DEPARTMENT OF EDUCATION

34 CFR Parts 300 and 301

RIN 1820–AB57

Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues final regulations governing the Assistance to States for Education of Children with Disabilities Program and the Preschool Grants for Children with Disabilities Program. These regulations are needed to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Act or IDEA).

DATES: These regulations take effect on October 13, 2006.

FOR FURTHER INFORMATION CONTACT: Alexa Posny, U.S. Department of Education, Potomac Center Plaza, 550 12th Street, SW., Washington, DC 20202–2641. Telephone: (202) 245–7459, ext. 3.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay System (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION: These regulations implement changes in the regulations governing the Assistance to States for Education of Children with Disabilities Program and the Preschool Grants for Children with Disabilities Program necessitated by the reauthorization of the IDEA. With the issuance of these final regulations, part 301 has been removed and the regulations implementing the Preschool Grants for Children with Disabilities Program are included under subpart H of these final regulations.

On June 21, 2005, the Secretary published a notice of proposed rulemaking in the **Federal Register** (70 FR 35782) (NPRM) to amend the regulations governing the Assistance to States for Education of Children with Disabilities Program, the Preschool Grants for Children with Disabilities Program, and Service Obligations under Special Education Personnel Development to Improve Services and Results for Children with Disabilities. In the preamble to the NPRM, the Secretary discussed, on pages 35783 through 35819, the changes proposed to the regulations for these programs; specifically, the amendments to 34 CFR part 300, the removal of 34 CFR part 301 and relocation of those provisions to subpart H of 34 CFR part 300, and the amendments to 34 CFR part 304.

Final regulations for 34 CFR Part 304—Special Education-Personnel Development to Improve Services and Results for Children with Disabilities were published in the **Federal Register** (71 FR 32396) on June 5, 2006, and became effective July 5, 2006.

Major Changes in the Regulations

The following is a summary of the major substantive changes in these final regulations from the regulations proposed in the NPRM (the rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section of this preamble):

Subpart A—General

Definitions

• The definition of *child with a disability* in § 300.8 has been revised as follows:

(1) Section 300.8(b) (Children aged three through nine experiencing developmental delays) has been changed to clarify that the use of the term ''developmental delay'' is subject to the conditions described in § 300.111(b).

(2) The definition of *other health impairment* in § 300.8(c)(9)(i) has been changed to add ''Tourette Syndrome'' to the list of chronic or acute health problems.

• The definition of *excess costs* in § 300.16 has been revised to clarify that the computation of excess costs may not include capital outlay and debt service. In addition, a new ''Appendix A to Part 300—Excess Cost Calculation'' has been added to provide a description (and an example) of how to calculate excess costs under the Act and these regulations.

• The definition of *highly qualified special education teacher* in § 300.18 has been revised, as follows:

(1) Section 300.18(b), regarding requirements for highly qualified special education teachers in general, has been modified to clarify that, when used with respect to any special education teacher teaching in a charter school, *highly qualified* means that the teacher meets the certification or licensing requirements, if any, set forth in the State's public charter school law.

(2) A new § 300.18(e), regarding separate ''high objective uniform State standards of evaluation'' (HOUSSE), has been added to provide that a State may develop a separate HOUSSE for special education teachers, provided that any adaptations of the State's HOUSSE would not establish a lower standard for the content knowledge requirements for special education teachers and meets all the requirements for a HOUSSE for regular education teachers. This provision also clarifies that a State may develop a separate HOUSSE for special education teachers, which may include single HOUSSE evaluations that cover multiple subjects.

(3) Section 300.18(g) (proposed § 300.18(f)) (''Applicability of definition to ESEA requirements; and clarification of new special education teacher'') has been revised as follows: (1) The heading has been revised, and (2) the language changed to clarify when a special education teacher is considered ''new'' for some purposes.

(4) Section 300.18(h) (proposed § 300.18(g)) has been modified to clarify that the highly qualified special education teacher requirements also do not apply to private school teachers hired or contracted by LEAs to provide equitable services to parentally-placed private school children with disabilities under § 300.138.

• The definition of *Indian and Indian tribe* in § 300.21 has been changed to clarify that nothing in the definition is intended to indicate that the Secretary of the Interior is required to provide services or funding to a State Indian tribe that is not listed in the **Federal Register** list of Indian entities recognized as eligible to receive services from the United States, published pursuant to Section 104 of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a–1.

• The definition of *parent* in § 300.30 has been revised to substitute ''biological'' for ''natural'' each time it appears in the definition, and to add language clarifying that to be considered a parent under this definition a ''guardian'' must be a person generally authorized to act as the child's parent, or authorized to make educational decisions for the child.

