

# IDEA 2004

U. S. DEPARTMENT OF  
EDUCATION'S  
COMMENTARY  
AND  
EXPLANATION ABOUT  
PROPOSED REGULATIONS  
FOR  
IDEA 2004

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The U. S. Department of Education (USDOE) has issued their proposed changes to the IDEA special education regulations that will be published in the Federal Register. Public comment is being solicited on the proposals and, after the comments are received and public meetings are held, final regulations will be published in Volume 34, Part 300 of the Code of Federal Regulations, beginning with 34 C.F.R. § 300.1. This is expected to occur sometime between December, 2005 and March, 2006. You are encouraged to comment. Visit the [www.wrightslaw.com](http://www.wrightslaw.com) website for suggested regulations in need of revision and information about the manner of presenting written comments and presentations at the public meetings.

This file contains USDOE's comments and explanations about the rationale for a specific change. In the interest of space, lengthy portions about topics of minimal interest to Wrightslaw readers was excluded, such as pages and pages about procedures for collection of information.

The actual proposed regulations are in a separate file. This is simply the discussion. As a visual aide to quickly skim through this document, the word "**Proposed**" is often in bold. At the end, USDOE provides a detailed discussion about specific topics of interest such as "Highly Qualified," "Discipline," etc.

STARTS HERE

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

ACTION: Notice of Proposed Rulemaking (NPRM)

SUMMARY: The Secretary proposes 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. These amendments are needed to implement recently enacted changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004.

DATES: To be considered, comments must be received at one of the addresses provided in the ADDRESSES section no later than 5 p.m. Washington, DC Time on (INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.) Comments received after this time will not be considered.

We will hold public meetings about this notice of proposed rulemaking (NPRM). The dates and times of the meetings and the cities in which the meetings will take place are in Public Meetings under Invitation to Comment elsewhere in this preamble.

ADDRESSES: Address all comments about these proposed regulations to Troy R. Justesen, U.S. Department of Education, 400 Maryland Avenue, SW, Potomac Center Plaza, room 5126, Washington, DC 20202-2641. If you prefer to send your comments through the Internet, you may address them to us at the U.S. Government Web site: [www.regulations.gov](http://www.regulations.gov) or you may send your Internet comments to us at the following address:

[IDEAComments@ed.gov](mailto:IDEAComments@ed.gov)

**You must include the term IDEA-Part B in the subject line of your electronic message.** Please

## USDOE COMMENTARY AND EXPLANATION ABOUT PROPOSED REGULATIONS FOR IDEA 2004

submit your comments only one time, in order to ensure that we do not receive duplicate copies.

If you want to comment on the information collection requirements, you must send your comments to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. You may also send a copy of those comments to the U.S. Department of Education (Department) representative named in this section.

**All first-class and Priority mail sent to the Department is put through an irradiation process, which can result in lengthy delays in mail delivery.** Please keep this in mind when sending your comments and please consider using commercial delivery services or email in order to ensure timely delivery of your comments.

FOR FURTHER INFORMATION CONTACT:  
Troy R. Justesen. Telephone: (202) 245-7468.

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 alternative format (e.g., Braille, large print, audiotope, or computer diskette) on request to the contact person listed under FOR FURTHER INFORMATION CONTACT.

SUPPLEMENTARY INFORMATION:

### Invitation to Comment

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should provide to reduce the potential costs or increase potential benefits while preserving the effective and efficient administration of these programs.

During and after the comment period, you may inspect all public comments about these proposed regulations in room 5126, Potomac Center Plaza, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader, or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

### Public Meetings

The dates and cities where the meetings about this NPRM will take place are listed below. Each meeting will take place from 1:00 to 4:00 PM and from 5:00 to 7:00 PM.

Friday, June 17, 2005 in Nashville, TN;  
Wednesday, June 22, 2005 in Sacramento, CA;  
Friday, June 24, 2005 in Las Vegas, NV;  
Monday, June 27, 2005 in New York, NY;  
Wednesday, June 29, 2005 in Chicago, IL;  
Thursday, July 7, 2005 in San Antonio, TX; and  
Tuesday, July 12, 2005 in Washington, DC.

