

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

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

State Enforcement Mechanisms (§ 300.537)

Comment: None.

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

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

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

Monitoring, Technical Assistance, and Enforcement

State Monitoring and Enforcement (§ 300.600)

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

the Secretary to monitor and enforce the Act.

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

Changes: None.

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

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

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

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

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

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

Changes: None.

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

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

Changes: None.

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

of each public agency; develop written policies and procedures to guide monitoring activities; and develop and maintain a stakeholder group, which would include public school administrators, advocates, family members, and others, to guide monitoring and enforcement activities.

Discussion: Section 300.149(b), consistent with section 612(a)(11) of the Act, already requires States to have policies and procedures in effect to ensure compliance with the monitoring and enforcement requirements in §§ 300.600 through 300.602 and §§ 300.606 through 300.608. Sections 300.167 through 300.169, consistent with section 612(a)(21) of the Act, require States to establish and maintain an advisory panel with broad and diverse representation to advise States on, among other things, developing evaluations and corrective action plans to address findings identified in Federal monitoring reports. Accordingly, we do not believe any modification of § 300.600, regarding State monitoring procedures, is necessary.

Changes: None.

Comment: Several commenters recommended modifying § 300.600 to require States to establish a committee, which includes advocates to oversee monitoring and enforcement activities. A number of commenters suggested that this group, at a minimum, include representatives of PTIs; protection and advocacy groups; and parent, disability advocacy, and education organizations.

Several commenters also recommended requiring the advisory committee to provide advice on the development of the State's performance goals and indicators required in § 300.157, the State's performance plan, including measurable and rigorous targets required in § 300.601(a)(1) and (a)(3), the State's report to the public required in § 300.602(b)(2), the State's corrective action or improvement plan under § 300.604(b)(2)(i), and other State monitoring, improvement, and enforcement activities.

Discussion: The State advisory panel, required in §§ 300.167 through 300.169, consistent with section 612(a)(21)(A) of the Act, addresses many of the commenters' suggestions. The purpose of the State advisory panel, as stated in § 300.167 and section 612(a)(21)(A) of the Act, is to provide policy guidance to the SEA with respect to special education and related services for children with disabilities. Pursuant to § 300.168 and section 612(a)(21)(B) of the Act, a broad membership is required. The duties of the panel are, among other things, to advise the SEA on unmet needs, evaluations, and

corrective action plans to address findings identified in Federal monitoring reports, consistent with § 300.169 and section 612(a)(21)(D) of the Act. However, although we believe that broad stakeholder involvement in the development of the State performance plans and annual performance reports is very important, we decline to regulate that a specific group be involved in their development. We have, however, provided guidance in OSEP's August 9, 2005 memorandum to States, *Submission of Part B State Performance Plans and Annual Performance Reports*, (OSEP Memo 05-12), located at <http://www.ed.gov/policy/speced/guid/idea/bapr/index.html>, which directs States to provide information in their State performance plans on how they obtained broad input from stakeholders on the State performance plan. Accordingly, we find it unnecessary to add any further clarification in § 300.600.

Changes: None.

Comment: Some commenters recommended modifying § 300.600(b)(2) to clarify that monitoring and enforcement activities also apply to programs under Part C of the Act. A few commenters suggested clarifying that Part C of the Act should be monitored to evaluate how well it serves infants and toddlers with disabilities and their families.

Discussion: Section 300.600 applies only to Part B of the Act. However, the commenters are correct that the monitoring and enforcement activities in section 616 of the Act also apply to Part C of the Act, as provided in section 642 of the Act. The Department will address this recommendation in the promulgation of regulations implementing Part C of the Act.

Changes: None.

Comment: A few commenters recommended clarifying that the monitoring priority in section 616(a)(3)(A) of the Act, relating to the provision of FAPE in the LRE, should be based on the unique needs of the individual child. One commenter stated that the regulations should stress individualization when determining LRE. This commenter recommended including language from note 89 of the Conf. Rpt. No. 108-779, p. 186, which highlights Congress' intent that each public agency ensure that a "continuum of alternative placements (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) is available to meet the needs of children with disabilities for special education and related services."

Discussion: Section 300.115, consistent with section 612(a)(5) of the Act, requires each public agency to ensure that a continuum of alternative placements (including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) is available to meet the needs of children with disabilities for special education and related services. The LRE provisions are intended to ensure that a child with a disability is served in a setting where the child can be educated successfully and that placement decisions are individually determined based on each child's abilities and needs. We do not believe that the change recommended by the commenter is needed.

Changes: None.

Comment: One commenter recommended changing § 300.600 to specify that the Department's monitoring of States for compliance with the LRE requirements in §§ 300.114 through 300.117 include a review of IEPs to determine if: (1) Placements were based on the individual unique needs of each child; (2) placements were requested by parents; (3) IEP Teams followed the IEP requirements in §§ 300.320 through 300.328; (4) children received the services required to participate and progress in the general curriculum; (5) children are in appropriate environments; and (6) the educational and emotional advancements of children were considered. The commenter recommended adding language to direct individuals who monitor the implementation of the Act to look further than "numbers" when monitoring the LRE requirements.

Discussion: As noted in section 616(a)(1) of the Act, the Secretary monitors implementation of the Act through oversight of States' exercise of general supervision and States' performance plans. Section 616(a)(1) of the Act further states that the Secretary requires States to monitor and enforce the implementation of the Act by LEAs. The activities listed by the commenter are not the type of monitoring activities the Act requires the Secretary to undertake. The commenter's listed activities are more appropriately the responsibilities of States as they monitor the implementation of the Act in their LEAs.

Changes: None.

Comment: One commenter recommended avoiding references to the Act in §§ 300.600 through 300.609 when references to the regulations could accomplish the same result.

Discussion: We agree with the commenter and will revise §§ 300.600 through 300.609 accordingly.

Changes: We have revised §§ 300.600 through 300.609 by replacing statutory citations with relevant regulatory citations, where appropriate.

Comment: One commenter recommended clarifying that racial disproportionality in educational placements falls within the monitoring priority areas for monitoring and enforcement.

Discussion: New § 300.600(d), consistent with section 616(a)(3) of the Act, includes disproportionate representation of racial and ethnic groups in special education and related services (to the extent the representation is the result of inappropriate identification) as a monitoring priority. Because the monitoring priority area clearly refers to disproportionate representation to the extent the representation is a result of inappropriate identification of children with disabilities, and not placement, we do not believe we can include disproportionate representation resulting from educational placement within the scope of this monitoring priority area.

Changes: None.

Comment: One commenter recommended including a requirement in § 300.600(c) that States develop corrective action plans for each LEA monitored to improve performance in the monitoring priority areas. The commenter also suggested requiring that corrective action plans be completed by the State within one year of the monitoring report.

Discussion: Section 300.600(a), consistent with section 616(a)(1)(C) of the Act, requires States to monitor implementation and enforcement of the Act. As discussed elsewhere in this section in response to comments regarding § 300.604 (Enforcement), we have revised § 300.600(a) to identify the specific enforcement actions included in § 300.604 that are appropriate for States to use with LEAs. The new § 300.600(a) identifies specific methods that must be used to ensure correction when an LEA has been determined to need assistance for two consecutive years or to need intervention for three or more consecutive years. For example, § 300.600(a) refers to § 300.604(b)(2)(i), which discusses the preparation of a corrective action or improvement plan. In addition, new § 300.608(b) clarifies that States can use other authority available to them to monitor and enforce the Act. States need the flexibility to select the most appropriate mechanism to ensure correction in a timely manner.

Requiring that corrective action plans be developed in every instance is overly prescriptive when there are multiple methods that can be used. Accordingly, we do not think it is necessary to make the change suggested by the commenter.

Changes: None.

State Performance Plans and Data Collection (§ 300.601)

Comment: One commenter expressed concern that § 300.601(a)(3) and (b)(1) over-regulate by requiring measurable and rigorous targets beyond those established in the Act. The commenter expressed concern that this would result in additional data collection and analyses and require substantial administrative staff time and additional costs at the State and local levels. The commenter stated that, while the Department may monitor any area and review any data, it is unnecessary to establish additional non-statutory indicators and targets.

Discussion: Section 300.601(a)(3), consistent with section 616(a)(3) of the Act, requires the Secretary to establish indicators to adequately measure performance in the monitoring priority areas. Under section 616(b)(2)(A) of the Act, States are required to establish measurable and rigorous targets for the indicators established under the monitoring priority areas described in section 616(a)(3). The Department established indicators only in the three monitoring priority areas listed in new § 300.600(d), consistent with section 616(a)(3) of the Act. Given that States are required to establish targets for indicators established under the monitoring priority areas and indicators were established only under the three statutory monitoring priority areas, the Secretary is not requiring measurable and rigorous targets in areas beyond those established in the Act. We disagree with the commenter and do not believe the Department has over-regulated in this area.