• The definition of *related services* in § 300.34 has been revised as follows:

(1) Section 300.34(a) (General) has been modified to (A) add the statutory term ''early identification and assessment of disabilities in children,'' which was inadvertently omitted from the NPRM, (B) combine ''school health services'' and ''school nurse services,'' and (C) remove the clause relating to a free appropriate public education under

''school nurse services'' because it duplicates the clause in § 300.34(c)(13).

(2) Section 300.34(b) has been changed to (A) expand the title to read ''Exception; services that apply to children with surgically implanted devices, including cochlear implants,'' and (B) clarify, in new paragraph (b)(1), that related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (*e.g.*, mapping), maintenance of that device, or the replacement of that device.

(3) A new § 300.34(b)(2) has been added to make clear that nothing in paragraph (b)(1) of § 300.34 (A) limits the right of a child with a surgically implanted device (*e.g.*, a cochlear implant) to receive related services, as listed in § 300.34(a), that are determined by the IEP Team to be necessary for the child to receive FAPE; (B) limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or (C) prevents the routine checking of an external component of a surgically-implanted device to make sure it is functioning properly, as required in § 300.113(b).

(4) The definition of *interpreting services* in § 300.34(c)(4) has been changed to clarify that the term includes (A) transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell for children who are deaf or hard of hearing, and (B) special interpreting services for children who are deaf-blind.

(5) The definition of *orientation and mobility services* in § 300.34(c)(7) has been changed to remove the term ''travel training instruction.'' The term is under the definition of *special education*, and is defined in § 300.39(b)(4).

(6) The definition of *school nurse services* in 300.34(c)(13) has been expanded and re-named *school health services and school nurse services.* The expanded definition clarifies that ''school nurse services'' are provided by a qualified school nurse, and ''school health services'' may be provided by a qualified school nurse or other qualified person.

• A definition of *scientifically based research* has been added in new § 300.35 that incorporates by reference the definition of that term from the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 6301 *et seq.* (ESEA).

With the addition of the new definition in § 300.35, the definitions in subpart A, beginning with the definition of *secondary school*, have been renumbered.

• The definition of *special education* in § 300.39 (proposed § 300.38) has been revised to remove the definition of *vocational and technical education* that was included in proposed § 300.38(b)(6).

• The definition of *supplementary aids and services* in § 300.42 (proposed § 300.41) has been modified to specify that aids, services, and other supports are also provided to enable children with disabilities to participate in extracurricular and nonacademic settings.

Subpart B—State Eligibility

FAPE Requirements

• Section 300.101(c) has been revised to clarify that a free appropriate public education (FAPE) must be available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course, and is advancing from grade to grade.

• Section 300.102(a)(3), regarding exceptions to FAPE, has been changed to clarify that a regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential (GED).

• Section 300.105, regarding assistive technology and proper functioning of hearing aids, has been re-titled ''Assistive technology,'' and proposed paragraph (b), regarding the proper functioning of hearing aids, has been moved to new § 300.113(a).

• Section 300.107(a), regarding nonacademic services, has been revised to specify the steps each public agency must take, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

• Proposed § 300.108(a), regarding physical education services, has been revised to specify that physical education must be made available to all children with disabilities receiving FAPE, unless the public agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades.

• A new § 300.113, regarding routine checking of hearing aids and external components of surgically implanted medical devices, has been added, as follows:

(1) Paragraph (a) of § 300.113 requires each public agency to ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

(2) A new § 300.113(b)(1) requires each public agency to ensure that the external components of surgically implanted medical devices are functioning properly. However, new § 300.113(b)(2) has been added to make it clear that, for a child with a surgically implanted medical device who is receiving special education and related services, a public agency is not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device).

Least Restrictive Environment

• Section 300.116(b)(3) and (c) regarding placements, has been revised to remove the qualification ''unless the parent agrees otherwise'' from the requirements that (1) the child's placement be as close as possible to the child's home, and (2) the child is educated in the school he or she would attend if not disabled.

• Section 300.117 (Nonacademic settings) has been changed to clarify that each public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's individualized education program (IEP) Team to be appropriate and necessary for the child to participate with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child.

Children With Disabilities Enrolled by Their Parents in Private Schools

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

• A new § 300.131(f), regarding child find for out-of-State parentally-placed private school children with disabilities, has been added to clarify that each LEA

in which private (including religious) elementary schools and secondary schools are located must include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located.

• Section 300.133, regarding expenditures for parentally-placed private school children with disabilities, has been revised, as follows:

(1) A new § 300.133(a)(2)(ii), has been added to clarify that children aged three through five are considered to be parentally-placed private school children with disabilities enrolled by their parents in private, including religious, elementary schools, if they are enrolled in a private school that meets the definition of *elementary school* in § 300.13.

