

*Comment:* One commenter stated that the requirements for alternative means of meeting participation in § 300.328 should be placed in the regulations following § 300.321, because the requirements add flexibility to the special education process.

*Discussion:* The requirements in § 300.328, regarding alternative means of meeting participation, apply to IEP Team meetings as well as placement meetings, and carrying out administrative matters under section 615 of the Act. Therefore, it would not be appropriate to move § 300.328 to the location in the regulations suggested by the commenter.

*Changes:* None.

### Subpart E—Procedural Safeguards

#### *Due Process Procedures for Parents and Children*

##### Opportunity To Examine Records; Parent Participation in Meetings (§ 300.501)

*Comment:* One commenter recommended adding language in § 300.501(a) stating that parents have the right to obtain a free copy of all education records.

*Discussion:* Section 300.501(a), consistent with section 615(b)(1) of the Act, affords parents an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. Specific procedures for access to records are contained in the confidentiality provisions in §§ 300.613 through 300.621. A participating agency, consistent with § 300.613(b)(2), however, must provide copies of a child's education records to a parent, if failure to do so would effectively prevent a parent from exercising the right to inspect and review the records, such as if a parent lives outside of commuting distance of the agency. This provision is consistent with the access rights afforded under FERPA in 34 CFR 99.10(d)(1).

We decline to make the change requested by the commenter because such a change would impose a significant new burden on public agencies that is not necessary. Public agencies, however, are free to provide copies whenever requested by the parent, if they choose to do so. We have, however, made a change to this section to correct the cross-references to the procedures for inspection and review of records.

*Changes:* We have corrected the cross-references to the procedures for inspection and review of records to §§ 300.613 through 300.621.

*Comment:* One commenter recommended adding a provision to § 300.501 that would give parents the opportunity to prepare their own reports and provide information that would become part of the child's education record.

*Discussion:* The Act and these regulations encourage parental input and involvement in all aspects of a child's educational program, and provide many opportunities for parents to provide information that becomes part of the child's education record. For example, § 300.304(a)(1), consistent with section 614(b)(2)(A) of the Act, requires any evaluation to include information provided by the parent; § 300.305(a)(2), consistent with section 614(c)(1)(B) of the Act, requires the review of existing data for evaluations and reevaluations to include input from the child's parents; § 300.306(a)(1), consistent with section 614(b)(4) of the Act, requires the parent to be part of the group that determines whether the child is a child with a disability and the educational needs of the child; and § 300.321(a)(1), consistent with section 614(d)(1)(B)(i) of the Act, requires the IEP Team that is responsible for developing, reviewing and revising the child's IEP to include the parent. In addition, § 300.322(a) specifies the steps a public agency must take to ensure that one or both parents are present at the IEP Team meeting and afforded the opportunity to participate in the meeting. Therefore, we do not believe that it is necessary to regulate on this issue. However, if a parent provides a report for the child's education record and the public agency chooses to maintain a copy of the written report, that report becomes part of the child's education record and is subject to the confidentiality of information requirements in §§ 300.610 through 300.627, and FERPA and its implementing regulations in 34 CFR part 99.

*Changes:* None.

*Comment:* Many commenters suggested adding language in § 300.501(b)(2) requiring the public agency to take whatever action is necessary to ensure that parents understand the proceedings at any of the meetings described in this section. The commenters stated that this requirement is not unnecessarily duplicative and removing it gives the impression that interpreters are no longer required. Several commenters recommended that if school staff determines that a parent has difficulty understanding the procedural safeguards, the public agency must explain the parent's rights at any time

that a change in services is contemplated.

*Discussion:* It is not necessary to add language to § 300.501(b)(2) to require a public agency to take whatever action is necessary to ensure that parents understand the proceedings at any of the meetings described in this section. Public agencies are required by other Federal statutes to take appropriate actions to ensure that parents who themselves have disabilities and limited English proficient parents understand proceedings at any of the meetings described in this section. The other Federal statutory provisions that apply in this regard are Section 504 of the Rehabilitation Act of 1973 and its implementing regulations in 34 CFR part 104 (prohibiting discrimination on the basis of disability by recipients of Federal financial assistance), title II of the Americans With Disabilities Act and its implementing regulations in 28 CFR part 35 (prohibiting discrimination on the basis of disability by public entities, regardless of receipt of Federal funds), and title VI of the Civil Rights Act of 1964 and its implementing regulations in 34 CFR part 100 (prohibiting discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance).

As noted in the *Analysis of Comments and Changes* section to subpart D, we have retained the requirements in current § 300.345(e), which require the public agency to take whatever action is necessary to ensure that the parent understands the proceedings at an IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. This requirement is in new § 300.322(e). We have also included a cross reference to new § 300.322(e) in § 300.501(c)(2) to clarify that.

It is not necessary to include regulations to require a public agency to explain the procedural safeguards to parents any time that a change in services is contemplated. Section 300.503 already requires prior written notice to be given to the parents of a child with a disability a reasonable time before the public agency proposes (or refuses) to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. As required in § 300.503(b)(4), the prior written notice must include a statement that the parents have protections under the procedural safeguards of this part. Consistent with §§ 300.503(c) and 300.504(d), the prior written notice and the procedural safeguards notice, respectively, must be written in language understandable to the general

public and provided in the native language or other mode of communication of the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication and that the parent understands the content of the notice.

*Changes:* None.

*Comment:* Several commenters stated that § 300.501(b)(3) implies that teaching methodologies and lesson plans must be included in the IEP, which exceeds the requirements of the Act. The commenters recommended removing “if those issues are not addressed in the child’s IEP” from § 300.501(b)(3).

*Discussion:* We agree that the phrase referred to by the commenters is confusing and open to misinterpretation and are removing it from § 300.501(b)(3).

*Changes:* We have removed the phrase “if those issues are not addressed in the child’s IEP” from § 300.501(b)(3) for clarity.

*Comment:* Many commenters recommended requiring a public agency to make several attempts to involve parents in placement decisions and requested that § 300.501 be changed to require a public agency to maintain: (1) Detailed records of telephone calls made or attempted and the results of those calls; (2) copies of correspondence sent to parents and any responses received; and (3) detailed records of visits made to a parent’s home or place of employment and the results of those visits.

*Discussion:* We do not believe the additional language requested by the commenters is necessary. Section 300.501(c)(4) requires a public agency to maintain a record of its attempts to contact parents prior to making a placement decision without parent participation. We believe this requirement is sufficient to ensure that a public agency holding a placement meeting with neither parent in attendance takes the necessary steps to contact parents and maintain appropriate documentation of its attempts to ensure parent participation. As a matter of practice, public agencies use a variety of methods to contact parents depending on the ways they find to be most efficient and effective for a particular situation. Public agencies take seriously their obligation to include parents in placement decisions and are in the best position to determine the

records they need to demonstrate that they have taken appropriate steps to include parents in placement decisions before holding a placement meeting without a parent in attendance.

*Changes:* None.

*Comment:* A few commenters recommended that placement meetings not be held, or decisions made, without a representative of the child. The commenters recommended appointing a surrogate parent when the biological or adoptive parent refuses to attend, or is unable to participate, in the placement meeting.

*Discussion:* There is no statutory authority to permit the appointment of a surrogate parent when a parent is either unable or unwilling to attend a meeting in which a decision is made relating to a child’s educational placement. In section 615(b)(2) of the Act, a public agency does not have the authority to appoint a surrogate parent where a child’s parent is available or can be identified and located after reasonable efforts, but refuses, or is unable, to attend a meeting or otherwise represent the child.

*Changes:* None.

#### Independent Educational Evaluation (§ 300.502)

*Comment:* One commenter suggested adding language to § 300.502 requiring evaluators who conduct independent educational evaluations (IEEs) to be licensed by the State.

*Discussion:* We are not changing the regulations in the manner requested by the commenter because the regulations already require that the standards be the same for all evaluators, as long as the agency’s criteria for evaluators do not prohibit a parent from obtaining an IEE. An IEE is defined in § 300.502(a)(3)(i) as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. Section 300.502(e) provides that in order for an IEE to be at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent’s right to an IEE. Except for these criteria, § 300.502(e)(2) provides that a public agency may not impose conditions or timelines related to obtaining an IEE at public expense. Consistent with applicable agency criteria, it would be appropriate for a public agency to require an IEE examiner to hold, or be eligible to hold, a particular license when a public

agency requires the same licensure for personnel who conduct the same types of evaluations for the agency. In contrast, it would be inconsistent with a parent’s right to an IEE for a public agency to require all evaluators to be licensed, if only individuals employed by a public agency may obtain a license.

*Changes:* None.

*Comment:* One commenter requested clarification regarding parental rights to an IEE when a public agency is using a response to intervention process to determine whether a child has SLD.

*Discussion:* If a parent disagrees with the results of a completed evaluation that includes a review of the results of a child’s response to intervention process, the parent has a right to an IEE at public expense, subject to the conditions in § 300.502(b)(2) through (b)(4). The parent, however, would not have the right to obtain an IEE at public expense before the public agency completes its evaluation simply because the parent disagrees with the public agency’s decision to use data from a child’s response to intervention as part of its evaluation to determine if the child is a child with a disability and the educational needs of the child.

*Changes:* None.

*Comment:* One commenter requested clarification regarding a public agency’s right to limit the amount it pays for an IEE and asked whether a public agency can place limits on the frequency of an IEE (e.g., a single IEE in an evaluation cycle or in a child’s school career).

*Discussion:* It is the Department’s longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs. This position is reflected in the regulatory provisions. Section 300.502(a)(2) provides that if a parent requests an IEE at public expense, the public agency must provide the parent with information about where an IEE may be obtained and the agency criteria applicable for IEEs. In order for an evaluation to be at public expense, § 300.502(e)(1) requires that the criteria under which an IEE is obtained, including the location of the IEE and the qualifications of the examiner, be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent that those criteria are consistent with a parent’s right to an IEE. In addition, § 300.502(e)(2) states that, except for the criteria described above, a public agency may not impose conditions or timelines related to obtaining an IEE at public expense.

Although it is appropriate for a public agency to establish reasonable cost containment criteria applicable to

personnel used by the agency, as well as to personnel used by parents, a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall outside the agency's cost containment criteria. Section 300.502(b)(2) provides that if the parent requests an IEE at public expense, the public agency either must ensure that the IEE is provided at public expense or file a due process complaint notice to request a hearing to demonstrate that the agency's evaluation is appropriate.

We do not, however, believe that the parent should be limited to one IEE at public expense in a child's school career. In the school career of a child, there could be more than one point when there is a legitimate disagreement between a parent and the public agency over evaluations of the child. Nevertheless, we do believe that it is important to clarify that a parent is not entitled to more than one IEE at public expense when the parent disagrees with a specific evaluation or reevaluation conducted or obtained by the public agency. Therefore, we are adding a new paragraph (b)(5) in § 300.502 to clarify that a parent is entitled to only one IEE each time the public agency conducts an evaluation with which the parent disagrees. This regulatory provision is consistent with a parent's statutory right to an IEE at public expense, while recognizing that public agencies should not be required to bear the cost of more than one IEE when a parent disagrees with an evaluation conducted or obtained by the public agency.

*Changes:* We have added a new paragraph (b)(5) in § 300.502 to clarify that a parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees.

*Comment:* Some commenters suggested adding language allowing an evaluator conducting an IEE the opportunity to review existing data, receive input from the child's parents, determine what additional data are needed to determine the scope of the evaluation, and select the instruments appropriate to evaluate the child. The commenters also stated that the public agency should not restrict the scope of the evaluation.

*Discussion:* We do not believe it is necessary to add language to the regulations regarding the review of existing data, input from the child's parents, the scope of the evaluation, or the instruments used to evaluate the child, because an IEE must meet the agency criteria that the public agency

uses when it initiates an evaluation, consistent with § 300.502(e).

Section 300.305(a) provides that, as part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including input from the child's parents. Since the review of existing evaluation data and input from the child's parents are part of the public agency's evaluation, they would also be appropriate elements in an IEE.

Similarly, § 300.304(b)(1) provides that an evaluation conducted by a public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability under § 300.8, and the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child to participate in appropriate activities). These requirements also apply to an IEE conducted by an independent evaluator, since these requirements will be a part of the agency's criteria.

Generally, the purpose of an evaluation under the Act is to determine whether the child is a child with a disability, and in the case of a reevaluation, whether the child continues to have a disability, and the educational needs of the child. It would be inconsistent with the Act for a public agency to limit the scope of an IEE in a way that would prevent an independent evaluator from fulfilling these purposes.

*Changes:* None.

*Comment:* Some commenters recommended adding language to the regulations requiring a parent to provide consent for release of education records when a hearing officer orders an LEA to provide an IEE at public expense.

*Discussion:* Consistent with § 300.622(b), parental consent is not required for a public agency to release education records to a hearing officer because a hearing officer is an official of a participating agency, as defined in § 300.611(c). However, when a hearing officer orders an IEE, parental consent would be required under § 300.622(a) for a public agency to release education records to the independent evaluator who will conduct the IEE, since in these situations, the independent evaluator is not an official of a participating agency. If a parent refuses to consent to the

release of education records to an independent evaluator, a hearing officer could decide to dismiss the complaint. Therefore, we are not changing the regulations in the manner suggested by the commenter.

*Changes:* None.

*Comment:* A few commenters requested clarification regarding what an LEA must do to satisfy the requirement in § 300.502(c)(1) that a public agency consider the results of an evaluation obtained by a parent at private expense. The commenters stated that public agencies often ignore the results of an IEE and recommended requiring public agencies to explain why an IEE was rejected.

*Discussion:* Section 300.502(c)(1) imposes an affirmative obligation on a public agency to consider the results of a parent-initiated evaluation at private expense in any decision regarding the provision of FAPE to the child, if that evaluation meets agency criteria. The requirement, however, does not mean that the public agency is compelled to consider the parent-initiated evaluation at private expense in its decision regarding the provision of FAPE, if it does not meet agency criteria. If the agency believes that the parent-initiated evaluation does not meet agency criteria, it would be appropriate for the agency to explain to the parent why it believes that the parent-initiated evaluation does not meet agency criteria.

*Changes:* None.

*Comment:* Several commenters indicated that permitting any party to use the results from a privately-funded IEE as evidence at a due process hearing may discourage parents from initiating and paying for evaluations of their child.

*Discussion:* If a parent obtains an evaluation at private expense, there is nothing in the Act or these regulations that requires a parent to share that evaluation with the public agency. A privately-funded evaluation that is not shared with a public agency would not be considered an IEE under this regulation. If, however, the parent chooses to share the evaluation with the public agency, that evaluation may be presented by any party as evidence in a due process hearing, in accordance with § 300.502(c)(2). Similarly, if a public agency reimburses a parent for an IEE, and the parent disagrees with the results of the IEE, there is nothing in the Act or these regulations that would prevent a public agency from introducing that evaluation in a due process hearing over the parent's objection. We disagree with the commenters to the extent that they believe that parents should have an

expectation of privacy regarding an evaluation that is publicly-funded or for which they seek public funding. We believe it is necessary to change § 300.502(c)(2) to ensure that public agencies have the opportunity to introduce the results of publicly-funded IEEs at due process hearings.

*Changes:* We have added language in § 300.502(c) to permit any party to present the results of a publicly-funded IEE. We have also clarified that if a parent shares a privately-funded IEE with the public agency, the privately-funded IEE may be used as evidence in a due process hearing.

*Comment:* One commenter recommended that the regulations prohibit the testimony of experts who did not evaluate the child before the due process hearing, unless the other party has an equal opportunity to evaluate the child at public expense, both parties consent to such testimony, or the hearing officer or judge orders the evaluation.

*Discussion:* It would be inappropriate to regulate in the manner recommended by the commenter. Such determinations are made on a case-by-case basis in light of the specific facts of each case at the discretion of the hearing officer. We believe that the hearing officer, as the designated trier of fact under the Act, is in the best position to determine whether expert testimony should be admitted and what weight, if any, should be accorded that expert testimony. We would expect that these decisions will be governed by commonly applied State evidentiary standards, such as whether the testimony is relevant, reliable, and based on sufficient facts and data.

*Changes:* None.

#### Prior Notice by the Public Agency; Content of Notice (§ 300.503)

*Comment:* One commenter stated that the prior written notice be given to parents as soon as possible, but no later than 15 days before the public agency proposes to initiate or refuse a change. Another commenter recommended requiring IEP Teams to carefully consider all the data and options before making a decision to change a child's placement or refuse the parent's request for services.

