

knowledge and skills that ensure adequate representation of the child, consistent with § 300.519(d). However, if a public agency determined there was a need to specify the duties and responsibilities for surrogate parents, there is nothing in the Act or these regulations that would prohibit them from doing so.

Changes: None.

SEA Responsibility (§ 300.519(h))

Comment: Some commenters recommended requiring LEAs to report to the SEA when a child needs a surrogate parent so that the SEA can fulfill its obligation to ensure that surrogate parents are assigned within the 30-day timeframe required in § 300.519(h). Some commenters requested clarification regarding what it means for the SEA to make “reasonable efforts” to appoint surrogate parents within the 30-day timeframe. The commenters recommended that SEAs track whether LEAs or courts appoint surrogate parents in a timely manner and provide technical assistance to LEAs and courts that fail to meet the 30-day timeframe.

Some commenters stated that LEAs spend too much time determining that a surrogate parent is needed and prolong the decision that a surrogate parent is needed until the LEA is ready to appoint the surrogate parent. One commenter stated that children in residential care facilities often have an immediate need for a surrogate parent and waiting 30 days to appoint a surrogate parent could cause lasting damage to a child.

Discussion: It would be over-regulating to specify the specific “reasonable efforts” that a State must take to ensure that a surrogate parent is appointed within the 30-day timeframe required in § 300.519(h), because what is considered a “reasonable effort” will vary on a case-by-case basis. We do not believe we should require LEAs to report to the State when a child in their district needs a surrogate parent or to require SEAs to track how long it takes LEAs and courts to appoint surrogate parents because to do so would be unnecessarily burdensome. States have the discretion to determine how best to monitor the timely appointment of surrogate parents by their LEAs. States also have discretion to use funds reserved for other State-level activities to provide technical assistance to LEAs and courts that fail to meet the 30-day timeframe, as requested by the commenters.

Under their general supervisory authority, States have responsibility for ensuring that LEAs appoint surrogate

parents for children who need them, consistent with the requirements in § 300.519 and section 615(b)(2) of the Act. Therefore, if an LEA consistently fails to meet the 30-day timeframe or unnecessarily delays the appointment of a surrogate parent, the State is responsible for ensuring that measures are taken to remedy the situation.

Changes: None.

Transfer of Rights at Age of Majority (§ 300.520)

Comment: A few commenters recommended clarifying § 300.520(a)(2) to mean that all rights transfer to children who have reached the age of majority under State law.

Discussion: To change the regulation in the manner suggested by the commenters would be inconsistent with the Act. Section 615(m)(1)(D) of the Act allows, but does not require, a State to transfer all rights accorded to parents under Part B of the Act to children who are incarcerated in an adult or juvenile, State or local correctional institution when a child with a disability reaches the age of majority under State law.

Changes: None.

Comment: A few commenters stated that families are often unaware of the transfer of rights at the age of majority and recommended requiring schools to inform parents and students in writing of the transfer of rights one year prior to the day the student reaches the age of majority.

Discussion: The commenters’ concerns are addressed elsewhere in the regulations. Section 300.320(c), consistent with section 614(d)(1)(A)(VIII)(cc) of the Act, requires that, beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child’s rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority. Section 300.322(f) (proposed § 300.322(e)) requires the public agency to give a copy of the child’s IEP to the parent, and, therefore, parents are informed as well.

Changes: None.

Comment: One commenter recommended that the regulations allow parents to continue to serve as the decision-maker and to retain the rights under the Act even in situations where the child is not determined to be incompetent under State law, if the parent retains such rights. The commenter stated that a State may not have a mechanism to determine that the child does not have the ability to provide informed consent, as required

in § 300.520(b), and if a State does have such a mechanism, it may be costly and time consuming for a parent to go to court to retain such rights. The commenter stated that an agreement between the parent and student should be a simple process whereby the student and parent both sign a form stating their agreement.

Discussion: Section 300.520(b) recognizes that some States have mechanisms to determine that a child with a disability who has reached the age of majority under State law does not have the ability to provide informed consent with respect to his or her educational program, even though the child has not been determined incompetent under State law. In such States, the State must establish procedures for appointing the parent (or, if the parent is not available, another appropriate individual) to represent the educational interests of the child throughout the remainder of the child’s eligibility under Part B of the Act. Whether parents may retain the ability to make educational decisions for a child who has reached the age of majority and who can provide informed consent is a matter of State laws regarding competency. That is, the child may be able to grant the parent a power of attorney or similar grant of authority to act on the child’s behalf under applicable State law. We believe that the rights accorded individuals at the age of majority, beyond those addressed in the regulation, are properly matters for States to control.

To ensure that this provision is clear, we are making minor changes to the language. These changes are not intended to change the meaning of § 300.520(b) from the meaning in current § 300.517(b).

Changes: We have changed § 300.520(b) for clarity.

Discipline Procedures (§§ 300.530 through 300.536)

Authority of School Personnel (§ 300.530)

Case-by-Case Determination (§ 300.530(a))

Comment: Many commenters requested clarifying the phrase “consider any unique circumstances on a case-by-case basis” in § 300.530(a) and what, if any, unique circumstances should be considered. A few of these commenters requested that the regulations include specific criteria to be used when making a case-by-case determination. Other commenters suggested clarifying that the purpose of a case-by-case determination is to not allow school personnel to remove a

child to an interim alternative educational setting for violating a code of student conduct when to do so would seem unjust under the circumstances. Some commenters suggested clarifying that the purpose of a case-by-case determination is to limit, not expand, disciplinary actions for a child with a disability. One commenter expressed concern that permitting school personnel to consider any unique circumstances on a case-by-case basis when determining a change in placement may result in schools applying this provision to cases for which it was not intended, potentially resulting in a denial of FAPE. Other commenters requested clarifying that a child's disciplinary history, ability to understand consequences, and expression of remorse should be factors considered when making a case-by-case determination. A few commenters requested school personnel document any supports provided to a child with a disability prior to the child's violation of a code of student behavior when making a case-by-case determination.

Discussion: We believe that the regulations do not need to be amended to clarify "consider any unique circumstances on a case-by-case basis" because what constitutes "unique circumstances" is best determined at the local level by school personnel who know the individual child and all the facts and circumstances regarding a child's behavior. We believe it would impede efforts of school personnel responsible for making a determination as to whether a change in placement for disciplinary purposes is appropriate for a child if the Department attempted to restrict or limit the interpretation of "consider any unique circumstances on a case-by-case basis." Factors such as a child's disciplinary history, ability to understand consequences, expression of remorse, and supports provided to a child with a disability prior to the violation of a school code could be unique circumstances considered by school personnel when determining whether a disciplinary change in placement is appropriate for a child with a disability. We believe providing school personnel the flexibility to consider whether a change in placement is appropriate for a child with a disability on a case-by-case basis and to determine what unique circumstances should be considered regarding a child who violates a code of conduct, as provided for under section 615(k)(1)(A) of the Act, will limit the inappropriate removal of a child with a disability from his or her current placement to an interim alternative educational setting,

another setting, or suspension. We also decline the commenters' suggestion to regulate further about the case-by-case determination in light of the discretion granted under the Act to school personnel in making this determination.

Changes: None.

Comment: Several commenters expressed concern that § 300.530(a) could be used to justify ignoring a manifestation determination when determining whether a change in placement is appropriate for a child. These commenters stated that the authority of school personnel to consider any unique circumstances on a case-by-case basis could be used to usurp the authority of the group making the manifestation determination and the IEP Team. Some commenters recommended removing the phrase "consistent with the requirements of this section" in § 300.530(a) because it is not included in the Act and limits the individualized disciplinary options that might arise under this authority.

Discussion: Section 300.530(a), consistent with section 615(k)(1)(A) of the Act, clarifies that, on a case-by-case basis, school personnel may consider whether a change in placement, that is otherwise permitted under the disciplinary procedures, is appropriate and should occur. It does not independently authorize school personnel, on a case-by-case basis, to institute a change in placement that would be inconsistent with § 300.530(b) through (i), including the requirement in paragraph (e) of this section regarding manifestation determinations. We are revising § 300.530(a) to clarify that any consideration regarding a change in placement under paragraph (a) of this section must be consistent with all other requirements in § 300.530.

Changes: We have revised § 300.530(a) to refer to the other requirements of § 300.530.

Comment: One commenter recommended changing § 300.530(a) to include the role of the IEP Team when determining whether a change in placement is appropriate for a child with a disability who violates a code of student conduct.

Discussion: We believe § 300.530(a), which follows the language in section 615(k)(1)(A) of the Act, appropriately gives school personnel the authority to determine, on a case-by-case basis, whether a change in placement that is consistent with the other requirements of § 300.530, would be appropriate for a child with a disability who violates a code of student conduct and, therefore, we do not believe it is appropriate to define a role for the IEP Team in this paragraph. There is nothing, however,

in the Act or these regulations that would preclude school personnel from involving parents or the IEP Team in making this determination.

Changes: None.

Comment: Some commenters requested clarifying who constitute "school personnel" as used in § 300.530(a).

Discussion: We do not believe it is necessary or appropriate to clarify in these regulations the "school personnel" that may consider whether a change in placement for disciplinary reasons is appropriate for a child because such decisions are best made at the local school or district level and based on the circumstances of each disciplinary case.

Changes: None.

Comment: Several commenters requested that the regulations clarify the meaning of "violates a code of student conduct." The commenters expressed concern that school personnel could use any minor infraction to remove a child.

Discussion: Local school personnel have the necessary authority to protect the safety and well-being of all children in their school and, therefore, are in the best position to determine a code of student conduct that is uniform and fair for all children in their school. We, therefore, do not believe it is necessary or appropriate to clarify in § 300.530(a) the meaning of "violates a code of student conduct."

Changes: None.

General (§ 300.530(b))

Comment: Several commenters requested removing "consecutive" from §§ 300.530 and 300.536 because there is no reference to consecutive school days in the Act.

Discussion: We are not removing "consecutive" from §§ 300.530 through 300.536, as recommended by the commenters, because the Department has long interpreted the Act to permit children with disabilities who violate a code of student conduct to be removed from their current educational placement for not more than 10 consecutive school days at a time, and that additional removals of 10 consecutive school days or less in the same school year would be possible, as long as any removal does not constitute a change in placement. We do not believe the changes to section 615(k) of the Act justify any change in this position. Further, the Department's position is consistent with S. Rpt. No. 108-185, p. 43, which states that "a school may order a change in placement for a child who violates a code of student conduct to an appropriate interim educational setting, another

setting, or suspension, for 10 consecutive school days or less, to the same extent that it would apply such a discipline measure to a child without a disability.”

Changes: None.

Comment: One commenter recommended replacing “school days” with “calendar days” in § 300.530 because using “school days” in the regulations might create a disincentive for school personnel to find solutions and develop an appropriate IEP in a timely manner.

Discussion: Section 615(k)(1)(B) of the Act clearly states that school personnel may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate alternative education setting, other setting, or suspension, for not more than 10 “school days;” therefore, it would be inconsistent with section 615(k)(1)(B) of the Act to change “school days” to “calendar days” as suggested by the commenter.

Changes: None.

Comment: One commenter requested that § 300.530 and all sections that pertain to discipline stipulate that children with disabilities must not be disciplined more severely than non-disabled children and disciplinary measures applied to them must not be longer in duration than those applied to non-disabled students.