(2) A new § 300.133(a)(3) has been added to specify that, if an LEA has not expended for equitable services for parentally-placed private school children with disabilities all of the applicable funds described in § 300.133(a)(1) and (a)(2) by the end of the fiscal year for which Congress appropriated the funds, the LEA must obligate the remaining funds for special education and related services (including direct services) to parentally-placed private school children with disabilities during a carry-over period of one additional year.

• Section 300.136, regarding compliance related to parentally-placed private school children with disabilities, has been revised to remove the requirement that private school officials must submit complaints to the SEA using the procedures in §§ 300.151 through 300.153.

• Section 300.138(a), regarding the requirement that services to parentally-placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools, has been modified to clarify that private elementary school and secondary school teachers who are providing equitable services to parentally-placed private school children with disabilities do not have to meet the highly qualified special education teacher requirements in § 300.18.

• Section 300.140, regarding due process complaints and State complaints, has been revised to make the following changes:

(1) Section 300.140(b)(1) (proposed § 300.140(a)(2)), regarding child find complaints, has been changed to clarify that the procedures in §§ 300.504 through 300.519 apply to complaints that an LEA has failed to meet the child find requirements in § 300.131, including the requirements in §§ 300.301 through 300.311.

(2) A new paragraph (b)(2) has been added to provide that any due process complaint regarding the child find requirements (as described in § 300.140(b)(1)) must be filed with the LEA in which the private school is located and a copy of the complaint must be forwarded to the SEA.

(3) A new § 300.140(c), regarding State complaints by private school officials, has been added to clarify that (A) any complaint that an SEA or LEA has failed to meet the requirements in §§ 300.132 through 300.135 and 300.137 through 300.144 must be filed in accordance with the procedures described in §§ 300.151 through 300.153, and (B) a complaint filed by a private school official under § 300.136(a) must be filed with the SEA in accordance with the procedures in § 300.136(b).

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

Section 300.148 Placement of Children by Parents if FAPE Is at Issue

• A new § 300.148(b), regarding disagreements about FAPE, has been added (from current § 300.403(b)) to clarify that disagreements between a parent and a public agency regarding the availability of a program appropriate for a child with a disability, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

State Complaint Procedures

• Section 300.152(a)(3)(ii) (proposed paragraph (a)(3)(B)) has been revised to clarify that each SEA's complaint procedures must provide the public agency with an opportunity to respond to a complaint filed under § 300.153, including, at a minimum, an opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation consistent with § 300.506.

• Section 300.152(b)(1)(ii), regarding time extensions for filing a State complaint, has been revised to clarify that it would be permissible to extend the 60-day timeline if the parent (or individual or organization if mediation or other alternative means of dispute resolution is available to the individual or organization under State procedures) and the public agency agree to engage in mediation or to engage in other alternative means of dispute resolution, if available in the State.

• Section 300.152(c), regarding complaints filed under § 300.152 and due process hearings under § 300.507 and §§ 300.530 through 300.532, has been revised to clarify that if a written complaint is received that is also the subject of a due process hearing under §§ 300.507 or 300.530 through 300.532, or contains multiple issues of which one or more are part of a due process hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not part of the due process hearing must be resolved using the time limit and procedures described elsewhere in the State complaint procedures. A new paragraph (c)(3) also has been added to require SEAs to resolve complaints alleging a public agency's failure to implement a due process hearing. This is the same requirement in current § 300.661(c)(3).

• Section 300.153(c), regarding the one year time limit from the date the alleged violation occurred and the date the complaint is received in accordance with § 300.151, has been revised by removing the exception clause related to complaints covered under § 300.507(a)(2).

Methods of Ensuring Services

• Section 300.154(d), regarding children with disabilities who are covered by public benefits or insurance, has been revised to clarify that the public agency must (1) obtain parental consent each time that access to the parent's public benefits or insurance is sought, and (2) notify parents that refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

Additional Eligibility Requirements

• Section 300.156(e), regarding personnel qualifications, has been revised (1) to add ''or a class of students,'' to clarify that a judicial action on behalf of a class of students may not be filed for failure of a particular SEA or LEA employee to be highly qualified, and (2) to substitute the word ''employee'' for ''staff person,'' to be more precise in the rule of construction in new § 300.18(f) (proposed § 300.18(e)).

• Section 300.160 (participation in assessments) has been removed, and the section has been designated as ''Reserved.'' Participation in assessments is the subject of a new notice of proposed rulemaking issued on December 15, 2005 (70 FR 74624) to amend the regulations governing programs under Title I of the ESEA and

Part B of the IDEA regarding additional flexibility for States to measure the achievement of children with disabilities based on modified achievement standards.