Changes: None.

Comment: A few commenters recommended changing § 300.601 to specify that States must provide an opportunity for public comment in developing the State performance plan.

Discussion: We agree that the public should be represented in developing State performance plans. In note 253–258 of the Conf. Rpt. No. 108–779, p. 232, Congress stated its expectation that State performance plans, indicators, and targets be developed with broad stakeholder input and public dissemination. OSEP Memo 05–12 requires States to provide information in the overview section of the State performance plan, clarifying how the

State obtained broad input from stakeholders on the State performance plan. Furthermore, §§ 300.167 through 300.169 clarify the State's responsibility to establish and maintain an advisory panel, whose membership consists of broad and diverse representation, to advise States on many issues, including developing evaluations and reporting on data to the Secretary. Accordingly, we believe that no additional clarification is needed.

Changes: None.

Comment: One commenter expressed concern that the requirement in § 300.601(a)(3) reflects a “one-size-fits-all” approach that is not in the Act because it requires the Secretary to establish indicators for the State performance plan and annual performance reports and requires States to collect data on each of the indicators.

Discussion: Section 616(a)(3) of the Act requires the Secretary to establish quantifiable indicators in each of the monitoring priority areas, and qualitative indicators, as needed, to adequately measure performance. Section 300.601(a) reflects this requirement. The requirement that each State establish measurable and rigorous targets for the indicators established by the Secretary and collect relevant data is set forth in section 616(b)(2)(B) of the Act. We do not agree that this presents a one-size-fits-all approach because States set their own targets for indicators such as graduation, dropout, and performance on assessments, and identify improvement strategies specific to the unique circumstances of their State. In addition, OSEP Memo 05–12 includes the indicators established by the Secretary and also indicates that States have the flexibility to establish their own indicators, in addition to the indicators established by the Secretary.

Changes: None.

Comment: One commenter recommended amending § 300.601 to specify that, as part of the State's performance plan, measurable and rigorous targets are only required for the indicators established by the Secretary and are not required for any additional indicators established by the State.

Discussion: Pursuant to the guidance in OSEP Memo 05–12, the Secretary has established indicators under the three monitoring priority areas in new § 300.600(d), consistent with section 616(a)(3) of the Act. States may choose to add additional indicators if there are other areas the State wishes to improve. If the State adds indicators to the State Performance Plan, the State must include measurable and rigorous targets for each additional indicator because the purpose of the State performance

plan is to evaluate the State's efforts to implement the statutory requirements and describe how the State will improve. States are free to have additional indicators that are not included in the State performance plan and these indicators would not need to have measurable and rigorous targets.

Changes: None.

State Use of Targets and Reporting (§ 300.602)

Comment: A few commenters recommended modifying § 300.602(b)(1)(A) to require each LEA to work with an LEA monitoring stakeholder advisory committee that would advise the LEA on analyzing and reporting its performance on the targets in the State performance plan and on developing LEA plans. The commenters stated that, at a minimum, the advisory committee should include representatives of parents, disability advocacy groups, and other organizations.

Discussion: There is nothing in section 616 of the Act that requires LEAs to establish local stakeholder groups. Given the wide variation in the size of LEAs across the country and the wide variety of issues facing those LEAs, we do not believe that a Federal requirement is appropriate. States have the discretion to establish (or have their LEAs establish) local advisory groups to advise the LEAs, if they so choose.

Changes: None.

Comment: One commenter recommended modifying § 300.602 to require each State to include LEA corrective action plans (including indicators, targets, findings, and timelines for LEAs to correct any findings) in the State's report to the public on the performance of each LEA in the State on the targets in the State's performance plan.

Discussion: Section 300.602, consistent with section 616(b)(2)(C) of the Act, requires States to report annually on the performance of each LEA against targets in the State performance plan. We believe requiring States to include LEAs' corrective action plans in the States' public reports would create additional burden for States that is not required by the Act.

Changes: None.

Comment: Several commenters recommended revising § 300.602 to specify that the State performance plan and the public report on LEAs' performance must be in language that is accessible to, and understandable by, all interested parties.

Discussion: The Department expects the information that a State reports in its annual performance reports and in the

public reports on LEA performance will be made available in an understandable and uniform format across the State, including alternative formats upon request, and, to the extent practicable, in a language that parents understand. We do not believe it is necessary to add a specific requirement to the regulations because other Federal laws and policies already require that information to parents be available in alternative formats and to parents who are limited English proficient. Specifically, Title VI of the Civil Rights Act of 1964 requires SEAs and LEAs to communicate to parents with limited English proficiency what is communicated to parents who are not limited English proficient. Under Title VI, SEAs and LEAs have flexibility in determining what mix of oral and written translation services may be necessary and reasonable for communicating this information. Similarly, Executive Order 13166 requires that recipients of Federal financial assistance take reasonable steps to ensure meaningful access by individuals with limited English proficiency. For individuals with disabilities, title II of the Americans with Disabilities Act requires that State and local governments, and Section 504 of the Rehabilitation Act of 1973 requires that recipients of Federal financial assistance, ensure that their communications with individuals with disabilities are as effective as their communications with others, and that appropriate auxiliary aids and services are available when necessary to ensure effective communication.

Changes: None.

Comment: One commenter suggested that the annual performance report include cross-references or links to the State report card and local report cards on the academic performance of children with disabilities under the ESEA.

Discussion: States may choose, but are not required, to include in the annual performance report the cross-references or links suggested by the commenter. States also may choose, but are not required, to use their ESEA report cards for reporting annually on the performance of LEAs on the indicators in the State performance plan. We do not believe it is appropriate to require States to cross-reference or link to ESEA report cards because it is overly burdensome and may create confusion because the indicators and timeframe for reporting may not be the same between the two reporting systems.

Changes: None.

Comment: One commenter recommended requiring States to post their monitoring reports of LEAs on the

States' Web site and make reports on monitoring activities for each LEA available to the public in written format and to the media.

Discussion: States have the discretion to decide how these reports are made available to the public. There is nothing in the Act that requires States to post monitoring reports of LEAs on the States' Web site or through other means. However, States may, if they wish, make such postings.

Changes: None.

Comment: One commenter suggested removing § 300.602(b)(1)(ii), which requires a State to include in its report to the public on the performance of each LEA, the most recent performance data on each individual LEA and the date the data were obtained, if the State collects these data through monitoring or sampling.

Discussion: We believe that the data we are requiring the States to provide under § 300.602(b)(1)(ii) are necessary for the proper implementation of the Act. Providing the most recent LEA performance data and the date the data were obtained will reduce data burden while maintaining the States' accountability for results, specifically related to indicator data that are more difficult to collect because those data are not collected through State-reported data collection systems under section 618 of the Act. However, the proposed regulations were not as clear as they should have been about the conditions under which States may use monitoring and sampling data. Therefore, we are revising § 300.601(b) by adding a new provision that specifies that if the Secretary permits States to collect data on specific indicators through State monitoring or sampling, and a State chooses to collect data on those indicators through State monitoring or sampling, the State must collect data on those indicators on each LEA at least once during the period of the State performance plan. This will require that States collect data to assess each LEA's performance on indicators for which State monitoring or sampling data are permitted during the period of the State performance plan, so that the public will receive specific information about each LEA. We also are revising § 300.602(b)(1)(ii) to make clear that the required information about specific LEAs would only have to be included in the reports to the public on LEA performance required by § 300.602(b)(1)(i)(A), which should prevent this provision from being interpreted to require LEA-specific reporting to the Secretary.

Changes: We have renumbered § 300.601(b)(2) as § 300.601(b)(3) and

added a new § 300.601(b)(2) to specify that, if permitted by the Secretary, if a State collects data on an indicator through State monitoring or sampling, the State must collect data on the indicator at least once during the period of the State performance plan. We also have revised § 300.602(b)(1)(ii) to provide a more specific reference to the public report required under § 300.602(b)(1)(i)(A).

Comment: One commenter recommended that § 300.602 specify that data on disproportionality be reported to the public, pursuant to sections 616(b)(2)(C) and 618 of the Act.