Discussion: We do not believe that it is necessary to change the regulations to state that children with disabilities must not be disciplined more severely than non-disabled children because § 300.530(b)(1), consistent with section 615(k)(1)(B) of the Act, is sufficiently clear that disciplinary measures are to be applied to children with disabilities to the extent they are applied to children without disabilities. Further, the manifestation determination provision in paragraph (e) of this section, and the right of a parent to request an expedited due process hearing in § 300.532, regarding the disciplinary placement or manifestation determination, are sufficient to ensure that schools implement disciplinary policies that provide for a uniform and fair way of disciplining children with disabilities in line with the discipline expectations for non-disabled students. A primary intent of Congress in revising section 615(k) of the Act was to provide for a uniform and fair way of disciplining all children—both for those children with disabilities and those children without disabilities. (S. Rpt. No. 108-185, p. 43; H. Rpt. No. 108-77, pp. 116-119).

Changes: None.

Comment: A few commenters requested clarifying the Department’s basis for the general authority of school personnel to remove a child with a disability for up to 10 consecutive school days, so as not to preclude subsequent short-term removals in the same school year. Many commenters expressed concern that permitting subsequent removals of up to 10 consecutive school days in the same school year could be misapplied and result in a denial of services. Several commenters stated that § 300.530 is not clear as to whether students who are removed for more than 10 school days in a school year must continue to receive services.

Discussion: The Department has long interpreted the Act to permit schools to remove a child with a disability who violates a code of student conduct from his or her current placement for not more than 10 consecutive school days, and that additional removals of 10 consecutive school days or less in the same school year would be possible, as long as those removals do not constitute a change in placement. The requirements in § 300.530(b) do not permit using repeated disciplinary removals of 10 school days or less as a means of avoiding the change in placement options in § 300.536. We believe it is important for purposes of school safety and order to preserve the authority that school personnel have to be able to remove a child for a discipline infraction for a short period of time, even though the child already may have been removed for more than 10 school days in that school year, as long as the pattern of removals does not itself constitute a change in placement of the child.

On the other hand, discipline must not be used as a means of disconnecting a child with a disability from education. Section 300.530(d) clarifies, in general, that the child must continue to receive educational services so that the child can continue to participate in the general curriculum (although in another setting), and progress toward meeting the goals in the child’s IEP.

Changes: None.

Comment: Several commenters recommended retaining the Department’s long term policy that an in-school suspension would not be considered a part of the days of suspension as long as the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.

Other commenters recommended including in the regulations the commentary from the March 12, 1999 **Federal Register** (64 FR 12619) regarding whether an in-school suspension or a bus suspension constitutes a day of removal.

Discussion: It has been the Department’s long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in § 300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy. Portions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals as defined in § 300.536.

Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child’s IEP. If the bus transportation were a part of the child’s IEP, a bus suspension would be treated as a suspension under § 300.530 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where services will be delivered. If the bus transportation is not a part of the child’s IEP, a bus suspension is not a suspension under § 300.530. In those cases, the child and the child’s parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should consider whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether the child’s behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child.

Because the determination as to whether an in-school suspension or bus suspension counts as a day of suspension under § 300.530 depends on the unique circumstances of each case, we do not believe that we should include these policies in our regulations.

Changes: None.

Services (§ 300.530(d))

Comment: Many commenters expressed concern that the change from “continue to progress in the general curriculum” in current § 300.522(b)(1) to “continue to participate in the

general education curriculum" in § 300.530(d)(1)(i) is a lower standard. They requested that we use the language from current § 300.522(b)(1).

Discussion: Section 615(k)(1)(D)(i) of the Act and § 300.530(d)(1) provide that a child must continue to receive educational services so as to enable the child "to continue to participate in the general educational curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." We believe that using the statutory language in the regulation is appropriate because the Act specifically uses different language to describe a child's relationship to the general education curriculum in periods of removal for disciplinary reasons than for services under the child's regular IEP in section 614(d)(1)(A)(i)(IV) of the Act. Based on this difference, we decline to make the change requested.

We caution that we do not interpret "participate" to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom as these classes generally are taught using a hands-on component or specialized equipment or facilities.

Changes: None.

Comment: Many commenters recommended § 300.530(d) clarify that children with disabilities who violate a code of student conduct and are removed from their current placement to an interim alternative educational setting or another setting, or are suspended, are entitled to FAPE in accordance with section 612(a)(1) of the Act. Several commenters recommended revising § 300.530(d)(1)(i) to explicitly state that the educational services provided to a child removed for disciplinary reasons must include all the special education services, related services, supplementary aids and services, and accommodations required by the child's IEP to ensure the child receives FAPE. Many commenters requested that the regulations clarify that LEAs must continue to implement a child's IEP as written, including related services, while the child is in an interim alternative educational setting.

Discussion: Section 612(a)(1)(A) of the Act provides that FAPE must be made available to all children with disabilities ages 3 through 21, inclusive, including children with disabilities who have been suspended or expelled from school. Further, section 615(k)(1)(D)(i)

of the Act provides that if school personnel seek to order a change in placement of a child with a disability who violates a code of student conduct, the child must continue to receive education services (as provided in section 612(a)(1) of the Act) so as to enable him or her to continue to participate in the general curriculum, although in another setting (which includes an interim alternative education setting), and to progress toward meeting the goals set out in the child's IEP. In other words, while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.

Section 300.530(d) clarifies that decisions regarding the extent to which services would need to be provided and the amount of services that would be necessary to enable a child with a disability to appropriately participate in the general curriculum and progress toward achieving the goals on the child's IEP may be different if the child is removed from his or her regular placement for a short period of time. For example, a child who is removed for a short period of time and who is performing at grade level may not need the same kind and amount of services to meet this standard as a child who is removed from his or her regular placement for 45 days under § 300.530(g) or § 300.532 and not performing at grade level.

We believe it is reasonable for school personnel (if the child is to be removed for more than 10 school days in the same school year and not considered a change in placement) and the IEP Team (if the child's removal is a change in placement under § 300.536 and not a manifestation of the child's disability or a removal pursuant to § 300.530(g)) to make informed educational decisions about the extent to which services must be provided for a child with a disability

placed in an interim alternative educational setting, another setting, or suspension to enable the child to participate in the general education curriculum and make progress toward the goals of the child's IEP.

As stated above, we read the Act as modifying the concept of FAPE in circumstances where a child is removed from his or her current placement for disciplinary reasons. Specifically, we interpret section 615(k)(1)(D)(i) of the Act to require that the special education and related services that are necessary to enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the child's IEP, must be provided at public expense, under public supervision and direction, and, to the extent appropriate to the circumstances, be provided in conformity with the child's IEP. We, therefore, believe § 300.530(d)(1) should be amended to be consistent with the Act by adding the reference to the FAPE requirements in § 300.101(a), and to ensure it is understood that the educational services provided to a child removed for disciplinary reasons are consistent with the FAPE requirements in section 612(a)(1) of the Act.

We are making additional technical changes to paragraph (d)(1) to eliminate cross-references, where appropriate, and to provide greater clarity that children with disabilities removed for disciplinary reasons pursuant to paragraphs (c) and (g) of this section must continue to receive services and receive, as appropriate, a functional behavior assessment and behavior intervention services and modifications. We are, therefore, removing from paragraph (d)(1) of this section the phrase "except as provided in paragraphs (d)(3) and (d)(4)" and removing the reference to paragraph (b) of this section, which references the general authority for removing a child who violates a code of student conduct, as it is unnecessary.

Changes: Section 300.530(d)(1)(i) has been amended to be consistent with section 615(k)(1)(D)(i) of the Act by cross-referencing the FAPE requirement in § 300.101(a). We have also revised paragraph (d)(1) by removing the reference to the exceptions for paragraph (d)(3) and (d)(4) of this section and removing the reference to paragraph (b) of this section.

Comment: None.

Discussion: In light of the changes made to proposed paragraph (d)(1) of this section by removing the phrase regarding the exceptions for paragraph (d)(3) and (d)(4) of this section, it is necessary to revise § 300.530(d)(2) to

accurately reflect when services may be provided in an interim alternative educational setting.

Changes: We have modified § 300.530(d)(2) to clarify that services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

Comment: Several commenters stated that § 300.530(d)(3) is not clear and requested clarification as to whether children who are removed for more than 10 school days in the same school year must continue to receive services. One commenter expressed concern that § 300.530(d)(3), which clarifies that a public agency is only required to provide services to a child with a disability who is removed from his or her current placement for 10 school days or less in that school year if it provides services to a child without disabilities who is similarly removed, is unsupported by the Act and substantially undermines the rights afforded to children with disabilities removed from their current placement for disciplinary reasons. The commenter wanted this provision removed from the regulations. Other commenters requested clarifying the authority of school personnel with respect to the procedures in § 300.530(d)(3).

Discussion: The Act and the regulations recognize that school officials need some reasonable degree of flexibility when disciplining children with disabilities who violate a code of student conduct. Interrupting a child's participation in education for up to 10 school days over the course of a school year, when necessary and appropriate to the circumstances, does not impose an unreasonable limitation on a child with a disability's right to FAPE. Section 300.530(d)(3) is consistent with section 612(a)(1)(A) of the Act and current § 300.121(d) and reflects the Department's longstanding position that public agencies need not provide services to a child with a disability removed for 10 school days or less in a school year, as long as the public agency does not provide educational services to nondisabled children removed for the same amount of time. This position was affirmed by the Supreme Court in Honig v. Doe, 484 U.S. 305 (1988). We are amending § 300.530(d)(3) to replace "need not" with "is only required to" for greater clarity. We also are amending paragraph (d)(3) of this section to write it in active voice and in the positive and removed the cross-reference to the general provision in paragraph (b) of this section, as it is not necessary.

Changes: Technical changes have been made to § 300.530(d)(3) to remove

the cross-reference to paragraph (b) of this section. We also amended this paragraph as stated above to provide greater clarity.

Comment: Many commenters wanted us to remove the words "if any" from § 300.530(d)(4). Several commenters thought that § 300.530(d)(4), which allows school personnel to determine the extent to which services are needed, "if any," gives public agencies the authority to deny special education services to students who have been suspended or expelled for more than 10 school days in a school year. Other commenters also thought that including the phrase "if any" implies that special education services are not mandatory for a child who has been removed for 10 or more non-consecutive days and do not constitute a change in placement.

Discussion: We believe § 300.530(d)(4) ensures that children with disabilities removed for brief periods of time receive appropriate services, while preserving the flexibility of school personnel to move quickly to remove a child when needed and determine how best to address the child's needs. Paragraph (d)(4) of this section is not intended to imply that a public agency may deny educational services to children with disabilities who have been suspended or expelled for more than 10 school days in a school year, nor is § 300.530(d)(4) intended to always require the provision of services when a child is removed from school for just a few days in a school year. We believe the extent to which educational services need to be provided and the type of instruction to be provided would depend on the length of the removal, the extent to which the child has been removed previously, and the child's needs and educational goals. For example, a child with a disability who is removed for only a few days and is performing near grade level would not likely need the same level of educational services as a child with a disability who has significant learning difficulties and is performing well below grade level. The Act is clear that the public agency must provide services to the extent necessary to enable the child to appropriately participate in the general curriculum and appropriately advance toward achieving the goals in the child's IEP.

We recognize the concern of the commenters that the phrase "if any" could imply that school personnel need not provide educational services to these children. Therefore, we are removing the phrase "if any" from paragraph (d)(4). For clarity, we are replacing the cross-reference to § 300.530(d)(1) with the language from

§ 300.530(d)(1)(i) and restructure the paragraph.

Changes: The phrase "if any" has been removed from § 300.530(d)(4). For clarity, we have removed a cross reference in § 300.530(d)(4) and replaced it with the language from § 300.530(d)(1)(i) and made technical edits to restructure the paragraph.