Other Provisions Required for State Eligibility

• Section 300.172, regarding access to instructional materials, has been revised: (1) To make clear that States must adopt the National Instructional Materials Accessibility Standard (NIMAS), published as Appendix C to these final regulations; (2) to establish a definition of ''timely manner,'' for purposes of § 300.172(b)(2) and (b)(3) if the State is not coordinating with the National Instructional Materials Access Center (NIMAC), or § 300.172(b)(3) and (c)(2) if the State is coordinating with the NIMAC; (3) to add a new § 300.172(b)(4) to require SEAs to ensure that all public agencies take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials; and (4) to add a new § 300.172(e)(2) to clarify, that all definitions in § 300.172(e)(1) apply to each State and LEA, whether or not the State or LEA chooses to coordinate with the NIMAC.

• A new § 300.177 has been added to include a provision regarding ''States' sovereign immunity.'' That provision, which has been added to incorporate the language in section 604 of the Act, makes clear that a State that accepts funds under Part B of the Act waives its immunity under the 11th amendment of the Constitution of the United States from suit in Federal court for a violation of Part B of the Act.

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

Parental Consent

• Section 300.300, regarding parental consent, has been revised, as follows:

(1) Paragraph (a) of § 300.300, regarding consent for initial evaluation, has been changed to provide that the public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability must, after providing notice consistent with §§ 300.503 and 300.504, obtain informed consent, consistent with § 300.9, from the parent of the child before conducting the evaluation. A new paragraph (a)(1)(iii) has been added to require a public agency to make reasonable efforts to obtain the informed consent from the parent for an initial evaluation.

(2) Section 300.300(a)(3), regarding a parent's failure to provide consent for initial evaluation, has been changed to clarify, in a new paragraph (a)(3)(ii), that the public agency does not violate its obligation under § 300.111 and §§ 300.301 through 300.311 if it declines to pursue the evaluation.

(3) Section 300.300(b), regarding parental consent for services, has been modified by a new paragraph (b)(2) that requires a public agency to make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services.

(4) Section 300.300(c)(1), regarding parental consent for reevaluations, has been modified to clarify that if a parent refuses to consent to a reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures in § 300.300(a)(3), and the public agency does not violate its obligation under § 300.111 and §§ 300.301 through 300.311 if it declines to pursue the evaluation or reevaluation.

(5) A new § 300.300(d)(4) has been added to provide that if a parent of a child who is home schooled or placed in a private school by the parent at the parent's expense, does not provide consent for an initial evaluation or a reevaluation, or the parent fails to respond to a request to provide consent, the public agency (A) may not use the consent override procedures (described elsewhere in § 300.300), and (B) is not required to consider the child eligible for services under the requirements relating to parentally-placed private school children with disabilities (§§ 300.132 through 300.144).

(6) A new § 300.300(d)(5) has been added to clarify that in order for a public agency to meet the reasonable efforts requirement to obtain informed parental consent for an initial evaluation, initial services, or a reevaluation, a public agency must document its attempts to obtain parental consent using the procedures in § 300.322(d).

Additional Procedures for Evaluating Children With Specific Learning Disabilities (SLD)

• Section 300.307 (Specific learning disabilities) has been revised, as follows:

(1) Proposed paragraph (a)(1) of § 300.307, which allowed a State to prohibit the use of a severe discrepancy between intellectual ability and achievement for determining if a child has an SLD, has been removed, and proposed paragraph (a)(2) of § 300.307 has been redesignated as paragraph (a)(1).

(2) Section 300.307(a)(2) (proposed paragraph (a)(3)) has been changed to clarify that the criteria adopted by the State must permit the use of a process based on the child's response to scientific, research-based intervention.

• Section 300.308 (Group members) has been changed to require the eligibility group for children suspected of having SLD to include the child's parents and a team of qualified professionals, which must include the child's regular teacher (or if the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age) or for a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. These are the same requirements in current § 300.540.

• Section 300.309 (Determining the existence of a specific learning disability) has been revised, as follows:

(1) Paragraph (a) of § 300.309 has been changed (A) to clarify that the group described in 300.306 may determine that a child has a specific learning disability if the child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of eight areas (e.g., oral expression, basic reading skill, etc.), when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards; and (B) to add ''limited English proficiency'' to the other five conditions that could account for the child's learning problems, and that the group considers in determining whether the child has an SLD.

(2) Section 300.309(b) has been changed to clarify (A) that, in order to ensure that underachievement in a child suspected of having an SLD is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§ 300.304 through 300.306, data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel, and (B) to replace (in paragraph (b)(1)) the term ''high quality research-based instruction'' with ''appropriate instruction.''