Discussion: The provisions in § 300.602 already include the requirement suggested by the commenter. Section 300.602, consistent with section 616(b)(2)(C) of the Act, requires each State to use the targets established in its State performance plan and the monitoring priority areas described in § 300.600(d), to analyze the performance of each LEA in the State, and to report annually to the public on such performance. As described in new § 300.600(d), the monitoring priority areas on which the State will report include the disproportionate representation of racial and ethnic groups in special education and related services, to the extent the disproportionate representation is the result of inappropriate identification. Accordingly, States are required to report this information to the public. States must establish targets on each of the indicators set by the Secretary.

We also note that § 300.642(a), consistent with section 618(b) of the Act, requires that data collected pursuant to section 618 of the Act be reported publicly. These data will include State-level data on the number and percentage of children with disabilities by race and ethnicity on a number of measures, including identification as children with disabilities, placement, graduation and drop-out, and discipline. Accordingly, we do not believe any further changes to the regulations are necessary.

Changes: None.

Secretary's Review and Determination Regarding State Performance (§ 300.603)

Comment: One commenter expressed concern that the tone and substance of the monitoring and enforcement provisions in §§ 300.603 through 300.609, related to approval or disapproval by the Secretary of the State's performance plan and interventions against the SEA, are overly prescriptive and negative. The commenter stated that enforcement provisions applicable to all elementary

school and secondary school programs already exist in GEPA.

Discussion: We do not agree that the enforcement provisions are overly prescriptive. These enforcement provisions simply reflect the statutory requirements in section 616(d) and (e) of the Act. These provisions are more specific than the provisions in GEPA.

Changes: None.

Comment: A few commenters recommended including in the regulations the provisions in section 616(c) of the Act, regarding the process the Secretary must follow if the Secretary finds that a State performance plan does not meet the requirements in section 616 of the Act.

Discussion: We believe that the review process spelled out in section 616(c) of the Act is sufficiently clear and that regulations are not necessary. Further, under the statutory framework, the State performance plans were due to the Department by December 3, 2005, and the Department's review of the State performance plans for the six-year period of federal fiscal years 2005 through 2011 has already been completed. Accordingly, we believe it is unnecessary to add further clarification regarding the Secretary's responsibilities in § 300.603.

Changes: None.

Comment: One commenter recommended that the Department's process for approval of targets in State performance plans be rational, consistent, and transparent. For example, the commenter suggested that as the Department responds to and negotiates with a State regarding the State's targets, the process should be open so that States can learn from the Department's discussions with other States.

Discussion: We agree with the commenter. Accordingly, the Department has posted its analyses of each State's performance plan on the Department's Web site at: <http://www.ed.gov/fund/data/report/idea/partbspap/index.html>. In so doing, the Department's analyses are transparent and provide States with the opportunity to review the Department's responses to other States' performance plans.

Changes: None.

Enforcement (§ 300.604)

Comment: A few commenters recommended changing the enforcement requirements in § 300.604 to clarify the actions a State must take relating to enforcement. The commenters stated that it is essential that States understand their explicit authority under the Act to take certain enforcement actions against LEAs if the

State is identified as a State that needs assistance, needs intervention, or needs substantial intervention. The commenters stated that some of the enforcement mechanisms available to the Secretary in section 616(e) of the Act, such as requiring entry into a GEPA compliance agreement or referral to the Office of the Inspector General, may have no direct counterpart under State law and therefore, would not be available to States.

Discussion: The Department agrees that it is important to clarify the specific enforcement actions that States must use against an LEA if the LEA is determined to need assistance, intervention, or substantial intervention. We are revising § 300.600(a) to identify the specific enforcement actions identified in § 300.604 that are appropriate for a State, as opposed to the Federal government, to use if it determines that an LEA needs assistance or intervention in implementing the requirements of Part B of the Act.

Changes: We have revised § 300.600(a) to require States to enforce Part B of the Act in accordance with the enforcement mechanisms identified in § 300.604(a)(1) and (a)(3), (b)(2)(i) and (b)(2)(v), and (c)(2).

Comment: One commenter recommended including in §§ 300.600 through 300.609 a method for individuals or organizations to inform the Department about compliance issues in their district or State.

Discussion: The Department is committed to obtaining input from individuals and organizations as part of its monitoring process, and has a system for receiving and responding to citizen complaints about LEA and State compliance. However, detailed operational procedures for monitoring State activities are not typically included in regulations. Accordingly, we believe it is unnecessary to provide further clarification regarding specific monitoring procedures in §§ 300.600 through 300.609.

Changes: None.

Comment: One commenter recommended clarifying in § 300.604 that withholding State administrative funds would only occur following the Secretary's determination that, for three or more consecutive years, the State needs intervention in implementing the requirements of Part B of the Act.

Discussion: Section 300.604(b)(2)(iii), consistent with section 616(e)(2)(iii) of the Act, clearly delineates that consideration of withholding State administrative funds occurs following a "needs intervention" determination by the Secretary for three or more consecutive years. Therefore, we do not

believe it is necessary to add further clarification regarding the withholding of State administrative funds.

Changes: None.

State Enforcement and Rule of Construction (§§ 300.608 and 300.609)

Comment: One commenter recommended including in § 300.608 a provision that would allow an SEA to use any means authorized by law to effect compliance when it is determined that an LEA is not meeting the requirements of Part B of the Act, including the targets in the State's performance plan.

Discussion: The enforcement scheme outlined in §§ 300.600(a), 300.604, and 300.608 represents the minimum steps that a State must take to enforce compliance with the Act. (The minimum enforcement steps the Department must take are specified in § 300.604.) However, we believe that the regulations should be clear that States have the flexibility to use other mechanisms to bring about compliance, just as section 616(g) of the Act and § 300.609 recognize that the Department needs the flexibility to use the authority in GEPA to monitor and enforce the Act, in addition to the enforcement program laid out in section 616(e) of the Act. Therefore, we will add to § 300.608 a new provision noting that States are not restricted from using any other authority available to them to monitor and enforce the Act. Taking steps under any such authority, however, does not relieve a State from complying with the requirements of §§ 300.600(a), 300.604, and 300.608(a).

Changes: We have designated proposed § 300.608 as § 300.608(a) and added a new paragraph (b) to specify that States are not restricted from utilizing any other authority available to them to monitor and enforce the Act. We also have clarified in § 300.609 that the reference to "authority under GEPA" includes the provisions of 34 CFR parts 76, 77, 80, and 81, including the imposition of special conditions under 34 CFR 80.12.

Confidentiality of Information

Confidentiality (§ 300.610) and Definitions (§ 300.611)

Comment: None.

Discussion: Both §§ 300.610 and 300.611 contained incorrect references to § 300.628, which does not exist. We have revised those references.

Changes: We have removed the incorrect references to § 300.628 in §§ 300.610 and 300.611 and replaced them with references to § 300.627 and § 300.625, respectively.

Notice to Parents (§ 300.612)

Comment: One commenter stated that § 300.612 exceeds the authority under sections 612(a)(8) and 617(c) of the Act.

Discussion: Proposed § 300.612 incorrectly referenced the requirements in § 300.121. The correct reference is § 300.123, which requires each State to have policies and procedures to ensure that public agencies in the State protect the confidentiality of personally identifiable information. We will make this correction in § 300.612. With this correction, § 300.612 requires the SEA to give notice to parents that fully informs them about the requirements regarding the confidentiality of personally identifiable information.

We do not agree that § 300.612 exceeds the authority under sections 612(a)(8) and 617(c) of the Act. Section 612(a)(8) of the Act requires agencies in the State to comply with section 617(c) of the Act, and section 617(c) of the Act gives the Secretary the authority to take appropriate measures to protect the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by SEAs and LEAs. This is a longstanding requirement in the regulations that we do not believe should be changed.

Changes: We have changed § 300.612(a) by removing the incorrect reference to § 300.121 and replacing it with a reference to § 300.123.

Comment: One commenter expressed concern that summaries of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information would not be adequate to fully inform parents.

Discussion: Section 300.612(a)(3) is a longstanding requirement that has been in the Part B regulations since they were published in 1977. The Department's experience in administering this program indicates that the requirement to include a summary of policies that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information is an effective way for parents to be informed about these requirements. Parents who desire additional information regarding their rights, consistent with these policies, can request the additional information from the SEA. SEAs are encouraged to comply with such requests without undue delay.

Changes: None.

Comment: One commenter recommended requiring the SEA to post its confidentiality of personally

identifiable information notice for parents on the State's Web site.

Discussion: We believe that it is up to each State to determine whether posting this notice on the State's Web site will serve the needs of parents and public agencies in the State. We, therefore, decline to regulate on this matter.

Changes: None.