We provided more specific information on meeting locations in a notice published in the Federal Register (70 FR 30917).

Assistance to Individuals with Disabilities at the Public Meetings

The meeting sites are accessible to individuals with disabilities, and sign language interpreters will be available. If you need an auxiliary aid or service other than a sign language interpreter (e.g., interpreting service such as oral, cued speech, or tactile interpreter, assisted listening device, or materials in an alternative format), notify the contact person listed in this NPRM at least two weeks before the scheduled meeting date. Although we will attempt to meet a request we receive after this date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

## BACKGROUND

On December 3, 2004, the Individuals with Disabilities Education Improvement Act of 2004 was enacted into law as Pub L. 108-446. The statute, as passed by Congress and signed by the President, reauthorizes and makes significant changes to the Individuals with Disabilities Education Act.

The Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Act or IDEA), is intended to help children with disabilities achieve to high standards--by promoting accountability for results, enhancing parental involvement, and using proven practices and materials; and, also, by providing more flexibility and reducing paperwork burdens for teachers, States, and local school districts. Enactment of the new law provides an opportunity to consider improvements in the current regulations that would strengthen the Federal effort to ensure every child with a disability has available a free appropriate public education that--(1) is of high quality, and (2) is designed to achieve the high standards reflected in the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001 (NCLB) and its implementing regulations.

Changes to the current Part B regulations (34 CFR parts 300 and 301) and Part D regulations (34 CFR part 304) are necessary in order for the Department to appropriately and effectively address the provisions of the new law and to assist State and local educational agencies in implementing their responsibilities under the new law. Changes to the current Part C regulations (part 303) also are necessary in order for the Department to appropriately and effectively address the provisions in Part C of the Act and to assist States in completing their responsibilities under the new law. The NPRM for the Part C regulations will be published soon.

On December 29, 2004, the Secretary published a notice in the Federal Register requesting advice and recommendations from the public on regulatory issues under the Act, and announcing a series of seven public meetings during January and February of 2005 to seek further input and suggestions from the public for developing regulations based on the new statute.

Over 6000 public comments were received in response to the Federal Register notice and at the seven public meetings, including letters from parents and public agency personnel, and parent-advocate

and professional organizations. The comments addressed each major provision of the new law (such as discipline procedures, provisions on personnel qualifications and highly qualified teachers, provisions related to evaluation of children and individualized education programs, participation of private school children with disabilities, and provisions on early intervening services). These comments were reviewed and considered in developing this NPRM. The Secretary appreciates the interest and thoughtful attention of the commenters responding to the December 29, 2004 notice and participating in the seven public meetings.

## General Proposed Regulatory Plan and Structure

In developing this NPRM, we have elected to construct one comprehensive, freestanding document that incorporates virtually all requirements from the new law along with the applicable regulations, rather than publishing a regulation that does not include statutory provisions. The rationale for doing this is to create a single reference document for parents, State personnel, school personnel, and others to use, rather than being forced to shift between one document for regulations and a separate document for the statute. This approach was used in developing the current regulations. Although this approach will result in a larger document, it is our impression that various groups strongly support continuing this practice.

In addition, we have reorganized the regulations by following the general order and structure of provisions in the statute, rather than using the arrangement of the current regulations. We believe this change in organization will be helpful to parents, State and local educational agency personnel, and the public both in reading the regulations, and in finding the direct link between a given statutory requirement and the regulation related to that requirement. Thus, in general, the requirements related to a given statutory section (e.g., State eligibility in section 612 of the Act) will be included in one location (subpart B) and in the same general order as in the statute, rather than being spread throughout four or more subparts, as the statutory sections are in the current regulations.

As restructured in this NPRM, the proposed regulations are divided into eight major subparts, each of which is directly linked to, and comports with, the general order of provisions in a specific section of the Act. For example, we have revised subpart G of the regulations to include all provisions regarding the allotment and use of funds from section 611 of the Act, rather than having those provisions

dispersed among several different subparts, as they are in the current regulations.

