition of "qualified personnel." One commenter stated that teachers should be trained to deliver the program of instruction and simply saying they should be highly qualified is not sufficient. One commenter recommended removing the phrase "qualified personnel" in § 300.309(b)(1), because it is likely to be interpreted to mean that instruction must be delivered by highly qualified teachers, as defined in the ESEA.

Discussion: Section 300.156 and section 614(a)(14) of the Act are clear that each State is responsible for establishing and maintaining personnel qualifications to ensure that personnel are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. Consistent with § 300.18 and section 602(10) of the Act, a public school teacher, including a special education teacher, who teaches core academic subjects must meet the highly qualified teacher standards under the Act. The term that is used in § 300.309(b)(1), "qualified personnel," does not, and should not be interpreted to, require that private school teachers be "highly qualified" to deliver the instruction discussed in § 300.309(b)(1).

Changes: None.

Comment: One commenter asked whether the regulations require an LEA to provide high-quality, research-based instruction in the regular education setting prior to, or as part of, the referral process before the group can determine whether a child has an SLD. One commenter recommended that research-based interventions occur prior to a referral to special education. Several commenters stated that an evaluation to assess all areas of suspected disability should follow an assessment of a child's response to instruction.

Discussion: What is important is that the group making the eligibility decision has the information that it needs to rule out that the child's underachievement is a result of a lack of appropriate instruction. That could include evidence that the child was provided appropriate instruction either before, or as a part of, the referral process. Evidence of appropriate instruction, including instruction delivered in an RTI model, is not a substitute for a complete assessment of all of the areas of suspected need. As discussed earlier in this section, we have revised § 300.309(b) to make this clear.

Changes: As discussed previously, we have revised § 300.309(b).

Comment: One commenter recommended that data be maintained on the number of children identified with SLD.

Discussion: Data are maintained on the number of children identified with SLD. Section 618 of the Act requires States to report annually to the Department the number and percentage of children with disabilities by disability category, in addition to race, ethnicity, limited English proficiency status, and gender.

Changes: None.

Comment: Many commenters recommended reinforcing the role of parents in determining whether a child has an SLD by adding language to § 300.309(b) stating that the child's parents and the group of qualified professionals must consider whether the child is a child with a disability.

Discussion: Section 300.306(a)(1), consistent with section 614(b)(4)(A) of the Act, is clear that the parent of the child is included in eligibility determinations. Section 300.309(a) cross-references the group in § 300.306, which includes the parent. We believe this adequately addresses the role of the parent and that no changes are necessary.

Changes: None.

Comment: One commenter requested a definition of "data-based documentation."

Discussion: Data-based documentation refers to an objective and systematic process of documenting a child's progress. This type of assessment is a feature of strong instruction in reading and math and is consistent with § 300.306(b)(1)(i) and (ii) and section 614(b)(5)(A) and (B) of the Act, that children cannot be identified for special education if an achievement problem is due to lack of appropriate instruction in reading or math.

Changes: None.

Comment: Numerous commenters supported requiring data-based documentation of repeated assessments of achievement at reasonable intervals to be provided to parents during the time the child is receiving instruction. One commenter emphasized the importance of documenting that the interventions used are data based and implemented with fidelity. One commenter stated that data-based documentation should be provided to all parents of children with disabilities, not just children suspected of having SLD. However, several commenters stated that requiring data-based documentation of repeated assessments is an additional bureaucratic requirement that is overly prescriptive

and costly, and will require additional paperwork.

Discussion: We believe that one of the most important aspects of good teaching is the ability to determine when a child is learning and then to tailor instruction to meet the child's individual needs. Effective teachers use data to make informed decisions about the effectiveness of a particular instructional strategy or program. A critical hallmark of appropriate instruction is that data documenting a child's progress are systematically collected and analyzed and that parents are kept informed of the child's progress. Assessments of a child's progress are not bureaucratic, but an essential component of good instruction.

Changes: None.

Comment: Several commenters requested definitions for "repeated assessments" and "reasonable intervals."

Discussion: Instructional models vary in terms of the frequency and number of repeated assessments that are required to determine a child's progress. It would be inappropriate for the Department to stipulate requirements in Federal regulations that would make it difficult for districts and States to implement instructional models they determine appropriate to their specific jurisdictions.

Changes: None.

Comment: One commenter recommended removing the requirement for data-based documentation of repeated assessments of achievement at reasonable intervals because it would make it impossible to determine eligibility if a child is new to a school district and district personnel do not have a child's records with such information.