Amendment of Records at Parent's Request (§ 300.618) and Opportunity for a Hearing (§ 300.619)

Comment: A few commenters requested clarification regarding how parents can register their disagreement with information in their child's record and request that their child's record be changed.

Discussion: Sections 300.618, 300.619, and 300.621 all address the process that parents must use to seek changes in their child's records if they believe the record is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. When a parent requests that a change be made in the child's record, under § 300.618, agencies must amend the information within a reasonable time or inform parents of the agency's refusal to amend the information and the parent's right to a hearing to challenge the public agency's determination. If parents want to challenge the accuracy of information in the child's education records, they may do so by requesting a hearing under § 300.619 (by contacting the LEA staff member assigned that responsibility). Section 300.621 specifically provides that a hearing held under § 300.619 must be conducted according to the procedures in 34 CFR 99.22. 34 CFR 99.22, in turn, requires a hearing to meet the following minimum requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more

individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

The parent is not required, under the Act and these regulations, to follow the procedures that are applicable to filing a due process complaint under §§ 300.507 through 300.510. This is because the hearing authorized under § 300.619 is for the explicit purpose of giving a parent the opportunity to challenge the information in education records when a parent believes the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. We do not believe further clarification regarding the specific procedures in §§ 300.618 and 300.619 is necessary. The procedures used for these hearings vary from State to State, and we believe it is best to give States the flexibility to develop their own procedures for such hearings, as long as they meet the requirements in § 300.621.

Changes: None.

Consent (§ 300.622)

Comment: One commenter suggested requiring schools to obtain parental consent before disclosing personally identifiable information to any party, unless authorized by 34 CFR part 99. Another commenter requested clarification regarding the requirements in § 300.622.

Discussion: We agree that § 300.622 should be revised to more accurately reflect the Department's policies regarding when parental consent is or is not required for disclosures of personally identifiable information to officials of participating agencies, and other individuals and entities. In some instances, current § 300.571 (proposed § 300.622) has been construed to prohibit disclosures without parental consent under this part that would be permitted without parental consent under FERPA. Accordingly, when final regulations for this program were issued in 1999, we amended current § 300.571(a) (proposed § 300.622(a)) to clarify that the release of disciplinary records to law enforcement authorities could occur without parental consent, to the extent that such disclosure was permitted under FERPA. In order to more clearly state the Department's longstanding position that consent is required for disclosures of personally

identifiable information to parties, other than officials of participating agencies collecting or using the information under this part, unless the information is contained in education records and the disclosure is allowed without parental consent under 34 CFR part 99, we are reorganizing § 300.622(a).

Under FERPA and § 300.622(a), schools, generally, must have written permission from the parent (or child who has reached the age of majority) in order to release information from a child's education records. However, there are exceptions to this general rule under FERPA that also apply to the records of children with disabilities and permit the release of information from education records without parental consent. Under 34 CFR 99.31(a), schools can disclose education records without consent under the circumstances specified in § 99.31 including if the disclosure meets one or more of the following conditions:

School officials with legitimate educational interests, as determined by the educational agency or institution;

Other schools where the student seeks or intends to enroll, subject to the requirements of § 99.34;

Specified authorized representatives, subject to the requirements of § 99.35, in connection with an audit or evaluation of Federal or State-supported education programs, or compliance with or enforcement of Federal legal requirements which relate to those programs;

Appropriate parties in connection with financial aid to a student for which the student has applied or which the student has received, if necessary for specified purposes;

Organizations conducting certain studies for or on behalf of the school;

Accrediting organizations;

To comply with a judicial order or lawfully issued subpoena;

Appropriate officials in cases of health and safety emergencies; and

State and local authorities, within a juvenile justice system, pursuant to specific State law.

We believe that the changes to § 300.622(a) state more clearly that under § 300.622, disclosures of personally identifiable information from education records of children with disabilities can be made without parental consent if the disclosure without parental consent would be permissible under FERPA. For example, in a situation involving a health emergency, information from a child with a disability's education records could be released to a hospital without parental consent in order to ensure that

the child received appropriate emergency health services.

Under proposed § 300.622(b), parental consent is not required for disclosures of personally identifiable information to officials of participating agencies for purposes of carrying out a requirement of this part. This is not a new requirement; proposed § 300.622(b) is the same as current § 300.571(b). However, we believe the requirement should be stated more clearly, and therefore, are changing the language in paragraph (b). We believe that this provision is particularly important to ensure that participating agencies have the information they need to carry out the requirements of this part in an effective manner. For example, if another State agency provides school health services under the Act, consent would not be required for a school nurse to have access to personally identifiable information in a child's education records in order to provide the school health services that are included on the child's IEP.

However, despite the recognition that officials of participating agencies need access to records of children with disabilities to carry out the requirements of this part, there are important privacy concerns that we feel need to be protected in certain specified situations. We believe that parental consent should be required before personally identifiable information can be released to representatives of participating agencies who are likely to provide or pay for transition services in accordance with § 300.321(b)(3). Representatives of these agencies, generally, are invited to participate in a child's IEP meeting because they may be providing or paying for transition services. We do not believe that the representatives of these agencies should have access to all the child's records unless the parent (or the child who has reached the age of majority) gives consent for the disclosure. We are, therefore, adding a new paragraph (b)(2) in § 300.622 to make this clear.

We also believe it is important to be clear about the confidentiality requirements for children who are placed in private schools by their parents, given the significant change in the child find requirements for these children. Under section 612(a)(10)(A)(i)(II) of the Act, child find for these children now is the responsibility of the LEA in which the private school is located and not the child's LEA of residence. We can anticipate situations in which there may be requests for information to be exchanged between the two LEAs, such as when a child is evaluated and

identified as a child with a disability by the LEA in which the private school is located and the child subsequently returns to public school in the LEA of residence. We believe under such circumstances parental consent should be required before personally identifiable information is released between officials of the LEA where a private school is located and the LEA of the parent's residence. We believe that consent is important in these situations to protect the privacy of the child and the child's family. Therefore, we are adding a new paragraph (b)(3) to § 300.622 to make this clear.

We are removing the requirement in proposed § 300.622(c) (current § 300.571(c)), which requires the SEA to provide policies and procedures that are used in the event that a parent refuses to provide consent under this section. This is already included in § 300.504(c)(3), which requires the procedural safeguards notice to include, among other things, a full explanation of the parental consent requirements and the opportunity to present and resolve complaints through the due process or State complaint procedures.

Changes: We have reorganized § 300.622 to more accurately reflect the Department's policy regarding when parental consent is and is not required for disclosures of personally identifiable information to officials of participating agencies, and other individuals and entities. We made changes to § 300.622(a) and added a new paragraph (b)(1) to clarify the Department's longstanding policy that consent is required for disclosures of personally identifiable information to parties, unless the interested parties are officials of participating agencies, collecting or using the information under this part, or the information is contained in education records and the disclosure is allowed without parental consent under FERPA. We added a new paragraph (b)(2) to clarify that parental consent is required for the disclosure of information to participating agencies that likely may provide or pay for transition services. We also added a new paragraph (b)(3) to require parental consent for the disclosure of records of parentally placed private school children between LEAs. Finally, we removed the requirement in proposed § 300.622(c) (current § 300.571(c)), because the information is included in § 300.504(c)(3).

Safeguards (§ 300.623)

Comment: None.

Discussion: We have corrected the incorrect reference to § 300.121 in the text of this regulation, which should

have referred to the State eligibility requirement concerning confidentiality, and not the State eligibility requirement regarding procedural safeguards.

Changes: We have removed the incorrect reference to § 300.121 and replaced it with a reference to § 300.123. Children's Rights (§ 300.625)

Comment: One commenter requested clarifying the requirement in § 300.625(a) that children receive privacy rights similar to those received by parents.

Discussion: Section 300.625 is the same as current § 300.574 and has been in the regulations since 1977. It provides that States must have policies and procedures concerning the extent to which children are afforded rights of privacy similar to those of parents, taking into consideration the age of the child and type or severity of disability. It does not require States to grant particular privacy rights to a child in addition to those that apply when the child reaches the age of majority, as specified in paragraphs (b) and (c) of § 300.625. We do not believe further clarification is necessary.

Changes: None.

Comment: A few commenters stated that the notice to transfer parental rights to a child at the age of majority should be provided to the child and parents one year before the child reaches the age of majority.

Discussion: We do not believe this change is necessary because the regulations in § 300.320(c) already address the notification requirement. Specifically, § 300.320(c) requires that, beginning no 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 under § 300.520. Because the regulations already contain the notice requirement, we do not believe it is necessary to add further clarification of this requirement to § 300.625.

Changes: None.