*Discussion:* Section 300.503(a) incorporates section 615(b)(3) of the Act and requires a public agency to provide parents with written notice that meets the requirements in § 300.503(b) a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. We

do not believe that it is necessary to substitute a specific timeline to clarify what is meant by the requirement that the notice be provided within a reasonable period of time, because we are not aware of significant problems in the timing of prior written notices. In addition, prior written notice is provided in a wide variety of circumstances for which any one timeline would be too rigid and, in many cases, might prove unworkable.

We do not believe that it is necessary to add a requirement that IEP Teams carefully consider all the data and options before making a decision to change a child's placement or refuse the parent's request for services. Section 300.306(c) already requires the group of professionals and the parent of the child to carefully consider information from a variety of sources before determining a child's eligibility and placement.

Furthermore, the requirements for developing, reviewing, and revising a child's IEP in § 300.324, ensure that IEP Teams carefully consider all available information in developing an IEP, including information from the child's parents.

*Changes:* None.

*Comment:* One commenter suggested permitting the prior written notice to be the IEP itself, rather than requiring a separate document.

*Discussion:* There is nothing in the Act or these regulations that would prohibit a public agency from using the IEP as part of the prior written notice so long as the document(s) the parent receives meet all the requirements in § 300.503.

*Changes:* None.

*Comment:* One commenter asked how a parent would know that the public agency is refusing to initiate or change the identification, evaluation, or placement of a child without an IEP Team meeting. Another commenter stated that prior written notice should be provided in advance of an IEP Team meeting, not at the IEP Team meeting, so that parents could prepare for the meeting. The commenter suggested adding language to the regulations requiring that the notice be given a reasonable time before an IEP Team meeting.

*Discussion:* The commenter confuses the Act's prior written notice requirements with the requirements governing IEP Team meetings. Section 300.503(a), consistent with section 615(b)(3) of the Act, requires prior written notice whenever a public agency proposes to initiate or change (or refuses to initiate or change) the identification, evaluation, or educational placement of a child, or the provision of FAPE to a

child. A public agency meets the requirements in § 300.503 so long as the prior written notice is provided a reasonable time before the public agency implements the proposal (or refusal) described in the notice. A public agency is not required to convene an IEP Team meeting before it proposes a change in the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. The proposal, however, triggers the obligation to convene an IEP Team meeting. Providing prior written notice in advance of meetings could suggest, in some circumstances, that the public agency's proposal was improperly arrived at before the meeting and without parent input. Therefore, we are not changing § 300.503 to require the prior written notice to be provided prior to an IEP Team meeting.

*Changes:* None.

*Comment:* A few commenters recommended retaining current § 300.503(a)(2), which provides that if the prior written notice relates to an action that also requires parental consent, the agency may give notice at the same time it requests parental consent.

*Discussion:* It is not necessary to explain in the regulations that prior written notice can be provided at the same time as parental consent is requested, because parental consent cannot be obtained without the requisite prior written notice. The removal of this regulatory provision, however, is not intended to prohibit a public agency from giving prior written notice at the same time that parental consent is sought, should the agency choose to do so.

*Changes:* None.

*Comment:* One commenter asked that the public agency be required to provide a description of all the proposals made by anyone on the IEP Team and the reasons why one proposal was chosen over another.

*Discussion:* Section 300.503(b)(1) and (b)(2) require the prior written notice to include a description of the action proposed or refused by the agency and an explanation of why the agency proposes or refuses to take the action. We do not believe that the change suggested by the commenter is needed because § 300.503(b)(6) and (b)(7) already require that the prior written notice include a description of the other options that the IEP Team considered, the reasons why those options were rejected, and a description of other factors that are relevant to the agency's proposal or refusal.

*Changes:* None.

*Comment:* One commenter suggested requiring the SEA to provide a list of resources for parents to obtain assistance in understanding the requirements of the Act, including providing easy access to the information on the State's Web site.

*Discussion:* Section 300.503(b)(5), consistent with section 615(c)(1)(D) of the Act, already requires the prior written notice to include sources for parents to contact to obtain assistance in understanding the provisions of this part. The Department believes that parents should have easy access to information regarding resources to understand the provisions of the Act. For many parents, this may include accessing such information on the State's Web site. Each State is in the best position to determine whether including this information on its Web site would be helpful for parents. Therefore, we decline to add this requirement to the regulations.

*Changes:* None.

*Comment:* One commenter recommended removing § 300.503(c)(2), regarding the public agency's responsibilities when the parent's native language or other mode of communication is not a written language. The commenter recommended, instead, requiring a public agency to use procedures that involve little or no cost. One commenter stated that § 300.503(c)(2) should be removed because all but paragraph (c)(2)(ii), regarding ensuring that the parent understands the content of the prior written notice, exceed statutory requirements.

*Discussion:* For parents whose mode of communication is not a written language, § 300.503(c)(2) requires the public agency to ensure that the notice is translated orally or by other means to the parent and that the parent understands the content of the notice. We decline to remove § 300.503(c) because we believe that these rights, as well as the other rights enumerated in § 300.503(c), are essential to ensure that public agencies provide all parents the requisite prior written notice in a meaningful and understandable manner.

*Changes:* None.

#### Procedural Safeguards Notice (§ 300.504)

*Comment:* Many comments were received regarding when the procedural safeguards notice must be provided to parents. One commenter stated that these requirements add paperwork and procedural burdens. Several commenters expressed concern that parents will have knowledge of their procedural safeguards only when they

file a State complaint or request a due process hearing. Some commenters recommended deleting the requirement in § 300.504(a)(2) for the public agency to give parents the procedural safeguards notice upon receipt of the first State complaint or due process hearing in the school year. Other commenters suggested amending § 300.504(a)(2) to require that the procedural safeguards notice be provided to parents upon receipt of the first due process complaint in that school year. Some commenters asked whether parents would receive a copy of the procedural safeguards notice only upon the first filing of a State complaint or a due process complaint, but not twice, if a parent submits a complaint and also a request for a due process hearing in the same school year.

One commenter was concerned that the parents of a child with a disability who transfers into a new school will not be notified of their procedural rights in a timely manner.

*Discussion:* Section 300.504(a) reflects the new statutory language in section 615(d)(1) of the Act, regarding the timing of the procedural safeguards notice. Section 300.504(a)(1) and (4), consistent with section 615(d)(1)(A) of the Act, states that a copy of the procedural safeguards must be given to parents one time a year, except that a copy must also be given to parents upon initial referral or parent request for evaluation; upon receipt of the first State complaint and due process complaint in that school year; and upon request by a parent. There is no longer a requirement that the procedural safeguards notice be given to parents upon notification of each IEP Team meeting, as in current § 300.504(a).

We disagree that § 300.504(a)(2) should be removed. The Department intends for parents to receive a copy of the procedural safeguards notice upon receipt of the first State complaint under §§ 300.151 through 300.153 and upon receipt of the first due process complaint under § 300.507 in a school year because we believe that parents particularly need a clear understanding of their rights when they embark on these processes and might not have available copies of the procedural safeguards notice provided earlier in the year, or the notice they previously received may be outdated. We are changing § 300.504(a)(2) to make this clear. We also are changing § 300.504(a) to specify that the statutory phrase "one time a year" refers to "one time a school year."

Regarding the concern that a parent whose child transfers to a new school district might not receive appropriate

notice of the Act's procedural safeguards, we do not believe that additional clarification is necessary. We believe that these regulatory provisions are sufficient to ensure that the parent of a child who changes school districts receives the requisite notice in a timely manner. When the child with a disability transfers to a new school district, that school district would have an obligation to ensure that the child's parents are provided notice at least once in that school year and at the other times specified in § 300.504(a).

We believe that the requirements in § 300.504(a) are necessary to ensure that parents have information about the due process procedures when they are most likely to need them and do not view these requirements as unduly burdensome.

*Changes:* Section 300.504(a)(2) has been changed to require public agencies to provide parents with a copy of the procedural safeguards notice upon receipt of the first State complaint under §§ 300.151 through 300.153 in a school year and upon receipt of the first due process complaint under § 300.507 in a school year. We have also changed paragraph (a) in § 300.504 to clarify that the statutory phrase "one time a year" refers to a "school" year.

*Comment:* Several commenters recommended that the procedural safeguards notice be given to parents when a decision has been made to take disciplinary action. Another commenter recommended that the procedural safeguards notice be given at the time a manifestation determination is reviewed.

*Discussion:* Section 615(k)(1)(H) of the Act requires public agencies to provide parents with a copy of the procedural safeguards notice not later than the date on which the decision to take disciplinary action is made. Therefore, we are adding this requirement in § 300.504(a). We will not add a requirement for public agencies to provide parents with a copy of the procedural safeguards notice following the manifestation determination conducted under § 300.530(e), because it would be unnecessarily duplicative to require a procedural safeguards notice to be provided both prior to and after a decision to take disciplinary action has been made.

*Changes:* A new paragraph (3) has been added in § 300.504(a) to require the procedural safeguards notice to be provided to parents in accordance with the discipline procedures in § 300.530(h). The subsequent paragraph has been renumbered, consistent with this change.

*Comment:* Some commenters requested that public agencies inform parents when the procedural safeguards notice has been revised, so that parents can request the updated version.

*Discussion:* Section 300.504(c), consistent with section 615(d) of the Act, lists the required contents of the procedural safeguards notice. If these requirements change because of changes made to the Act, public agencies would be required to change their procedural safeguards notice accordingly. Such changes, along with any additional changes to a State's rules, would be subject to the public participation requirements in § 300.165 and section 612(a)(19) of the Act.

*Changes:* None.

*Comment:* One commenter recommended requiring that the procedural safeguards notice include a parent's right to request the credentials of any teacher who supports the child in the educational environment, as well as documentation regarding the type of supervision provided for any teacher who is supervised by a highly qualified teacher.

*Discussion:* The content of the procedural safeguards notice is based on the items listed in section 615(d)(2) of the Act, which do not include providing information about teachers' credentials and personnel qualifications in a procedural safeguards notice, as requested by the commenter. Nor is there any requirement elsewhere in the Act for public agencies to provide information about teachers' credentials and personnel qualifications.

Section 1111(h)(6) of the ESEA, however, requires LEAs to inform parents about the quality of a school's teachers in title I schools. Under the ESEA, an LEA that accepts title I, part A funding must notify parents of students in title I schools that they can request information regarding their child's teacher, including, at a minimum: (1) whether the teacher has met State requirements for licensure and certification for the grade level(s) and subject-matter(s) in which the teacher provides instruction; (2) whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria has been waived; (3) the college major and any other graduate certifications or degrees held by the teacher, and the field of discipline of the certifications or degrees; and (4) whether the child is provided services by paraprofessionals, and if so, their qualifications. In addition, each title I school must provide each parent timely notice that the parent's child has been assigned, or has been taught for four or more

consecutive weeks, by a teacher who is not highly qualified. These requirements also apply to special education teachers who teach core academic subjects in title I schools.

*Changes:* None.

*Comment:* Numerous commenters expressed concern with allowing LEAs to post the procedural safeguards notice on the school's Web site. Several commenters asked whether directing a parent to the Web site constitutes distribution of the notice under the Act. One commenter suggested adding specific language to the regulations stating that posting the notice on the school Web site does not replace other Part B requirements regarding distribution of the notice.

*Discussion:* Section 300.504(b), incorporates section 615(d)(1)(B) of the Act, and permits, but does not require, a public agency to post a current copy of the procedural safeguards notice on its Web site, if one exists. The public agency would not meet its obligation in § 300.504(a) by simply directing a parent to the Web site. Rather, a public agency must still offer parents a printed copy of the procedural safeguards notice. If, however, a parent declines the offered printed copy of the notice and indicates a clear preference to obtain the notice electronically on their own from the agency's Web site, it would be reasonable for the public agency to document that it offered a printed copy of the notice that the parent declined. Posting the procedural safeguards notice on a public agency's Web site is clearly optional and for the convenience of the public and does not replace the distribution requirements in the Act. We do not believe it is necessary to add a regulation to clarify this.

*Changes:* None.

*Comment:* None.

*Discussion:* As noted in the *Analysis of Comments and Changes* section for subpart B, § 300.152(c)(1) has been amended to require that States set aside any part of a State complaint filed under §§ 300.151 through 300.153 that is being addressed in a due process hearing until the conclusion of the hearing, and resolve any issue that is not a part of the due process hearing decision within the 60-day timeline for State complaints (unless the timeline is extended, consistent with § 300.152(b)). This change was made to address those limited occasions when a parent files both a State complaint and a due process hearing on the same or similar issues. While the Department does not encourage the dual filing of complaints, we are aware that this occasionally occurs and it is important for the regulations to be clear as to how such

situations should be handled. In light of this change, we are amending the requirement in § 300.504(c)(5), regarding the contents of the procedural safeguards notice, to inform parents of the opportunity to present and resolve complaints through the due process complaint and the State complaint procedures.

*Changes:* We have removed the "or" in § 300.504(c)(5) and replaced it with "and" to require that the procedural safeguards notice include a full explanation of the opportunity to present and resolve complaints through the due process complaint and the State complaint procedures.

*Comment:* None.

*Discussion:* We are aware of the fact that over the years there has been much confusion about exactly what must be included in the procedural safeguards notice. To help clear up this confusion, the Department is publishing a model procedural safeguards notice on its Web site today in accordance with section 617(e) of the Act. In addition to making this model procedural safeguards notice available on the Department's Web site, we also are amending the cross-references in § 300.504(c) to identify the specific regulatory provisions that include procedural safeguards for which an explanation must be provided in the procedural safeguards notice.

*Changes:* We have revised the cross-references to specific regulatory sections in the introductory paragraph of § 300.504(c), consistent with the content listed in § 300.504(c)(1) through (13).

*Comment:* A few commenters asked that the regulations require a State to develop its procedural safeguards notice with the State's PTIs and CPRCs to ensure that it is appropriate for parents. One commenter recommended including contact information for PTIs and CPRCs in the notice.

*Discussion:* Section 300.165 and section 612(a)(19) of the Act require each State to ensure that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities, prior to adopting any policies and procedures to comply with Part B of the Act. There is nothing in the Act or these regulations that would prevent a public agency from consulting representatives of PTIs, CPRCs, or other advocacy organizations for assistance in developing the procedural safeguards notice so that it is appropriate for parents and the general public.

It would be unnecessarily prescriptive to require States to consult with representatives from particular

organizations in developing their procedural safeguards notice or to require that a State's procedural safeguards notice include contact information for particular organizations. We believe that such decisions are best left to States.

*Changes:* None.

*Comment:* Several commenters suggested requiring the procedural safeguards notice to explain how a resolution meeting works and the responsibilities of parents who participate in a resolution meeting. Some commenters recommended requiring public agencies to inform parents in writing about the differences between mediation and resolution meetings including the differences in confidentiality rules; whether attorneys' fees may be reimbursed; the effect of resolution and mediation sessions on due process hearing timelines; and the requirements governing the execution of resolution and mediation agreements.

*Discussion:* Section 300.504(c)(6), consistent with section 615(d)(2)(E)(iii) of the Act, requires the procedural safeguards notice to include a full explanation regarding the availability of mediation to resolve complaints. In addition, § 300.504(c)(5) requires the procedural safeguards notice to provide a full explanation of the opportunity for parents to present and resolve complaints through the due process complaint and State complaint procedures, including the time period in which to file a complaint, the opportunity for the agency to resolve the complaint, and the differences between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures. Because resolution meetings are part of the due process procedures, consistent with § 300.510 and section 615(f)(1)(B) of the Act, the explanation of due process procedures would necessarily include information about how the resolution meeting works and the responsibilities of the parties in the resolution meeting.

We do not believe it is necessary to require the procedural safeguards notice to explain the differences between mediation and resolution meetings because the differences will be apparent from the clear explanations of the respective procedures that are already required in the notice. However, there is nothing in the Act or these regulations that would prohibit a State from describing the differences between mediation and resolution meetings in its procedural safeguards notice, if it chose to do so.

*Changes:* None.

*Comment:* Several commenters requested clarification regarding the differences between the State complaint and due process complaint procedures that are required to be included in the procedural safeguards notice. Some commenters requested clarification regarding the meaning of the phrases "jurisdiction of each procedure" and "what issues may be raised" in State complaints versus due process complaints.