Discussion: We do not believe removing the requirement is the appropriate solution to the commenter's problem. States will need to adopt criteria for determining how to provide such data for children new to a district. Children should not be identified as having SLD if there is no evidence of appropriate instruction.

Changes: None.

Comment: One commenter expressed concern that § 300.309(b)(2), requiring parents to be informed of their child's repeated failure to perform well on assessments, could be interpreted to refer to the assessments under the ESEA and that this would mean that a child must perform poorly over a period of several school years to be considered for eligibility under the category of SLD.

Discussion: While the results of a child's performance on assessments

under the ESEA may be included as data documenting a child's progress, relying exclusively on data from Statewide assessments under the ESEA would likely not meet the requirement for repeated assessments at "reasonable intervals," as required by these regulations. It is possible that a State could develop other assessments tied to the State approved test that would meet these requirements.

Changes: None.

Comment: Numerous commenters asked how long an intervention should continue before determining a child has not made adequate progress and a referral for an evaluation to determine eligibility for special education is made. Several commenters recommended that if a child is not making progress within 45 days, an evaluation should take place. Other commenters recommended a time limit of 90 days. One commenter recommended the regulations include a range of active intervention days, not just a waiting period, within which the IEP Team expects to notice a change, and recommended between 45–75 school days. One commenter suggested 6–10 weeks as an appropriate period of time.

A few commenters recommended requiring States to establish reasonable time limits for decision making. Several commenters recommended requiring the IEP Team and the parents to agree on an appropriate period of time.

Several commenters stated that unless a timeline is specified in the regulations, there would be different standards occurring throughout the country. A few commenters expressed concern that if time limits were not clarified, school districts and parents would interpret the timelines differently, which would result in contentious situations and litigation. One commenter stated that a parent could sue for compensatory services if, after requesting an evaluation, the LEA requires an assessment of how the child responds to high quality research-based instruction.

Several commenters stated that the lack of a specific timeline means that an evaluation could be indefinitely delayed and children denied services. Several commenters recommended adding language to the regulations to ensure that RTI models could not be used to delay an evaluation of a child suspected of having a disability, access to special education and related services, or protections under the Act.

In addition to requesting a definition of an "appropriate period of time," a few commenters requested a definition of "adequate progress" and recommended adding language to

require States to define "adequate progress." One commenter stated that a child's rate of learning needs to be examined carefully. One commenter offered a definition of a "developmentally appropriate rate" as the time or the number of repetitions required to have at least 85 percent of children at the same age or grade level acquire and retain the particular skill or academic levels, as established by research or by experience with the delivery of that curriculum or program.

Discussion: Instructional models vary in terms of the length of time required for the intervention to have the intended effect on a child's progress. It would not be appropriate for the Department to establish timelines or the other requirements proposed by the commenters in Federal regulations, because doing so would make it difficult for LEAs to implement models specific to their local school districts. These decisions are best left to State and local professionals who have knowledge of the instructional methods used in their schools.

The Department believes that good instruction depends on repeated assessments of a child's progress. This allows teachers to make informed decisions about the need to change their instruction to meet the needs of the child, and also provides parents with information about their child's progress so that they can support instruction and learning at home. Parents should be informed if there are concerns about their child's progress and should be aware of the strategies being used to improve and monitor their child's progress.

We understand the commenters' requests for more specific details on timelines and measures of adequate progress. However, as noted above, these decisions are best left to professionals who have knowledge about the instructional models and strategies used in their States and districts.

We also understand the commenters' concerns that the requirements in § 300.309(b) may result in untimely evaluations or services and that parents must be fully informed about the school's concerns about their child's progress and interventions provided by the school. Therefore, we will combine proposed § 300.309(c) and (d), and revise the new § 300.309(c) to ensure that the public agency promptly requests parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided with appropriate instruction, which could include instruction in an RTI model, and whenever a child is

referred for an evaluation. We will also add a new § 300.311(a)(7)(ii) to ensure that the parents of a child suspected of having an SLD who has participated in a process that evaluates the child's response to scientific, research-based intervention, are notified about the State's policies regarding collection of child performance data and the general education services that will be provided; strategies to increase their child's rate of learning; and their right to request an evaluation at any time. If parents request an evaluation and provide consent, the timeframe for evaluation begins and the information required in § 300.309(b) must be collected (if it does not already exist) before the end of that period.