Enforcement (§ 300.626)

Comment: None.

Discussion: This provision, concerning State enforcement, should not refer to § 300.610, which is a requirement that applies to the Secretary.

Changes: We have removed the incorrect reference to § 300.610 and replaced it with a reference to § 300.611.

Annual report of children served—information required in the report (§ 300.641)

Comment: A few commenters stated that § 300.641 is inconsistent with the requirement in § 300.111(d), which states that the Act does not require the classification of children by their disability. The commenter noted that it is difficult to comply with the requirements for data collection and analysis without classifying children by their disability.

Discussion: We do not believe there is any inconsistency between the requirements in § 300.641(c) and § 300.111, as suggested by the commenter. Section 300.641(c) addresses counting children who have already been identified as having a disability and is consistent with the requirements in section 618 of the Act. Section 300.111 addresses child find and the determination of a child's eligibility for special education and related services. The Act does not require children to be identified with a particular disability category for purposes of the delivery of special education and related services. In other words, while the Act requires that the Department collect aggregate data on children's disabilities, it does not require that particular children be labeled with particular disabilities for purposes of service delivery, since a child's entitlement under the Act is to FAPE and not to a particular disability label.

Changes: None.

Comment: A few commenters recommended removing § 300.641(c) because States have reporting policies in place that might not be consistent with these new requirements. Numerous commenters stated that LEAs often report children with vision and hearing loss who have an additional disability in the category of multiple disabilities, which has resulted in under-reporting of children who are deaf-blind. The commenters stated that an accurate count of children with deaf-blindness is necessary to ensure that these children receive the specialized communication services they need, and to ensure that a sufficient number of specialists are trained to meet the specialized needs of these children. One commenter stated that a child's secondary disability should not affect the reporting of the child's primary disability. Another commenter suggested referring to deaf-blindness as the primary disability, if a child has multiple disabilities.

Discussion: The reporting requirements in § 300.641(c) are not new. Section 300.641(c) is the same as

current § 300.751(e); State reporting policies therefore should already be consistent with these regulations. Section 300.641(d) addresses how States must report a child with a disability who has more than one disability for purposes of the annual report of children served under the Act. Paragraph (d)(1) states that if a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category of deaf-blindness. Paragraph (d)(2) states that if a child has more than one disability and is not reported as having deaf-blindness or as having a developmental delay, the child must be reported under the category of multiple disabilities. We believe that § 300.641(d) is clear that children with deaf-blindness who have an additional disability must be included in the category of multiple disabilities. To designate deaf-blindness as the primary disability and include children with deaf-blindness who have an additional disability in the category of deaf-blindness would be inconsistent with the requirements in § 300.641(d).

Although we do not believe that any changes to the requirements in § 300.641(d) are necessary, we will review the instructions we provide to States regarding the reporting of children with deaf-blindness who have an additional disability and make any needed clarifications.

Changes: None.

Disproportionality (§ 300.646)

Comment: One commenter requested clarification as to whether the determination of disproportionality is based solely on a numerical formula or on district policies, procedures, and practices. One commenter recommended amending the regulations to clarify that the determination of disproportionality is based on a review of LEA policies and procedures, and not just a numerical determination. Another commenter requested a definition of significant disproportionality. Several commenters requested that the regulations clarify that States need only address statistically significant disproportionality based on the use of reliable data.

Discussion: Section 618(d)(1) of the Act is clear that the determination of significant disproportionality by race or ethnicity is based on a collection and examination of data and not on a district's policies, procedures, or practices. This requirement is clearly reflected in § 300.646. We do not believe it is appropriate to change § 300.646 because the commenter's suggestion is

inconsistent with the provisions in section 618(d) of the Act.

With respect to the definition of significant disproportionality, each State has the discretion to define the term for the LEAs and for the State in general. Therefore, in identifying significant disproportionality, a State may determine statistically significant levels. The State's review of its constituent LEAs' policies, practices, and procedures for identifying and placing children with disabilities would occur in LEAs with significant disproportionality in identification, placement, or discipline, based on the examination of the data. The purpose of this review is to determine if the policies, practices, and procedures are consistent with the Act. Establishing a national standard for significant disproportionality is not appropriate because there are multiple factors at the State level to consider in making such determinations. For example, States need to consider the population size, the size of individual LEAs, and composition of State population. States are in the best position to evaluate those factors. The Department has provided guidance to States on methods for assessing disproportionality. This guidance can be found at: <http://www.ideadata.org/docs/Disproportionality%20Technical%20Assistance%20Guide.pdf>.

Changes: None.

Comment: A few commenters suggested adding gender to the analysis of disproportionality. The commenters expressed concern that males are over-identified as children with disabilities.

Discussion: Although States will be collecting data on the gender of children with disabilities for other purposes, the Act does not require an analysis for disproportionality on the basis of gender. We are concerned about increasing the burden on States. Given that there is no statement of congressional intent indicating the need to do this analysis, we do not believe it should be included in the regulations.

Changes: None.

Comment: One commenter expressed concern that the regulations are not consistent with the statutory requirements for data collection on suspension, expulsion, identification, and placement.

Discussion: We disagree with the commenter. The regulations in § 300.646 reflect the requirements in section 618(d) of the Act.

Changes: None.

Comment: Several commenters raised concerns and made recommendations regarding § 300.646(b)(2), which requires the State to require any LEA

identified with significant disproportionality to reserve the maximum amount under section 613(f) of the Act for comprehensive, coordinated early intervening services to serve children in the LEA, particularly, but not exclusively children in those groups that were significantly overidentified. A few commenters recommended that LEAs not be required to reserve the maximum amount under section 613(f) of the Act. Several commenters recommended adding language in § 300.646(b)(2) to require LEAs to monitor the effect of early intervening services on disproportionate representation.

Discussion: The requirements in § 300.646(b)(2) follow the specific language in section 616(d) of the Act. To allow LEAs to reserve less than the maximum amount required in section 613(f) of the Act when significant disproportionality is identified would be inconsistent with the Act. Therefore, we do not believe a change in this requirement is appropriate.

As part of the requirements in §§ 300.600 through 300.604, States must report annually on indicators in three monitoring priority areas. One of the monitoring priority areas is disproportionality, for which there are two indicators. In addition to annually reviewing State performance on each indicator in each monitoring priority area, the State must review each LEA against indicators established for each monitoring priority area, so the State will be examining data annually to identify any disproportionality. If disproportionality is identified in LEAs, the policies, procedures, and practices of the LEAs will be examined to determine if they are leading to inappropriate identification, and, pursuant to section 618(d)(2)(C) of the Act and § 300.646(b)(3), the LEA will be required to report publicly on the revision of policies, practices, and procedures used in identification or placement. It is, therefore, unnecessary to add a requirement that LEAs monitor the effect of early intervening services on disproportionality because the LEAs will have to continue to publicly report on their revision of policies, practices and procedures until the significant disproportionality in the LEA is eliminated. We believe that the intent of the suggestion will be accomplished through this other requirement.

Changes: None.

Subpart G—Authorization, Allotment, Use of Funds, and Authorization of Appropriations

Outlying Areas, Freely Associated States, and the Secretary of the Interior (§ 300.701)

Comment: None.

Discussion: The requirements of Part B of the Act that were listed in the NPRM under § 300.701(a)(1)(ii)(A)(1) through (5) did not include all of the requirements that apply to freely associated States. To ensure that freely associated States do not interpret these regulations as including all of the requirements in Part B of the Act that apply to them, we are removing these provisions. Section 300.701(a)(1)(ii) and (2) clarifies that, consistent with section 611(b)(1)(A)(ii) of the Act, freely associated States must meet the applicable requirements that apply to States under Part B of the Act.

Changes: We have removed paragraphs (1) through (5) in § 300.701(a)(1)(ii)(A).

Technical Assistance (§ 300.702)

Comment: One commenter requested that the regulations clarify whether the technical assistance funds referred to in § 300.702 are available to both SEAs and lead agencies under Part C of the Act.

Discussion: Section 300.702, consistent with section 611(c) of the Act, allows the Secretary to reserve funds under Part B of the Act to support technical assistance activities authorized in section 616(i) of the Act. Under section 642 of the Act, section 616 applies to the early intervention programs for infants and toddlers with disabilities under Part C of the Act. Section 616(i) of the Act requires the Secretary to review the data collection and analysis capacity of States to ensure that data and information necessary for monitoring the implementation of Parts B and C of the Act are collected, analyzed, and accurately reported to the Secretary, and to provide technical assistance, as needed. Therefore the technical assistance referred to in § 300.702 can be provided to both SEAs and lead agencies under Part C of the Act.