In addition, we have removed part 301 (Preschool Grants for Children with Disabilities) from title 34 and placed the Preschool Grants provisions from section 619 of the Act into a new subpart H under part 300. This restructuring and consolidation of the financial requirements from both the statute and regulations into a specific location in the regulations should be useful to State and local administrators and others in finding the relevant statutory and regulatory provisions regarding both the Assistance to States and Preschool Grants programs.

In reviewing the current regulations, we considered their continued necessity and relevance in light of a number of factors: Whether statutory changes required changes to existing regulations; whether changes in other laws, or the passage of time and changed conditions rendered the regulations obsolete or unnecessary; whether less burdensome alternatives or greater flexibility was appropriate; and whether the regulation could be changed in light of section 607(b) of the Act (section 607(b) of the Act provides that the Secretary may not publish final regulations that would procedurally or substantively lessen the protections provided to children with disabilities in the regulations that were in effect on July 20, 1983, except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation). In the following discussion of proposed regulatory changes, we identify the changes that would be made to existing regulations after consideration of these factors.

**Proposed Regulatory Changes**  
**Subpart A—General**  
**Purposes and Applicability**

**Proposed §300.1** would be revised only to add, consistent with a change to section 601(d)(1)(A) of the Act, the words “further education” in paragraph (a).

Except for the section heading, **proposed §300.2** would be unchanged from the existing provision.

Section 300.3 of the current regulations would be removed as unnecessary, because the regulations listed in this section already apply, by their own terms, to States and local agencies under Part B of the Act.

**Definitions Used In This Part**

As in the current regulations, **proposed §300.4** (Act) would refer to the Individuals with Disabilities Education Act, as amended.

**Proposed §300.5** (Assistive technology device) would retain the current definition, and include the new language from section 602(1) of the Act that the term does not include a medical device that is surgically implanted, or the replacement of that device.

**Proposed §300.6** (Assistive technology service) would be consistent with the current regulatory definition of that term.

**Proposed §300.7** (Charter school) would define the term to have the meaning given that term in section 5210(1) of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C 6301 et seq. (ESEA).

**Proposed §300.8** (Child with a disability) would make the following changes to the current regulatory definition in §300.7: In paragraphs (a)(1) and (a)(2) cross-references to evaluation procedures would be updated to reflect the placement of those procedures in these proposed regulations. The parenthetical following “serious emotional disturbance” in paragraph (a)(1) would be revised to read “referred to in this part as emotional disturbance.” The cross-reference regarding related services in the definition of special education in paragraph (a)(2)(ii) would be updated. In paragraph (b), a parenthetical phrase would be added following the reference to children aged three through nine to clarify that “developmental delay” could be used for any subset of that age range, including children three through five. This reflects a change in section 602(3)(B) of the Act. Paragraph (c)(8) (Orthopedic impairment) would revise current §300.7(c)(8) by removing the parenthetical listing of examples, because these examples are outdated.

Finally, in paragraph (c)(10)(i) of **proposed §300.8**, which contains a definition of the term specific learning disability, the word “the” would be substituted for “an” before the phrase “imperfect ability to listen, think, . . .” reflecting the addition of “the” in section 602(30)(A) of the Act.

**Proposed §300.9** would incorporate the regulatory definition of Consent that appears in §300.500(b)(1) of the current regulations. The current provision in

§300.8 that cross-references the §300.500 definition of consent, would be removed.

Consistent with section 602(4) of the Act, **proposed §300.10** would add the new definition of Core academic subjects as that term is defined in section 9101 of the ESEA.

**Proposed §300.11** would revise the definitions of Day; business day; school day in current §300.9 only by updating the cross-reference to the regulatory requirement in **proposed §300.148(c)** concerning a limitation on reimbursement for private school placements.

The regulatory definition of Educational service agency currently in §300.10 would be moved to **proposed §300.12** and revised by adding the word “schools” after “public elementary” in paragraph (a)(2) of this section to conform with the language in section 602(5) of the Act. In proposed paragraph (c), the provision concerning entities that meet the definition of intermediate educational unit in section 602(23) of the Act as in effect prior to June 4, 1997 would be retained. There are entities still providing special education and related services to preschool children with disabilities that meet the definition of intermediate educational unit, but may not meet the definition of educational service agency because they are not responsible for the provision of special education and related services provided within public elementary schools of the State.