Comment: One commenter questioned whether the ability of school personnel to remove a child from his or her current placement for disciplinary reasons means, if a child's current placement is a special education classroom setting, school personnel may remove the child from special education services.

Discussion: If the child's current placement is a special education setting, the child could be removed from the special education setting to another setting for disciplinary reasons. Similarly, if the child with a disability who violated a school code of conduct receives services in a regular classroom, the child could be removed to an appropriate interim alternative educational setting, another setting, or suspension. Section 300.530(b), consistent with section 615(k)(1)(B) of the Act, provides that school personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension. However, § 300.530(d) is clear that the child who is removed for more than 10 school days in the same school year must continue to receive educational services, to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his or her IEP.

Changes: None.

Comment: One commenter requested clarifying how many days a child with a disability may be placed in an interim alternative educational setting before the public agency must provide services.

Discussion: School personnel may remove a child with a disability from his or her current placement to an interim alternative educational setting, another setting, or suspension for up to 10 school days in the same school year without providing educational services. Beginning, however, on the eleventh cumulative day in a school year that a child with a disability is removed from the child's current placement, and for any subsequent removals, educational services must be provided to the extent required in § 300.530(d), while the removal continues.

Changes: None.

Comment: Numerous commenters recommended revising § 300.530(d)(4) to require that the parent be included in the consultation school personnel must have with at least one of the child's teachers to determine the extent to which services are needed for a child with a disability who has been removed from his or her current placement for more than 10 school days (if the current removal is for not more than 10 consecutive school days and is not a change in placement under § 300.536).

Discussion: The provisions in § 300.530(d)(4) only address the provision of services in those situations where a removal of a child with a disability from the child's current placement is for a short period of time and the removal does not constitute a change in placement. In many instances, these short-term removals are for one or two days. We believe that, in these instances, it is reasonable for appropriate school personnel, in consultation with at least one of the teachers of a child, to determine how best to address the child's needs during these relatively brief periods of removal. We believe it would place an unreasonable burden on school personnel to require that the parent be involved in making the determination of the extent to which services are needed for a child removed for such a short period of time. We do not believe requiring school personnel to make these decisions under these circumstances imposes an unreasonable limitation on a child with a disability's right to FAPE. For these reasons, we do not believe § 300.530(d)(4) should be revised to require that the parent be included in the consultation. However, there is nothing in these regulations that would prohibit school personnel, if they choose to do so, from including parents in the consultation.

Changes: None.

Comment: One commenter requested that § 300.530(d)(4) be modified to include the requirement in current § 300.121(d)(3)(i) that school personnel consult with the child's special education teacher as opposed to any of the child's teachers. The commenter stated that it makes sense that the special education teacher be considered the first choice for this role given that the special education teacher generally has the most knowledge of the child and the student's educational needs.

Discussion: The determination of which teacher school personnel should consult should be based on the facts and circumstances of each case, the needs of the child and the expertise of the child's teachers. We agree that, in many cases,

the special education teacher may be the most appropriate teacher with whom school personnel should consult. This, however, is not always the case. In light of the short-term nature of the removals under paragraph (d)(4) of the section and the need for school personnel to make quick decisions regarding services, we believe local school personnel need broad flexibility in making such decisions and are in the best position to determine the appropriate teacher with whom to consult. For these reasons, we are not amending § 300.530(d)(4) to require consultation with the child's special education teacher as in current § 300.121(d)(3)(i). There is nothing, however, in the Act or these regulations that would prohibit school personnel from consulting with one of the child's special education teachers.

Changes: None.

Comment: Several commenters recommended the regulations clarify that a child placed in an appropriate interim alternative educational setting will participate in all State and districtwide assessments.

Discussion: It is not necessary to include the language recommended by the commenters as section 612(a)(16)(A) of the Act is clear that the State must ensure that all children with disabilities are included in all general State and districtwide assessment programs, including assessments described in section 1111 of the ESEA, 20 U.S.C. 6311, with appropriate accommodations and alternate assessments, if necessary, and as indicated in each child's respective IEP. This requirement applies to children with disabilities who have been placed in an appropriate interim alternative education setting or another setting, or who are suspended.

Changes: None.

Comment: One commenter requested specifying in § 300.530(d) that LEAs must include children with disabilities placed in interim alternative educational settings in their determination of AYP. The writer expressed concern that LEAs may try to avoid accountability by placing children with disabilities in interim alternative educational settings.

Discussion: The Act does not address the issue of AYP. However, title 1 of the ESEA is clear that children who are enrolled within a district for a full academic year must be included in the AYP reports of an LEA. (20 U.S.C. 7325) Title 1 of the ESEA does not provide an exception for children with disabilities placed in interim alternative educational settings. In addition, State agencies, LEAs, and schools must assess all children, regardless of whether a

child is to be included for reporting or accountability purposes and regardless of the amount of time the child has been enrolled in the State agency, LEA, or school. The only public school children with disabilities enrolled in public settings who are exempted from participation in State and districtwide assessment programs under the Act are children with disabilities convicted as adults under State law and incarcerated in adult prisons (§ 300.324(d)(1)(i)). As AYP is addressed under title 1 of the ESEA, we do not need to regulate on this matter.

Changes: None.

Comment: A few commenters stated that § 300.530(d)(5) is inconsistent with section 615(k)(1)(E) of the Act, which requires that within 10 school days of any decision to change a child's placement because of a violation of a code of conduct, the LEA, parent, and relevant members of the IEP Team (as determined by the parent and the LEA) shall consider whether the conduct was caused by or had a direct and substantial relationship to the disability or whether the conduct was caused by the failure of the LEA to implement the IEP. These commenters stated that § 300.530(d)(5) gives the IEP Team control over determinations regarding services and placement, regardless of manifestation, and does not give control to the LEA, parent and relevant members of the IEP Team as provided in the Act.

Discussion: We disagree with the commenters that § 300.530(d)(5) is inconsistent with section 615(k)(1)(E) of the Act because paragraph (d)(5) of this section describes who is responsible for determining the appropriate services for a child with a disability whose disciplinary removal is a change in placement under § 300.536, while section 615(k)(1)(E) of the Act describes who is responsible for making a manifestation determination. These are very different and distinct provisions. Further, section 615(k) of the Act does not specifically address who is responsible for determining the educational services to be provided a child with a disability whose disciplinary removal is a change in placement. Section 615(k)(1)(E) of the Act, consistent with § 300.530(e), provides that, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the IEP Team (as determined by the parent and the LEA) shall determine whether the child's conduct was a manifestation of the child's disability. We believe that in

instances where a child's disciplinary removal constitutes a change in placement, and given the length of time of such removals, the IEP Team is the appropriate entity to determine the educational services necessary to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. Section 300.530(d)(5) is clear that whenever a removal constitutes a change in placement under § 300.536, the child's IEP Team determines the services the child will be provided.

Changes: None.

Comment: One commenter stated that the phrase "location in which services will be provided" as used in § 300.530(d)(5) is not included in the Act. The commenter pointed out that section 615(k)(2) of the Act refers to the IEP Team's "determination of setting." The commenter stated that using the statutory language will make it less likely the IEP Team will interpret the regulations to require the IEP Team to determine the specific location of the services to be provided to a child removed from his or her current placement to an interim alternative educational setting. Several other commenters stated that the use of the phrase "location in which services will be provided" in paragraph (d)(5) of this section is confusing and recommended limiting the IEP Team responsibility to determining the setting (as required under section 615(k)(2) of the Act) and the services and not the specific location.

Discussion: Section 615(k)(2) of the Act provides that the IEP Team is responsible for determining the interim alternative educational setting for a child with a disability for certain removals that are a change of placement. In § 300.531, for reasons described elsewhere in this preamble, we interpret this obligation to apply to all removals that constitute a change of placement for disciplinary reasons, as defined in § 300.536. We interpret "setting" in this context to be the environment in which the child will receive services, such as an alternative school, alternative classroom, or home setting. In many instances, the location and the setting or environment in which the child will receive services are the same. It is possible, however, that a school may have available more than one location that meets the criteria of the setting chosen by the IEP Team. For example, an LEA may have available two alternative schools that meet the criteria of the interim alternative educational setting chosen by the IEP Team. In those

cases school personnel would be able to assign the child to either of these locations, if the IEP Team has not specified a particular one.

We are persuaded by the commenters and, therefore, are removing the reference to "location in which services will be provided" in paragraphs (d)(4) and (d)(5) of this section. We are also removing the phrase "is for more than 10 consecutive school days or" from paragraphs (d)(5) of this section because it is unnecessary since such a removal is a change in placement under § 300.536.

Changes: We have amended paragraphs (d)(4) and (d)(5) of this section by removing the phrase "location in which services will be provided." We also have amended paragraph (d)(5) of this section by removing the phrase "is for more than 10 consecutive school days or."

Manifestation Determination (§ 300.530(e))

Comment: Several commenters requested including in § 300.530(e) the following measures when determining the relationship between a behavior and a disability: (1) whether the child's disability impaired the ability of the child to control the behavior; (2) whether the child understood the impact and consequences of the behavior; (3) whether the placement was appropriate; or (4) whether the IEP, the identified services, and their implementation were appropriate.

Another commenter recommended clarifying that when a determination is made that a child's behavior is not a manifestation of his or her disability, if the group does not consider whether the IEP and placement were appropriate, the parents have the right to file a complaint.

Discussion: The language requested by the commenters was included in section 615(k)(4) of the Individuals with Disabilities Education Act Amendments of 1997, Public Law 105–17. Congress later removed the requirements mentioned by the commenters for conducting a review to determine whether a child's behavior was a manifestation of the child's disability and it would be beyond the authority of the Department to include the language in these regulations. Section 615(k)(1)(E) of the Act now requires the LEA, the parent, and relevant members of the IEP Team (as determined by the parent and the LEA), to determine whether a child's behavior was a manifestation of the child's disability based on two inquiries: (1) was the conduct caused by, or did it have a direct and substantial relationship to the child's

disability; or (2) was the conduct the direct result of the LEA's failure to implement the child's IEP?

It is not necessary to clarify that a parent has the right to file a complaint, as the commenters suggest. Section 300.532, consistent with section 615(k)(3) of the Act, provides that a parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), may request an expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed, and the determination by the hearing officer must be rendered within 10 school days after the hearing.

Changes: None.

Comment: Several commenters recommended that the observations used for the manifestation determination review be from both teachers and related service personnel. Some commenters requested § 300.530(e) clarify that the phrase "all relevant information in the child's file" includes a review of the child's IEP, placement appropriateness, special education services, supplementary aids and services, and if the behavior intervention strategies were appropriate and consistent with the IEP. One commenter recommended documents and discussions at IEP Team meetings referencing the child's behavior should be maintained and considered at a manifestation determination.

Discussion: Section 300.530(e)(1), which tracks section 615(k)(1)(E) of the Act, requires a review of all relevant information in the child's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents. We believe this clearly conveys that the list of relevant information in paragraph (e)(1) of the section is not exhaustive and may include other relevant information in the child's file, such as the information mentioned by the commenters. It would be impractical to list all the possible relevant information that may be in a child's file and, therefore, it is not necessary to further regulate on this matter.

Changes: None.

Comment: Several commenters requested clarifying that a manifestation determination under § 300.530(e) would not need to be conducted for removals of not more than 10 consecutive days or for removals that otherwise do not constitute a change in placement.