Changes: None.

Allocations to States (§ 300.703)

Comment: A few commenters noted that States need additional funding to comply with these regulations.

Discussion: The Department does not have the authority to allocate more funds than Congress appropriates. Section 300.703, consistent with section 611(d) of the Act, describes how the

appropriated funds must be distributed to States.

Changes: None.

State-Level Activities (§ 300.704)

Comment: One commenter suggested adding language in the regulations requiring public agencies to provide technical assistance to personnel in residential treatment facilities. The commenter stated that this assistance would help residential treatment facilities meet the requirements of FAPE for the children they serve.

Discussion: Section 300.704(a)(1), consistent with section 611(e)(1) of the Act, allows, but does not require, States to use funds reserved for State administration to provide technical assistance to other programs that provide services to children with disabilities, which could include residential treatment facilities providing services to children with disabilities under the Act. Section 300.704(b)(4)(i), consistent with section 611(e)(2)(C)(i) of the Act, allows, but does not require, States to use funds reserved for other State-level activities to provide support and direct services, including technical assistance, personnel preparation, and professional development and training, which could include technical assistance to staff who provide services to children with disabilities at residential treatment centers and other such facilities. Because the Act gives States the discretion to determine how to use these funds, so long as they are used in accordance with the requirements in Part B of the Act, the Department does not believe it would be appropriate to remove this discretion by regulation and require States to use these funds to provide technical assistance to particular types of facilities, as suggested by the commenter.

Changes: None.

Comment: We received a number of comments requesting that the regulations require States to use funds reserved for State-level activities for specific purposes. Some commenters stated that these funds should be used to find and train surrogate parents. Other commenters requested that these funds be used to support parent centers. One commenter requested that these funds be used for programs that employ well-researched best practices. Another commenter suggested that the funds be used for family involvement activities. One commenter requested that the regulations clarify that these funds may be used to purchase supplemental educational materials.

Discussion: The Act does not require States to use their funds reserved for

other State-level activities for the purposes requested by the commenters. The Act also does not prohibit the use of funds for these purposes. Instead, States have discretion in determining how these funds are used, so long as they are used to carry out the activities in § 300.704(b)(3) and (4). Therefore, we do not believe it would be appropriate to regulate as suggested by the commenters.

Changes: None.

Comment: One commenter stated that the term “maximize” in § 300.704(b)(4)(v), regarding the use of funds to support the use of technology to maximize accessibility to the general education curriculum, was an “affirmative duty” and, thus, required more detailed instruction. This commenter also stated that the term “improve” in § 300.704(b)(4)(xi), regarding the use of funds to provide professional development to teachers who teach children with disabilities in order to improve academic achievement, was an “affirmative duty” and, thus, required more detailed instruction.

Discussion: The language referred to by the commenter is from the Act. The activities noted by the commenter are authorized under the Act but are not required. The Department has reviewed § 300.704(b)(4)(v) and (b)(4)(xi) and does not believe that additional detail is necessary, because States need the flexibility that the Act provides to appropriately meet the needs within the State.

Changes: None.

Comment: One commenter agreed with the provision in § 300.704(b)(4)(v) that allows States to use funds to support the use of technology to maximize access to the general education curriculum for children with disabilities. The commenter stated, however, that SEAs and LEAs would be unwilling to research and employ new technologies and asked who would be responsible for conducting this activity.

Discussion: Supporting the use of technology to maximize accessibility to the general education curriculum is a State-level activity that States are permitted, but not required, to fund. States have considerable flexibility in determining what State-level activities will be funded, provided the requirements of Part B of the Act are met. How a State implements a particular activity or program is a matter best left to each State to decide.

Changes: None.

Comment: One commenter stated that § 300.704(b)(4)(v), regarding the use of technology to maximize accessibility to the general education curriculum for

children with disabilities, lacked specificity and asked for definitions of the terms “universal design principles,” “maximize accessibility to the general curriculum,” and “maximum extent.”

Discussion: The definition of *universal design*, as used in the Assistive Technology Act of 1998, as amended, is included in the *Analysis of Comments and Changes* section for subpart A. We believe this will clarify the meaning of “universal design principles,” as used in § 300.704(b)(4)(v). The term “maximize accessibility to the general education curriculum” is sufficiently specific in the context used and does not need further definition. The term “maximum extent” is not used in § 300.704(b)(4)(v).

Changes: None.

Local Educational Agency High Cost Fund (§ 300.704(c))

Comment: One commenter expressed concern that the regulations for the high cost fund, particularly the reference to the cost of room and board for a residential placement, would discourage educational placements in the LRE. The commenter stated that many children with disabilities are sent out of their school districts for special education and related services and asked that the regulations ensure that this practice does not increase.

Discussion: The language regarding room and board in § 300.704(c)(4)(ii) was included to clarify that the cost of room and board for a necessary residential placement could be supported by the high cost fund. Section § 300.704(c)(4)(ii) clarifies that the cost of room and board for a residential placement must be determined necessary and be consistent with the LRE requirements in § 300.114. We believe this is adequate to ensure that educational placements in the LRE are not discouraged.

Changes: None.

Comment: One commenter stated that reimbursements from a high cost fund would be difficult to compute and requested a template to assist LEAs in their calculations. Another commenter requested a list of specific procedures that would be excluded from coverage by a high cost fund.

Discussion: How States implement the high cost fund is a matter left to the discretion of each State, so long as the State meets the requirements of Part B of the Act. Accordingly, the Department does not believe it would be appropriate to develop a template, prepared at the Federal level, or a list of specific procedures that would be excluded from coverage. Whether a particular expenditure is appropriate will vary

with the specific facts and circumstances of the situation.

Changes: None.

Comment: One commenter asked whether high cost funds could be used for court-ordered placements.

Discussion: Nothing in the Act or the regulations prohibits payment for providing special education and related services to high need children with disabilities in court-ordered placements, if a State wishes to fund such placements and the other provisions of Part B of the Act are met.

Changes: None.

Comment: A few commenters requested that the regulations include plans for continuing programs funded by high cost funds should these funds become unavailable.

Discussion: The availability of Federal support for a high cost fund, as described in § 300.704(c) and section 611(e)(3) of the Act, is based on a number of factors, including continued Federal appropriations for the Grants to States program and the continued authorization for such a fund under the Act. Funding of a high cost fund in a particular State is dependent on a State's decision to use a portion of its State-level set-aside for a high cost fund. This is a matter of State discretion and is not appropriate for regulation at the Federal level.

Changes: None.

Comment: A few commenters requested an opportunity for public comment before a State implements a high cost fund.

Discussion: Section 300.704(c)(3)(i), consistent with section 611(e)(3)(C)(ii) of the Act, requires an SEA to develop, annually review, and amend, as necessary, a State plan for a high cost fund. Under § 300.704(c)(3)(i)(A), the State plan must, among other components, establish, in consultation and coordination with representatives from LEAs, a definition of a high need child with a disability that meets certain criteria. This plan must be developed no later than 90 days after the State reserves funds for a high cost fund. Section 300.704(c)(3)(ii), consistent with section 611(e)(3)(C)(iii) of the Act, requires a State to make its final State plan for the high cost fund available to the public not less than 30 days before the beginning of the school year, including dissemination of such information on the State's Web site. Although there is nothing in the Act that requires that the public be given the opportunity to comment on the State's plan, there also is nothing in the Act that would prohibit a State from providing an opportunity for public comment prior to finalizing the State's

plan for the high cost fund. We believe the decision to provide opportunity for public comment is best left to each State.

Changes: None.

Comment: A few commenters asked if LEAs are obligated to participate in the State Medicaid program and whether States could limit the types of reimbursement to LEAs from Medicaid.

Discussion: LEAs are not obligated under the Act to participate in a State Medicaid program. Title XIX of the Social Security Act of 1965, as amended, controls Medicaid reimbursement for medical assistance for eligible individuals and families with low incomes and resources. Therefore, it would not be appropriate to address in these regulations whether States, under the Act, could limit the type of Medicaid reimbursement to LEAs.

Changes: None.

Comment: One commenter asked if there was any intent to develop criteria for the development of innovative cost sharing consortia, as stated in § 300.704(c)(1)(i)(B). The commenter stated that there are no regulations for submitting a State plan for innovative cost-sharing consortia, similar or parallel to the requirements associated with the high cost fund.