*Discussion:* It is important for public agencies to include an explanation of the State complaint procedures in §§ 300.151 through 300.153 and the due process complaint procedures in § 300.507 in the procedural safeguards notice to assist parents in understanding the differences between these procedures. The reference to "jurisdictional issues" addresses the scope of the State complaint and due process complaint procedures. An organization or individual may file a State complaint under §§ 300.151 through 300.153 alleging that a public agency has violated a requirement of the Act for a violation that occurred not more than one year prior to the date on which the complaint is received, unless one of the exceptions in § 300.153(c) is applicable. The Department's longstanding position is that a State must resolve any complaint, and may not remove from the jurisdiction of its State complaint procedures complaints regarding the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child simply because those issues also could be the subject of a due process complaint. We view the State complaint procedures as a very important tool in a State's exercise of its general supervision responsibilities, consistent with sections 612(a)(11) and 616(a) of the Act, to monitor LEA implementation of the requirements in Part B of the Act. These responsibilities extend to both systemic and child-specific issues.

A parent or a public agency may file a due process complaint under § 300.507 on any matter relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to such child for an alleged violation that occurred not more than two years (or, within the timeframe established by the State) before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint.

*Changes:* None.

Electronic Mail (§ 300.505)

*Comment:* One commenter requested that the regulations clarify that a parent who elects to receive notices by electronic mail must do so in writing.

*Discussion:* Section 300.505, which incorporates section 615(n) of the Act, permits public agencies to make the electronic mail option available for notices required in section 615 of the Act, including the prior written notice, procedural safeguards notice, and due process complaint notice. It would be an unnecessary paperwork burden to require a parent who elects to receive notices by electronic mail to do so in writing, particularly when there are other methods available to document such a request, for example, by the LEA making a notation of the parent's verbal request. We believe public agencies should have the flexibility to determine whether and how to document that a parent elects to receive these notices by electronic mail.

*Changes:* None.

Mediation (§ 300.506)

*Comment:* Several commenters stated that the S. Rpt. No. 108-185 expressed Congressional intent for a hearing officer to have the same plenary power over a due process hearing as a Federal or State judge. The commenters, therefore, recommended permitting a hearing officer to require mediation.

*Discussion:* Section 300.506(a) incorporates section 615(e)(1) of the Act and requires public agencies to establish and implement procedures to allow parties to resolve disputes involving any matter under Part B of the Act, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process. Section 615(e)(2)(A)(i) of the Act requires the public agency to ensure, among other things, that the mediation process is voluntary on the part of the parties. In light of these explicit statutory requirements, we do not believe that a hearing officer can order that the parties to a due process complaint engage in mediation.

*Changes:* None.

*Comment:* One commenter suggested that the regulations include language to ensure that the mediation process is not used to deny or delay a parent's right to have a State complaint investigated.

*Discussion:* We do not believe that additional language is necessary to address the commenter's concern. Section 300.506(a) requires each public agency to ensure that procedures are established and implemented to allow parties to resolve disputes involving any matter under Part B of the Act,



including matters arising prior to the filing of a due process complaint, to resolve disputes through mediation. We believe that parties could use mediation prior to, or after, filing a State complaint.

Section 300.506(b)(1)(ii), consistent with section 615(e)(2)(A)(ii) of the Act, is clear that mediation cannot be used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny other rights afforded under Part B of the Act. "Other rights under Part B of the Act" include a parent's right to file a State complaint and to have that complaint resolved within applicable timelines. If the parties involved voluntarily wish to engage in mediation once the complaint is filed, and the mediation is not successful in resolving the dispute, the entity responsible for resolving the complaint at the State level must ensure that the complaint is resolved within the applicable timelines in § 300.152. Mediation is not an exceptional circumstance that would justify extension of the 60-day timeline for issuing the final decision in a State complaint, unless the parties agree otherwise. However, as provided in § 300.152(b)(1)(ii), the parent and the public agency involved can agree to extend the time limit to engage in mediation to resolve the complaint.

*Changes:* None.

*Comment:* One commenter recommended allowing parties in a dispute to engage in mediation and have the mediator facilitate the IEP Team meeting to incorporate the terms of the mediation agreement into the child's IEP.

*Discussion:* Although not required by the Act, there is nothing in the Act that would prohibit the parties in a dispute to agree during mediation to have the mediator facilitate an IEP Team meeting and to incorporate the terms of the mediation agreement into the child's IEP.

*Changes:* None.

*Comment:* Some commenters suggested defining "effective mediation techniques" as techniques recognized by any State or national accreditation or professional mediation association. The commenters also recommended requiring a formal training and certification process for mediators, which is created and paid for by the SEA.

*Discussion:* We decline to define "effective mediation techniques" in the manner suggested by the commenters. States have used a number of successful techniques over the years to resolve disputes between parents and public agencies, and we do not want to restrict

a State's discretion by providing a particular definition. Whether formal training and certification for mediators is required is a decision best left to each State, depending on State policy.

*Changes:* None.

*Comment:* A few commenters recommended requiring mediators to be unbiased and knowledgeable in laws, regulations, and best practices related to children with disabilities. Some commenters recommended requiring the list of mediators to include information on the mediator's qualifications. Other commenters recommended that the list of mediators and their qualifications be provided to parents and the public.

*Discussion:* We do not believe additional regulations regarding the qualifications of mediators are necessary. Section 300.506(b)(3), consistent with section 615(e)(2)(C) of the Act, requires States to maintain a list of individuals who are qualified mediators and knowledgeable in the laws and regulations relating to the provision of special education and related services. In addition, § 300.506(c)(1)(ii) requires impartial mediators who do not have a personal or professional interest that would conflict with the person's objectivity.

Parents do not select the mediator to mediate a particular case. Rather, § 300.506(b)(3)(ii) requires that the process for selecting mediators be impartial. Therefore, we do not believe that public agencies should be required to provide the list of mediators and their qualifications to parents and the public. However, there is nothing in the Act that would prohibit a State from making this information available to parents and the public, if it chooses to do so.

*Changes:* None.

*Comment:* One commenter recommended that the regulations clarify whether the public agency is required to offer parents who choose not to use the mediation process an opportunity to meet with a disinterested party.

*Discussion:* We believe the regulations are clear. Section 300.506(b)(2), consistent with section 615(e)(2)(B) of the Act, states that a public agency may establish procedures to offer parents and schools that choose not to use mediation, an opportunity to meet with a disinterested party who would explain the benefits of, and encourage the use of, mediation. Therefore, States may establish such procedures, but are not required to do so. No further clarification is necessary.

*Changes:* None.

*Comment:* One commenter objected to the requirement in § 300.506(b)(3)(ii) that States select mediators on a

random, rotational, or other impartial basis, and requested retaining current § 300.506(b)(2)(ii), which permits the parties to agree on a mediator when the mediator is not selected on a random basis.

*Discussion:* Section 300.506(b)(3)(ii) replaces current § 300.506(b)(2)(ii) and requires the State to select mediators on a random, rotational, or other impartial basis. These provisions are sufficient to ensure that the selection of the mediator is not biased, while providing SEAs additional flexibility in selecting mediators. Selecting mediators on an impartial basis would include permitting the parties involved in a dispute to agree on a mediator.

*Changes:* None.

*Comment:* One commenter requested a definition of "timely manner" in § 300.506(b)(5), regarding the scheduling of mediation sessions.

*Discussion:* Section 300.506(b)(5) incorporates section 615(e)(2)(E) of the Act and requires that the scheduling of each session in the mediation process be completed in a timely manner. It is not necessary to define "timely manner" because this requirement must be read consistent with the State's responsibility to ensure that the mediation process does not operate to deny or delay a parent's right to a hearing on a due process complaint, or to deny other rights afforded under Part B of the Act.

*Changes:* None.

*Comment:* Many commenters stated that mediation discussions should remain confidential and not be used in any subsequent due process hearings or proceedings. The commenters recommended that the phrase "arising from that dispute" in § 300.506(b)(6)(i) and § 300.506(b)(8) be removed. The commenters viewed these provisions as permitting confidentiality to apply only to the current issue in dispute, and not in other subsequent actions. Some commenters expressed concern that mediation could be used as "discovery" for some future dispute between parties, or for a simultaneous dispute between the same public agency and some other children, or disputes involving the same lawyers but different parties.

*Discussion:* We agree with the commenters that the phrase "arising from that dispute" should be removed in § 300.506(b)(6)(i) or § 300.506(b)(8). We believe that it is important to preserve the integrity of the mediation process to ensure that mediation discussions remain confidential and not be used in subsequent due process hearings or civil proceedings. To ensure that we do not interfere with the evidentiary privilege laws of States that might not participate in the Part B



program (a possibility, but not a current actuality), we are adding new language that limits the confidentiality provision to apply to due process hearings and proceedings in any Federal court and any State court of a State participating in Part B of the Act.

*Changes:* We have removed the phrase "arising from that dispute" from § 300.506(b)(6)(i). We also have removed the phrase "proceedings arising from that dispute" and replaced it with "proceeding of any Federal court or State court of a State receiving assistance under this part" from § 300.506(b)(8).

*Comment:* None.

*Discussion:* Following the publication of the NPRM, the Department reconsidered the subject of confidentiality pledges prior to the commencement of mediation. Section 300.506(b)(9) was included in the NPRM in light of note 208 of Conf. Rpt. No. 108-779, p. 216, which indicates the Conference committee's intention that parties could be required to sign confidentiality pledges prior to the commencement of mediation, without regard to whether the mediation ultimately resolves the dispute. However, § 300.506(b)(8), already requires that discussions that occur during the mediation process be confidential and not be used as evidence in any subsequent due process hearing or civil proceeding. Therefore, we are removing § 300.506(b)(9). Removing § 300.506(b)(9), however, is not intended to prevent States from allowing parties to sign a confidentiality pledge to ensure that discussions during the mediation process remain confidential, irrespective of whether the mediation results in a resolution.

*Changes:* Paragraph (b)(9) in § 300.506 has been removed.

*Comment:* A few commenters expressed concern regarding the requirement in § 300.506(c)(1)(ii) that mediators must not have a personal or professional interest that conflicts with "the person's objectivity." The commenters stated that disputes will arise and compromise the integrity of the proceedings without a mechanism to determine whether a conflict exists.

*Discussion:* Section 300.506(c)(1)(ii) incorporates section 615(e) of the Act, and provides that mediators must not have a personal or professional interest that would conflict with the person's objectivity. SEAs have an interest in ensuring that their mediators are seen as impartial persons so that the parties to disputes will be willing to use mediation to resolve those disputes. We do not believe that further regulation is needed, as the SEAs' interest in

ensuring that mediators are seen as impartial should be sufficient to provide for mechanisms to resolve conflicts to the extent needed in that State.

*Changes:* None.

*Comment:* One commenter recommended that the regulations clarify that a mediator cannot be employed simultaneously as a hearing officer.

*Discussion:* Case-by-case determinations would need to be made as to whether there is a conflict of interest in the situation that the commenter describes. For example, we believe that a conflict would arise if a mediator was subsequently assigned as a hearing officer for the same matter. We believe that the requirements in § 300.506(c)(1)(ii), applicable to mediators, and the corresponding requirements in § 300.511(c)(1)(i)(B), applicable to hearing officers, which prohibit a mediator and a hearing officer from having a personal or professional interest that would conflict with the person's objectivity at the mediation or the hearing, are sufficient to ensure that mediators and hearing officers are fair and unbiased.

*Changes:* None.

#### Filing a Due Process Complaint (§ 300.507)

*Comment:* Some commenters recommended changing the section heading in § 300.507 from "Filing a due process complaint" to "Requesting a due process hearing" to avoid confusion with the State complaint process. A few commenters requested that the regulations clarify that a request for due process hearing may be made regarding any matter pertaining to the identification, evaluation, educational placement, or provision of FAPE for a child.

*Discussion:* We do not believe that changing the heading to this section is necessary or that further clarification is needed regarding the matters about which a due process complaint can be filed. Section 300.507(a) and section 615(b)(6)(A) of the Act are clear that a parent or public agency may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. A party must file a due process complaint in accordance with §§ 300.507 through 300.508 prior to the opportunity for a due process hearing under this part. If the LEA does not resolve the complaint to the satisfaction of the parents during the resolution process, the disputed issues that were raised in the due process complaint

would be the subject of a due process hearing.

*Changes:* None.

*Comment:* Several commenters objected to the removal of current § 300.507(a)(2), which requires the public agency to inform the parent about the availability of mediation when a hearing is initiated. The commenters stated that the notice about the availability of mediation should be expanded, not eliminated.

*Discussion:* Section 615(e)(1) of the Act expands the availability of mediation by requiring public agencies to offer mediation to resolve disputes about any matter under this part. Current § 300.507(a)(2) was replaced by § 300.506(a), which incorporates section 615(e)(1) of the Act, and requires mediation to be available to resolve disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint. Section 300.506(a), therefore, expands the availability of mediation beyond that required in current § 300.507(a)(2). Therefore, there is no need to add the provision requested by the commenter.

*Changes:* None.

*Comment:* A few commenters stated that the requirement in § 300.507(a) places the burden on the parent to file a due process complaint.

*Discussion:* Section 300.507(a), consistent with section 615(b)(6) of the Act, permits either a parent or a public agency to file a due process complaint. Section 615(b)(7) of the Act is clear that a parent or a public agency must file a due process complaint notice before a due process hearing may commence.

*Changes:* None.

*Comment:* Many commenters supported the time limit for submitting a due process complaint. Some commenters stated that the regulations should clarify that, while States may adopt an explicit statute of limitations that is shorter than two years, they may not adopt a time period that is longer than two years. Other commenters recommended that the regulations clarify that if a State has an explicit time limit for requesting a due process hearing the State time limit must be reasonable. A few commenters recommended requiring States to conduct public hearings and provide an opportunity for public comment before the State establishes a reasonable time limit for filing a due process complaint. Still other commenters stated that the regulations should include a statement that common-law directives regarding statutes of limitations should not override the Act or State regulatory time limits.

Some commenters expressed concern that reducing the statute of limitations from three years to two years makes it impossible to protect the rights of children. The commenters stated that parents and school districts will be discouraged from participating in alternative dispute resolution options because of the short timeframe for filing a due process complaint.

*Discussion:* Section 300.507(a)(2) and section 615(b)(6)(B) of the Act are clear that a due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew, or should have known, about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limit for filing a due process complaint, in the time allowed by that State law.

There is nothing in the Act that would preclude a State from having a time limit for filing a complaint that is shorter or longer than two years. We believe that the Act leaves this decision to the States. A State choosing to adopt a time limit for requesting a hearing, other than the two year time limit in the Act, must comply with the public participation requirements in § 300.165 and section 612(a)(19) of the Act, which require that prior to the adoption of any policies and procedures needed to comply with Part B of the Act (including any amendments to such policies and procedures), the State must ensure that there are public hearings, adequate notice of the hearings, and an opportunity for public comment. However, if a State already has an explicit time limit in statute or regulation, and has met the requirements in § 300.165 and section 612(a)(19) of the Act in establishing that requirement, new public hearings and public comment periods are not required.

It is not necessary to clarify that common-law directives regarding statutes of limitations should not override the Act or State regulatory timelines, as the commenters recommended, because the Act and these regulations prescribe specific limitation periods which supersede common law directives in this regard.

*Changes:* None.

*Comment:* One commenter suggested that the regulations allow extensions of the statute of limitations when a violation is continuing or the parent is requesting compensatory services for a violation that occurred not more than three years prior to the date the due process complaint is received.

*Discussion:* Section 615(f)(3)(D) of the Act provides explicit exceptions to the

timeline for requesting a due process hearing. Section 300.511(f) incorporates these provisions. These exceptions do not include when a violation is continuing or where a parent is requesting compensatory services for a violation that occurred not more than three years from the date that the due process complaint was filed. Therefore, we do not believe that the regulations should be changed.

*Changes:* None.

*Comment:* One commenter suggested removing § 300.507(b), which requires a public agency to inform parents of any free or low-cost legal and other relevant services in the area. The commenter stated that schools should voluntarily provide this information to parents. One commenter requested clarification regarding the meaning of “other relevant services” about which the public agency must inform parents. Another commenter requested that public agencies post information about free or low-cost legal services on their Web sites.

*Discussion:* The provisions in § 300.507(b) are protected by section 607(b) of the Act and require the public agency to inform parents about the availability of free or low-cost legal and other relevant services, if the parent requests such information or the parent or the agency requests a due process hearing. Generally, “other relevant services” refers to other sources that parents could consult for information, such as parent centers.