Changes: We have combined proposed § 300.309(c) and (d), and revised the new paragraph (c) in § 300.309 to require the public agency to promptly request parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided appropriate instruction, and whenever a child is referred for an evaluation. We also have added a new § 300.311(a)(7)(ii) to require that the eligibility report include evidence that when a child has participated in an RTI process, the parents were informed of State policies regarding child performance data that would be collected and the general education services that would be provided; strategies to support the child's rate of learning; and a parent's right to request an evaluation at any time.

Comment: Many commenters recommended clarifying when parental consent for evaluation should be obtained and when the 60-day timeline to complete an evaluation begins. Several commenters recommended ensuring that the 60-day timeline for evaluation applies regardless of the evaluation model used. One commenter asked how scientific research-based interventions could be completed within a 60-day evaluation timeline. One commenter stated that 60 days may not be enough time to appropriately determine whether a child responds to instruction, particularly for children who have not had exposure to such interventions (e.g., children entering the public school system for the first time). One commenter asked if the intent of the regulations is to allow a determination that a child has an SLD to take place outside the timeline for an initial evaluation, and stated that without clarification of the intersection between an RTI process (that may, by definition, require additional time beyond that which is permitted for an

evaluation) and the required period of time for an initial assessment, the regulations would cause confusion and result in improper evaluations and eligibility determinations.

Several commenters recommended that the regulations address the need for an extension of the timeline and allow States to set an alternative timeline without a written agreement. Several commenters requested adding a provision for an extended timeline, with parental consent, in exceptional circumstances. Several commenters stated that the language regarding an extension of timelines is confusing.

Discussion: Section 300.309(c), as revised, clarifies that if a child has not made adequate progress after an appropriate period of time, a referral for an evaluation must be made. As required in § 300.301(c), the initial evaluation must be conducted within 60 days of receiving consent for an evaluation (or if the State establishes a timeframe within which the evaluation must be completed, within that timeframe). Models based on RTI typically evaluate the child's response to instruction prior to the onset of the 60-day period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on the child's achievement, including observation data. RTI models provide the data the group must consider on the child's progress when provided with appropriate instruction by qualified professionals as part of the evaluation.

Section 300.309(b)(1) requires that the eligibility group consider data on the child's progress when provided with appropriate instruction by qualified professionals as part of this evaluation. These data, along with other relevant information, will assist the eligibility group in determining whether the child's low achievement is attributable to a lack of appropriate instruction. As required in § 300.306(b)(1)(i) and (ii), consistent with section 614(b)(5)(A) and (B) of the Act, a child cannot be identified as a child with a disability if the determinant factor for that determination is lack of appropriate instruction in reading or math.

Based on their review of the existing data, and input from the child's parents, the eligibility group must decide, on a case-by-case basis, depending on the needs of the child and the information available regarding the child, what additional data, if any, are needed to determine whether the child is a child with a disability, and the educational needs of the child. If the eligibility group determines that additional data are needed and that these data cannot be

obtained within the 60-day timeframe (or the timeframe established by the State), new § 300.309(c) (proposed § 300.309(d)) allows the extension of the timeframe with mutual written agreement of the child's parent and the eligibility group.

Changes: None.

Comment: One commenter asked how the 60-day timeframe would be followed if the time extends over school breaks.

Discussion: The 60-day timeframe refers to 60 calendar days and would include school breaks.

Changes: None.

Comment: Several commenters stated that the regulations appear to set up a separate process and procedure for the evaluation and identification of children with SLD, and then impose the timeframe and procedures that apply to the evaluation of all other disability categories. One commenter stated that the timeframe for evaluating children with SLD is less stringent than for other disability categories and is, therefore, discriminatory.

Discussion: Although there are additional criteria and procedures for evaluating and identifying children suspected of having SLD, the group must also comply with the procedures and timelines that apply to all evaluations, including evaluations for SLD. Evaluation of children suspected of having SLD must follow the same procedures and timeframes required in §§ 300.301 through 300.306, in addition to those in §§ 300.307 through 300.311.

Changes: None.

Comment: One commenter stated that "appropriate period of time" should be replaced with "reasonable period of time" because courts are accustomed to deciding what constitutes a reasonable timeframe in various evaluation contexts.

Discussion: It is not necessary to change "appropriate period of time" to "reasonable period of time," because the terms here have similar meanings and are commonly understood to be synonymous.

Changes: None.

Comment: One commenter requested that the regulations clarify who should refer a child for an evaluation to determine eligibility for special education services.