(3) Section 300.309(c) has been changed to provide that the public agency must promptly request parental

consent to evaluate a child suspected of having an SLD who has not made adequate progress after an appropriate period of time when provided appropriate instruction, and whenever a child is referred for an evaluation.

• Section 300.310, regarding Observation, has been revised, as follows:

(1) Paragraph (a) of proposed § 300.310 has been revised (A) to remove the phrase ''trained in observation, and (B) to specify that the public agency must ensure that the child is observed in the child's learning environment.

(2) A new § 300.310(b) has been added to require the eligibility group to decide to (A) use information obtained from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation, or (B) have at least one member of the group described in § 300.306(a)(1) conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent is obtained.

Paragraph (b) of proposed § 300.310 has been redesignated as new § 300.310(c).

• Section 300.311 (Written report) has been renamed ''Specific documentation for the eligibility determination,'' and has been revised, as follows:

(1) Section 300.311(a)(5), regarding whether the child does not achieve commensurate with the child's age, has been modified and expanded to add whether the child does not achieve adequately for the child's age or to meet State-approved grade-level standards consistent with § 300.309(a)(1), and (A) the child does not make sufficient progress to meet age or to meet State-approved grade-level standards consistent with § 300.309(a)(2)(i), or (B) the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development consistent with § 300.309(a)(2)(ii).

(2) Proposed § 300.311(a)(6), regarding whether there are strengths or weaknesses or both in performance or achievement or both relative to intellectual development, has been removed.

(3) A new § 300.311(a)(6) has been added to clarify that the documentation must include a statement of the determination of the group concerning the effects of visual, hearing, or motor disability, mental retardation, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency on the child's achievement level.

(4) A new § 300.311(a)(7) has been added to provide that if the child has participated in a process that assesses the child's response to scientific, research-based intervention, the documentation must include the instructional strategies used and the student-centered data collected, and documentation that the child's parents were notified about (A) the State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided, (B) strategies for increasing the child's rate of learning, and (C) the parents' right to request an evaluation.

Individualized Education Programs

• Section 300.320 (Definition of IEP) has been revised in paragraph (a)(5) to replace ''regular education environment'' with ''regular class,'' in order to be consistent with the language in the Act.

• Section 300.321(e), regarding attendance at IEP Team meetings, has been revised to clarify that the excusal of IEP Team members from attending an IEP Team meeting under certain circumstances, refers to the IEP Team members in § 300.320(a)(2) through (a)(5).

• Section 300.322, regarding parent participation, has been revised to: (1) Include, in § 300.322(d), examples of the records a public agency must keep of its attempts to involve the parents in IEP meetings; (2) add a new § 300.322(e), which requires the public agency to take whatever action is necessary to ensure that the parent understands the proceedings of the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English; and (3) redesignate paragraph (e) as paragraph (f) accordingly.

• Section 300.323(d) has been revised to require public agencies to ensure that each regular teacher, special education teacher, related services provider, and any other service provider who is responsible for the implementation of a child's IEP, is informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the child's IEP. These are the same requirements in current § 300.342(b)(3)(i) and (b)(3)(ii).

• Section 300.323(e), regarding IEPs for children who transfer public agencies, has been revised to: (1) Divide the provision into three separate paragraphs (§ 300.323(e), (f), and (g)) for purposes of clarity and improved readability (e.g., transfers within the same State, transfers from another State, and transmittal of records); (2) adopt ''school year'' in lieu of ''academic year'' as the term commonly used by parents and public agencies; and (3) adopt other modifiers (e.g., ''new'' and ''previous'') to distinguish between States and public agencies that are involved in transfers by children with disabilities.

• Section 300.324(a)(4), regarding changes to an IEP after the annual IEP meeting for a school year, has been restructured into two paragraphs, and a new paragraph (a)(4)(ii) has been added to require the public agency to ensure that, if changes are made to a child's IEP without an IEP meeting, that the child's IEP Team is informed of the changes.

• Section 300.324(b), regarding the review and revision of IEPs, has been changed to include a new paragraph (b)(2), to clarify that, in conducting a review of a child's IEP, the IEP Team must consider the same special factors it considered when developing the child's IEP.

Subpart E—Procedural Safeguards

• Section 300.502, regarding independent educational evaluations, has been revised, as follows:

(1) A new § 300.502(b)(5) has been added to make clear that a parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

(2) Section 300.502(c) has been changed to clarify that if a parent obtains an independent evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the public agency must consider the evaluation, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child.