The Department believes that parents should have easy access to information about any free or low-cost legal and other relevant services in the area. Making the information available on the State’s Web site may be a good way of providing parents easily accessible information, but it may not be effective in all cases. Each State is in the best position to determine whether including this information on its Web site would be helpful for parents. Therefore, we decline to add this as a requirement in these regulations, as recommended by the commenter.

*Changes:* None.

*Comment:* None.

*Discussion:* Upon internal review, we determined that it would be clearer for § 300.507(b)(2) to state that the parents or the agency files a due process complaint, rather than request a hearing under § 300.507.

*Changes:* We have amended the language of § 300.507(b)(2) to refer to filing a due process complaint rather than requesting a hearing.

Due Process Complaint (§ 300.508)

*Comment:* A few commenters expressed concern regarding the use of similar terminology for due process complaints and State complaints. Some commenters stated that the State complaint procedures may mistakenly be considered a pre-requisite to commencing a due process hearing. A few commenters requested changing the heading in § 300.508 from “Due process complaint” to “Requesting a due process hearing” to avoid unnecessary confusion.

*Discussion:* Section 615(b)(7)(B) of the Act states that a party may not have a hearing on a due process complaint or engage in a resolution meeting until the party, or the attorney representing the party, files a due process complaint that meets the requirements in § 300.508(b). There is no requirement that a party file a State complaint prior to filing a due process hearing, and we believe that the regulation is sufficiently clear about this point. Renaming this section “Requesting a due process hearing” could incorrectly suggest that there is no requirement to file a due process complaint prior to a due process hearing. Therefore, we decline to change the name of the heading, as requested by the commenters.

*Changes:* None.

*Comment:* A few commenters requested clarification regarding when a determination about the sufficiency of a due process complaint must be made and who makes the determination. One commenter stated that any party who alleges that a notice is insufficient should be required to state in writing the basis for that belief, including the information that is missing or inadequate.

Many commenters recommended removing the phrase “or engage in a resolution meeting” in § 300.508(c). The commenters expressed concern that requiring parties to engage in a resolution meeting before a due process hearing will delay the due process hearing, particularly when the parties must wait for a hearing officer to determine the sufficiency of a due process complaint before holding a resolution meeting. One commenter requested that the regulations state that the public agency may not deny or delay a parent’s right to a due process hearing. A few commenters recommended that the regulations clarify that a resolution meeting cannot be held until the complaint is deemed sufficient.

Some commenters questioned the appropriateness of requiring a substantive response to a due process complaint during a resolution meeting

before the complaint is determined to be sufficient. Other commenters asked whether the 10-day timeline for the party receiving the complaint to respond to the due process complaint resets when a party deems a due process complaint to be insufficient or when a hearing officer rules that the complaint is insufficient.

One commenter asked whether two resolution meetings are required when the sufficiency of the complaint is challenged, and whether the 30-day resolution period is reset by an insufficient complaint. The same commenter asked whether the resolution meeting should be scheduled within 50 days of receiving the parent's original due process complaint, if insufficiency has been determined or is pending.

*Discussion:* Section 300.510(a), consistent with section 615(f)(1)(B) of the Act, requires the LEA, within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a hearing, to convene a meeting with the parent and the relevant members of the IEP Team to discuss the parent's due process complaint so that the LEA has an opportunity to resolve the dispute. Section 300.508(d)(1), consistent with section 615(c)(2)(A) and (D) of the Act, provides 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 due process complaint does not meet the requirements in § 300.508(b). If the party receiving the due process complaint notice believes the complaint is insufficient, the hearing officer determines the sufficiency of the complaint. There is no requirement that the party who alleges that a notice is insufficient state in writing the basis for the belief.

Section 300.508(d)(2), consistent with section 615(c)(2)(D) of the Act, states that the hearing officer must make a determination within five days of receiving notice that the party believes the complaint is insufficient and immediately notify the parties in writing of that determination.

If the hearing officer determines that the notice is not sufficient, the hearing officer's decision will identify how the notice is insufficient, so that the filing party can amend the notice, if appropriate. We are not further regulating on how the sufficiency claim is raised, however, as we believe that this matter is more appropriately

addressed by each State, in light of their other hearing procedures.

Section 615(b)(7)(B) of the Act, provides that a party may not have a hearing on a due process complaint until the party or the party's attorney files a due process complaint that meets the content standards in section 615(b)(7)(A) of the Act, which are reflected in § 300.508(b). If the complaint is determined to be insufficient and is not amended, the complaint could be dismissed.

We agree with S. Rpt. No. 108-185, p. 38, which states that the resolution meeting should not be postponed when the LEA believes that a parent's complaint is insufficient. While the period to file a sufficiency claim is the same as the period for holding the resolution meeting, parties receiving due process complaint notices should raise their sufficiency claims as early as possible, so that the resolution period will provide a meaningful opportunity for the parties to resolve the dispute.

In order to resolve ambiguity on the relationship of a sufficiency claim to the resolution meeting, we are revising § 300.508(c) to remove the reference, which is not statutory, to the resolution meeting. There is no need to hold more than one resolution meeting, impose additional procedural rules, or otherwise adjust the resolution timeline.

We do not believe it is necessary to add language to the regulations stating that a public agency may not deny or delay a parent's right to a due process hearing. We believe that the timelines and requirements for filing a due process complaint, and the timelines for hearing officer decisions regarding the sufficiency of a complaint will safeguard against due process hearings being unfairly or unnecessarily delayed.

*Changes:* We have removed the words "or engage in a resolution meeting" in § 300.508(c) for clarity.

*Comment:* One commenter stated that the timeline for filing a due process hearing should begin when the due process complaint is deemed sufficient. However, some commenters stated that the timeline should begin when a party files a due process complaint notice. Several commenters stated that a hearing officer should be allowed to determine whether an amended complaint relates to the original complaint for purposes of determining the time limit for filing a due process complaint.

*Discussion:* We do not believe that a separate filing of a due process complaint notice and due process complaint, with separate timelines, is required by the Act, as those distinctions would be unnecessarily

burdensome and cumbersome. Section 615(b)(7)(A)(i) of the Act describes the due process complaint notice as being filed "in the complaint," and we have organized our regulation consistent with this provision.

Section 300.507(a)(2), consistent with section 615(b)(6)(B) of the Act, states that a due process complaint must allege a violation that occurred not more than two years (or the time allowed by State law), before the date the parent or public agency knew, or should have known, about the alleged action that forms the basis of the due process complaint. Section 615(f)(3)(D) of the Act provides exceptions to the timeline if a parent was prevented from filing a due process complaint, which are reflected in § 300.511(f). It is up to hearing officers to determine whether a specific complaint is within the allowable timeline, including whether an amended complaint relates to a previous complaint.

*Changes:* None.

*Comment:* Many commenters stated that the process for amending a due process complaint is complex and unnecessarily complicated, and will force parents to seek the services of an attorney and make the relationship between parties more adversarial. One commenter recommended allowing a hearing request to be amended up to five days before the parties meet to set a hearing schedule, rather than five days before the hearing.

*Discussion:* We do not agree that the process for amending a due process complaint is complex and unnecessarily complicated. Section 300.508(d)(3) and section 615(c)(2)(E) of the Act allow the party filing the due process complaint an opportunity to amend the complaint to ensure that the complaint accurately sets out their differences with the other party. The complaint can be amended only if the parties mutually agree in writing to the amendment and are given the opportunity for a resolution meeting, or the hearing officer grants permission to amend the complaint at any time not later than five days before the due process hearing begins. This process ensures that the parties involved understand and agree on the nature of the complaint before the hearing begins. We, therefore, decline to change these regulations, and see no reason to change the timeline for amending a complaint in the manner suggested by the commenter.

Section 300.508(d)(4) and section 615(c)(2)(E)(ii) of the Act provide that when a due process complaint is amended, the timelines for the resolution meeting and the time period for resolving the complaint begin again

with the filing of the amended due process complaint.

*Changes:* None.

*Comment:* Some commenters stated that parents who are filing a due process complaint without the assistance of an attorney should have more flexibility when the sufficiency of the complaint is determined. The commenters stated that parents should be able to receive assistance from their State's due process office to complete the due process complaint so that it meets the standard for sufficiency.

*Discussion:* To assist parents in filing a due process complaint, § 300.509 and section 615(b)(8) of the Act require each State to develop a model due process complaint form. While there is no requirement that States assist parents in completing the due process complaint form, resolution of a complaint is more likely when both parties to the complaint have a clear understanding of the nature of the complaint. Therefore, the Department encourages States, to the extent possible, to assist a parent in completing the due process complaint so that it meets the standards for sufficiency. However, consistent with section 615(c)(2)(D) of the Act, the final decision regarding the sufficiency of a due process complaint is left to the discretion of the hearing officer.

*Changes:* None.

*Comment:* One commenter stated that parents who file a due process complaint without the assistance of an attorney should be allowed to amend their complaint without having to start the process all over again, as long as their statement provides the information LEAs need to proceed toward resolution. A few commenters stated that a formal amendment should not be required for minor insufficiencies, such as leaving out the child's address or name of the child's school, especially if the LEA already has this information.

Many commenters recommended that a hearing officer be allowed to permit a party to amend the due process complaint, unless doing so would prejudice the opposing party. The commenters stated that, at a minimum, the regulations should state that hearing officers must follow the standard that permits them to freely grant amendments, regardless of timelines, when justice so requires.

*Discussion:* Section 300.508(d)(3), consistent with section 615(c)(2)(E) of the Act, provides that a party may only amend its complaint in two circumstances: (1) if the other party consents in writing to the amendment and is given the opportunity to resolve the complaint in a resolution meeting convened under § 300.510, or (2) if the

hearing officer grants permission for the amendment, but only at a time not later than five days before the hearing begins. Therefore, we do not believe further clarification is necessary. With regard to parents who file a due process complaint without the assistance of an attorney or for minor deficiencies or omissions in complaints, we would expect that hearing officers would exercise appropriate discretion in considering requests for amendments.

*Changes:* None.

*Comment:* One commenter suggested adding language to the regulations stating that an LEA may request and, as a matter of right, be granted one 10-day extension to respond to a parent's due process complaint.

*Discussion:* Section 615(c)(2)(B)(ii) of the Act provides that the receiving party must provide the party that filed the complaint a response to the complaint within 10 days of receiving the complaint. The Act makes no provision for extending this time period, and we do not believe it would be appropriate to amend the regulations in this manner. Allowing an LEA additional time to respond to a parent's due process complaint could be used to unduly delay the due process hearing, to the detriment of the interests of the child.

*Changes:* None.

*Comment:* A few commenters expressed concern that the regulations appear to require parents to be represented by an attorney in due process proceedings and requested that the regulations permit a party in a due process hearing to be represented by a non-attorney advocate. The commenters stated that this would allow more uniform access to assistance across all socio-economic groups and decrease the formality of hearings.

*Discussion:* We are considering the issue of non-attorney representation of parties in a due process hearing under the Act, in light of State rules concerning the unauthorized practice of law. We anticipate publishing a notice of proposed rulemaking in the near future seeking public comment on this issue.

*Changes:* None.

*Comment:* One commenter requested clarification regarding whether there is legal significance or consequence to a responding party who fails to file the required response to a due process complaint or to an LEA that fails to send both the prior written notice and the due process complaint notice.

*Discussion:* The Act does not establish consequences for parents who are the receiving parties to complaints if they fail to respond to a due process complaint notice. However, either

party's failure to respond to, or to file, the requisite notices could increase the likelihood that the resolution meeting will not be successful in resolving the dispute and that a more costly and time-consuming due process hearing will occur.

*Changes:* None.

*Comment:* One commenter recommended that the regulations specifically state that a party has a right to seek immediate intervention from a hearing officer to resolve pre-hearing issues and disputes.

*Discussion:* Section 300.508, consistent with section 615(b) and (c) of the Act, sets out the requirements and timelines for filing a due process complaint. We do not believe the further clarification requested by the commenter is necessary because the due process complaint procedures are intended to resolve pre-hearing issues and disputes and allow parties to seek immediate resolution by a hearing officer, when necessary, regarding the sufficiency of a due process complaint and amendments to a complaint.

*Changes:* None.

*Comment:* One commenter requested that the regulations require a hearing officer to dismiss a complaint when the hearing officer determines that all issues and allegations are insufficient to go forward.

*Discussion:* We do not believe that Federal regulations on this matter are required, as we believe that States and individual hearing officers are in a better position to decide on the utility of, or need for, dismissals.

*Changes:* None.

#### Model Forms (§ 300.509)

*Comment:* None.

*Discussion:* In reviewing this section, we realized that the language in paragraph (a) might incorrectly be read to suggest that parties other than parents and public agencies could file due process complaints.

*Changes:* We have amended the language of § 300.509(a) to clarify that only parents and public agencies can file due process complaints, while parents, public agencies, and other parties can file State complaints.

*Comment:* One commenter suggested including a statement in § 300.509 clarifying that parents can use a model form, create their own form, or use a form created by their attorney, as long as it meets the requirements of the Act.

*Discussion:* We agree that the use of the model forms should not be required by an SEA or LEA, and that parents (or other parties filing a State complaint) may use some other form of notice, so long as their notice meets the content

requirements of the Act. We are clarifying this in § 300.509.

*Changes:* We have restructured § 300.509 and clarified that SEAs or LEAs cannot require the use of the model forms. We have added a new paragraph (b) to § 300.509 to provide that parents and other parties may use another form, so long as the form that is used meets the content requirements in § 300.508(b) for filing a due process complaint, or the requirements in § 300.153(b) for filing a State complaint.

*Comment:* A few commenters requested language requiring the State to work with the State PTI and CPRC to develop the model forms so that they are written in a manner that parents can understand.

*Discussion:* It would be over-regulating to require a State to work with a particular group or groups to develop their model forms. We believe that such decisions are best made by each State and, therefore, decline to require a State to work with the State PTI and CPRC to develop the model forms. However, States must comply with the public participation requirements in § 300.165 and section 612(a)(19) of the Act prior to adopting a model form. To meet the public participation requirements, the State must ensure that there are public hearings and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

*Changes:* None.

*Comment:* A few commenters recommended that the regulations clarify that a hearing officer may not determine that a due process complaint is insufficient in any State that has not developed the model forms required in § 300.509.

*Discussion:* It would be inappropriate to prohibit a hearing officer from finding that a complaint is insufficient if the receiving party properly challenges the sufficiency of the complaint in accordance with § 300.508(d)(1) because the State has failed to develop the model forms in accordance with § 300.509 and section 615(b)(8) of the Act. Development of the model forms is a State responsibility and parties to a due process hearing should not be penalized because a State fails to meet the requirements in section 615(b)(8) of the Act. The Department is authorized to impose sanctions on a State, in accordance with section 616(d), (e), and (g) of the Act, if it fails to develop the model forms required in § 300.509.

*Changes:* None.

*Comment:* One commenter recommended that model forms should

be developed to assist education agencies in filing a due process complaint.

*Discussion:* We disagree with the commenter. We believe that the due process complaint requirements in § 300.508 provide sufficient information for education agencies that wish to file a due process complaint.

*Changes:* None.

Resolution Process (§ 300.510)

Resolution Meeting (§ 300.510(a))

*Comment:* One commenter expressed concern that the resolution process under the due process complaint procedures could limit the State complaint procedures as a means of resolving disputes.

*Discussion:* The due process complaint procedures and the State complaint procedures are separate and distinct. The State complaint procedures remain a viable alternative to the due process procedures for parents to resolve disputes with public agencies in a less formal and more cost-effective manner.

*Changes:* None.

*Comment:* Several commenters recommended that the regulations require an LEA to notify the parent, within five days of receiving a due process complaint, whether the LEA intends to convene a resolution meeting or waive the session. The commenters recommended that the notice include a signature line for a parent to indicate an agreement to waive the resolution meeting.

*Discussion:* Section 615(f)(1)(B) of the Act requires an LEA to convene a resolution meeting with the parent and the relevant member(s) of the IEP Team within 15 days of receiving notice of the parent's due process complaint. The purpose of the meeting is for the parent to discuss the due process complaint and the facts that form the basis of the due process complaint so that the LEA has an opportunity to resolve the dispute. We do not believe it is necessary to require an LEA to notify the parent within five days of receiving a due process complaint about the LEA's intention to convene or waive the resolution process. An LEA that wishes to engage in a resolution meeting will need to contact the parent to arrange the meeting soon after the due process complaint is received in order to ensure that the resolution meeting is held within 15 days.