Discussion: Under § 300.301(b), and consistent with the requirements in § 300.300 and section 614(a)(1)(D) of the Act, either a parent of a child or a public agency may initiate a request for an evaluation at any time to determine if the child is a child with a disability. We do not believe that further clarification is necessary.

Changes: None.

Comment: One commenter stated that a school district should retain its discretion not to evaluate a child subject to the parent's right to contest the decision through due process procedures.

Discussion: The commenter's concern is already addressed in § 300.111, which provides that an LEA must identify, locate, and evaluate children who are in need of special education and related services. If an LEA refuses to evaluate a child, the LEA must provide prior written notice, consistent with § 300.503 and section 615(b)(3) of the Act. The parent can challenge this decision through a due process hearing.

Changes: None.

Observation (§ 300.310)

Comment: Many commenters recommended removing the observation requirements in § 300.310, stating that they are costly and overly prescriptive and have no statutory basis. One commenter stated that the requirements for determining eligibility under the category of SLD are so specific that the observation requirements are unnecessary.

Discussion: The observation requirements for children suspected of having SLD have been in the regulations since before 1983. Important information can be obtained about a child through observation in the classroom, or for a child less than school age, in an environment appropriate for a child of that age. Objective observations are essential to assessing a child's performance and should be a part of routine classroom instruction and are not costly or overly prescriptive. We believe the observation requirements are an important matter to regulate clearly. We will, therefore, change § 300.310(a) through § 300.310(c) to clearly state that the public agency must ensure appropriate observation and documentation of the child's academic performance and behavior in the areas of difficulty to determine whether a child has an SLD.

Changes: We have changed § 300.310(a) through § 300.310(c) to clearly state the observation requirements in determining whether a child has an SLD.

Comment: Several commenters supported requiring a member of the group to be trained in observation. Many commenters requested clarification regarding what it means to be trained in observation. One commenter stated that there are no established training protocols or uniform professional standards for conducting an observation.

Discussion: We agree that the requirement for an individual to be trained in observation is unclear and should be removed. States are responsible for determining specific personnel qualification requirements, and, for the reasons stated under § 300.308, States and LEAs should determine appropriate group membership.

Changes: We have removed the phrase "trained in observation" from § 300.310(a).

Comment: Several commenters stated that the public agency should determine the most appropriate individual to conduct the observation. One commenter recommended specifying a reading specialist to conduct the observation when the child's learning problems involve reading. Another commenter stated that the observer should not be limited to a member of the eligibility group. One commenter stated that it is not necessary to obtain parental consent for the observation.

Discussion: The person conducting the observation should be a member of the eligibility group because information from the observation will be used in making the eligibility determination. If information is available from an observation conducted as part of routine classroom instruction that is important for the eligibility group to consider, the eligibility group should include the person who conducted that routine classroom. This will eliminate redundant observations and save time and resources. Parental consent is not required for observations conducted as part of routine classroom instruction and monitoring of the child's performance before the child is referred for an evaluation.

If an observation has not been conducted, or additional observation data are needed, the decision as to which person should conduct the observation is best left to members of the eligibility group, based on the type of information that is needed to make the eligibility determination and identify the child's needs. Parental consent is required for observations conducted after the child is suspected of having a disability and is referred for an evaluation. We will revise § 300.310 to clarify the different ways in which observation data may be obtained and to clarify that parental consent is required for observations conducted after the child is suspected of having a disability and is referred for an evaluation.

Changes: We have revised § 300.310 to specify in paragraph (a) that the public agency must ensure that the child is observed in the child's learning environment. A new § 300.310(b) has

been added to require the eligibility group to use the information obtained from the routine classroom observation or conduct a new observation and to require parental consent for observations conducted after the child is suspected of having a disability and is referred for an evaluation. Proposed § 300.310(b) has been redesignated as new § 300.310(c).

Comment: One commenter requested clarification regarding the definition of an “appropriate” environment in which to conduct the observation of a child who is less than school age, as well as guidance in determining what such an environment would be for children who are out of school.

Discussion: The eligibility group is in the best position to determine the environment appropriate for a child who is less than school age or out of school.

Changes: None.

Comment: One commenter requested clear guidance about the working relationship between the special education teacher and the general education teacher in conducting an observation.

Discussion: We decline to provide specific guidance on the working relationship between the special education teacher and the general education teacher in conducting an observation because this relationship will necessarily vary depending on how classrooms are structured and teacher responsibilities assigned. Such decisions are best made at the local level. Generally, we would expect that the child’s general education teacher would have data from routine classroom instruction and would work with the other members of the eligibility group to determine what additional data, if any, are needed to determine whether a child has an SLD. A special education teacher who is experienced in working with children with SLD, for example, might have suggestions on ways to structure a particular observation session to obtain any additional information that is needed, and may be able to assist the general education teacher in gathering the data.