Discussion: By including an introductory phrase to proposed § 300.530(e)(1) we intended to clarify

that a manifestation determination need not be conducted for removals that will be for not more than 10 consecutive school days and will not constitute a change in placement under § 300.536. In other words, manifestation determinations are limited to removals that constitute a change in placement under § 300.536. Upon further consideration, we believe the phrase “except for removals that will be for not more than 10 consecutive school days and will not constitute a change in placement under § 300.536” is unnecessary and confusing. We believe limiting § 300.530(e)(1) to the statutory language in section 615(k)(1)(E)(i) of the Act makes it sufficiently clear that within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct a manifestation determination must be conducted and, therefore, we are removing the introductory phrase as it is unnecessary.

Changes: We have revised § 300.530(e) by removing the introductory phrase “except for removals that will be for not more than 10 consecutive school days and will not constitute a change in placement under § 300.536.”

Comment: A few commenters expressed concern that the manifestation determination is too narrow and does not account for the spectrum of inter-related and individual challenges associated with many disabilities.

Discussion: We believe the criteria in § 300.530(e)(1) that the LEA, parent, and relevant members of the IEP Team must determine whether a child’s conduct is a manifestation of the child’s disability is broad and flexible, and would include such factors as the inter-related and individual challenges associated with many disabilities. The revised manifestation provisions in section 615 of the Act provide a simplified, common sense manifestation determination process that could be used by school personnel. The basis for this change is provided in note 237–245 of the Conf. Rpt., pp. 224–225, which states, “the Conferees intend to assure that the manifestation determination is done carefully and thoroughly with consideration of any rare or extraordinary circumstances presented.” The Conferees further intended that “if a change in placement is proposed, the manifestation determination will analyze the child’s behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability.” No further clarification is necessary.

Changes: None.

Comment: A few commenters recommended that the manifestation determination in § 300.530(e) include a case-by-case analysis of the disability of the child involved compared with the child’s conduct as many children with disabilities display behaviors that can be disruptive to a classroom, but these behaviors should not be considered a current disciplinary issue when the behaviors are characteristic of the disability.

Discussion: We believe that it is not necessary to modify the regulations to include a requirement that a manifestation determination include a case-by-case analysis of the disability of the child because section 615(k)(1)(E) of the Act and § 300.530(e) are sufficiently clear that decisions regarding the manifestation determination must be made on a case-by-case basis. We believe the Act recognizes that a child with a disability may display disruptive behaviors characteristic of the child’s disability and the child should not be punished for behaviors that are a result of the child’s disability. The intent of Congress in developing section 615(k)(1)(E) was that, in determining that a child’s conduct was a manifestation of his or her disability, it must be determined that “the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability, and was not an attenuated association, such as low self-esteem, to the child’s disability.” (Note 237–245 of the Conf. Rpt., p. 225). The regulation, which follows the statutory language, thus accurately reflects the manner in which the Act describes the behavior of the child is to be considered in the manifestation determination.

Further, section 615(k)(1)(F) of the Act and § 300.530(f) provide that if the LEA, the parent, and relevant members of the IEP Team make the determination that the behavior resulting in the removal was a manifestation of the child’s disability, the following actions must be implemented: (1) the IEP Team must conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change in placement occurred, and implement a behavioral intervention plan for the child; (2) or if a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and (3) return the child to the placement from which the child was removed (other than a 45-day placement under § 300.530(g)), unless the parent and the LEA agree to a change in

placement as part of the modification of the behavioral intervention plan.

Changes: None.

Comment: One commenter recommended clarifying that when a determination is made that a child’s behavior is not a manifestation of his or her disability, if the group does not consider whether the placement was appropriate, the parents have the right to file a complaint.

Discussion: The Act no longer requires that the appropriateness of the child’s IEP and placement be considered when making a manifestation determination. The Act now requires that the LEA, the parent, and relevant members of the IEP Team must, when making a manifestation determination, determine whether (1) the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or (2) the conduct in question was the direct result of the LEA’s failure to implement the IEP. However, § 300.532, consistent with section 615(k)(3) of the Act, does provide that a parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), may request an expedited due process hearing, which must occur within 20 school days of the date the hearing is requested and must result in a determination within 10 school days after the hearing.

Changes: None.

Comment: Several commenters requested clarification on the potential range of consequences when a disciplinary change in placement has occurred for a child with a disability and the child’s behavior is determined to be a manifestation of his or her disability.

Discussion: Under section 615(k)(1)(F) of the Act and section 504 of the Rehabilitation Act of 1973, if the behavior that resulted in the change of placement is determined to be a manifestation of a child’s disability, the child must be returned to the placement from which the child was removed (other than a 45-day placement under §§ 300.530(g), 300.532(b)(2), and 300.533), unless the public agency and the parents otherwise agree to a change of placement.

When the behavior is related to the child’s disability, proper development of the child’s IEP should include development of strategies, including positive behavioral interventions, supports, and other strategies to address that behavior, consistent with § 300.324(a)(2)(i) and (a)(3)(i). When the behavior is determined to be a

manifestation of a child's disability but has not previously been addressed in the child's IEP, the IEP Team must review and revise the child's IEP so that the child will receive services appropriate to his or her needs. Implementation of the behavioral strategies identified in a child's IEP, including strategies designed to correct behavior by imposing disciplinary consequences, is appropriate under the Act and section 504, even if the behavior is a manifestation of the child's disability. A change in placement that is appropriate and consistent with the child's needs may be implemented subject to the parent's procedural safeguards regarding prior notice (§ 300.503), mediation (§ 300.506), due process (§§ 300.507 through 300.517) and pendency (§ 300.518).

Changes: None.

Comment: Many commenters requested modifying § 300.530(e) to require that, if it is determined that the child's behavior was a direct result of the LEA's failure to implement the child's IEP, it must take immediate steps to remedy those deficiencies.

Discussion: If the LEA, the parent, and the relevant members of the IEP Team determine that the child's conduct is a manifestation of the child's disability because the child's behavior was the direct result of the LEA's failure to implement the IEP, the LEA has an affirmative obligation to take immediate steps to ensure that all services set forth in the child's IEP are provided, consistent with the child's needs as identified in the IEP. We agree with the commenters that these regulations should require that, if it is determined that the child's behavior was a direct result of the LEA's failure to implement the child's IEP, the LEA must take immediate steps to remedy those deficiencies. Therefore, we are adding a new paragraph (e)(3) to this section, consistent with this obligation.

Changes: We have added a new paragraph (3) to § 300.532(e) which provides that, if the LEA, the parent, and relevant members of the child's IEP Team determine that the child's behavior was a direct result of the LEA's failure to implement the child's IEP, the LEA must take immediate steps to remedy those deficiencies.

Comment: A few commenters expressed concern that the absence of short-term objectives in the IEP hampers the ability to determine if the child's conduct was the direct result of the LEA's failure to implement the IEP.

Discussion: We disagree with the commenters that the absence of short-term objectives in the IEP will hinder the ability of the LEA, the parent, and

relevant members of the IEP Team to determine whether a child's conduct is the direct result of the LEA's failure to implement the child's IEP. The group members making the manifestation determination are required to review not only the IEP of the child, but all relevant information in the child's folder, any teacher observations of the child, and any relevant information provided by the parents. We believe the information available to the group making the manifestation determination, when reviewed in its totality, is sufficient to make a manifestation determination.

Changes: None.

Determination That Behavior Was a Manifestation (§ 300.530(f))

Comment: Some commenters recommended requiring that, even if a child's conduct is determined not to be a manifestation of the child's disability pursuant to § 300.530(e), the IEP Team, in determining how the child will be provided services, must, at a minimum, consider whether to conduct a functional behavioral assessment and implement a behavior plan. One commenter requested that the requirement in § 300.530(f) for conducting a functional behavioral assessment be removed from this section and added to §§ 300.320 through 300.324, regarding IEPs.

Discussion: Section 300.530(f), consistent with section 615(k)(1)(F) of the Act, requires that a child with a disability receive, as appropriate, a functional behavioral assessment, and behavioral intervention plan and modifications, that are designed to address the child's behavior if the child's behavior that gave rise to the removal is a manifestation of the child's disability. As provided in § 300.530(e), a manifestation determination is only required for disciplinary removals that constitute a change of placement under § 300.536. However, we must recognize that Congress specifically removed from the Act a requirement to conduct a functional behavioral assessment or review and modify an existing behavioral intervention plan for all children within 10 days of a disciplinary removal, regardless of whether the behavior was a manifestation or not.

We also recognize, though, that as a matter of practice, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement. In fact, the Act emphasizes a proactive approach to behaviors that interfere

with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP Team consider, as appropriate, and address in the child's IEP, "the use of positive behavioral interventions, and other strategies to address the behavior." (See section 614(d)(3)(B)(i) of the Act). This provision should ensure that children who need behavior intervention plans to succeed in school receive them. For these reasons, we decline to make the changes suggested.

Changes: None.

Comment: Many commenters requested requiring that a functional behavioral assessment older than one year be considered invalid in a manifestation determination review. One commenter suggested that the regulations include language that requires the agency to conduct a new functional behavioral assessment when the child's most recent functional assessment is not current.

Discussion: We believe it would be inappropriate to specify through regulation what constitutes a "current" or "valid" functional behavioral assessment as such decisions are best left to the LEA, the parent, and relevant members of the IEP Team (as determined by the LEA and the parent) who, pursuant to section 615(k)(1)(E) of the Act, are responsible for making the manifestation determination. As a policy matter, a previously conducted functional behavioral assessment that is valid and relevant should be included in the information reviewed by the LEA, the parent, and relevant members of the IEP Team when making a manifestation determination.

Changes: None.

Special Circumstances (§ 300.530(g))

Comment: Some commenters recommended requiring that an appropriate permanent placement be in effect at the beginning of the next school year to ensure that a child is not held in the 45-school day interim alternative educational setting for a period that extends into the new academic year.

Discussion: Interim alternative educational settings under section 615(k)(1)(G) of the Act and § 300.530(g) are limited to not more than 45 school days, unless extended by the hearing officer under § 300.532(b)(3) because returning the child to his or her original placement would be substantially likely to cause injury to him or herself or to others. The 45-school day placement in an interim alternative educational setting, unless extended by § 300.532(b)(3), is a maximum time limit for a change in placement to an

appropriate interim alternative educational setting. We decline to change the regulations as suggested by the commenters based on the school year ending before a child completes the ordered school day placement in an interim alternative educational setting (in this example 45 school days). There is nothing in the Act or these regulations that precludes the public agency from requiring the child to fulfill the remainder of the placement when a new school year begins as agency personnel have this flexibility under section 615(k)(1)(G) of the Act.

Changes: None.

Comment: Some commenters requested that the regulations clarify that a child's home is not a suitable placement setting for an interim alternative educational setting for a child with a disability removed pursuant to § 300.530 for disciplinary reasons.

Discussion: While the Act does not specify the alternative setting in which educational services must be provided, the Act is clear that the determination of an appropriate alternative educational setting must be selected "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." (See section 615(k)(1)(D)(i) of the Act). Further, section 615(k)(2) of the Act provides that the interim alternative educational setting must be determined by the IEP Team. What constitutes an appropriate interim alternative educational setting will depend on the circumstances of each individual case.

Whether a child's home would be an appropriate interim alternative educational setting under § 300.530 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from his or her regular placement, and the child's individual needs and educational goals. In general, though, because removals under §§ 300.530(g) and 300.532 will be for periods of time up to 45 days, care must be taken to ensure that if home instruction is provided for a child removed under § 300.530, the services that are provided will satisfy the requirements for services for a removal under § 300.530(d) and section 615(k)(1)(D) of the Act. We do not believe, however, that it is appropriate to include in the regulations that a child's home is not a suitable placement setting for an interim alternative educational setting as suggested by the commenter. As stated above, the Act

gives the IEP Team the responsibility of determining the alternative setting and we believe the IEP Team must have the flexibility to make the setting determination based on the circumstances and the child's individual needs.