Section 300.510(a)(3) provides that the resolution meeting does not need to be held if the parent and the LEA agree in writing to waive the meeting, or if the parent and LEA agree to use the

mediation process to resolve the complaint. The manner in which the LEA and parent come to an agreement to waive the resolution meeting is left to the discretion of States and LEAs. We do not believe that there is a need to regulate further in this area.

*Changes:* None.

*Comment:* Some commenters asked whether the requirements for resolution meetings apply when an LEA initiates a due process hearing. A few commenters recommended that the requirements for resolution meetings should not apply when an LEA initiates a due process hearing.

*Discussion:* Section 615(f)(1)(B)(i) of the Act requires an LEA to convene a resolution meeting when a parent files a due process complaint. Consistent with section 615(f)(1)(B)(i)(IV) of the Act, the resolution meeting provides an opportunity for the parents of the child to discuss their complaint, and the facts that form the basis of the complaint, so that the LEA has an opportunity to resolve the complaint. There is no provision requiring a resolution meeting when an LEA is the complaining party. The Department's experience has shown that LEAs rarely initiate due process proceedings.

*Changes:* None.

*Comment:* Some commenters recommended that the regulations clarify that, in addition to their attorney, parents may bring other participants to the resolution meeting, such as an advocate or family friend. Other commenters recommended that neither party should be permitted to bring an attorney to the resolution meeting. Some commenters recommended requiring parents to notify the LEA at least one day before the resolution meeting whether their attorney will be participating in the resolution meeting. Other commenters, however, stated that parents should not be required to notify the LEA in advance of the meeting whether the parent plans to bring anyone to the meeting.

*Discussion:* Section 615(f)(1)(B)(i) of the Act states that an LEA must convene a resolution meeting with the parents and the relevant members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that includes a representative of the public agency who has decision-making authority on behalf of that agency, and may not include the LEA's attorney unless the parent is accompanied by an attorney.

Section 300.510(a)(4) states that the parent and the LEA determine the relevant members of the IEP Team to attend the resolution meeting. We do not believe it is necessary to clarify that

a parent may bring other participants, such as an advocate or family friend, to the resolution meeting because section 614(d)(1)(B)(vi) of the Act and § 300.321(a)(6) are clear that the IEP Team may include, at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child. Therefore, such individuals could attend the resolution meeting if the LEA or parent determined that such individuals are relevant members of the IEP Team.

We do not believe it is necessary to regulate on whether a parent must provide advance notice to the LEA that the parent intends to bring an attorney to the resolution meeting because we expect that it would not be in the interest of the parent to withhold such information prior to a resolution meeting so as to appear at the resolution meeting with an attorney without advance notice to the public agency. In such cases, the public agency could refuse to hold the resolution meeting until it could arrange the attendance of its attorney (within the 15-day period). The parent would incur additional expenses from having to bring their attorney to two resolution meetings.

*Changes:* None.

*Comment:* Some commenters requested clarification regarding whether the parent and the LEA must agree to the parties who will attend the resolution meeting, or whether the parent and the LEA can decide independently who will attend the meeting. The commenters recommended that any disputes regarding who should attend the resolution meeting should be resolved in a timely manner and the meeting should proceed with all the disputed participants when there is no agreement within the 15-day period. Some commenters stated that allowing parents to determine which members of the IEP Team should attend the resolution meeting exceeds statutory authority.

*Discussion:* Section 615(f)(1)(B)(i) of the Act requires the LEA to convene a resolution meeting with the parent and the relevant member(s) of the IEP Team who have specific knowledge of the facts identified in the complaint. Section 300.510(a)(4) requires the parent and the LEA to determine the relevant members of the IEP Team who will attend the meeting. We urge LEAs and parents to act cooperatively in determining who will attend the resolution meeting, as a resolution meeting is unlikely to result in any resolution of the dispute if the parties cannot even agree on who should attend. The parties should keep in mind

that the resolution process offers a valuable chance to resolve disputes before expending what can be considerable time and money in due process hearings. We decline to regulate further on how to resolve disputes about who should attend these meetings in the absence of information about specific problems in the process.

*Changes:* None.

*Comment:* Some commenters recommended that the regulations provide information on how a resolution meeting should proceed. Several commenters expressed concern that the regulations offer no guidance on the protocol or structure of resolution meetings, and do not specify whether an impartial mediator or facilitator should conduct the meeting.

*Discussion:* Section 615(f)(1)(B)(i)(IV) of the Act states that the purpose of a resolution meeting is for parents to discuss their due process complaint and the facts that form the basis of the due process complaint so that the LEA has an opportunity to resolve the dispute. We do not believe that it is necessary or appropriate to regulate on the specific structure or protocol for resolution meetings as doing so could interfere with the LEA and the parent in their efforts to resolve the complaint in the resolution meeting.

*Changes:* None.

*Comment:* A few commenters recommended that the regulations address the need for families to receive training in dispute resolution.

*Discussion:* There is nothing in the Act that would prevent a public agency from offering training in dispute resolution or referring parents to organizations that provide training in dispute resolution. Such matters are best left to local and State officials to determine, based on the training needs of parents and families. Therefore, we decline to regulate on this matter.

*Changes:* None.

*Comment:* One commenter recommended allowing parents to participate in resolution meetings through alternative means (e.g., teleconferences) and alternative procedures (e.g., participation by a child's court-appointed advocate) when parents are unavailable (e.g., military service, hospitalization).

*Discussion:* We understand that circumstances beyond a parent's control (e.g., military service, hospitalization) may prevent a parent from attending a resolution meeting in person. If the LEA notifies the parent of its intent to schedule a resolution meeting within 15 days of receiving notice of the parent's due process complaint, and the parent informs the LEA in advance of the

meeting that circumstances prevent the parent from attending the meeting in person, it would be appropriate for an LEA to offer to use alternative means to ensure parent participation, such as those described in § 300.328, including videoconferences or conference telephone calls, subject to the parent's agreement.

There is no authority in the Act for an LEA to permit a court-appointed advocate to attend the resolution meeting in place of a parent, unless the public agency has appointed that individual as a surrogate parent in accordance with § 300.519, or the agency determines that the person is a person acting in the place of the biological or adoptive parent of the child in accordance with § 300.30(a)(4).

*Changes:* None.

#### Resolution Period (§ 300.510(b))

*Comment:* One commenter noted that § 300.510(b)(1) states that if an LEA has not resolved a due process complaint within 30 days of the receipt of the complaint, the due process hearing "must" occur, which is inconsistent with section 615(f)(1)(B)(ii) of the Act, which states that the due process hearing "may" occur. However, another commenter recommended retaining the language in § 300.510(b), in lieu of the permissive statutory language.

*Discussion:* We believe that § 300.510(b)(1) should be changed to be consistent with section 615(f)(1)(B)(ii) of the Act. A requirement that a due process hearing must occur when the resolution period is not successful in resolving the underlying dispute could prove unduly restrictive for the parties, particularly in situations where the parties agree to an extension of the resolution period or reach a settlement after the resolution period has expired. Therefore, we are changing § 300.510(b)(1) to state that a due process hearing "may" occur if the parties have not resolved the dispute that formed the basis for the due process complaint by the end of the resolution period.

*Changes:* Section 300.510(b)(1) has been changed by removing the word "must" and replacing it with "may" prior to the word "occur" to reflect the language in section 615(f)(1)(B)(ii) of the Act.

*Comment:* Some commenters recommended requiring LEAs to waive the resolution period when a parent can show that, prior to the filing of the complaint, the LEA had specific knowledge of the facts later identified in the complaint and had a reasonable time to resolve the issue, or did not notify the parent within five days of the resolution

meeting or inform the parent of their options.

*Discussion:* Section 615(f)(1)(B)(i) of the Act provides two occasions when a resolution meeting need not occur: (1) when the parent and LEA agree in writing to waive the meeting; and (2) when the parent and LEA agree to use the mediation process in § 300.506. There are no provisions that allow a parent or an LEA to unilaterally waive the resolution meeting. In the circumstances mentioned by the commenter, the resolution meeting still is a required vehicle for the parent and the LEA to attempt to resolve their differences prior to initiating a due process hearing.

*Changes:* None.

*Comment:* We received numerous comments expressing concern about the resolution process and requesting changes to the regulations to ensure that the resolution process is used effectively to resolve disputes and not to delay or deny the right to a due process hearing. Some commenters requested that § 300.510(b)(3) be removed because it allows a public agency to delay the due process hearing by scheduling resolution meetings at times or places that are inconvenient for the parent. Many commenters recommended that if an LEA fails to convene a resolution meeting within the required 15 days, bring the required personnel to a resolution meeting, or participate in a resolution meeting in good faith, the 45-day timeline for a hearing decision should begin on the date that the due process complaint notice was filed.

Several commenters requested clarification on what is considered "participation" or "good faith" participation in a resolution meeting and who decides if participation has occurred. A number of commenters recommended that the regulations permit a hearing officer to determine whether a parent or LEA has participated in the resolution meeting and whether the due process hearing can proceed. Another commenter requested clarification on when the 45-day timeline for a due process hearing begins when a hearing officer determines that a parent has participated.

Several commenters asked how long a due process complaint remains open if the parent does not participate during the 30-day resolution period. A number of commenters requested clarification as to whether and how an LEA can dismiss a due process complaint when a parent refuses to participate in a resolution meeting. One commenter recommended that the regulations clarify the

consequences of indefinitely delaying a due process hearing.

*Discussion:* We do not agree that § 300.510(b)(3) should be removed. This provision is based on H. Rpt. No. 108-77, p. 114, that provides:

[If] the parent and the LEA mutually agree that the meeting does not need to occur, the resolution meeting does not need to take place. However, unless such an agreement is reached, the failure of the party bringing the complaints to participate in the meeting will delay the timeline for convening a due process hearing until the meeting is held.

We fully expect that only in very rare situations will an LEA fail to meet its obligation to convene a resolution meeting within 15 days of receiving notice of the parent's due process complaint, delay the due process hearing by scheduling meetings at times or places that are inconvenient for the parent, or otherwise not participate in good faith in the resolution process. However, in instances of noncompliance, we believe parents should be able to request a hearing officer to allow the due process hearing to proceed.

In situations where an LEA convenes a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint, and the parent fails to participate in the resolution meeting, the LEA would need to continue to make diligent efforts throughout the remainder of the 30-day resolution period to convince the parent to participate in the resolution meeting. If, however, at the end of the 30-day resolution period, the LEA is still unable to convince the parent to participate in the resolution meeting, we believe that an LEA should be able to seek intervention by a hearing officer to dismiss the complaint.

Therefore, we are adding language to the regulations to allow the parents to seek a hearing officer's intervention in cases where an LEA fails to convene a resolution meeting within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting. We also are adding language to allow an LEA, at the conclusion of the 30-day resolution period, to request a hearing officer to dismiss a complaint when the LEA is unable to obtain the participation of a parent in a resolution meeting despite making reasonable efforts to do so during the 30-day resolution period.

*Changes:* We have added a new paragraph (b)(4) in § 300.510 to allow an LEA, at the conclusion of the 30-day resolution period to seek the intervention of a hearing officer to

dismiss the parent's complaint, if the LEA is unable to obtain the participation of the parent in the resolution meeting, after reasonable efforts have been made.

We have also added a new paragraph (b)(5) to allow a parent to seek the intervention of a hearing officer to begin the due process hearing, if the LEA fails to hold the resolution meeting within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting.

*Comment:* Some commenters stated that the 45-day timeline for a due process hearing should begin when both parties agree that the complaint will not be resolved in a resolution meeting or mediation session. Other commenters suggested that when a resolution meeting or mediation session is held and it is clear before the end of the 30-day resolution period that the LEA and the parent cannot resolve the dispute, the 45-day timeline should be allowed to begin prior to the end of the 30-day resolution period. A few commenters requested further clarification regarding how the timeline is counted once the parent participates in a resolution meeting. A few commenters recommended that the 45-day timeline for the hearing commence once both parties agree that the issue will not be resolved without a due process hearing. One commenter recommended that the regulations require the waiver to be in writing so that hearing officers have a specific point in time to know when they should be counting the 45 days.

*Discussion:* We agree that the due process hearing should be allowed to proceed if the LEA and parent agree in writing to waive the resolution meeting. We also believe that the due process hearing should be allowed to proceed when an LEA and the parent agree to waive the remainder of the 30-day resolution period when it becomes apparent that the LEA and the parent will be unable to reach agreement through resolution or mediation. There may also be situations in which both parties agree to continue the mediation session beyond the 30-day resolution period. Therefore, we are adding language to the regulations to clarify these exceptions to the 30-day resolution period.

The new language specifies that the 45-day timeline for the due process hearing starts the day after one of the following events: (a) both parties agree in writing to waive the resolution meeting; (b) after either the mediation or resolution meeting starts, but before the end of the 30-day resolution period, both parties agree in writing that no agreement is possible; and (c) if both



parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later the parent or public agency withdraws from the mediation process.

*Changes:* We have added a new paragraph (c) in § 300.510 that specifies adjustments to the 30-day resolution period. Subsequent paragraphs have been renumbered accordingly.

*Comment:* Some commenters recommended that the regulations require public agencies to document their attempts to ensure parent participation in resolution meetings, and to do so in the same manner that they are required to document their attempts to involve parents in IEP Team meetings.

*Discussion:* We agree with the commenters and will add language to § 300.510(b)(4) to make this clear.

*Changes:* We have added language in § 300.510(b)(4) to require an LEA to use the same procedures it uses in § 300.322(d) to document its efforts to obtain the participation of a parent in a resolution meeting. We also have amended § 300.510(b)(4) to refer to "due process complaints," for clarity.

Written Settlement Agreement (New § 300.510(d)) (Proposed § 300.510(c))

*Comment:* One commenter asked whether decisions agreed to in resolution meetings supersede previous IEP decisions and whether the IEP Team must reconvene to sanction the decisions made in a resolution meeting. One commenter recommended that if the resolution agreement includes IEP-related matters, the agreement must state that the LEA will convene an IEP Team meeting within a specific number of days to revise the IEP accordingly or develop an IEP addendum, as appropriate.

*Discussion:* Unless the agreement specifically requires that the IEP Team reconvene, there is nothing in the Act or these regulations that requires the IEP Team to reconvene following a resolution agreement that includes IEP-related matters. We do not believe that it is necessary or appropriate to anticipate the elements of a particular settlement agreement, which may supersede an existing IEP. The contents of settlement agreements are left to the parties who execute a settlement agreement.

*Changes:* None.

*Comment:* One commenter recommended that the regulations clarify whether the SEA, a hearing officer, or an administrative law judge has the authority to enforce a written resolution agreement. A few commenters recommended permitting a

parent to seek assistance from the SEA to compel a school district to abide by a resolution agreement. The commenters stated that many families cannot afford legal representation and, in jurisdictions in which parents cannot represent themselves at the Federal district court level, this would, in essence, leave such parents without meaningful redress, except through the State court system.

One commenter recommended that the regulations specify that a resolution agreement is enforceable in court without exhausting administrative remedies. The commenter stated that unless this is clearly stated, parents may be forced to proceed through a two-tier due process system, rather than proceed directly to court, which would be counter to the purpose of a resolution agreement.

Several commenters suggested adding language in § 300.506(b)(7) clarifying that a written, signed mediation agreement can be enforced through a State's administrative complaint process, as well as in State and Federal court. The commenters stated that such a provision would be consistent with Congressional intent to reduce litigation and permit parties to resolve disagreements in a more positive, less costly manner. The commenters also suggested permitting State- or circuit-based variation in enforcement mechanisms.

*Discussion:* Section 615(f)(1)(B)(iii) of the Act provides that if an agreement is reached in a resolution meeting, the parties must execute a legally binding agreement that is signed by both the parent and a representative of the agency who has the authority to bind the agency, and is enforceable in any State court of competent jurisdiction or in a district court of the United States. These same requirements apply to agreements reached through mediation sessions, pursuant to section 615(e)(2)(F)(iii) of the Act. The Act is clear that exhaustion of administrative remedies is not required since the Act provides that the agreement is enforceable in a State court of competent jurisdiction or in a district court of the United States.

If a party to a resolution agreement or a mediation agreement believes that the agreement has been breached, we believe that, in addition to enforcement in a State court of competent jurisdiction or district court of the United States, States should be able to offer the option of using other available State mechanisms (e.g., State complaint procedures) to enforce resolution agreements and mediation agreements, as long as those other enforcement mechanisms are voluntary.