• Section 300.504 (Procedural safeguards notice) has been revised, as follows:

(1) Paragraph (a)(2) of § 300.504 has been changed to add that a copy of the procedural safeguards notice must be given upon receipt of the first due process complaint under § 300.507 in a school year, as well as upon receipt of the first State complaint under § 300.151 through 300.153.

(2) A new § 300.504(a)(3) has been added to provide that the notice must be given to the parents of a child with a disability in accordance with the discipline procedures in § 300.530(h).

• Section 300.506(b), regarding the requirements for mediation, has been revised by (1) removing the provision about the ''confidentiality pledge,'' in proposed paragraph (b)(9), because it is no longer required under the Act, and (2) changing paragraph (b)(8), regarding the prohibition against using discussions that occur in the mediation process, to clarify that ''civil proceedings'' includes any Federal court or State court of a State receiving assistance under this part.

• Section 300.509, regarding model forms to assist parents and public agencies in filing due process complaints and parents and other parties in filing State complaints, has been revised to add, with respect to due process complaints, ''public agencies,'' and with respect to State complaints, ''other parties,'' as well as parents, and to clarify that (1) while each SEA must develop model forms, the SEA or LEA may not require the use of the forms, and (2) parents, public agencies, and other parties may either use the appropriate model form, or another form or other document, so long as the form or document meets, as appropriate, the requirements for filing a due process complaint or a State complaint.

• Section 300.510 (Resolution process) has been revised, as follows:

(1) Section 300.510(b)(1), regarding the resolution period, has been changed to state that a due process hearing ''may occur'' (in lieu of ''must occur'') by the end of the resolution period, if the parties have not resolved the dispute that formed the basis for the due process complaint.

(2) A new § 300.510(b)(3) has been added to provide that, except where the parties have jointly agreed to waive the resolution process or to use mediation (notwithstanding § 300.510(b)(1) and (2)), the failure of a parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(3) A new § 300.510(b)(4) has been added to provide that if an LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made, and documented using the procedures in § 300.322(d), the LEA may, at the conclusion of the 30-day resolution period, request that a hearing officer dismiss the parent's due process complaint.

(4) A new paragraph (b)(5) of § 300.510 has been added to provide that, if the LEA fails to hold the resolution meeting within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timelines.

(5) A new § 300.510(c) (Adjustments to the 30-day resolution period) has been added that specifies exceptions to the 30-day resolution period (e.g., (A) both parties agree in writing to waive the resolution meeting; (B) after either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or (C) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process). Subsequent paragraphs have been renumbered accordingly.

(6) Paragraph (d)(2) of § 300.510 (proposed paragraph(c)(2)), regarding the enforceability of a written settlement agreement in any State court of competent jurisdiction or in a district court of the United States, has been expanded to add the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to a new § 300.537.

• Section 300.513(a) (Decision of hearing officer) has been revised by (1) changing the paragraph title to read ''Decision of hearing officer on the provision of FAPE,'' and (2) clarifying that a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

• Section 300.515(a), regarding timelines and convenience of hearings and reviews, has been revised to include a specific reference to the adjusted time periods described in § 300.510(c).

• Section 300.516(b), regarding the 90-day time limitation from the date of the decision of the hearing to file a civil action, has been revised to provide that the 90-day period begins from the date of the decision of the hearing officer or the decision of the State review official.

• Section 300.518 (Child's status during proceedings) has been revised by adding a new paragraph (c), which provides that if a complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned 3, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under § 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

• Section 300.520(b), regarding a special rule about the transfer of parental rights at the age of majority, has been revised to more clearly state that a State must establish procedures for appointing the parent of a child with a disability, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.

Discipline Procedures

• Section 300.530(d)(1)(i), regarding services, has been revised to be consistent with section 615(k)(1)(D)(i) of the Act, by adding a reference to the FAPE requirements in § 300.101(a).

• Section 300.530(d)(4), regarding the removal of a child with a disability from the child's current placement for 10 school days in the same school year, has been revised to remove the reference to school personnel, in consultation with at least one of the child's teachers, determining the location in which services will be provided.

• Section 300.530(d)(5), regarding removals that constitute a change of placement under § 300.536, has been revised to remove the reference to the IEP Team determining the location in which services will be provided.

• A new § 300.530(e)(3), has been added to provide that, if the LEA, the parent, and members of the child's IEP Team determine that the child's behavior was the direct result of the LEA's failure to implement the child's IEP, the LEA must take immediate steps to remedy those deficiencies.

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

• Section 300.532 (Appeal) has been revised, as follows:

(1) Paragraph (a) of § 300.532, regarding the conditions in which the parent of a child with a disability or an LEA may request a hearing, has been

modified to clarify that the hearing is requested by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).