Changes: None.

Comment: One commenter expressed concern that the high standard of "serious bodily injury" is unreasonable. The commenter states that school personnel should be given discretion to remove children for a 45 school-day period who have committed assault or otherwise acted dangerously. The commenter stated that the standard for having inflicted "serious bodily injury" would seldom be met without a child being incarcerated. Another commenter stated that the statutory definition of *serious bodily injury* is too narrow to have much practical value for school purposes since most injuries on school grounds are not related to the use of dangerous weapons. This commenter recommended expanding the definition to include more typical injuries that occur on school property, and not limiting the definition by the language in section 1365(3)(h) of title 18, United States Code.

Discussion: Section 300.530(g)(3) incorporates the new provision in section 615(k)(1)(G)(iii) of the Act that permits school personnel to remove a child to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is a manifestation of the child's disability if the child has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function. Section 615(k)(7)(D) of the Act is clear that the term *serious bodily injury* has the meaning given the term in section 1365(3)(h) of title 18, United States Code. That provision defines *serious bodily injury* as bodily injury, which involves substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Nothing in the Act permits the Department to expand the definition of *serious bodily injury*, as used in § 300.530(g), to include a bodily injury beyond that included in 18 U.S.C. 1365(3)(h). Therefore, we are not amending § 300.530(g)(3).

Changes: None.

Comment: One commenter recommended clarifying the distinction between the removal of a child to an interim alternative educational setting by school personnel for inflicting "serious bodily injury upon another

person" (§ 300.530(g)(3)) and the removal of the child by a hearing officer because maintaining the child's current placement is "substantially likely to result in injury to the child or others" (§ 300.532(b)(2)(ii)).

Discussion: The provision in § 300.530(g)(3), consistent with section 615(k)(1)(G)(iii) of the Act, indicates that school personnel have the discretion to remove a child with a disability who inflicts "serious bodily injury upon another person" from his or her current placement to an interim alternative educational setting for up to 45 school days (defined in 18 U.S.C. 1365(3)(h) as bodily injury), which involve substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Section 300.530(g)(3) applies to school personnel's unilateral removal of a child from the current educational placement. School officials must seek permission from the hearing officer under § 300.532 to order a change of placement of the child to an appropriate interim alternative educational setting. Hearing officers have the authority under § 300.532 to exercise their judgments after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or others. Given that the phrase "serious bodily injury," as used in § 300.530(g), has a definitive meaning and the meaning of "substantially likely to result in injury to the child or others" is left to the judgment of the hearing officer, we do not believe further clarification is needed.

Changes: None.

Notification (§ 300.530(h))

Comment: Some commenters recommended clarifying that parental notification in § 300.530(h) must take place following disciplinary action proposing a removal of a child for more than 10 consecutive days or when there is a disciplinary change in placement. One commenter suggested that, to be consistent with the Act, the parental notification requirement should only pertain to disciplinary decisions made pursuant to § 300.530(g).

Discussion: We agree with the commenters that the meaning of the term "disciplinary action" in section 615(k)(1)(H) of the Act, regarding parental notification, is unclear. We believe that, on the one hand, it would be unreasonably burdensome to read the term as applying to every imposition of discipline, including those that might

not result in the child being removed from the regular educational environment at all. On the other hand, we think the suggestion that the term be applied only to removals under § 300.530(g) would inappropriately narrow the application of the notification provision and result in parents not being notified for removals that could reasonably have a significant impact on a child's education, such as a removal for 10 school days or more. Therefore, we agree with those commenters who suggested that paragraph (h) of this section should be amended to clarify that the requirement for parental notification applies to a removal that constitutes a change in placement of a child with a disability for a violation of a code of student conduct.

Changes: Section 300.530(h) has been amended to clarify that on the date on which the decision is made to make a removal that constitutes a change in the placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504.

Comment: One commenter stated that the requirement in § 300.530(h), which requires the LEA to provide the parents the procedural safeguards notice described in § 300.504 whenever the decision to take disciplinary action is made, is inconsistent with the Act and recommended revising § 300.530(h) to be consistent with section 615(k)(1)(H) of the Act. The commenter stated that section 615(k)(1)(H) of the Act requires the LEA to "notify" the parents of the decision to take disciplinary action and of all the procedural safeguards. The commenter stated that the statutory language implies that the LEA simply needs to remind (notify) the parent of the procedural safeguards given to them for the school year as required in section 615(d)(1)(A)(i) through (iii) of the Act, not to "provide" the parents with the procedural safeguards notice as required in § 300.530(h).

Discussion: The commenter is correct that section 615(k)(1)(H) of the Act does not specifically state that the LEA must "provide a copy" of the procedural safeguards notice but, that the LEA must "notify" the parent of the LEA's decision to take disciplinary action and of all procedural safeguards accorded under section 615 of the Act. We believe, however, that implicit in the Act is a much higher standard for "notify" than "remind" parents as suggested by the commenter. Further, in other places where "notify" is used in the Act, it is clear the meaning of the

term is "to provide notice" (for example, section 615(c)(2)(A) and (D) of the Act). We believe § 300.530(h), which requires the LEA to notify the parents of its decision to change the placement of their child with a disability because of a violation of a code of student conduct and provide the parents the procedural safeguards notice described in § 300.504, is reasonable and consistent with the Act.

Changes: None.

Definitions (§ 300.530(i))

Comment: Many commenters stated that the definitions for *serious bodily injury*, *controlled substance*, and *weapon* are not readily available to school personnel and parents and requested that the full definitions be included in § 300.530(i) and not only referenced.

Discussion: As we stated in the *Analysis of Comments and Changes* discussion for subpart A of this part, including the actual definitions of terms that are defined in statutes other than the Act is problematic because these definitions may change over time and the Department would need to amend the regulations each time an included definition that is defined in another statute changes. However, we are including the definitions of *serious bodily injury* from section 1365(h)(3) of title 18, United States Code, and *dangerous weapon* from section 930(g)(2) of title 18, United States Code, here for reference. We are not including the definition of *controlled substance* from section 202(c) of the Controlled Substances Act because the definition is lengthy and frequently changes.

The term *serious bodily injury* means bodily injury that involves—

1. A substantial risk of death;
2. Extreme physical pain;
3. Protracted and obvious disfigurement; or
4. Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

The term *dangerous weapon* means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length.

Changes: None.

Determination of Setting (§ 300.531)

Comment: None.

Discussion: In light of the restructuring of § 300.530 and the elimination of cross-references in that section, we are revising § 300.531 to include a cross-reference to paragraph

(d)(5) of § 300.530 to make clear that, for a removal that is a change of placement under § 300.536, the child's IEP Team must determine the appropriate interim alternative educational setting for the child.

Changes: We have revised § 300.531 to include a cross-reference to paragraph (d)(5) of § 300.530.

Appeal (§ 300.532)

Comment: Numerous commenters requested clarifying in the regulations that the public agency has the burden to prove to a hearing officer that removing the child is necessary because maintaining the current placement is substantially likely to result in injury to self or others.

Discussion: Although the Act does not address allocation of the burden of proof in due process hearings brought under the Act, the U.S. Supreme Court recently addressed the issue. In *Schaffer*, the Court first noted that the term "burden of proof" is commonly held to encompass both the burden of persuasion (i.e., which party loses if the evidence is closely balanced) and the burden of production (i.e., the party responsible for going forward at different points in the proceeding). In *Schaffer*, only the burden of persuasion was at issue. The Court held that the burden of persuasion in a hearing challenging the validity of an IEP is placed on the party on which this burden usually falls—on the party seeking relief—whether that is the parent of the child with a disability or the LEA. Where the public agency has requested that a hearing officer remove a child to an interim alternative educational setting, the burden of persuasion is on the public agency. Since Supreme Court precedent is binding legal authority, further regulation in this area is unnecessary.

Changes: None.

Comment: Many commenters requested that the regulations clarify that the LEA has the burden of proof in determining whether the child's behavior was or was not a manifestation of the child's disability and that the IEP was appropriate and properly implemented. Other commenters expressed concern that the regulations, as written, put the burden on the parent to prove either that the conduct was caused by or had a direct and substantial relationship to the child's disability or that the IEP was not being implemented.

Discussion: The concept of burden of proof is not applicable to the manifestation determination, which does not occur in a hearing under the Act. Under § 300.530(e), the LEA, the

parent, and relevant members of the IEP Team (as determined by the parent and the LEA) are responsible for determining whether the child's behavior is a manifestation of the child's disability, by conducting a fair inquiry into the issues posed by

§ 300.530(e)(1)(i) and (ii). If the parent disagrees with the manifestation determination, they have the right to appeal that decision by requesting a due process hearing under § 300.532. At the point a due process hearing is requested, the concept of burden of proof would be applicable. As stated above, the Supreme Court determined in *Schaffer* that the burden of proof ultimately is allocated to the moving party.

Changes: None.

Comment: A few commenters recommended requiring that the hearing officer must consider the appropriateness of the child's current placement; consider whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and determine that the interim alternative educational setting meets specified requirements.

Discussion: We are not making changes to the regulations, regarding a hearing officer's decision-making, to require a hearing officer to consider such factors as those suggested by the commenters because a hearing officer must have the ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice and exercise his or her judgment in the context of all the factors involved in an individual case.

Changes: None.

Comment: Some commenters recommended clarifying the reference to a "hearing" in § 300.532(a) and an "expedited hearing" in § 300.532(c). Some of these commenters stated that there seems to be a conflict between the two hearings. Other commenters questioned whether the hearing referenced in paragraphs (a) and (c) of this section must be conducted consistent with all the impartial due process hearing requirements. Another commenter suggested that a hearing requested pursuant to § 300.532 may be contrary to section 615(h) of the Act, which provides for the right to counsel, to cross-examine witnesses, and to present evidence and receive the record of due process hearings.

Discussion: The hearing referenced in § 300.532(a) and (c) is the same hearing and not separate hearings. Paragraph (a) in this section states that a parent of a child with a disability who disagrees

with any decision regarding a placement, or the manifestation determination, or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing. Paragraph (c) of this section clarifies that a hearing requested under paragraph (a) of this section is an impartial due process hearing consistent with the due process hearing requirements of §§ 300.510 through 300.514 (including hearing rights, such as a right to counsel, presenting evidence and cross-examining witnesses, and obtaining a written decision), except that the timelines for the hearing are expedited and a State may establish different procedural rules for expedited due process hearings as long as the rules ensure the requirements in §§ 300.510 through 300.514 are met. We believe these regulations will ensure that the basic protections regarding hearings under the Act are met, while enabling States to adjust other procedural rules they may have superimposed on due process hearings in light of the expedited nature of these hearings. Further, we believe it is important that all the due process protections in §§ 300.510 through 300.514 are maintained because of the importance of the rights at issue in these hearings.

Changes: None.

Comment: One commenter recommended the regulations clarify that a placement determination made by a hearing officer pursuant to his or her authority under § 300.532(b), regarding an appeal requested by a parent who disagrees with the placement of a child, is final and cannot be augmented by the SEA or LEA.

Discussion: Section 300.514, consistent with section 615(i)(1)(A) of the Act, is clear that a hearing officer's decision made in a hearing conducted pursuant to §§ 300.530 through 300.534 is final, except that a party may appeal the decision under the provisions in § 300.514(b). Absent a decision upon appeal, the SEA or the LEA may not augment or alter the hearing officer's decision. We do not believe that the regulations need to be clarified.

Changes: None.