Therefore, we are adding a new regulation on State enforcement mechanisms to clarify that States have the option of allowing resolution agreements and mediation agreements to be enforced through other mechanisms, provided that the other enforcement mechanisms do not operate to deny or delay the right of any party to the agreement to seek enforcement in an appropriate State or Federal court.

Regarding the commenters' suggestion of allowing State and circuit variations in enforcement mechanisms, we do not believe the Department has the authority to regulate in this area because doing so would interfere with matters reserved for State and Federal courts. In general, a written resolution or mediation agreement is a binding contract between the parties, and therefore, the validity and enforceability of that agreement would be reviewed in light of applicable State and Federal laws, including State contract laws.

*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 meeting 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 § 300.537 in new § 300.510(d) (proposed § 300.510(c)), regarding written settlement agreements.

Agreement Review Period (New § 300.510(e)) (Proposed § 300.510(d))

*Comment:* Many commenters recommended including language in the regulations to ensure that parents are informed orally and in writing that either party to a resolution agreement may reconsider and void the resolution agreement within three business days. One commenter expressed concern that some parents lack the education or legal expertise of school districts, and will miss this important right unless informed both orally and in writing. A few commenters stated that this notice must be provided to parents in their native language or primary mode of communication.

*Discussion:* Section 300.504(a), consistent with section 615(d)(1)(A) of the Act, requires a public agency to provide parents with a copy of the

procedural safeguards notice at least one time in a school year and under the exceptional circumstances specified in § 300.504(a), which includes the first occurrence of the filing of a due process complaint in a school year. The procedural safeguards notice, which must be written in language understandable to the general public and in the native language of the parent, unless clearly not feasible to do so, must include a full explanation of the Act's procedural safeguards. If the native language or other mode of communication of the parent is not a written language, § 300.503(c)(2) requires the public agency to take steps to ensure that the notice is translated orally or by other means for the parent in his or her native language or other mode of communication and that the parent understands the content of the notice. Under § 300.504(c)(5)(ii), the notice must inform parents about the opportunity to present and resolve a due process complaint in accordance with the resolution process required in § 300.510 and section 615(f)(1)(B) of the Act, including a party's right to void the resolution agreement within three business days of execution. We believe it would be overly burdensome to require public agencies to provide the procedural safeguards notice both orally and in writing to an individual parent, and, therefore, decline to change the regulation.

*Changes:* None.

*Comment:* Several commenters recommended that the regulations clarify whether discussions during the resolution meeting remain confidential.

*Discussion:* We decline to regulate on this matter because the Act is silent regarding the confidentiality of resolution discussions. However, there is nothing in the Act or these regulations that would prohibit the parties from entering into a confidentiality agreement as part of their resolution agreement. A State could not, however, require that the participants in a resolution meeting keep the discussions confidential or make a confidentiality agreement a condition of a parent's participation in the resolution meeting.

*Changes:* None.

*Comment:* One commenter recommended that the regulations require each SEA to develop a model settlement agreement form with appropriate release language, a withdrawal form to be filed with the hearing officer, and a confidentiality agreement.

*Discussion:* The terms of settlement agreements will necessarily vary based on numerous factors, including the

nature of the dispute and the specific resolution agreed to by the parties involved. Therefore, we do not believe it is practical or useful to require SEAs to develop a model settlement agreement form.

*Changes:* None.

*Comment:* A few commenters recommended that the regulations define "days" in this section to mean "business days."

*Discussion:* Under § 300.11(a), *day* means calendar day, unless otherwise indicated as a business day or school day. All references to *day* in § 300.510 are calendar days, except for new § 300.510(e) (proposed § 300.510(d)), which specifies that the parties may void a resolution agreement within three business days of the agreement's execution.

*Changes:* None.

#### Impartial Due Process Hearing (§ 300.511)

*Comment:* One commenter stated that section 615(f)(1)(A) of the Act refers to when a due process complaint is "received" and recommended using this language in § 300.511(a), which refers to when a due process complaint is "filed." The commenter stated that LEAs are more likely to understand and relate to when a due process complaint is "received" versus when a due process complaint is "filed."

*Discussion:* We agree with the commenter and are changing § 300.511(a) to be consistent with section 615(f)(1)(A) of the Act, which provides that a parent or the LEA must have the opportunity for an impartial due process hearing under this part when a due process complaint is received under section 615(b)(6) or (k) of the Act.

*Changes:* For consistency with statutory language, we have changed the first clause in the first sentence of § 300.511(a) by removing the words "filed under § 300.507" and adding in their place the words "received under § 300.507 or § 300.532".

*Comment:* Some commenters recommended that the regulations clarify that a party has a right to seek immediate intervention from a hearing officer to resolve pre-hearing issues and disputes. One commenter recommended that the regulations clarify that hearing officers are empowered and obligated to promptly hear and decide all pre-hearing issues and disputes so that decisions can be made about whether to proceed to a hearing, as well as to focus and streamline the evidentiary hearing process. The commenter provided the following examples of pre-hearing issues that should be resolved prior to

a hearing: the sufficiency of the complaint; the sufficiency of the response and notice pursuant to § 300.508(e); the sufficiency of the response pursuant to § 300.508(f); motions for stay-put; the hearing schedule; the order of witnesses; the burden of proof; the burden of going forward; witness testimony by telephone or video conference; production of records; exchange of evidence; admissibility of evidence; and issuance and enforcement of subpoenas and subpoenas *duces tecum*.

*Discussion:* Section 615(c)(2)(D) and (E) of the Act, respectively, address situations where it is necessary for hearing officers to make determinations regarding the sufficiency of a complaint and amendments to a complaint before a due process hearing. We do not believe it is necessary to regulate further on the other pre-hearing issues and decisions mentioned by the commenters because we believe that States should have considerable latitude in determining appropriate procedural rules for due process hearings as long as they are not inconsistent with the basic elements of due process hearings and rights of the parties set out in the Act and these regulations. The specific application of those procedures to particular cases generally should be left to the discretion of hearing officers who have the knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing.

*Changes:* None.

*Comment:* One commenter stated that the Act does not provide adequate guidance on the specific set of legal procedures that must be followed in conducting a due process hearing and recommended that the regulations include guidance regarding the following: Limiting the use of hearsay testimony; requiring all testimony to be subject to cross-examination; the order of testimony; timelines; and the statute of limitations. The commenter stated that while timelines and the statute of limitations are addressed in the Act, there are no consequences for failure to comply.

*Discussion:* In addition to addressing timelines, hearing rights, and statutes of limitations, the Act and these regulations also address a significant due process right relating to the impartiality and qualifications of

hearing officers. Under Section 615(f)(3) of the Act and § 300.511(c), a hearing officer must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice. Hearing officers consider failure to comply with timelines and statutes of limitations on a case-by-case basis, depending on the specific circumstances in each case. We believe that the requirements for hearing officers are sufficient to ensure that proper legal procedures are used and that it is not appropriate to regulate on every applicable legal procedure that a hearing officer must follow, because those are matters of State law.

*Changes:* None.

#### Agency Responsible for Conducting the Due Process Hearing (§ 300.511(b))

*Comment:* One commenter noted that § 300.511(b) refers to the State or a public agency holding a hearing, whereas the Act refers to the State or an LEA holding a hearing. The commenter requested clarification regarding whether any agency, other than an LEA, is permitted to hold a hearing under the Act.

*Discussion:* The term “public agency” in these regulations is intended to address situations where an entity might satisfy the definition of *public agency* in § 300.33, but would not satisfy the definition of *LEA* in § 300.28. As set forth in § 300.33, a *public agency* may be responsible for the education of a child with a disability. In these circumstances, the public agency would hold the due process hearing.

*Changes:* None.

#### Impartial Hearing Officer (§ 300.511(c))

*Comment:* A few commenters recommended revising § 300.511(c)(1)(i)(B) to state that a hearing officer must not have a personal or professional conflict of interest.

*Discussion:* Section 300.511(c)(1)(i)(B) incorporates the language in section 615(f)(3)(A)(i)(II) of the Act and provides that a hearing officer must not be a person having a personal or professional interest that conflicts with the person’s objectivity in the hearing. The meaning of this requirement is clear and we do not believe it is necessary to change it to ensure continued compliance with this longstanding requirement.

*Changes:* None.

*Comment:* One commenter recommended that the regulations require the conduct of impartial hearing officers to be addressed by the State judicial code of conduct.

*Discussion:* Under section 615(f)(3) of the Act and § 300.511(c), a hearing

officer must possess the knowledge and ability to conduct hearings and to render and write decisions in accordance with appropriate, standard legal practice. We believe that this provides sufficient guidance. The application of State judicial code of conduct standards is a State matter.

*Changes:* None.

*Comment:* One commenter noted that § 300.511(c)(1)(iii) and (iv) require a hearing officer to possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice, and recommended that the regulations outline standard legal practice so that parents without attorney representation will have this information.

*Discussion:* The requirements in § 300.511(c)(1)(iii) and (iv) incorporate the requirements in section 615(f)(3)(A)(iii) and (iv) of the Act. These requirements are general in nature and appropriately reflect the fact that standard legal practice will vary depending on the State in which the hearing is held. Accordingly, it would not be feasible to outline standard legal practice in these regulations, as recommended by the commenter.

*Changes:* None.

*Comment:* Some commenters recommended that the regulations require hearing officers to receive ongoing, periodic professional development regarding new regulations and court decisions so that their decisions reflect the latest developments and interpretations. A few commenters recommended requiring SEAs to provide training for hearing officers by trainers who are experienced in conducting hearings and writing decisions in accordance with standard legal practice. A few commenters recommended that the regulations require hearing officers to be informed that they are bound by the decisions of courts that govern their jurisdiction.

*Discussion:* It is not necessary to regulate in the manner recommended by the commenters because this is a responsibility of each State. The Act prescribes minimum qualifications for hearing officers, which are reflected in § 300.511(c). Pursuant to its general supervisory responsibility, each State must ensure that individuals selected to conduct impartial due process hearings meet the requirements in § 300.511(c)(1)(ii) through (iv). States are in the best position to determine the required training and the frequency of the required training, consistent with State rules and policies.

*Changes:* None.

*Comment:* One commenter noted that the Act does not include the provision in § 300.511(c)(2), which provides that a person who otherwise qualifies to conduct a hearing is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer. The commenter, therefore, recommended removing § 300.511(c)(2).

*Discussion:* We do not agree that the provision should be removed. This provision is longstanding. Although the Act prohibits an individual who is employed by a public agency involved in the education or care of the child to be a hearing officer, we believe that it is important to continue to clarify that a person’s payment for serving as a hearing officer does not render that individual a public agency employee who is excluded from serving as a hearing officer. In many instances, public agencies retain hearing officers under contract. The fact that an individual is hired by a public agency solely for the purpose of serving as a hearing officer does not create an excluded employee relationship. Public agencies need to ensure that hearing officers conduct due process hearings and it is only reasonable that those persons are paid for their work as hearing officers.

*Changes:* None.

*Comment:* Some commenters requested that the regulations require SEAs to make the list of hearing officers and their qualifications available to the public.

*Discussion:* Public agencies must maintain a list of persons who serve as hearing officers and a statement of their qualifications. However, there is nothing in the Act that requires a public agency to make information regarding the qualifications of hearing officers available to the public. Parents do not select the hearing officer to hear their complaints. Therefore, we do not believe that it is necessary to require public agencies to provide information regarding the qualifications of hearing officers to the public, and we decline to regulate in this regard. The commenter’s recommendation would impose an additional burden on public agencies that is not required by the Act.

*Changes:* None.

#### Subject Matter of Due Process Hearings (§ 300.511(d))

*Comment:* A few commenters requested that the regulations clarify that the party requesting the due process hearing may raise issues that are included in any amendments to the complaint. One commenter requested clarification regarding whether the party that the complaint is against can raise

other issues. A few commenters recommended that the regulations clarify that hearing officers may raise and resolve issues concerning noncompliance even if the party requesting the hearing does not raise the issues.

*Discussion:* Section 300.508(d)(4) and section 615(c)(2)(E)(ii) of the Act provide that the applicable timeline for a hearing shall begin at the time that a party files an amended complaint, and makes clear that after the party files an amended complaint, timelines for the resolution meeting and the opportunity to resolve the complaint begin again. The issues raised in the amended complaint would be the subjects of the resolution meeting, and these issues also would be addressed in a due process hearing, if the LEA does not resolve the dispute to the satisfaction of the parent through the resolution process.

The Act does not address whether the non-complaining party may raise other issues at the hearing that were not raised in the due process complaint, and we believe that such matters should be left to the discretion of hearing officers in light of the particular facts and circumstances of a case. The Act also does not address whether hearing officers may raise and resolve issues concerning noncompliance even if the party requesting the hearing does not raise the issues. Such decisions are best left to individual State's procedures for conducting due process hearings.

*Changes:* None.

*Comment:* One commenter recommended that the Department include in the regulations language that allocates the burden of proof to the moving party.

*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 v. Weast*, 546 U.S. —, 126 S. Ct. 528 (2005) (*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 school district. Since Supreme Court precedent is binding legal authority,

further regulation in this area is unnecessary. In addition, we are not aware of significant questions regarding the burden of production that would require regulation.

*Changes:* None.

**Timeline for Requesting a Hearing (§ 300.511(e)) and Exceptions to the Timeline (§ 300.511(f))**

*Comment:* Some commenters stated that exceptions to the timeline in § 300.511(f) should include situations in which a parent is unable to file a due process complaint because the parent is not literate or cannot write in English. One commenter recommended considering the parent's degree of English fluency and other factors in determining the parent's ability to have knowledge about the alleged action that is the basis for the due process complaint.

*Discussion:* Section 300.511(f), consistent with section 615(f)(3)(D) of the Act, provides explicit exceptions to the statute of limitations for filing a due process complaint. These exceptions include situations in which the parent is prevented from filing a due process complaint because the LEA withheld from the parent information that is required to be provided to parents under these regulations, such as failing to provide prior written notice or a procedural safeguards notice that was not in the parent's native language, as required by §§ 300.503(c) and 300.504(d), respectively. Additionally, in States using the timeline in § 300.511(e) (i.e., "within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint"), hearing officers will have to make determinations, on a case-by-case basis, of factors affecting whether the parent "knew or should have known" about the action that is the basis of the complaint. Therefore, we decline to add additional exceptions to § 300.511(f).

*Changes:* None.

*Comment:* Some commenters requested that the regulations clarify whether the statute of limitations in section 615(b)(6)(B) of the Act is the same statute of limitations in section 615(f)(3)(C) of the Act. The commenters stated that the Act and regulations are confusing because the statute of limitations is mentioned twice and implies that the timeline for filing a complaint and filing a request for a due process hearing are different.

*Discussion:* The statute of limitations in section 615(b)(6)(B) of the Act is the same as the statute of limitations in section 615(f)(3)(C) of the Act. Because

we are following the structure of the Act, we have included this language in §§ 300.507(a)(2) and 300.511(e).

*Changes:* None.

*Comment:* Some commenters recommended that the regulations clarify that "misrepresentations" by an LEA in § 300.511(f)(1) include misleading, as well as false, statements. The commenters stated that misleading statements create the same obstacle for parents as false statements in terms of when parents know about an alleged violation. One commenter recommended that "misrepresentations" include both intentional and unintentional misrepresentations.

*Discussion:* We do not believe it is appropriate to define or clarify the meaning of "misrepresentations," as requested by the commenters. Such matters are within the purview of the hearing officer. If the complaining party believes that the timeline in § 300.511(e) should not apply, the complaining party would need to ask the hearing officer to determine whether an untimely due process complaint can proceed to hearing based on misrepresentations by an LEA. The hearing officer would then determine whether the party's allegation constitutes an exception to the applicable timeline.

*Changes:* None.

**Additional Disclosure of Information (§ 300.512(b))**

*Comment:* One commenter recommended that the regulations permit parties to mutually consent to waive the five-day timeline and exchange documents closer to the hearing date.

*Discussion:* There is nothing in the Act or these regulations that would prevent the parties from agreeing to disclose relevant information to all other parties less than five business days prior to a due process hearing.

*Changes:* None.