Changes: None.

Comment: One commenter recommended requiring an observation for any child suspected of having a disability, not just those suspected of having an SLD.

Discussion: Observation data will generally be a part of the existing data reviewed for any child suspected of having a disability. Section 300.305(a)(1) requires the eligibility group for any child suspected of having a disability to review existing evaluation

data, including classroom-based observations and observations by teachers and related services providers. We do not believe that requiring an observation of children suspected of other disabilities is necessary, however, as identification of those other disabilities is not always as dependent on classroom performance and behavior as is identification of children with SLD.

Changes: None.

Specific Documentation for the Eligibility Determination (Proposed Written Report) (§ 300.311)

Comment: Several commenters supported the requirements for the written report, stating that they provide a useful framework for practitioners. However, several commenters stated that the requirements for the written report should be removed because they go beyond the requirements of the Act and impose additional procedural and paperwork burdens for school personnel. Several commenters stated that the report is much more detailed than the evaluation and eligibility report for children with other disabilities, and stated that this could discourage schools from evaluating children suspected of having SLD.

Discussion: Section 614(b)(4)(B) of the Act requires the public agency to provide a copy of the evaluation report and the documentation of determination of eligibility to the parents for all children evaluated under the Act. Section 300.311 specifies the content for the evaluation report for children suspected of having SLD. States and LEAs have more discretion over the specific content of an evaluation report for children suspected of having a disability under the other disability categories. Therefore, whether the SLD evaluation report is more detailed or burdensome than other evaluation reports would depend on State and local requirements. We believe that the elements of the report specified in § 300.311 provide important checks to prevent misidentification and ensure that children who actually have SLD are identified.

Changes: None.

Comment: Several commenters recommended that the written report include statements regarding the existence of a psychological processing disorder and the basis for making the determination; whether the child achieved commensurate with the child’s age and ability; whether the child achieved commensurate with the child’s age and intellectual development; whether the child achieved commensurate with the child’s peers;

and whether there are strengths and weaknesses in performance or cognitive abilities in one or more of the areas in § 300.309(a) that require special education and related services.

Discussion: We decline to change the content of the written report in the manner recommended by the commenters because the statements that commenters recommended be included in the written report are inconsistent with the eligibility requirements for children with SLD in § 300.309.

Changes: None.

Comment: One commenter recommended including an assurance that the eligibility determination was made in accordance with § 300.306(c)(1), regarding procedures for determining eligibility and placement, and § 300.8(c)(10), regarding the definition of *specific learning disability*.

Discussion: Section 300.311(b) requires each member of the eligibility group to certify in writing whether the report reflects the particular member’s conclusion about whether the child has an SLD, and if it does not reflect his or her conclusion, submit a separate statement presenting his or her conclusions. There is no need for any additional assurances.

Changes: None.

Comment: One commenter stated that including “evaluation report” in the description of the written report is confusing because it is unclear whether the evaluation report is something additional to the written report.

Discussion: The information required in the written report in § 300.311 is a part of the documentation of eligibility required in § 300.306(a)(2). Section 300.306(b) and (c) lists the requirements for eligibility determinations for all children suspected of having a disability, including children suspected of having SLD. Section 300.311 provides specific elements that must be addressed in the report for children suspected of having SLD. Two separate reports are not necessary as long as the information in § 300.311 is included in the documentation of the eligibility determination in § 300.306(a)(2). We agree that this should be clarified. Therefore, we will change the heading for § 300.311 from “Written report” to “Specific documentation for the eligibility determination” and will modify the language in § 300.311(a) accordingly.

Changes: We have changed the heading for § 300.311 and modified § 300.311(a) to clarify that the requirements in § 300.311 are in addition to the requirements for the documentation of the eligibility

determination required in § 300.306(a)(2).

Comment: Several commenters requested that the written report include the determination of the group concerning the effects of cultural factors, limited English proficiency, and environmental or economic disadvantage to be consistent with all the elements in § 300.309(a)(3).

Discussion: We agree that it is important to emphasize the importance of considering such factors in determining eligibility under SLD and will add these factors in § 300.311(a).

Changes: We have added a new paragraph (6) to § 300.311(a) to require the written report to include a statement on the effects of cultural factors, limited English proficiency, environmental, or economic disadvantage.