Comment: One commenter recommended clarifying whether there is a difference between "likely to result in injury to child or others" as used in § 300.532(b)(2)(ii) and "child would be dangerous" as used in § 300.530(b)(3). The commenter suggested that § 300.532(b)(3), which permits the LEA to return to the hearing officer to request continuation of an interim alternative education placement if the LEA believes

the child would be dangerous if returned to the original placement, is a lesser standard than that required of the hearing officer in § 300.532(b)(2)(ii), which permits a hearing officer to order a change in placement to an appropriate interim alternative education setting if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

Discussion: There is no intended difference between the phrase "likely to result in injury to the child or others" as used in § 300.532(b)(2)(ii) and "child would be dangerous" as used in § 300.532(b)(3). Section 300.532(b)(2)(ii) clarifies that the hearing officer can order a change in placement of a child with a disability to an interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or others. To avoid confusion, the term "dangerous" is replaced with "substantially likely to result in injury to the child or to others."

Changes: We have replaced the term "dangerous" in § 300.532(b)(3) with "substantially likely to result in injury to the child or to others."

Comment: A few commenters questioned whether the change from the heading "expedited due process hearings" in current § 300.528 to "expedited hearing" in § 300.532(c) represents a change in the hearings that are available under § 300.532.

Discussion: The removal of "due process" from the heading in current 300.528 does not represent a substantive change. The change was made to track the statutory requirements in the Act. However, we believe it is important to clarify that an expedited hearing under § 300.532(c) is a due process hearing and the heading to paragraph (c) has been amended to retain the heading in current § 300.528. We also have made additional technical and clarifying changes to paragraphs (c)(2) and (c)(3) of § 300.532. In paragraph (c)(2) of this section, we are clarifying that an expedited hearing must occur within 20 school days of the date the complaint requesting the hearing is filed and restructuring the paragraph for clarity. In paragraph (c)(3) of this section, we are clarifying that the meeting referenced in this paragraph is a resolution meeting.

Changes: The heading in § 300.532(c) has been revised to clarify that a hearing under paragraph (c) of this section is an "expedited due process hearing." We have also made technical and clarifying

changes to paragraphs (c)(2) and (c)(3) of this section.

Comment: Many commenters requested clarifying whether the requirements in § 300.508(d), regarding sufficiency of the complaint, apply to the expedited hearing requested under § 300.532(c), pertaining to disagreements with a decision regarding disciplinary placements.

Discussion: In light of the shortened timelines for conducting an expedited due process hearing under § 300.532(c), it is not practical to apply to the expedited due process hearing the sufficiency provision in § 300.508(d), which requires that the due process complaint must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not include all the necessary content of a complaint as required in § 300.508(b).

To identify the provisions that do apply when a parent requests a hearing under § 300.532(a), we have changed § 300.532(a) to clarify that parents and the LEA may request a hearing under § 300.532(a) by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).

Changes: We have changed § 300.532(a) to provide that the parent and the LEA may request a hearing under this section by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).

Comment: Several commenters stated that section 615(k) of the Act does not require a resolution meeting as part of an expedited hearing and recommended removing the requirement in § 300.532(c)(3)(i) that a resolution meeting must occur within seven days of the date an expedited hearing is requested under § 300.532(a). One commenter stated that, given the expedited timelines for the hearing and the decision, Congress did not intend for the resolution meeting to apply to an expedited hearing under section 615(k)(4) of the Act.

Discussion: We are not removing the requirement in § 300.532(c) requiring a resolution meeting because an expedited hearing under section 615(k)(3) of the Act is a due process hearing subject to the provisions in section 615(f) of the Act, including the requirement that the LEA convene a resolution meeting when the parent files a due process complaint. Recognizing the need to promptly resolve a disagreement regarding a disciplinary decision, we believe the resolution

meeting provides an opportunity for an LEA and parents to resolve a disagreement regarding a disciplinary placement or manifestation determination before the timeframe for conducting a due process hearing begins. In light of the requirement in section 615(k)(4)(B) of the Act that an expedited hearing must occur within 20 school days of the date the complaint requesting the hearing is filed and a determination must be made within 10 school days after the hearing, which is a much shorter time frame than the one for a due process complaint filed pursuant to 615(f) of the Act, we shortened the resolution meeting timeline to fit into the expedited hearing timeline. Recognizing the need to ensure that the resolution meeting does not delay the expedited hearing if an agreement is not reached, § 300.532(c)(3) provides that the resolution meeting must occur within seven days of receiving notice of the parent's due process complaint regarding a disciplinary placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), and the hearing may proceed unless the matter is resolved within 15 days of the receipt of the parent's due process complaint requesting the expedited due process hearing, and all the applicable timelines for an expedited due process hearing under paragraph (c) of this section commence. However, the parties may agree to waive the resolution meeting or agree to use the mediation process.

Changes: None.

Comment: Several commenters noted that § 300.532(c)(3)(i) states that a resolution meeting must occur within seven days of the date the "hearing is requested," while § 300.510(a)(1), consistent with section 615(f)(1)(B)(i)(I) of the Act, states that the resolution meeting must occur within 15 days of "receiving notice of the due process complaint." The commenters recommended that the Department amend § 300.532(c)(3)(i) to be consistent with § 300.510(a)(1).

Discussion: We agree with the commenters that the language in § 300.532(c)(3)(i) should be consistent with § 300.510(a)(1) and are amending § 300.532(c)(3)(i) to state that a resolution meeting must occur within seven days of "receiving notice of the parent's due process complaint" to be consistent with § 300.510(a)(1). In addition, for consistency, we are amending § 300.532(c)(3)(ii) to state that the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15

days of "the receipt of the parent's due process complaint."

Changes: Paragraphs (c)(3)(i) and (ii) of § 300.532 have been amended as stated above. Paragraph (c)(3) of this section has also been amended to remove the cross-reference to § 300.510(a)(3) and specific explanatory language has been inserted.

Comment: One commenter asked whether the intent of § 300.532(c)(3)(ii) is to allow the expedited hearing to go forward if the parent fails to participate in the resolution meeting within 15 days of receipt of a hearing request or whether the resolution meeting and hearing would be indefinitely delayed in the context of the expedited hearing for the failure of a parent to participate in the resolution meeting.

Discussion: Section 300.532(c)(3)(i) clearly states that the resolution meeting must occur within seven days of a public agency's receiving notice of the parent's due process complaint. It is not expected that parties will necessarily reach agreement during the resolution meeting; the parties often need time to consider the resolution options offered at the meeting. The intent of § 300.532(c)(3)(ii) is to allow parties sufficient time to consider the resolution options discussed in the resolution meeting. However, if the parties do not reach agreement within 15 days of receipt of the parent's due process complaint, the expedited hearing may proceed and all the applicable timelines for an expedited due process hearing under paragraph (c) commence. Lack of parent participation in the resolution meeting would be addressed the same way it is in a regular due process hearing under § 300.510(b), except that the timeframes will differ. For these reasons, we believe it is unnecessary to clarify the regulations.

Changes: None.

Comment: Several commenters recommended removing proposed § 300.532(c)(4), which allows a State to shorten the time periods for the disclosure of evidence, evaluations, and recommendations for expedited due process hearings to two business days, because it will not give a parent adequate time to prepare for hearings, especially when a parent doesn't have a lawyer. One commenter stated that because LEAs have possession and control of education records, a reduction to two days for disclosure is unfair and creates a hardship on a parent in preparing for the hearing. Other commenters stated that this provision is inconsistent with section 615(f)(2) of the Act, which requires that not less than five business days prior to a hearing, parties must disclose all

evaluations and recommendations that parties intend to use at a hearing. A few commenters stated that proposed § 300.532(c)(4) diminishes the protections for children with disabilities and their parents found in the July 20, 1983 regulations, and, therefore, violates section 607(b)(1) and (b)(2) of the Act.

Discussion: We are persuaded by the commenters that limiting the disclosure time to two days would significantly impair the ability of the parties to prepare for the hearing, since one purpose of the expedited hearing is to provide protection to the child. We are removing proposed § 300.532(c)(4), which provides an exception to the normal five day disclosure requirement.

Changes: We have removed proposed § 300.532(c)(4) for the reason stated above. In addition, proposed paragraphs (c)(5) and (c)(6) of this section have been redesignated as paragraphs (c)(4) and (c)(5), respectively. A technical edit has been made to paragraph (c)(1) of this section to ensure the reference to proposed paragraphs (c)(2) through (5) of this section now reference paragraphs (c)(2) through (4) consistent with these changes.

Comment: Numerous commenters expressed concern that proposed § 300.532(c)(5) (new § 300.532(c)(4)), which permits States to establish a different set of procedural rules for expedited due process hearings, could permit States to re-write rules regarding basic procedural safeguards. One commenter expressed concern that proposed § 300.532(c)(5) may lead to abuse if the rules from §§ 300.511 through 300.514 regarding complaints, sufficiency, raising new issues, losing on procedural grounds, and appeals are not part of the expedited due process hearing requirements.

Discussion: We agree with the commenters that proposed § 300.532(c)(5), as written, could be interpreted to give States authority to change due process rules provided for in the Act. Therefore, we are amending new § 300.532(c)(4) (proposed § 300.532(c)(5)) to clarify that while a State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, the State must ensure that the requirements in §§ 300.510 through 300.514 are met. This will ensure that the basic protections regarding expedited hearings under the Act are met, while enabling States, in light of the expedited nature of these hearings, to adjust other procedural rules they have established for due process hearings.

Changes: New § 300.532(c)(4) (proposed § 300.532(c)(5)) has been amended to clarify that a State may establish different State imposed rules for expedited due process hearings under § 300.532(c) than it has established for other due process hearings but, except for the timelines modified as in paragraph (c)(3) of § 300.532, the State must ensure that the requirements in §§ 300.510 through 300.514 are met.

Placement During Appeals (§ 300.533)

Comment: One commenter recommended retaining the “stay-put” requirement in current § 300.526(b). This section provides that if a child is placed in an interim alternative education setting and school personnel propose to change the child’s placement after expiration of the interim alternative educational placement, during the pendency of any proceeding to challenge the proposed change in placement, the child must remain in the child’s placement prior to the interim alternative educational setting. One commenter requested clarification as to whether the removal of current § 300.526(b) represents a substantive change in the Department’s policy. Other commenters requested clarifying what the child’s placement would be after the 45-day interim alternative educational setting if the LEA requests another hearing under § 300.532(b)(3).

Discussion: The Act changed the stay-put provision applying to disciplinary actions. The provisions regarding stay-put in current § 300.527(b) are not included in these regulations because the provisions upon which § 300.527(b) were based, were removed by Congress from section 615(k)(4) of the Act. We, therefore, are not revising the regulations in light of Congress’ clear intent that, when there is an appeal under section 615(k)(3) of the Act by the parent or the public agency, the child shall remain in the interim alternative educational setting chosen by the IEP Team pending the hearing officer’s decision or until the time period for the disciplinary action expires, whichever occurs first, unless the parent and the public agency agree otherwise.

Section 300.533 reflects the statutory requirements in section 615(k)(4)(A) of the Act. For example, consistent with § 300.533, if a child’s parents oppose a proposed change in placement at the end of a 45-day interim alternative educational placement, during the pendency of the proceeding to challenge the change in placement, the child remains in the interim alternative educational setting pending the decision of the hearing officer or until the

expiration of the time period for the disciplinary action, whichever occurs first, unless the parent and the public agency agree otherwise.

Changes: None.