**Hearing Decisions (§ 300.513)**

**Decision of Hearing Officer (§ 300.513(a))**

*Comment:* Some commenters requested that the regulations clarify that LRE is a substantive, not a procedural, issue and that a hearing officer can base relief on the failure of an LEA to provide FAPE in the LRE to the maximum extent possible. A few commenters recommended that the regulations allow a hearing officer to dismiss a complaint or to rule on summary judgment if there is no claim or controversy to be adjudicated. The commenters stated that hearing officers

should be allowed to dismiss cases when the alleged violation does not focus on a substantive issue.

*Discussion:* Section 300.513(a)(1) and section 615(f)(3)(E) of the Act provide that, in general, a decision made by a hearing officer must be made on substantive grounds based on a determination of whether the child received FAPE. Furthermore, § 300.513(a)(3), consistent with section 615(f)(3)(E)(iii) of the Act, allows a hearing officer to order an LEA to comply with procedural requirements under §§ 300.500 through 300.536.

Although the Act and these regulations require that hearing officers base determinations of whether a child received FAPE on substantive grounds, hearing officers also may find that a child did not receive FAPE based on the specific procedural inadequacies set out in § 300.513(a)(2), consistent with section 615(f)(3)(E)(ii) of the Act.

Hearing officers continue to have the discretion to dismiss complaints and to make rulings on matters in addition to those concerning the provision of FAPE, such as the other matters mentioned in § 300.507(a)(1). To clarify this point, we are revising the heading of § 300.513(a) to refer to decisions of hearing officers about FAPE, and are revising § 300.513(a)(1). The requirements in §§ 300.507 through 300.508 governing the content of the due process complaint, including requirements for sufficiency and complaint amendment, and requirements governing the resolution process in § 300.510 should help to ensure that due process complaints that are the subject of a due process hearing under this part contain claims that are appropriate for a hearing officer's decision.

*Changes:* We have reworded § 300.513(a)(1) and revised the heading of § 300.513(a) to refer to decisions regarding FAPE.

#### Construction Clause (§ 300.513(b))

*Comment:* Some commenters recommended that the construction clause in § 300.513(b) include that nothing in §§ 300.507 through 300.513 shall be construed to affect the right of a parent to file a complaint with the SEA under §§ 300.151 through 300.153 for a procedural violation that does not meet the requirements in § 300.513(a)(2).

*Discussion:* We decline to make the change requested because we think that these matters are already addressed in the regulations. Section 300.507(a) describes the matters on which a party can request a due process hearing. Section 300.151(a) provides that an organization or individual may file a

signed written complaint alleging that a public agency has violated a requirement of Part B of the Act, which would include procedural violations that would not meet the standard in § 300.507(a)(1).

*Changes:* None.

#### Finality of Hearing Decision; Appeal; Impartial Review (§ 300.514)

*Comment:* One commenter recommended clarifying that § 300.514(b) applies only to States with a two-tier due process system.

*Discussion:* We believe that § 300.514(b)(1) is clear that a State-level appeal of a due process decision is available only in States that have a two-tiered due process system. This is a longstanding provision, which is consistent with section 615(g) of the Act. We do not believe further clarification in the text of the regulations is necessary.

*Changes:* None.

#### Timelines and Convenience of Hearings and Reviews (§ 300.515)

*Comment:* One commenter recommended that the regulations clarify when the various timelines for resolution meetings and due process hearings start and stop. One commenter disagreed with § 300.515(a), stating that the 45-day timeline should begin when the public agency receives a request for a due process hearing.

*Discussion:* We agree that clarification is needed regarding the various timelines for resolution meetings and due process hearings. As stated earlier in the *Analysis of Comments and Changes* in § 300.510, we have added a new paragraph (c) in § 300.510 to specify adjustments to the 30-day resolution period and when the 45-day timeline for due process hearings begins for these exceptions. In order to be consistent with this change, we are changing the introductory language in § 300.515(a).

*Changes:* We have changed the introductory language in § 300.515(a) to reference the adjustments to the 30-day timeline in new § 300.510(c).

*Comment:* A few commenters recommended that the hearings and reviews be conducted at a time and place that are "mutually convenient" to the parent and child involved, rather than "reasonably convenient," as required in § 300.515(d). Another commenter recommended that the hearings and reviews be conducted at a time and place that is reasonably convenient to "all parties involved."

*Discussion:* The Department believes that every effort should be made to schedule hearings at times and locations

that are convenient for the parties involved. However, given the multiple individuals that may be involved in a hearing, it is likely that hearings would be delayed for long periods of time if the times and locations must be "mutually convenient" for all parties involved. Therefore, we decline to change this regulation.

*Changes:* None.

#### Civil Action (§ 300.516)

*Comment:* Several commenters recommended that the regulations clarify that the 90-day timeline for a party aggrieved by the findings and decision of a due process hearing to file a civil action begins either from the date of a hearing officer's decision or from the date of a State review officer's decision, if the State has a two-tiered due process system. One commenter stated that many cases would be inappropriately dismissed if this regulation is not clarified.

*Discussion:* We agree with the commenters and are clarifying that the party bringing the action has 90 days from the date of the decision of the hearing officer or the decision of the State review official to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law. This change is needed to ensure that the applicable time limitation does not penalize parties in States with two-tier due process systems that require a party aggrieved by the due process hearing officer's decision to file a State-level appeal prior to bringing a civil action in State or Federal court.

*Changes:* We have added "or, if applicable, the decision of the State review official," in § 300.516(b) to clarify the timeline for bringing a civil action in States that have a two-tiered due process system.

*Comment:* Some commenters recommended that the regulations clarify that the State time limit for bringing a civil action under Part B of the Act can only be used if it is longer than 90 days. One commenter recommended that the regulations clarify whether State law may establish a time limit of less than the 90 days for filing a civil action.

*Discussion:* Section 300.516(b) and section 615(i)(2)(B) of the Act provide that the party bringing the action shall have 90 days from the date of the decision of the hearing officer or the decision of the State review official to file a civil action or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law. There is

no requirement that would limit the State's authority to set a time limit longer than or shorter than 90 days and we believe that the regulations are clear that a State may set a longer or shorter time limit under State law.

*Changes:* None.

*Comment:* One commenter recommended that the regulations require an LEA, at the conclusion of a due process hearing, to provide a parent who is not represented by counsel, a written notice regarding the time limit for filing a civil action.

*Discussion:* Parents involved in a due process hearing would already have received information about the availability of a civil action and the timeline for filing a civil action when they received the procedural safeguards notice, in accordance with § 300.504. We decline to require an additional notice at the conclusion of a due process hearing, because this would impose an additional paperwork burden on public agencies.

*Changes:* None.

#### Attorneys' Fees (§ 300.517)

*Comment:* We received a number of comments seeking clarification of, or modifications to, the statutory language governing the award of attorneys' fees. Some commenters recommended that the regulations require the SEA or LEA to affirmatively prove that the parent's intent was improper in order to be awarded attorneys' fees under this provision. A few commenters recommended modifying the regulations to expressly require a determination by a court that the complaint or cause of action was frivolous, unreasonable, or without foundation, before an award of attorneys' fees can be considered.

One commenter requested that the regulations clarify that section 615(i)(3)(B)(i) of the Act seeks to codify the standards set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and that the principles set forth in this action (that attorneys' fees may only be awarded to defendants in actions where the plaintiffs' claims are frivolous, without foundation, or brought in bad faith) should apply in favor of school districts and parents, since either party can bring complaints.

One commenter recommended that § 300.517(a)(1)(ii) and (iii) be revised to refer to an attorney of a parent or a parent because there are many parents who are attorneys representing their children in due process hearings. Another commenter recommended including language that the parent must be the prevailing party on substantive grounds in order to claim an award of attorneys' fees.

*Discussion:* Section 300.517(a) incorporates the language in section 615(i)(3)(B) of the Act. Further guidance on the interpretation of this statutory language is not appropriate since judicial interpretations of statutory provisions will necessarily vary based upon case-by-case factual determinations, consistent with the requirement that the award of reasonable attorneys' fees is left to a court's discretion.

With regard to the recommendation that we include language that the parent must be the prevailing party on substantive grounds, we decline to regulate because we believe that the statutory provisions regarding attorneys' fees are appropriately described in § 300.517. Furthermore, section 615(f)(3)(E) of the Act, reflected in § 300.513, recognizes both that hearing officer determinations that a child did not receive FAPE, in some circumstances, may be based on procedural violations, and that hearing officers may order LEAs to comply with procedural requirements. Either of these circumstances, in appropriate cases, might result in a parent being determined to be a prevailing party for purposes of claiming attorneys' fees.

We decline to add language to § 300.517(a)(1)(ii) to refer to a parent who is an attorney, because the reference to "an attorney of a parent" would include anyone serving as an attorney.

*Changes:* None.

*Comment:* One commenter recommended that § 300.517(a)(1)(iii), regarding attorneys' fees, be changed to include non-attorney advocates who are acting on behalf of parents and provide that these individuals be held to the same standard as attorneys. Another commenter expressed concern regarding circuit court rulings that require SEAs to pay for expert witnesses for parents who cannot afford them. The commenter recommended that the regulations permit SEAs to establish a list of private experts who are willing to testify at due process hearings and to use funds provided under Part B of the Act to pay such experts when either party uses them.

*Discussion:* Section 615(i)(3)(B) of the Act allows a court to award reasonable attorneys' fees as a part of the costs to a parent who is the prevailing party. Although the Act also provides parents with the right to be accompanied and advised by individuals with special knowledge or training with respect to the problems of children with disabilities at a due process hearing, it does not provide for awarding attorneys' fees to these other individuals. Lay

advocates are, by definition, not attorneys and are not entitled to compensation as if they were attorneys. In addition, consistent with the Supreme Court's recent decision in *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, No. 05-18, U.S., 2006 U.S. LEXIS 5162 (June 26, 2006), if Congress wishes to allow recovery of experts' fees by prevailing parents, it must include explicit language authorizing that recovery, which was not done in the Act. This would apply whether the expert was seeking payment for testifying or advocating.

*Changes:* None.

*Comment:* One commenter stated that attorneys' fees should be available for resolution meetings because parents are required to attend these meetings before a due process hearing can begin. Another commenter recommended that the regulations clarify that the prohibition on attorneys' fees for resolution activities applies to the resolution meeting, as well as any resolution agreement. One commenter requested that the regulations clarify that attorneys' fees for resolution meetings will not be paid until a compromise is reached, and will be based on the resolution meeting itself and not the work that the attorney puts into preparing for the resolution meeting.

*Discussion:* Section 300.517(c)(2)(iii) of the regulations, consistent with section 615(i)(3)(D)(iii) of the Act, specifies that the resolution meeting is not considered to be a meeting convened as a result of an administrative hearing or judicial action or an administrative hearing or judicial action for purposes of the attorneys' fees provision. Accordingly, such fees may not be awarded for resolution meetings.

While it is clear that attorneys' fees may not be awarded for resolution meetings, the Act is silent as to whether attorneys' fees are available for activities that occur outside the resolution meeting conducted pursuant to section 615(f)(1)(B)(i) of the Act and § 300.510(a). We decline to regulate on this issue because we believe these determinations will be fact-specific and should be left to the discretion of the court.

*Changes:* None.

*Comment:* A few commenters asked whether attorneys' fees can be awarded for attending an IEP Team meeting that is convened as a result of a mediation session conducted prior to the filing of a due process complaint or for attending an IEP Team meeting that is convened as a result of a mediation session conducted at any time.

*Discussion:* Section 615(i)(3)(D)(ii) of the Act permits States to determine whether attorneys' fees may be awarded for an IEP Team meeting that results from a mediation session described in § 300.506. Section 300.517(c)(2)(ii), as proposed, inadvertently, limited States to considering awarding attorneys' fees for an IEP Team meeting conducted as the result of a mediation arising prior to the filing of a due process request. This was an error and has been corrected to allow States the discretion to award attorneys' fees for a meeting of the IEP Team conducted as a result of any mediation described in § 300.506.

*Changes:* In order to be consistent with section 615(i)(3)(D)(ii) of the Act, we have revised § 300.517(c)(2)(ii) by placing a period after the reference to § 300.506 and removing the rest of the sentence.

*Comment:* One commenter recommended that attorneys' fees should also apply to due process complaints brought by private schools or agencies, not just families.

*Discussion:* Section 300.507(a)(1) permits a parent or a public agency to file a due process complaint under the Act. Private schools or agencies are not permitted to file a due process complaint under the Act. Under section 615(f)(1)(A) of the Act, only the parents and public agency are authorized to request a due process hearing.

*Changes:* None.

*Comment:* One commenter requested that the regulations clarify in § 300.517(c)(3) what standard will be used to determine whether a parent was substantially justified in rejecting a settlement offer.

*Discussion:* It would be inappropriate to include a standard for determining whether a parent is substantially justified in rejecting a settlement offer because such matters will depend on the specific facts and circumstances in each case. The hearing officer, as the designated trier of fact under the Act, is in the best position to determine whether a parent was substantially justified in rejecting a settlement offer. We would expect that a hearing officer's decision will be governed by commonly applied State evidentiary standards, such as whether the testimony is relevant, reliable, and based on sufficient facts and data.

*Changes:* None.

#### Child's Status During Proceedings (§ 300.518)

*Comment:* A few commenters requested clarification regarding whether the current educational placement is the last agreed-upon placement. One commenter requested

clarification as to whether the pendent placement is the regular education class or a class or program selected by the child's IEP Team.

*Discussion:* We believe that there is no need for further regulations in this area. The current educational placement during the pendency of any administrative or judicial proceeding described in § 300.518 and section 615(j) of the Act, refers to the setting in which the IEP is currently being implemented. The child's current placement is generally not considered to be location-specific.

*Changes:* None.

*Comment:* One commenter recommended clarifying that an IFSP is not a child's pendent placement as the child transitions from a Part C early intervention program to a Part B preschool program.

*Discussion:* The programs under Parts B and C of the Act differ in their scope, eligibility, and the services available. Services under Part B of the Act are generally provided in a school setting. By contrast, services under Part C of the Act are provided, to the maximum extent appropriate, in the natural environment, which is often the infant or toddler's home or other community program designed for typically developing infants or toddlers. The Department has long interpreted the current educational placement language in the stay-put provisions in section 615(j) of the Act and § 300.518(a) as referring only to the child's placement under Part B of the Act and not to the early intervention services received by the child under Part C of the Act. We believe that a child who previously received services under Part C of the Act, but has turned three and is no longer eligible under Part C of the Act, and is applying for initial services under Part B of the Act, does not have a "current educational placement."

We are adding language to clarify that if the complaint involves an application for initial services under Part B of the Act from a child who has turned three and is no longer eligible under Part C of the Act, the public agency is not required to continue providing the early intervention services on the child's IFSP. The provision clarifies that a public agency must obtain parental consent prior to the initial provision of special education and related services, consistent with § 300.300(b), and if a child is eligible under Part B of the Act and the parent provides consent under § 300.300(b), the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

*Changes:* We have added a new paragraph (c) in § 300.518 to clarify the Department's longstanding policy that if a complaint involves an application for initial services under Part B of the Act from a child who has turned three and is no longer eligible under Part C of the Act, the public agency is not required to continue providing the early intervention services on the child's IFSP. Proposed § 300.518(c) has been redesignated as new § 300.518(d).

*Comment:* One commenter recommended revising § 300.518 to clearly state that during the pendency of any administrative or judicial proceeding, LEAs are not absolved of their obligation to fully comply with all substantive and procedural requirements in Part B of the Act, with the exception of requirements that are impossible to fulfill because of the stay put order or because of a parent's refusal.

*Discussion:* We do not agree that the change requested by the commenter is necessary. Section 615(j) of the Act and § 300.518 provide that during the pendency of any administrative or judicial proceeding regarding a due process complaint under § 300.507, except as provided in § 300.533, unless the parent and the SEA or LEA agree to a proposed change in the educational placement of the child, the child remains in the current educational placement. Implicit in maintaining a child's current educational placement is the requirement that the public agency must ensure that FAPE continues to be made available to the child.

*Changes:* None.

*Comment:* A few commenters recommended that stay put not apply to a child if the child's parent fails to participate in a resolution meeting. Another commenter expressed concern about the applicability of the stay put provision when resolution meetings are delayed.