Discussion: The commenter is correct that the proposed regulations would not require the development of a State plan for the high cost fund that includes information or criteria about the development of innovative cost-sharing consortia. It is important that, if a State elects to reserve funds for supporting innovative and effective ways of cost sharing under § 300.704(c)(1)(i)(B), the State, in its State plan under § 300.704(c)(3)(i), include a description of how those funds will be used. Therefore, a change will be made to make this clear.

Changes: A new paragraph (F) has been added to § 300.704(c)(3)(i) to clarify that, if a State elects to reserve funds for supporting innovative and effective ways of cost sharing, it must describe in its State plan how these funds will be used.

Comment: One commenter asked whether State administrative funds could be used for administering the high cost fund.

Discussion: Section 300.704(c)(2) is clear that a State cannot use any of the funds the State reserves for the high cost fund for costs associated with establishing, supporting, and otherwise administering the fund. However, a State may use funds reserved for State administration under § 300.704(a) for administering the high cost fund.

Changes: None.

Comment: One commenter requested that the regulations require an SEA to describe in its State plan for the high cost fund the ways in which the SEA will work with State child welfare programs.

Discussion: Section 300.704(c)(3) incorporates the language in section 611(e)(3)(C) of the Act, regarding a State plan for the high cost fund. The Act does not require that the State plan include the ways in which the SEA will work with State child welfare agencies. However, there is nothing in the Act or these regulations that would prohibit a State from including such information in its plan if it chooses to do so. We believe that the decision whether to include this information in the State plan for the high cost fund is a matter best left to the State.

Changes: None.

Comment: A few commenters stated that parents, representatives of the State Advisory Panel, and other stakeholders should participate in developing the definition of a high need child for the purposes of the high cost fund.

Discussion: Section 300.704(c)(3)(i)(A), consistent with section 611(e)(3)(C)(i) of the Act, requires the SEA to establish a State definition of a high need child with a disability in consultation with LEAs. The Act does not require the involvement of parents, representatives of the State Advisory panel, or other stakeholders. However, there is nothing in the Act or these regulations that would prohibit a State from consulting with these or other groups, if the State chooses to do so. The Department believes that it would be inappropriate to require SEAs to consult with specific groups, because the appropriate groups for consultation will vary from State to State.

Changes: None.

Flexibility in Using Funds for Part C (§ 300.704(f))

Comment: A few commenters requested that § 300.704(f) require States that offer early intervention services to children with disabilities who are eligible for services under section 619 of the Act to notify families of the details of this program and a parent's right to change immediately to special education services should the parent desire. Another commenter recommended that § 300.704(f) require LEAs to obtain parental consent before providing early intervention services to children eligible for services under section 619 of the Act.

Discussion: Section 300.704(f) adopts the requirements of, and is consistent

with, section 611(e)(7) of the Act. Under section 611(e)(7) of the Act, funds that are available under §§ 300.704(a)(1), 300.705(c), and 300.814(e) may be used to develop and implement a State policy to provide services under Part C of the Act to children beyond the age of three. The provisions that authorize such programs are reflected in Part C of the Act, predominantly in section 635(c) of the Act, which contains specific notice and consent requirements. The notice of proposed rulemaking for Part C of the Act will address the notice, consent, and other requirements that apply to State lead agencies that elect to offer services to children with disabilities and their families beyond the age of three under section 635(c) of the Act. The public will have a separate opportunity to comment on the proposed regulations for Part C of the Act when they are published in the **Federal Register**. Accordingly, it would not be appropriate to include the requested information in these regulations implementing Part B of the Act.

Changes: None.

Allocation for State in Which By-Pass Is Implemented for Parentally-Placed Private School Children With Disabilities (§ 300.706)

Comment: None.

Discussion: We have determined that § 300.706 is no longer applicable. Under section 611(d) of the Act, distribution of funds under Part B of the Act to States is not based on child count. Section 300.191 details the amount of funds under Part B of the Act that the Secretary deducts from a State's allocation if a by-pass is implemented.

Changes: We have removed § 300.706, because it is no longer applicable.

Use of amounts by Secretary of the Interior (§ 300.707)

Definitions (§ 300.707(a))

Comment: A few commenters requested that the Department add a new definition of LEA and SEA for the purposes of regulations related to schools operated or funded by the Secretary of the Interior. One commenter stated that the regulations would be clearer if these terms were defined for BIA-funded schools, because the definition of *state educational agency* makes no mention of the BIA. Another commenter recommended defining LEAs as BIA-funded schools and defining SEA as the Secretary of the Interior for the purposes of regulations related to schools operated or funded by the Secretary of the Interior.

Discussion: We believe the definition of *local educational agency* in § 300.28,

with a specific reference to BIA-funded schools in § 300.28(c), and the definition of *State educational agency* in § 300.41, along with the requirements in §§ 300.707 through 300.716, provide sufficient clarity on the Secretary of the Interior's responsibilities to implement the requirements of the Act. However, we understand that the definitions of *local educational agency* and *State educational agency* by themselves may not be directly applicable to the regulations related to schools operated or funded by the Secretary of the Interior. Therefore, the Department will consider taking action to clarify the definitions of *local educational agency* and *State educational agency* for the purpose of this regulation in the future.

Changes: None.

Comment: One commenter stated that the definition of *tribal governing body of a school* is similar to the definition of "tribal governing body" in the principal statute governing BIA-funded schools (section 1141 of the Education Amendments of 1978, 25 U.S.C. 2021(19)) and suggested using that definition if the intent was to define "tribal governing body." The commenter also noted that tribal governing body of a school is not used anywhere in the regulations.

Discussion: The Department agrees that the definition of "tribal governing body" in 25 U.S.C. 2021(19) is a better definition than the definition of *tribal governing body of a school*. The definition is more accurate and defines a term used in these regulations. We are replacing the definition of *tribal governing body of a school* with the definition of *tribal governing body*, as defined in 25 U.S.C. 2021(19): *Tribal governing body* means, with respect to any school, the tribal governing body, or tribal governing bodies, that represent at least 90 percent of the children served by such school.

Changes: The definition of *tribal governing body of a school* in § 300.707(a)(2) has been replaced with the definition of *tribal governing body* from 25 U.S.C. 2021(19).

Provision of Amounts for Assistance (§ 300.707(b))

Comment: One commenter suggested adding specific language to the regulations to require the Secretaries of the Interior and Education to meet the statutory deadlines for providing and distributing funds under Part B of the Act.

Discussion: Section 300.707(b), consistent with section 611(h)(1)(A) of the Act, sets specific dates for the Secretary of the Interior to allocate funds provided to the Secretary of the

Interior under the Act to elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. The Secretary of the Interior must allocate 80 percent of these funds by July 1 of each fiscal year, and the remaining 20 percent by September 30 of each fiscal year. The Act does not require the Secretary of Education to meet any deadline for providing and distributing funds to the Secretary of the Interior. Provision of funds under Part B of the Act to the Department of the Interior (DOI) will always depend on whether the DOI has properly established and maintained its eligibility. Therefore, we do not believe it would be appropriate to establish such a deadline.

Changes: None.

Comment: One commenter stated that BIA-funded schools do not require State accreditation and asked how a program affiliated with a BIA-funded school could be mandated by the State to be accredited.

Discussion: The commenter appears to be referring to current § 300.715(c), regarding counting children aged three through five who are enrolled in programs affiliated with BIA-funded schools that are State accredited. Current § 300.715(c) was removed because a State can no longer require a BIA-funded school to attain or maintain State accreditation.

Changes: None.

Comment: A few commenters recommended revising § 300.707(c) to clarify that, for children living on reservations who do not attend BIA-funded schools, the SEA in which the reservation is located is responsible for ensuring that the requirements of Part B of the Act are implemented, and if the reservation is in more than one State, the SEA in which the child resides is responsible.

Discussion: The Department agrees that there is a need to clarify that States are responsible for serving Indian children on reservations located in their State who are not attending BIA-funded schools. We will revise § 300.707(c) to clarify that, for children on reservations who do not attend BIA-funded schools, the State in which the reservation is located must ensure that all the requirements of Part B of the Act are implemented.

The Act does not address who is responsible if a reservation is located in more than one State. Under section 612(a)(1)(A) of the Act, a State must make FAPE available to all children with disabilities residing in the State. Therefore, as a general matter, if a reservation is located in more than one State, the State in which the child

resides would be responsible for ensuring that the requirements of Part B of the Act are met for that child.

Changes: Section 300.707(c) has been revised to clarify that, for children on reservations who do not attend BIA-funded schools, the State in which the reservation is located must ensure that all the requirements of Part B of the Act are met.

Use of Funds Under Part B of the Act (§ 300.710(a))

Comment: One commenter stated that the Secretary of the Interior has no statutory authority to reserve funds for administration under section 611(h)(1)(A) of the Act, and therefore, § 300.710 should be removed from the regulations.