**Proposed §300.13** would reflect the definition of Elementary school in section 602(6) of the Act, including the new language specifying that the term includes a public elementary charter school.

**Proposed §300.14** would reflect the current statutory definition of Equipment and would be substantially the same as §300.11 of the current regulations.

**Proposed §300.15** would incorporate the regulatory definition of Evaluation that appears in the current regulations in §300.500(b)(2), with the cross-reference to the evaluation procedures updated to reflect their placement in these proposed regulations and to include the additional procedures regarding specific learning disability. The current regulation, regarding evaluation in §300.12, which cross-references the definition in current §300.500, would be removed as duplicative and unnecessary.

**Proposed §300.16** (Excess costs), defined in the current regulations in §300.184, would be revised consistent with changes in section 602(8) of the Act.

This provision is substantially the same as the current definition in §300.184(b).

**Proposed §300.17** (free appropriate public education or FAPE) would incorporate the provisions of section 602(9) of the Act and be the same as the definition in §300.13 of the current regulations, except that §300.17(d) would be updated to add a cross-reference to the individualized education program (IEP) requirements.

A new definition of highly qualified special education teacher would be added in **proposed §300.18**, reflecting the addition of a definition of this term to the statute in section 602(10) of the Act, with the following modifications: Paragraph (a)(1) of this section would specify that the term “highly qualified” applies only to public elementary school and secondary school special education teachers, consistent with the definition of that term in section 9101 of the ESEA, which is incorporated into the Act and applied to special education teachers in section 602(10) of the Act. We do not believe that the “highly qualified” requirements of the ESEA, or, by statutory cross-reference, the Act, were intended to apply to private school teachers, even in situations where a child with a disability is placed in, or referred to, a private school by a public agency in order to carry out the public agency’s responsibilities under this part, consistent with section 612(a)(10)(B) of the Act and **proposed §300.146**. This issue also is addressed in **proposed §300.156**.

**Proposed §300.18(b)(2)** would specify that a teacher participating in an alternate route to certification program would be considered to be fully certified under certain circumstances. The standard to be applied to an alternate route to certification program would be the same as for those programs under the regulations implementing title I of the ESEA in 34 CFR §200.56(a)(2)(ii). This would provide for consistency in the interpretation and application of the alternate route to certification provisions across these programs.

In **proposed §300.18(b)(3)**, a provision would be added to clarify that a public elementary or secondary school teacher who is not teaching a core academic subject would be considered highly qualified if the teacher meets the requirements of **proposed §300.18(b)(1)** and (2). This provision would reflect note 21 in U.S. House of Representatives Conference Report No. 108-779, (Conf. Rpt.) that special education teachers who are only providing consultative services to other teachers who are highly qualified to teach particular academic subjects, could

be highly qualified by meeting the special education qualifications alone. **Proposed §300.18(c)(2)** would clarify that all special education teachers who are exclusively teaching students who are assessed based on alternate academic achievement standards, as permitted under the regulations implementing title I of the ESEA, at a minimum, have subject matter knowledge at the elementary level or above, as determined by the State, needed to effectively teach to those standards. Note 21 in the Conf. Rpt. calls for teachers exclusively teaching students who are assessed based on alternate academic achievement standards above the elementary level to have a high level of competency in each of the core academic subjects taught.

The proposed regulation would not specifically address the use of a separate "high objective uniform State standard of evaluation" (HOUSSE) for special education teachers. However, note 21 in the Conf. Rpt. recognized that some States have developed HOUSSE standards for special education teachers, and indicated that those separate HOUSSE standards should be permitted, including single HOUSSE evaluations that cover multiple subjects, as long as those adaptations of a State's HOUSSE for use with special education teachers would not establish a lesser standard for the content knowledge requirements for special education teachers. We request comment on whether additional regulatory action is needed on this point. **Proposed §300.18(g)** would clarify that the requirements in **proposed §300.18** regarding highly qualified special education teachers do not apply with respect to teachers hired by private elementary and secondary schools.