*Discussion:* The Act now makes the resolution process a prerequisite to an impartial due process hearing. Under section 615(j) of the Act, a child must be maintained in the current educational placement while proceedings under the Act are pending, and paragraph (a) of § 300.518 clarifies that unless the parent and the public agency agree otherwise, the child involved in the complaint must remain in his or her current educational placement during the pendency of any administrative or judicial proceeding regarding a due process complaint under § 300.507. Thus, the Act is clear that the public agency must maintain the child's current educational placement during the pendency of the



30-day resolution process, which is triggered once the parent files a due process complaint under this part, regardless of whether the due process complaint is resolved prior to a due process hearing. We believe it is important for this to be clear in the procedural safeguards notice. Therefore, we are changing § 300.504(c)(7) to clarify that the notice must inform parents about the child's placement during the pendency of any due process complaint.

Since a party must file a due process complaint as the first step in the hearing process, we also are making a change in § 300.518(a) to refer to a due process complaint, rather than a request for a due process hearing. This change is needed to clarify that a child's right to remain in the current educational placement attaches when a due process complaint is filed, regardless of whether the due process complaint results in a request for a due process hearing.

*Changes:* We have removed the reference in § 300.504(c)(7) to due process "hearings" and added "any due process complaint" to clarify that the procedural safeguards notice must include information regarding the child's placement during the pendency of any due process complaint. We also have changed § 300.518 by removing the words "request for a due process hearing" prior to the reference to § 300.507 and adding, in their place, the words "due process complaint."

*Comment:* One commenter recommended including language to invalidate the stay put agreement if the original decision is reversed at the second tier hearing or in a judicial appeal. One commenter recommended providing interim financial relief for parents if an LEA appeals the decision of a due process hearing officer to maintain a child with a disability in a private school setting.

*Discussion:* We are maintaining the provisions in proposed § 300.518(c), (new § 300.518(d)), but with one modification. The basis for this regulation is the longstanding judicial interpretation of the Act's pendency provision that when a hearing officer's decision is in agreement with the parent that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parent for purposes of determining the child's current placement during subsequent appeals. See, e.g., *Burlington School Committee v. Dept. of Educ.*, 471 U.S. 359, 372 (1985); *Susquenita School District v. Raelle S.*, 96 F.3d 78, 84 (3rd Cir. 1996); *Clovis Unified Sch. Dist. v. Cal. Office of Administrative Hearings*, 903 F.2d 635, 641 (9th Cir. 1990). To

clarify that new § 300.518(d) (proposed § 300.518(c)) does not apply to a first-tier due process hearing decision in a State that has two tiers of administrative review, but only to a State-level hearing officer's decision in a one-tier system or State review official's decision in a two-tier system that is in favor of a parent's proposed placement, we are removing the reference to "local agency" in new § 300.518(d). This change is made to align the regulation more closely with case law.

With regard to the concern about providing financial relief for prevailing parents when an LEA appeals the decision of a due process hearing to maintain a child with a disability in a private school setting, we decline to regulate on this issue because such decisions are matters best left to State law, hearing officers, and courts.

*Changes:* We have removed "or local agency" in new § 300.518(d) (proposed § 300.518(c)) because a decision by a hearing officer or a State review official in favor of a parent's proposed placement is an agreement between the parent and the State, not the local agency.

*Comment:* One commenter recommended clarifying that any agreement by a parent to waive the stay put protection must comply with the requirements for consent in § 300.9.

*Discussion:* Consent is required when a pending complaint involves an application for initial admission to public school. In this case, parental consent is required for the child to be placed in the public school until the completion of all proceedings, consistent with § 300.518(b) and section 615(j) of the Act. Other waivers of the stay put protections while an administrative or judicial proceeding is pending, need only be by agreement between the parent and the public agency.

*Changes:* None.

#### Surrogate Parents (§ 300.519)

*Comment:* A few commenters asked whether a student in the penal system has a right to a surrogate parent.

*Discussion:* Students with disabilities in State correctional facilities do not have an automatic right to a surrogate parent solely by reason of their confinement at a correctional facility. Public agencies must make case-by-case determinations in accordance with the requirements in § 300.519, regarding whether a student with a disability in a State correctional facility needs a surrogate parent. Whether a student with a disability confined in a State correctional facility is considered a *ward of the State*, as defined in new

§ 300.45 (proposed § 300.44) whose rights must be protected through the appointment of a surrogate parent, is a matter that must be determined under State law.

*Changes:* None.

*Comment:* One commenter recommended defining the term "locate" as used in § 300.519.

*Discussion:* "Locate," as used in § 300.519(a)(2), regarding a public agency's efforts to locate a child's parent, means that a public agency makes reasonable efforts to discover the whereabouts of a parent, as defined in § 300.30, before assigning a surrogate parent. We do not believe that it is necessary to define "locate" in these regulations because it has the same meaning as the common meaning of the term.

*Changes:* None.

#### Duties of Public Agency (§ 300.519(b))

*Comment:* A number of comments were received regarding the procedures for assigning surrogate parents. One commenter recommended requiring LEAs to appoint a surrogate parent unless the juvenile court has already appointed one. The commenter stated that this would avoid situations in which the LEA and juvenile court each believe that the other is assuming this responsibility and a surrogate parent is never appointed.

A few commenters recommended that the process for assigning surrogate parents within the 30-day timeframe be developed in collaboration with judges and other child advocates. Some commenters recommended that the regulations require the involvement of child welfare agencies, homeless liaisons, and any other party who has knowledge about the needs of homeless children or children in foster care in determining whether a surrogate parent is needed.

*Discussion:* It is not necessary to amend the regulations in the manner recommended by the commenters. To ensure that the rights of children with disabilities are protected, § 300.519(b) requires public agencies to have a method for determining whether a child needs a surrogate parent and for assigning a surrogate parent to a child. Such methods would include determining whether a court has already appointed a surrogate parent, as provided under § 300.519(c). Therefore, it is unnecessary to add language requiring LEAs to appoint a surrogate parent unless the juvenile court has already appointed one, as requested by a commenter. Section 300.519(d)(1) allows a public agency to select a surrogate parent in any way permitted

under State law, and § 300.519(h) requires the SEA to make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent.

We believe that the determination of whether public agencies collaborate with other parties, such as child welfare agencies or homeless liaisons, in appointing surrogate parents is best left to State discretion. There is nothing in the Act that would prohibit a public agency from collaborating with judges and child advocates in establishing a process for assigning surrogate parents, as recommended by the commenter. However, in situations where a public agency involves other parties in determining whether a surrogate parent is needed, the public agency must ensure that the confidentiality of personally identifiable data, information, and records collected or maintained by SEAs and LEAs is protected in accordance with §§ 300.610 through 300.627, and that the privacy of education records is protected under FERPA and its implementing regulations in 34 CFR part 99.

*Changes:* None.

*Comment:* One commenter recommended retaining current § 300.370(b)(2), which specifically mentions the recruitment and training of surrogate parents as a State-level activity for which funds provided under Part B of the Act may be used. One commenter requested clarification as to who should provide training for surrogate parents. A few commenters recommended that PTIs in each State be responsible for training surrogate parents.

*Discussion:* It is not necessary to retain current § 300.370(b)(2) in order to permit the continued use of funds provided under Part B of the Act for the recruitment and training of surrogate parents. Section 300.704(b) and section 611(e)(2)(C)(i) of the Act provide that funds reserved for other State-level activities may be used for support and direct services, including technical assistance, personnel preparation, and professional development and training. This would include the recruitment and training of surrogate parents.

Determinations regarding who should conduct the training for surrogate parents are best left to the discretion of State and local officials. There is nothing in the Act or these regulations that requires or prohibits surrogate parent training to be conducted by PTIs.

*Changes:* None.

*Comment:* A few commenters recommended that a child have the same surrogate parent for each IEP Team

meeting, eligibility meeting, and other meetings in which a parent's presence is requested by the public agency.

*Discussion:* The Act and these regulations do not address the length of time that a surrogate parent must serve. Nor do we believe that it would be appropriate to impose a uniform rule in light of the wide variety of circumstances that might arise related to a child's need for a surrogate parent. Even so, to minimize disruption for the child, public agencies should take steps to ensure that the individual appointed as a surrogate parent can serve in that capacity over the period of time that the child needs a surrogate.

*Changes:* None.

Wards of the State (§ 300.519(c))

*Comment:* Many commenters stated that the requirements for a surrogate parent for public wards of the State (when a judge overseeing a case appoints a surrogate parent) are less stringent than the requirements for surrogate parents for other children. The commenters stated that the requirements that surrogate parents have no personal or professional interest that conflicts with the interest of the child, and have knowledge and skills that ensure adequate representation of the child, as required in § 300.519(d)(2)(ii) and (iii), respectively, should be required for surrogate parents for children who are wards of the State. One commenter recommended that court-appointed surrogate parents should have to meet Federal requirements for surrogate parents, not the requirements promulgated by LEAs. The commenter stated that courts may have jurisdiction over cases from more than one school district and should not have to apply different standards depending on which school district is involved.

*Discussion:* The criteria for selecting surrogate parents in § 300.519(d)(2)(ii) and (iii), which apply to surrogate parents appointed by a public agency for children with disabilities under Part B of the Act, do not apply to the selection of surrogate parents for children who are wards of the State under the laws of the State. Section 615(b)(2)(A)(i) of the Act provides that, in the case of a child who is a ward of the State, a surrogate parent may alternatively be appointed by the judge overseeing the child's care, provided that the surrogate parent is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child. We decline to impose additional requirements for surrogate parents for children who are wards of the State

beyond what is required in the Act, so as to interfere as little as possible with State practice in appointing individuals to act for the child. However, we would expect that in most situations, the court-appointed individuals will not have personal or professional interests that conflict with the interests of the child and will have the knowledge and skills to adequately represent the interests of the child.

*Changes:* None.

*Comment:* One commenter recommended that the regulations clarify that if a parent under § 300.30 is known and the child is a ward of the State, the public agency must appoint a surrogate parent only if the public agency determines that a surrogate parent is needed to protect the educational interests of the child. The commenter stated that the public agency should not appoint a surrogate parent without approval of a court of competent jurisdiction if the parent is the biological or adoptive parent whose rights to make educational decisions for the child have not been terminated, suspended, or limited.

*Discussion:* The commenters' concern is already addressed in the regulations. Section 300.30(b)(1) provides that when there is more than one party attempting to act as a parent, the biological or adoptive parent must be presumed to be the parent, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

*Changes:* None.

*Comment:* Some commenters noted that the regulations do not protect a child who is a ward of the tribe in the same manner as a child who is a ward of the State. The commenters stated that this means that American Indian children have less protection than children of other ethnicities and recommended that the regulations clarify that wards of the State include children who are wards of a tribe of competent jurisdiction.

*Discussion:* The definition of State in new § 300.40 (proposed § 300.39) is based on section 602(31) of the Act, which does not include an Indian tribe or tribal governing body. Therefore, the Department does not have the authority to interpret ward of the State to include children who are wards of a tribe of competent jurisdiction. However this does not relieve States or the BIA of their responsibility to ensure that the rights of a child who is a ward of a tribe are protected through the appointment of a surrogate parent under § 300.519 when no parent can be identified; when the agency cannot, after reasonable efforts, locate a parent; or when the

child is an unaccompanied homeless youth.

*Changes:* None.

#### Criteria for Selection of Surrogates (§ 300.519(d))

*Comment:* Many commenters recommended that the regulations require public agencies to develop procedures to terminate the appointment of a surrogate parent if the person does not perform the duties of a surrogate parent. The commenters stated that such procedures should be developed in collaboration with the child welfare agency, as well as any other party knowledgeable about a child's need for surrogate assignments, including homeless liaisons, court-appointed special advocates, guardians *ad litem*, attorneys, or judges.

*Discussion:* If a public agency learns that an individual appointed as a surrogate parent is not carrying out the responsibilities of a surrogate parent in § 300.519(g), the public agency, consistent with its obligation to protect the rights of children with disabilities under the circumstances set out in § 300.519(a), would need to take steps to terminate the appointment of a surrogate parent. It is up to each State to determine whether procedures to terminate surrogate parents are needed and whether to collaborate with other agencies as part of any procedures they may choose to develop.

*Changes:* None.

*Comment:* A few commenters stated that the regulations should specify that an LEA cannot replace a surrogate parent simply because the surrogate parent disagrees with an LEA.

*Discussion:* As noted in the response to the prior comment, public agencies have a responsibility to ensure that a surrogate parent is carrying out their responsibilities, so there are some circumstances when removal may be appropriate. A mere disagreement with the decisions of a surrogate parent about appropriate services or placements for the child, however, generally would not be sufficient to give rise to a removal, as the role of the surrogate parent is to represent the interests of the child, which may not be the same as the interests of the public agency. We do not think a regulation is necessary, however, as we believe that the rights of the child with a disability are adequately protected under Section 504 of the Rehabilitation Act (Section 504) and Title II of the Americans with Disabilities Act (Title II), which prohibit retaliation or coercion against any individual who exercises their rights under Federal law for the purpose of assisting children with disabilities by

protecting rights protected under those statutes. See, 34 CFR 104.61, referencing 34 CFR 100.7(e); 28 CFR 35.134. These statutes generally prohibit discrimination against individuals on the basis of disability by recipients of Federal financial assistance (Section 504) and prohibit discrimination against individuals on the basis of disability by State and local governments (Title II).

*Changes:* None.

#### Non-Employee Requirement; Compensation (§ 300.519(e))

*Comment:* A few commenters recommended that the regulations state that a foster parent is not prohibited from serving as a surrogate parent for a child solely because the foster parent is an employee of the SEA, LEA, or other agency that is involved in the education or care of the child.

*Discussion:* A child with a foster parent who is considered a parent, as defined in § 300.30(a), does not need a surrogate parent unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent, consistent with § 300.30(a)(2). Therefore, there is no need to change the regulations in the manner suggested by the commenters.

*Changes:* None.

#### Unaccompanied Homeless Youth (§ 300.519(f))

*Comment:* A few commenters requested clarification on how long the appointment should be for a temporary surrogate for an unaccompanied homeless youth. A few commenters also requested clarification on how the conflict of interest, and knowledge and skills requirements for surrogate parents apply to temporary surrogate parents for unaccompanied homeless youth.

*Discussion:* Section 300.519(f) allows LEAs to appoint a temporary surrogate parent for a child who is an unaccompanied homeless youth, without regard to the requirement in § 300.519(d)(2)(i) that a surrogate parent not be an employee of any agency involved in the education or care of the child. Thus, a temporary surrogate parent for an unaccompanied homeless youth may include State, LEA, or agency staff that is involved in the education or care of the child.

The Act does not specify how long a temporary surrogate parent can represent the child. Nor do we believe it is necessary or appropriate to specify a time limit for a temporary surrogate parent, as the need for a temporary surrogate parent will vary depending on the specific circumstances and unique

problems faced by each unaccompanied homeless youth.

Section 300.519(f) specifically allows the appointment of a temporary surrogate parent without regard to the non-employee requirements in § 300.519(d)(2)(i). There are no similar exceptions for the requirements in § 300.519(d)(2)(ii) and (iii). Therefore, temporary surrogate parents for unaccompanied homeless youth must not have a personal or professional interest that conflicts with the interest of the child the surrogate parent represents, and must have the knowledge and skills that ensure adequate representation of the child, consistent with § 300.519(d)(2)(ii) and (iii), respectively.

*Changes:* None.

#### Surrogate Parent Responsibilities (§ 300.519(g))

*Comment:* A few commenters requested a definition of "surrogate parent." Some commenters stated that § 300.519(g) provides only general parameters regarding the responsibilities of surrogate parents and does not provide guidance on specific duties or responsibilities of surrogate parents. The commenters stated that, at a minimum, the regulations should require that States develop duties and responsibilities for surrogate parents, such as meeting with the child, participating in meetings, and reviewing the child's education record.

*Discussion:* We do not believe that it is necessary to define "surrogate parent" because § 300.519(g), consistent with section 615(b)(2) of the Act, clarifies that a surrogate parent is an individual who represents the child in all matters related to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. This is a longstanding provision and is intended to describe the areas in which a surrogate parent may represent the child.

We believe that the provisions in § 300.519 are sufficient to ensure that public agencies fulfill their obligation to ensure that the rights of children are protected in the circumstances in § 300.519(a). Therefore, we believe it is unnecessary, and would be over regulating, to specify in these regulations requirements for surrogate parents to meet and get to know the child prior to meetings, as recommended by one commenter. Likewise, we do not believe that it is necessary to require public agencies to develop specific duties and responsibilities for surrogate parents because public agencies already must ensure that a surrogate parent has the

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 student and parent agree in writing that 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