Comment: Several commenters requested clarification of what happens if a group member disagrees with the report and agreement is never reached. Other commenters asked whether services are delayed pending a group consensus; whether the submission of a separate statement is synonymous with a veto for eligibility; whether it matters which group member submits a separate report; and whether each group member has equal standing.

Discussion: The eligibility group should work toward consensus, but under § 300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability. Parents and school personnel are encouraged to work together in making the eligibility determination. If the parent disagrees with the public agency's determination, under § 300.503, the public agency must provide the parent with prior written notice and the parent's right to seek resolution of any disagreement through an impartial due process hearing, consistent with the requirements in § 300.503 and section 615(b)(3) of the Act.

Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal dispute resolution process. However, as stated in § 300.506(b)(1)(ii) and section 615(e)(2)(A)(ii) of the Act, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B of the Act.

Changes: None.

Individualized Education Programs

Definition of Individualized Education Program (§ 300.320)

General (§ 300.320(a))

We received numerous comments requesting that we require the IEP to include additional content that is not in the Act. Under section 614(d)(1)(A)(ii)(I) of the Act, the Department cannot interpret section 614 of the Act to require public agencies to include additional information in a child's IEP that is not explicitly required under the Act. Therefore, we generally have not included these comments in our analysis and discussion of § 300.320.

Comment: One commenter requested that § 300.320 refer to a "student with a disability" instead of a "child with a disability."

Discussion: The words "child" and "student" are used interchangeably throughout the Act. The regulations follow the statutory language whenever possible. In § 300.320, we used the term "child with a disability," consistent with section 614(d) of the Act.

Changes: None.

Comment: Many commenters recommended that the regulations include a definition of "functional" as it is used, for example, in "functional performance" in § 300.320(a)(1) and "functional goals" in § 300.320(a)(2). Some commenters suggested defining "functional" as the acquisition of essential and critical skills needed for children with disabilities to learn specific daily living, personal, social, and employment skills, or the skills needed to increase performance and independence at work, in school, in the home, in the community, for leisure time, and for postsecondary and other life long learning opportunities. One commenter recommended that the regulations include examples of functional skills and how functional skills should be measured.

Discussion: It is not necessary to include a definition of "functional" in these regulations because we believe it is a term that is generally understood to refer to skills or activities that are not considered academic or related to a child's academic achievement. Instead, "functional" is often used in the context of routine activities of everyday living. We do not believe it is necessary to include examples of functional skills in the regulations because the range of functional skills is as varied as the individual needs of children with disabilities. We also decline to include examples of how functional skills are measured because this is a decision that is best left to public agencies, based on

the needs of their children. However, it should be noted that the evaluation procedures used to measure a child's functional skills must meet the same standards as all other evaluation procedures, consistent with § 300.304(c)(1).

Changes: None.

Comment: One commenter recommended revising § 300.320(a) to state that "an IEP includes" rather than "an IEP must include" in order to reflect the specific language in section 614(d) of the Act. The commenter stated that use of the word "must" limits the contents of an IEP to the items listed in § 300.320(a).

Discussion: The word "must" is used in § 300.320(a) to clarify that an IEP is required to include the items listed in § 300.320(a). We believe it is important to retain this language in § 300.320(a). Under section 614(d)(1)(A)(ii)(I) of the Act, section 614 of the Act cannot be interpreted to require content in the IEP beyond that which is specified in the Act.

Changes: None.

Comment: One commenter requested clarifying the meaning of "appropriate" as used, for example, in § 300.320(a)(1)(ii) to refer to a child's participation in "appropriate" activities.

Discussion: The word "appropriate" in these regulations does not have a different meaning from its common usage. Generally, the word "appropriate" is used to mean "suitable" or "fitting" for a particular person, condition, occasion, or place.

Changes: None.

Comment: Some commenters recommended requiring the IEP to include a statement of the relevant social and cultural background of a child and how those factors affect the appropriate participation, performance, and placement of the child in special education.

Discussion: Section 614(d)(1)(A)(ii)(I) of the Act precludes the Department from interpreting section 614 of the Act to require public agencies to include information in a child's IEP other than what is explicitly required in the Act. Therefore, we cannot require the IEP to include the statement requested by the commenters. However, a child's social or cultural background is one of many factors that a public agency must consider in interpreting evaluation data to determine if a child is a child with a disability under § 300.8 and the educational needs of the child, consistent with § 300.306(c)(1)(i).

Changes: None.

Comment: One commenter stated that adapted physical education should be part of a child's IEP. Another