(2) Section 300.532(b)(3) has been changed to more definitively provide that if the LEA believes that returning the child to his or her original placement is substantially likely to result in injury to the child or others.

(3) Section 300.532(c)(3), regarding an expedited due process hearing, has been adjusted to provide that unless the parents and an LEA agree in writing to waive a resolution meeting, or agree to use the mediation process described in § 300.506, the resolution meeting must occur within seven days of receiving notice of the due process complaint, and the hearing may proceed within 15 days of receipt of the due process complaint unless the matter has been resolved to satisfaction of both parties.

(4) Proposed § 300.532(c)(4), regarding the two-day timeframe for disclosing information to the opposing party prior to an expedited due process hearing, has been removed.

• Section 500.536(a)(2)(ii) (proposed § 300.536(b)(2)) has been revised to remove the requirement that a child's behavior must have been a manifestation of the child's disability before determining that a series of removals constitutes a change in placement under § 300.536. Paragraph (a)(2)(ii) has also been amended to reference the child's behavior in ''previous'' incidents that resulted in the series of removals.

• A new § 300.536(b) has been added 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 and that the determination is subject to review through due process and judicial determinations.

• A new § 300.537 (State enforcement mechanisms) has been added to clarify that notwithstanding § 300.506(b)(7) and § 300.510(c)(2), which provide for judicial enforcement of a written agreement reached as a result of a mediation or resolution meeting, nothing in this part would prevent the SEA from using other mechanisms to seek enforcement of that agreement, provided that use of those mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

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

Monitoring, Technical Assistance, and Enforcement

• Section 300.600 (State monitoring and enforcement) has been revised, as follows:

(1) Section 300.600(a) has been amended to require the State to enforce Part B of the Act in accordance with § 300.604(a)(1) and (a)(3), (b)(2)(i) and (b)(2)(v), and (c)(2).

(2) A new paragraph (d) has been added, which provides that the State must monitor the LEAs located in the State, using quantifiable indicators in each of the following priority areas, and such qualitative indicators as are needed to adequately measure performance in those areas, including: (A) Provision of FAPE in the least restrictive environment; (B) State exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, and a system of transition services as defined in § 300.43 and in 20 U.S.C. 1437(a)(9); and (C) disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

• A new § 300.601(b)(2), regarding State use of targets and reporting, has been added 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.

• A new § 300.608(b), regarding State enforcement, has been added to specify that States are not restricted from utilizing any other authority available to them to monitor and enforce the requirements of Part B of the Act.

Confidentiality of Information

• Section 300.622 (Consent) has been restructured and revised to more accurately reflect the Department's policy regarding when parental consent is required for disclosures of personally identifiable information, as follows:

(1) Paragraph (a) of § 300.622 has been changed to provide that parental consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies, unless the information is contained in education records, and the disclosure is authorized without parental consent under the regulations for the Family Educational Rights and Privacy Act (FERPA, 34 CFR part 99).

(2) A new § 300.622(b)(1) has been added to clarify that parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of Part B of the Act or these regulations.

(3) A new § 300.622(b)(2) has been added to provide that parental consent must be obtained before personally identifiable information is released to officials of participating agencies that provide or pay for transition services.

(4) A new paragraph (b)(3) has been added to require that, with respect to parentally-placed private school children with disabilities, parental consent must be obtained before any personally identifiable information is released between officials in the LEA where the private school is located and the LEA of the parent's residence.

(5) Proposed § 300.622(c), regarding the requirement to provide policies and procedures for use in the event that a parent refuses to consent, has been removed because it is covered elsewhere in these regulations.

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

Allotments, Grants, and Use of Funds

• Section 300.701(a)(1)(ii)(A), regarding the applicable requirements of Part B of the Act that apply to freely associated States, has been revised by removing the five listed requirements because those requirements did not include all requirements that apply to freely associated States. This change clarifies that freely associated States must meet the applicable requirements that apply to States under Part B of the Act.

• Section 300.704(c)(3)(i), regarding the requirement to develop, annually review, and revise (if necessary) a State plan for the high cost fund, has been revised to add a new paragraph (F) that requires that if the 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.

• Section 300.706 (Allocation for State in which by-pass is implemented for parentally-placed private school children with disabilities) has been removed because it is no longer applicable. The section has been redesignated as ''Reserved.''

Secretary of the Interior

• Section 300.707 (Use of amounts by Secretary of the Interior) has been changed, as follows:

(1) The definition of *Tribal governing body of a school* has been replaced with the definition of *tribal governing body* from 25 U.S.C. 2021(19).