Discussion: The Secretary of the Interior may reserve funds for administration under § 300.710. Section 300.707(b), consistent with section 611(h)(1)(A) of the Act, requires the Secretary of Education to provide amounts to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. The amount of such payment for any fiscal year must be equal to 80 percent of the amount allotted for the Secretary of the Interior under section 611(b)(2) of the Act for that fiscal year.

Since the enactment of regulations implementing Pub. L. 94-142 in 1977, the regulations have permitted the Secretary of the Interior to use five percent of the funds under Part B of the Act allocated for the education of children with disabilities enrolled in BIA-funded schools for administration. The Act added the requirement in section 611(h)(1)(A) for 80 percent of the funds to be allocated to BIA-funded schools by July 1 of each fiscal year, and 20 percent of the funds allocated by September 30 of each fiscal year. Congress' intent in adding this requirement was to ensure that the Secretary of the Interior distributes funds under Part B of the Act quickly and efficiently to BIA-funded schools to ensure that they have the resources they need to provide services to children with disabilities. (See H. Rpt. 108-77, p. 92.) There is no indication that Congress intended to eliminate the Department's longstanding regulatory provision permitting the Secretary of the Interior to reserve funds for administration, which assist the Office of Indian Education Programs in carrying out its monitoring activities. Section

611(h)(4)(F) of the Act specifically prohibits the Secretary of the Interior from using any of the 20 percent of the funds under Part B of the Act allocated for coordinating services for preschool children with disabilities for administrative purposes. However, there is no provision that prohibits the Secretary of the Interior from using any of the 80 percent of funds under Part B of the Act allocated to provide special education and related services in BIA-funded schools for administrative purposes.

Changes: None.

Early Intervening Services (§ 300.711)

Comment: One commenter supported permitting BIA-funded schools to use funds under Part B of the Act for early intervening services, but stated that not all BIA-funded schools receive funds under Part B of the Act, because the BIA will not provide any such funds until a school uses 15 percent of its Indian School Equalization Program funds (ISEP). The commenter requested that the regulations specify that BIA-funded schools are permitted and encouraged to use their ISEP funds to provide early intervening services and that schools, upon doing so, would be eligible for funds under Part B of the Act.

Discussion: While the Act requires that the Secretary of the Interior allocate funds under Part B of the Act to BIA-funded schools to meet the educational needs of children with disabilities, the Act does not establish requirements for how those funds must be distributed to BIA-funded schools. The Secretary of the Interior requires that BIA-funded schools use 15 percent of ISEP formula funds for special education services before receiving funds under Part B of the Act. While the Department understands the concern that not every BIA-funded school will have special education needs sufficient to meet the 15 percent threshold and, therefore, may not receive any funds under Part B of the Act, the Department does not have the authority to permit or encourage BIA-funded schools to use their 15 percent ISEP threshold funds to provide early intervening services or to require the Secretary of the Interior to provide Part B funds to those schools once they have spent 15 percent of their ISEP funds on early intervening services.

Changes: None.

Plan for Coordination of Services (§ 300.713)

Comment: One commenter stated that the requirements in § 303.713 go beyond the legal authority of the Secretary of the Interior. The commenter stated that the Secretary of the Interior provides

services only in BIA-funded schools, and the Office of Indian Education Programs does not have jurisdiction over a State to ensure that the State is providing services to Indian children under Part B of the Act. In addition, the commenter stated that the term “all Indian children” was too broad, because the Secretary of the Interior is authorized to provide funding only for programs for children who are at least one-fourth Indian blood of a federally recognized tribe; residing on or near a reservation; and enrolled in a BIA-funded school.

Discussion: Section 300.713(a) and section 611(h)(5) of the Act do not require the Secretary of the Interior to provide services or funding to Indian children who are not at least one-fourth Indian blood of a federally recognized tribe, residing on or near a reservation, and enrolled in a BIA-funded school. These sections require the Secretary of the Interior to develop and implement a plan for the coordination of services for all Indian children with disabilities residing on reservations covered under Part B of the Act. In order to clarify the Secretary of the Interior’s responsibility under this provision, we are revising § 300.713(a) to clarify that reservations covered under Part B of the Act means reservations served by elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior.

Section 300.713(a) and section 611(h)(5) of the Act require that the plan address the coordination of services for all Indian children residing on those reservations. This includes Indian children residing on those reservations that are enrolled in public schools in the local school district, as well as Indian children that are enrolled in BIA-funded schools. This also includes Indian students incarcerated in State, local, and tribal juvenile and adult correctional facilities. We are revising § 300.713(b) to ensure that the plan provides for coordination of services benefiting all Indian children with disabilities, including services provided by SEAs and State, local, and tribal juvenile and adult correctional facilities.

Changes: Section 300.713(a) has been revised to require the Secretary of the Interior to develop and implement a plan for the coordination of services for all Indian children with disabilities residing on reservations served by elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. Section 300.713(b) has been revised to require the plan to provide for the coordination of services benefiting these children from whatever source,

including SEAs, and State, local, and tribal juvenile and adult correctional facilities.

Establishment of Advisory Board (§ 300.714)

Comment: One commenter requested definitions of “collaboration” and “collaborated teachers.”

Discussion: We do not believe it is necessary to define “collaboration” in these regulations, because it is a commonly used term, which means working jointly with others, especially in an intellectual endeavor. Although the Act does not prohibit the Department from regulating on this issue, we do not believe it is necessary. The term “collaborated teachers” is not used in the Act or these regulations and, thus, is not appropriate for inclusion in the definitions in these regulations.

Changes: None.

Subpart H—Preschool Grants for Children with Disabilities

Allocation for State in Which By-Pass Is Implemented for Parentally-Placed Private School Children With Disabilities (§ 300.811)

Comment: None.

Discussion: We have determined that § 300.811, regarding allocation for a State in which by-pass is implemented for parentally-placed private school children with disabilities, is no longer applicable. Under section 619(c) of the Act, distribution of Part B funds to States is not based on child count. Section 300.191 details the amount of Part B funds the Secretary deducts from a State’s allocation if a by-pass is implemented.

Changes: We are removing § 300.811 from the final regulations.

Subgrants to LEAs (§ 300.815)

Comment: One commenter asked whether the base year that applies to section 611 of the Act also applies to section 619 of the Act.

Discussion: The base year that applies to section 611 of the Act is not the same as the base year that applies to section 619 of the Act. The formula for allocating funds to LEAs under sections 611 and 619 of the Act is based on the amount of program funds received in a prior year (the base year), the relative numbers of children enrolled in public and private elementary schools and secondary schools within the LEA’s jurisdiction, and the relative numbers of children living in poverty. Under section 619(g)(1)(A) of the Act, the base year for allocating section 619 funds to LEAs under the Preschool Grant program is Federal fiscal year (FFY)

1997. Under section 611(f)(2)(A) of the Act, the base year for allocating section 611 funds to LEAs under the Grants to States for the Education of Children with Disabilities Program is FFY 1999.

Changes: None.

Executive Order 12866

Costs and Benefits

Under Executive Order 12866, we have assessed the costs and benefits of this regulatory action.

Summary of Public Comments

The Department received four comments on the role of school psychologists in administering IQ tests as described in the proposed analysis of the costs and benefits of this regulatory action. The first commenter stated that it is inaccurate to conclude that fewer school psychologists will be needed, and asserted that school psychologists typically do more than administer IQ tests to students. The second commenter stated that public agencies could realize savings under the proposed regulation by reducing the amount of time school psychologists spend conducting cognitive assessments to document IQ discrepancies. The third commenter requested that the Department remove all language suggesting that potential savings may result from the need for fewer school psychologists to administer IQ tests. The fourth commenter stated that time saved on formal assessments as a result of the need to conduct fewer IQ tests could be used by school psychologists to train school staff in research-validated instructional and behavioral interventions, and to engage in other pro-active pre-referral policies.

All of these comments were considered in conducting the analysis of the costs and benefits of the final regulations. All of the Department’s estimates and assumptions on which they are based are described below.

Summary of Costs and Benefits

Costs and Benefits of Statutory Changes

For the information of readers, the following is an analysis of the costs and benefits of the most significant statutory changes made by the Act that are incorporated into the final regulations governing the Assistance to States for the Education of Children with Disabilities program under Part B of the Act. In conducting this analysis, the Department examined the extent to which the regulations add to or reduce the costs for public agencies and others in relation to the costs of implementing the program regulations prior to the enactment of the new statute. Based on