**Proposed §300.19** would reflect the definition of Homeless children added to the statute in section 602(11) of the Act.

The definition of include in **proposed §300.20** is substantively unchanged from the current regulatory provision in §300.14.

The proposed definitions of Indian and Indian tribe in §300.21 would incorporate the definitions of those terms currently in §300.264 and reflect the language in sections 602(12) and 602(13) of the Act. The Department of Education seeks comment on the definition of Indian tribe because the current definition includes state tribes. The Department of the Interior is only authorized to provide services to Federally Recognized tribes, therefore, States should provide comments on how they would provide these services to State recognized tribes. Nothing in this definition is intended to require the BIA to provide

services or funding to a State Indian tribe for which BIA is not responsible.

The definition of Individualized education program or IEP in **proposed §300.22** would incorporate the regulatory definition of that term currently in §300.340(a), and would reflect the language in section 602(14) of the Act. The current §300.15 cross-referencing the §300.340 definition would be removed as duplicative and unnecessary.

**Proposed §300.23** (Individualized education program team) would be the same as §300.16 of the current regulations. The definition in **proposed §300.24** of Individualized family service plan would be the same as the current regulatory definition in §300.17, except that **proposed §300.24** would appropriately refer to the current statutory definition of IFSP in section 636 of the Act and not to the regulatory definition in 34 CFR 303.340(b).

**Proposed §300.25** (Infant or toddler with a disability), §300.26 (Institution of higher education), and §300.27 (Limited English proficient) would reflect statutory definitions of those terms in sections 602(16), 602(17), and 602(18) of the Act, respectively.

**Proposed §300.28** (Local educational agency or LEA) is substantively unchanged from the current regulatory definition in §300.18, and would reflect the definition of that term in section 602(19) of the Act.

**Proposed §300.29** (Native language) is substantively unchanged from the current regulatory definition of that term in §300.19.

**Proposed §300.30** (Parent) would revise the current regulatory definition of that term in §300.20 to better reflect the revised statutory definition of Parent in section 602(23) of the Act. **Proposed §300.30(a)(2)** would reflect the provision regarding a State law prohibition on when a foster parent can be considered a parent, but would add language to recognize that similar restrictions may exist in State regulations or in contractual agreements between a State or local entity and the foster parent, and should be accorded similar deference. **Proposed §300.30(b)(1)** would provide that the natural or adoptive parent would be presumed to be the parent for purposes of the regulations if that person were attempting to act as the parent under **proposed §300.30** and more than one person is qualified to act as a parent, unless that person does not have legal authority to make educational decisions for the child, or there is a

judicial order or decree specifying some other person to act as the parent under Part B of the Act. **Proposed §300.30(b)(2)** would provide that if a person or persons is specified in a judicial order or decree to act as the parent for purposes of §300.30, that person would be the parent under Part B of the Act. **Proposed §300.30(b)(2)** would, however, exclude an agency involved in the education or care of the child from serving as a parent, consistent with the statutory prohibition that applies to surrogate parents in sections 615(b)(2) and 639(a)(5) of the Act. The provisions in **proposed §300.30(b)** should assist schools and public agencies in identifying the appropriate person to serve as the parent under Part B of the Act, especially in those difficult situations in which more than one individual wants to make educational decisions.

**Proposed §300.31** would add a new definition of Parent training and information center reflecting section 602(25) of the Act. This term would be used in **proposed §300.506**.

**Proposed §§300.32** (Personally identifiable) and 300.33 (Public agency) are substantively unchanged from current regulatory definitions of these terms in §300.500(b)(3) and §300.22, respectively. We note that throughout these proposed regulations, public agency has been used to make clear where the requirements do not apply only to States and LEAs.

The current regulatory definition of Qualified personnel in §300.23 would be removed, because personnel qualifications would be adequately addressed in **proposed §300.156**.