(2) Section 300.707(c), regarding an additional requirement under ''Use of amounts by Secretary of the Interior,'' has been revised to clarify that, with respect to all other children aged 3 to 21, inclusive, on reservations, the SEA of the State in which the reservation is located must ensure that all the requirements of Part B of the Act are met.

• Section 300.713 (Plan for coordination of services) has been revised to require (1) in § 300.713(a), 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, and (2) in § 300.713(b), the plan to provide for the coordination of services benefiting these children from whatever source covered by the plan, including SEAs, and State, local, and tribal juvenile and adult correctional facilities.

Analysis of Comments and Changes

Introduction

In response to the invitation in the NPRM, more than 5,500 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM immediately follows this introduction.

The perspectives of parents, individuals with disabilities, teachers, related services providers, State and local officials, members of Congress, and others were very important in helping us to identify where changes to the proposed regulations were necessary, and in formulating many of the changes. In light of the comments received, a number of significant changes are reflected in these final regulations.

We discuss substantive issues under the subpart and section to which they pertain. References to subparts in this analysis are to those contained in the final regulations. The analysis generally does not address—

(a) Minor changes, including technical changes made to the language published in the NPRM;

(b) Suggested changes the Secretary is not legally authorized to make under applicable statutory authority; and

(c) Comments that express concerns of a general nature about the Department or other matters that are not directly relevant to these regulations, such as requests for information about innovative instructional methods or matters that are within the purview of State and local decision-makers.

Subpart A—General

Definitions Used in This Part

Applicability of This Part to State and Local Agencies (§ 300.2)

Comment: None.

Discussion: Section § 300.2(c)(2) contains an incorrect reference to § 300.148(b). The correct reference should be to § 300.148.

Changes: We have removed the reference to § 300.148(b) and replaced it with a reference to § 300.148.

Assistive Technology Device (§ 300.5)

Comment: Some commenters opposed the exclusion of surgically implanted medical devices in the definition of *assistive technology device*. Another commenter recommended limiting the definition of *assistive technology device* to a device that is needed to achieve educational outcomes, rather than requiring local educational agencies (LEAs) to pay for any assistive technology device that increases, maintains, or improves any functional need of the child.

Discussion: The definition of *assistive technology device* in § 300.5 incorporates the definition in section 602(1)(B) of the Act. We do not believe the definition should be changed in the manner suggested by the commenters because the changes are inconsistent with the statutory definition. The definition in the Act specifically refers to any item, piece of equipment, or product system that is used to increase, maintain, or improve the functional capabilities of the child and specifically excludes a medical device that is surgically implanted or the replacement of such device. Accordingly, we continue to believe it is appropriate to exclude surgically implanted medical devices from this definition. In response to the second comment, § 300.105(a) requires each public agency to ensure that assistive technology devices (or assistive technology services, or both) are made available to a child with a disability if required as part of the child's special education, related services, or supplementary aids and services. This provision ties the definition to a child's educational needs, which public agencies must meet in order to ensure that a child with a disability receives a free appropriate public education (FAPE).

Changes: None.

Comment: One commenter requested that the regulations clarify that an assistive technology device is not synonymous with an augmentative communication device. A few commenters recommended including recordings for the blind and dyslexic playback devices in the definition of *assistive technology devices*. Some commenters recommended including language in the regulations clarifying that medical devices used for breathing, nutrition, and other bodily functions are assistive technology devices.

Discussion: The definition of *assistive technology device* does not list specific devices, nor would it be practical or possible to include an exhaustive list of assistive technology devices. Whether an augmentative communication device, playback devices, or other devices could be considered an assistive technology device for a child depends on whether the device is used to increase, maintain, or improve the functional capabilities of a child with a disability, and whether the child's individualized education program (IEP) Team determines that the child needs the device in order to receive a free appropriate public education (FAPE). However, medical devices that are surgically implanted, including those used for breathing, nutrition, and other bodily functions, are excluded from the definition of an *assistive technology device* in section 602(1)(B) of the Act. The exclusion applicable to a medical device that is surgically implanted includes both the implanted component of the device, as well as its external components.

Changes: None.

Comment: A few commenters asked whether the definition of *assistive technology device* includes an internet-based instructional program, and what the relationship is between internet-based instructional programs and specially-designed instruction.

Discussion: An instructional program is not a device, and, therefore, would not meet the definition of an *assistive technology device*. Whether an internet-based instructional program is appropriate for a particular child is determined by the child's IEP Team, which would determine whether the program is needed in order for the child to receive FAPE.

Changes: None.

Comment: A few commenters recommended including the proper functioning of hearing aids in the definition of *assistive technology device*.

Discussion: We believe that the provision requiring public agencies to ensure that hearing aids worn in school are functioning properly is more appropriately included in new § 300.113