Comment: One commenter recommended that LEAs and SEAs not be allowed to have a policy prohibiting the IEP Team from deciding where the child would “stay-put” during an appeal under § 300.532. The commenter stated that the IEP Team should have the authority to maintain a child in his or her current placement when appropriate.

Discussion: Section 300.531, consistent with section 615(k)(2) of the Act, provides that the IEP Team determines the interim alternative educational setting for removals that constitute a change in placement under § 300.536. Additionally, section 615(k)(4)(A) of the Act is clear that, during an appeal under section 615(k)(3) of the Act, the child must remain in the interim alternative education setting pending the decision of the hearing officer or until the expiration of the time period for the disciplinary action expires, whichever comes first, unless the parent and the LEA agree otherwise. Thus, under the Act, whenever a hearing is requested under section 615(k)(3) of the Act by the parent or the LEA, it is the parties involved in the hearing (i.e., the parent and the LEA), not the IEP Team, that may agree to change the time period of the removal or the interim setting for the child. We, therefore, do not believe it is necessary or appropriate to regulate as suggested by the commenter. There is nothing in the Act or these regulations, however, which would prohibit the parents and the LEA from agreeing to involve the IEP Team in any decision to change the time period of the removal or interim alternative educational setting.

Changes: None.

Protections of Children Not Determined Eligible for Special Education and Related Services (§ 300.534)

Comment: A few commenters requested including in § 300.534(b)(1) language allowing the parent of the child to express concerns about his or her child orally to supervisory or administrative personnel, rather than requiring written notification. Other commenters requested clarifying what it means for parents to “express concern” to school personnel.

Discussion: Section 615(k)(5)(B)(i) of the Act clearly states that parents must express concern “in writing” to supervisory or administrative personnel, or a teacher of the child, that their child

is in need of special education and related services. To include the language recommended by the commenters in § 300.534(b)(1) to allow the parent of the child to orally express their concerns (as opposed to doing so in writing) is inconsistent with and would impermissibly broaden the requirements in the Act. We do not believe it is necessary to clarify the phrase "express concern" in § 300.534(b) because we believe that, in the context of this section, it is understood to mean that a parent is concerned that his or her child is in need of special education and related services and expresses that concern in writing to the child's teacher or administrative personnel.

Changes: None.

Comment: One commenter recommended adding to the basis of knowledge criteria in § 300.534(b) that if the child were currently receiving early intervening services under § 300.226 the LEA would be deemed to have knowledge that a child is a child with a disability.

Discussion: A public agency will not be considered to have a basis of knowledge under § 300.534(b) merely because a child receives services under the coordinated, early intervening services in section 613(f) of the Act and § 300.226 of these regulations. The basis of knowledge criteria is clearly stated in section 615(k)(5)(B) of the Act and § 300.534. We do not believe that expanding the basis of knowledge provision, as recommended by the commenter, would be appropriate given the specific requirements in the Act. However, if a parent or a teacher of a child receiving early intervening services expresses a concern, in writing, to appropriate agency personnel, that the child may need special education and related services, the public agency would be deemed to have knowledge that the child is a child with a disability under this part.

Changes: None.

Comment: A few commenters recommended removing the requirement in § 300.534(b)(3) that the teacher of the child must express specific concerns regarding a child's pattern of behavior directly to the director of special education of the LEA or to other supervisory personnel of the LEA "in accordance with the agency's established child find or special education referral system." One of the commenters stated that this language is confusing and is not required by the Act. One commenter requested clarifying whether the LEA would be deemed to have knowledge if the information was relayed by a child's

teacher in a written manner not consistent with the LEA's referral system.

Discussion: Since not all child find and referral processes in States and LEAs would necessarily meet the requirement in section 615(k)(5)(B)(iii) of the Act that the teacher of the child, or other personnel of the LEA, must express specific concerns about a pattern of behavior demonstrated by the child "directly to the director of special education of such agency or to other supervisory personnel of the agency," we are removing from § 300.534(b)(3) the requirement that concerns be expressed in accordance with the agency's established child find or special education referral system.

We continue to believe the child find and special education referral system is an important function of schools, LEAs, and States. School personnel should refer children for evaluation through the agency's child or special education referral system when the child's behavior or performance indicates that they may have a disability covered under the Act. Having the teacher of a child (or other personnel) express his or her concerns regarding a child in accordance with the agency's established child find or referral system helps ensure that the concerns expressed are specific, rather than casual comments, regarding the behaviors demonstrated by the child and indicate that the child may be a child with a disability under the Act. For these reasons, we would encourage those States and LEAs whose child find or referral processes do not permit teachers to express specific concerns directly to the director of special education of such agency or to other supervisory personnel of the agency, to change these processes to meet this requirement.

Changes: In light of some State child find procedures, we have removed from § 300.534(b)(3) the requirement that the teacher or other LEA personnel must express concerns regarding a child's pattern of behavior in accordance with the agency's established child find or special education referral system.

Comment: Several commenters recommended clarifying that a child who was evaluated and determined ineligible for special education and related services years ago would not be an exception under § 300.534(c) to the basis of knowledge requirement in paragraph (b) of this section. Many commenters recommended that an evaluation and eligibility determination that is more than three years old not prevent deeming an LEA to have a basis of knowledge. One of these commenters

specifically recommended revising § 300.534(c)(1)(i) to clarify 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 §§ 300.300 through 300.311 "within three years prior to the incident."

Discussion: The exceptions included in § 300.534(c) track the statutory requirements in section 615(k)(5)(C) of the Act. The intent of Congress in revising section 615(k)(5) of the Act was to "ensure that schools can appropriately discipline students, while maintaining protections for students whom the school had valid reason to know had a disability" and that the provisions in the Act should not have the "unintended consequence of providing a shield against the ability of a school district to be able to appropriately discipline a student." (S. Rpt. No. 108-185, p. 46). We are not including time restrictions, as suggested by the commenters, to the exceptions in paragraph (c) of this section because we believe such restrictions are unnecessary and could have the unintended consequence of hindering the school's ability to appropriately discipline a child. We believe the basis of knowledge provision in § 300.534(b) is sufficient to ensure that a school had valid reason to know that a child may need special education and related services.

Changes: None.

Comment: A few commenters recommended removing § 300.534(c)(1)(i), which states that a public agency would not be deemed to have knowledge that a child is a child with a disability if the parent has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311. The commenters stated that this would deny children with disabilities FAPE and the procedural protections granted children with disabilities removed from their educational placement for disciplinary reasons.

Discussion: The requirement in § 300.534(c)(1)(i), regarding the exception to the basis of knowledge if a parent refuses to consent to an evaluation, is statutory. Further, § 300.300(a)(3), consistent with section 614(a)(1)(D)(ii)(I) of the Act, clearly states that the public agency may, but is not required to, pursue an initial evaluation of a child if the parents refuse to provide consent, or fail to respond to a request to provide consent, for the initial evaluation, by utilizing the Act's due process procedures. If a public agency chooses not to utilize the Act's due process procedures, the LEA

is not considered in violation of the requirement to provide FAPE.

Changes: None.

Comment: A few commenters recommended retaining in § 300.534(c)(2) the language in current § 300.527(c)(1)(i) to clarify that the evaluation used to determine whether a child is a child with a disability under this part must be conducted pursuant to §§ 300.300 through 300.311.

Discussion: It is accurate that the evaluation referenced in § 300.534(c)(2) must be conducted consistent with the evaluation requirements in §§ 300.300 through 300.311. We agree with the commenters that paragraph (c)(2) of this section should be amended to make clear that the evaluation conducted under this paragraph must be conducted consistent with the evaluation requirements in §§ 300.300 through 300.311.

Changes: We have amended paragraph (c)(2) to make clear that the evaluation under this provision must be conducted in accordance with §§ 300.300 through 300.311.

Comment: A few commenters recommended amending § 300.534(d)(2) to require that if a request is made for an evaluation of a child during the time period in which the child is subjected to a disciplinary removal under § 300.530, the evaluation must be completed within ten days of the parent's request and that an eligibility determination be made within five days of the completion of the evaluation.

Discussion: We do not believe a specific timeline for an expedited evaluation or an eligibility determination should be included in these regulations. What may be required to conduct an evaluation will vary widely depending on the nature and extent of a child's suspected disability and the amount of additional information that would be necessary to make an eligibility determination. However, § 300.534(d)(2)(i), consistent with section 615(k)(5)(D)(ii) of the Act, specifies that the evaluation in these instances be "expedited", which means that an evaluation should be conducted in a shorter period of time than a typical evaluation conducted pursuant to section 614 of the Act, which must be conducted within 60 days of receiving parental consent for the evaluation. (See section 614(a)(1)(C)(i)(I) of the Act). Further, we believe it would be inappropriate to specify the timeframe from the completion of an evaluation to the determination of eligibility when there is no specific statutory basis to do so. The Department has long held that eligibility decisions should be made within a reasonable period of time

following the completion of an evaluation.

Changes: None.

Comment: A few commenters stated that § 300.534(d)(2) seems to imply that when a request is made for an expedited evaluation of a child subjected to a disciplinary removal, the child would receive an educational placement and services pending the results of the evaluation.

Discussion: We believe that § 300.534(d) is clear. Section 300.534(d) does not require the provision of services to a child while an expedited evaluation is being conducted, if the public agency did not have a basis of knowledge that the child was a child with a disability. An educational placement under § 300.534(d)(2)(ii) may include a suspension or expulsion without services, if those measures are comparable to disciplinary measures applied to children without disabilities who engage in comparable behavior. Of course, States and LEAs are free to choose to provide services to children under § 300.534(d).

Changes: None.

Referral to and Action by Law Enforcement and Judicial Authorities (§ 300.535)

Comment: One commenter stated that the requirement in § 300.535(b)(2), which requires a public agency reporting a crime to transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act (FERPA), is beyond the scope of the Act and should be removed.

Discussion: We do not believe that § 300.535(b)(2) goes beyond the scope of the Act as sections 612(a)(8) and 617(c) of the Act direct the Secretary to take appropriate action, in accordance with FERPA, to assure the confidentiality of personally identifiable information contained in records collected or maintained by the Secretary and by SEAs and LEAs. We therefore are not removing this provision. We maintain that the provisions in section 615(k)(6)(B) of the Act, as reflected in § 300.535(b)(2), must be read consistent with the disclosures permitted under FERPA for the education records of all children. Under FERPA, personally identifiable information (such as the child's status as a special education child) can only be released with parental consent, except in certain very limited circumstances. Therefore, the transmission of a child's special education and disciplinary records under paragraph (b)(2) of this section without parental consent is permissible

only to the extent that such transmission is permitted under FERPA.

Changes: None.

Change of Placement Because of Disciplinary Removals (§ 300.536)

Comment: A few commenters expressed concern that the requirements in § 300.536 do not account for schools with zero tolerance policies.

Discussion: We believe the provisions in §§ 300.530 through 300.536 do account for zero tolerance policies by providing public agencies the flexibility to implement discipline policies as they deem necessary to create safe classrooms and schools for teachers and children as long as those policies are fair and equitable for all children and protect the rights of children with disabilities. If a child with a disability is removed from his or her current placement and placed in an interim alternative educational setting, another setting, or suspended or expelled under the public agency's zero tolerance policy, the disciplinary requirements in §§ 300.530 through 300.536 apply.

Therefore, we do not believe it is necessary to include language in § 300.536 regarding a public agency's zero tolerance policy as such policies are irrelevant to what constitutes a change in placement for disciplinary removals under the Act.

Changes: None.

Comment: Many commenters recommended removing proposed § 300.536(b) (new § 300.536(a)(2)) regarding a series of removals that constitute a change in placement stating it has no statutory basis.

Discussion: We believe section 615(k)(1)(B) of the Act regarding the authority of school personnel to remove children with disabilities for not more than 10 school days, to the same extent as nondisabled children, provides the statutory basis for proposed § 300.536(b) (new § 300.536(a)(2)). This section of the Act does not permit using repeated disciplinary removals of 10 school days or less as a means of avoiding the normal change in placement protections under Part B of the Act.

Changes: None.

Comment: Numerous commenters recommended removing the reference to manifestation determination in proposed § 300.536(b)(2) (new § 300.536(a)(2)(ii)). Several of these commenters stated that it is unnecessary since the manifestation determination is reserved for removals longer than 10 school days. Some commenters stated if the language in proposed paragraph (b)(1) of this section (new paragraph (a)(2)(i) of this section) that a series of removals constitutes a pattern because

the series of removals total more than 10 school days in a school year is going to be retained, proposed paragraph (b)(2) of this section (new paragraph (a)(2)(ii) of this section) should be eliminated because it is excessive and has no basis in the Act. Other commenters found the manifestation determination requirement in proposed paragraph (b)(2) of this section “circular” because requiring a child’s behavior to be a manifestation of his or her disability before determining that a change in placement has occurred under proposed paragraph (b)(2) of this section (new paragraph (a)(2)(ii) of this section) and then requiring that a manifestation determination be conducted under § 300.530(e), whenever a child’s removal constitutes a change in placement, is redundant and confusing.

Discussion: We agree with the commenters that requiring that a child’s behavior must be a manifestation of the child’s disability before determining that a series of removals constitutes a change in placement under proposed paragraph (b) of this section (new paragraph (a)(2) of this section) should be removed. We believe it is sufficient for the public agency to conclude that a change in placement has occurred if a child has been subjected to a series of removals that total more than 10 school days in a school year, the behaviors are substantially similar in nature, and such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another support the premise that the series of removals constitute a pattern. However, our removal of the manifestation determination under proposed paragraph (b)(2) of this section (new paragraph (a)(2) of this section) does not eliminate the obligation to conduct a manifestation determination under § 300.530(e) if the public agency’s determination is that the series of removals constitutes a change in placement. Section 300.530(e) requires that a manifestation determination be conducted within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.

Changes: We have restructured proposed § 300.536(b) as follows: Proposed paragraph (b)(1) of this section is redesignated as new paragraph (a)(2)(i); proposed paragraph (b)(2) of this section is redesignated as new paragraph (a)(2)(ii); proposed paragraph (b)(3) of this section is redesignated as paragraph (a)(2)(iii). We also removed from new paragraph (a)(2)(ii) of this section (proposed paragraph (b)(2) of this section) the requirement that a

child’s behavior must have been a manifestation of the child’s disability before determining that a series of removals constitutes a change in placement under § 300.536.

Comment: One commenter recommended revising proposed § 300.536(b)(2) (new § 300.536(a)(2)(ii)) to clarify that the child’s behavior must be substantially similar to the child’s behavior in “previous” incidents that resulted in the series of removals.

Discussion: Our intent in including new § 300.536(a)(2)(ii) (proposed § 300.536(b)(2)) to these regulations is to assist in the appropriate application of the change in placement provisions in paragraph (a)(2) of this section. We concur with the commenter and believe adding the reference to “previous” incidents provides clarity to the provision that, when determining whether a child has been subjected to a series of removals that constitute a pattern under § 300.536(a)(2), school personnel should determine whether the child’s behavior that resulted in the removal is substantially similar to the previous incidents that resulted in the series of removals.

Changes: New § 300.536(a)(2)(ii) (proposed § 300.536(b)(2)) has been amended to reference the child’s behavior in “previous” incidents that resulted in the series of removals.

Comment: Many commenters requested the regulations define “substantially similar behavior.” Many commenters expressed concern that there is no precedent or statutory support for the use of “substantially similar behavior” and requested explaining the statutory basis for including the provision. One commenter suggested including a provision in proposed § 300.536(b)(2) that substantially similar behaviors must have been recognized by the IEP Team or be included in the IEP as related to the child’s disability. One commenter stated that what constitutes “substantially similar behavior” is highly subjective, prone to overuse, and likely to lead to litigation.

Discussion: We are not changing the regulations because, in light of the Department’s longstanding position that a change in placement has occurred if a child has been subjected to a series of disciplinary removals that constitute a pattern, we believe requiring the public agency to carefully review the child’s previous behaviors to determine whether the behaviors, taken cumulatively, are substantially similar is an important step in determining whether a series of removals of a child constitutes a change in placement, and is necessary to ensure that public

agencies appropriately apply the change in placement provisions. Whether the behavior in the incidents that resulted in the series of removals is “substantially similar” should be made on a case-by-case basis and include consideration of any relevant information regarding the child’s behaviors, including, where appropriate, any information in the child’s IEP. However, we do not believe it is appropriate to require in these regulations that the “substantially similar behaviors” be recognized by the IEP Team or included in the child’s IEP as recommended by the commenter. The commenter is correct that what constitutes “substantially similar behavior” is a subjective determination. However, we believe that when the child’s behaviors, taken cumulatively, are objectively reviewed in the context of all the criteria in paragraph (a)(2) of this section for determining whether the series of behaviors constitutes a change in placement, the public agency will be able to make a reasonable determination as to whether a change in placement has occurred. Of course, if the parent disagrees with the determination by the public agency, the parent may request a due process hearing pursuant to § 300.532.

Changes: None.

Comment: One commenter requested an explanation of what recourse parents have if they disagree with the public agency’s change in placement decision for a child who violates a code of student conduct.

Discussion: If a parent of a child with a disability disagrees with any decision regarding a disciplinary change in placement of a child under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), the parent may request a due process hearing pursuant to § 300.532.

Changes: None.

Comment: Several commenters requested clarifying who determines whether a series of removals under proposed § 300.536(b) (new paragraph (a)(2) of this section) constitutes a change in placement. One commenter recommended adding in proposed paragraph (b) language from the *Analysis of Comments and Changes* to current § 300.520 clarifying that any decision regarding whether a pattern of removals constitutes a change in placement must be made on a case-by-case basis by the public agency. (March 12, 1999 (64 FR 12618)).

Discussion: Whether a pattern of removals constitutes a “change in placement” under new paragraph (a)(2) of this section (proposed § 300.536(b)) must be determined on a case-by-case

basis by the public agency. We agree it is important to clarify this position in these regulations and is necessary to ensure proper implementation of this section. We are including the language from the **Federal Register** of March 12, 1999 (64 FR 12618), (as suggested by the commenter).

Changes: A new paragraph (b) has been added to § 300.536 to clarify that the public agency (subject to review through the due process and judicial proceedings) makes the determination, on a case-by-case basis, whether a pattern of removals constitutes a change in placement.

State Enforcement Mechanisms § 300.537

Comment: None.

Discussion: New § 300.537 is addressed under the *Analysis of Comments and Changes* section for this subpart in response to comments on § 300.510(d).

Changes: We have added a new § 300.537 on State enforcement mechanisms to clarify that, notwithstanding §§ 300.506(b)(7) and new 300.510(d)(2)(proposed § 300.510(c)(2)), nothing in this part prevents a State from providing parties to a written agreement reached as a result of a mediation or resolution process other mechanisms to enforce that agreement, provided that such mechanisms are not mandatory and do not deny or delay the right of the parties to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States. We have also added a cross reference to new § 300.573 in new § 300.510(d) (proposed § 300.510(c)), regarding written settlement agreements.

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

Monitoring, Technical Assistance, and Enforcement

State Monitoring and Enforcement § 300.600

Comment: Several commenters recommended modifying § 300.600 to include language from section 616(a)(1) and (a)(3) of the Act to clarify that the Department, like the States, has the authority and obligation to monitor and enforce Part B of the Act. The commenters recommended that the requirements in section 616(a)(1) of the Act be included in the regulations because improving accountability is one of the most important goals of this reauthorization and the Act mandates

the Secretary to monitor and enforce the Act.

Discussion: We take the responsibility to monitor and enforce compliance with the Act seriously, but that responsibility comes from the Act, and from the Department's inherent authority to ensure that the laws it is charged with implementing are carried out, and not from these regulations. In general, we do not believe that it is necessary to include language on the responsibility of the Secretary in the regulations, as, under § 300.2, the regulations apply to States that receive payments under Part B of the Act and public agencies of those States, but not to the Department. Information on our monitoring and enforcement activities is available on the Department's Web site at: <http://www.ed.gov/policy/speced/guid/idea/monitor/index.html>.

Changes: None.

Comment: Several commenters stated that the monitoring priority areas in section 616(a)(3) of the Act should be included in § 300.600.

Discussion: We agree that the monitoring priority areas in section 616(a)(3) of the Act related to State responsibilities should be included in the regulations because these provisions require each State to monitor its LEAs in each of the monitoring priority areas specified in the Act. Accordingly, we will add further clarification regarding the monitoring priority areas from section 616(a)(3) of the Act in § 300.600.

Changes: A new paragraph (d) has been added to § 300.600 to include the State monitoring priority areas in section 616(a)(3) of the Act.

Comment: One commenter expressed concern that there will be no accountability on the part of States and the Department for complying with the requirements in section 616(a)(1) and (a)(3) of the Act because the regulations do not reflect these requirements.

Discussion: The requirements in section 616(a)(1) of the Act, relating to a State's monitoring responsibilities, are included in the regulations in § 300.600(a). Further, as indicated in the response to the previous comment, a provision regarding the State's responsibility to monitor LEAs located in the State using the indicators in the monitoring priority areas in section 616(a)(3) of the Act has been added in new § 300.600(d). Regarding the Secretary's monitoring responsibility, section 616(a)(1) of the Act is clear that the Secretary must monitor implementation of Part B of the Act through the oversight of States' exercise of general supervision and through the State performance plans. Sections 616(a)(3) and 616(b) further describe the

Secretary's responsibilities to monitor States' implementation of Part B of the Act. In addition, note 253–258 of the Conf. Rpt. No. 108–779, p. 232, provides that the Secretary must request such information from States and stakeholders as is necessary to implement the purposes of the Act, including the use of on-site monitoring visits and file reviews to enforce the requirements of the Act. We continue to believe it is unnecessary to include the Secretary's obligations in the regulations. We also do not believe further clarification regarding State accountability is necessary in § 300.600.

Changes: None.

Comment: One commenter noted that § 300.600(c) requires States to use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the monitoring priority areas identified in section 616(a)(3) of the Act. The commenter expressed concern that this requirement expands the data collection burden on States and focuses on inputs, processes, and whether certain procedural rights are met, rather than focusing on educational results and outcomes for children with disabilities.

Discussion: Section 300.600 reflects the requirements in the Act and Congress' determination that collection of this data is necessary to fulfill the purposes of the Act. Specifically, section 616(b)(2) of the Act requires each State to develop a State performance plan that includes measurable and rigorous targets for the indicators established under the monitoring priority areas. As directed by section 616(a)(3) of the Act, the Secretary also has established quantifiable indicators in each of the monitoring priority areas listed in the Act and these regulations. These indicators focus on improving educational results and functional outcomes for children with disabilities, and include issues such as the provision of services in the LRE, participation and performance on Statewide assessments, and graduation and dropout rates. In addition, important systemic indicators, such as monitoring, mediation, and child find, are included. More information about State performance plans, the indicators, and the Department's review of the State performance plans is available on the Department's Web site at: <http://www.ed.gov/policy/speced/guid/idea/bapr/index.html>.

Changes: None.

Comment: One commenter recommended changing § 300.600 to require States to develop policies and procedures to analyze the performance