**Proposed §300.34** (Related services), reflecting changes in section 602(26) of the Act, would amend the current regulatory definition in §300.24 in the following ways: In **proposed §300.34(a)** “interpreting services” and “school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the IEP of the child” would be added. **Proposed §300.34(b)** would be added to address the statutory limitation on surgically implanted medical devices. Paragraph (b) also would specify that related services would not include the costs of maximizing the functioning of a surgically implanted device or the maintenance of a surgically implanted device. School districts should not be required to bear these costs, which are integral to the functioning of the implanted device. Proposed paragraph (c) would include new definitions of Interpreting services and School nurse services. The list is not intended to be exhaustive and other therapies, as well as other

services not listed, may be included in a child’s IEP if the IEP Team determines that a particular service is needed for a child to benefit from special education. In all cases concerning related services, the IEP Team’s determination about appropriate services must be reflected in the child’s IEP and those listed services must be provided in accordance with the IEP at public expense and at no cost to the parents. Nothing in the Act or in the definition of related services requires the provision of a related service to a child unless the child’s IEP Team has determined that the service is required in order for the child to benefit from special education and has included the service on the child’s IEP.

**Proposed §300.35** (Secondary school) would revise the current regulatory definition of this term in §300.25 to add the new statutory language specifying that the term includes a public secondary charter school.

**Proposed §300.36** (Services plan) would add a new definition that would describe the content, development, and implementation of plans for parentally-placed private school children with disabilities who have been designated to receive services. The definition would cross-reference the specific requirements for the provision of services to parentally-placed private school children with disabilities in **proposed §§300.132** and 300.137 through 300.139.

**Proposed §300.37** (Secretary) would reflect the statutory definition of that term in section 602(28) of the Act.

**Proposed §§300.38** (Special education), 300.39 (State), and 300.41 (Supplementary aids and services) would be substantively unchanged from current regulatory provisions in §§300.26, 300.27 and 300.28, respectively, except that State would be revised to reference an exception when the term is used in subparts G and H of these regulations. **Proposed §300.38(b)(5)** would revise the definition of vocational education in current §300.26(b)(5) to include the definition of vocational and technical education and the definition of vocational and technical education in the Carl D. Perkins Vocational and Applied Technology Act of 1988, as amended, 20 U.S.C. 2301, 2302(29) would be added in **proposed §300.38(b)(6)**.

**Proposed §300.42** (Transition services) would revise the current regulatory definition of the term in §300.29, reflecting new statutory language in section 602(34) of the Act.

New proposed definitions would be added in §§300.43 and 300.44 reflecting the statutory definitions of Universal design and Ward of the State, respectively. The definition of Ward of the State underscores that the determination of whether a child is a ward of the State is limited to applicable State law. Finally, the current list of definitions found in the Education Department General Administrative Regulations (EDGAR) in §300.30 would be removed as unnecessary, as these definitions already apply by their own terms, except that the definition of Secretary in **proposed** §300.37 and State educational agency in **proposed** §300.40, which are included in the current EDGAR list, would be included in the proposed regulation because they also are defined in section 602(28) and (32) of the Act.

### **Subpart B--State Eligibility General**

Revised subpart B would incorporate current provisions from other subparts that, under the current regulations, are cross-referenced in subpart B. These changes would be consistent with the statutory structure. Some of the provisions that are consolidated in proposed subpart B would include: certain provisions related to FAPE, currently in subpart C; provisions regarding private school children with disabilities, currently in subpart D; the least restrictive environment (LRE) provisions, currently in subpart E; and the State complaint procedures, currently in subpart F.

**Proposed** §300.100 would revise current §300.110 to provide for the submission of a plan that includes assurances related to the conditions of eligibility for assistance. The requirement that States submit copies of all State statutes, regulations, and other documents would be removed from current §300.110, consistent with the changes in Section 612(a) of the Act. Consistent with this approach, these proposed regulations would eliminate from the current regulations throughout subpart B all provisions requiring that policies and procedures be on file with the Secretary.

### **FAPE Requirements**

**Proposed** §300.101 would incorporate the current general FAPE provision in §300.121(a), and would include a reference to the SEA's obligation to make FAPE available to children who have been suspended or expelled from school, consistent with **proposed** §300.530(d). Consistent with changes to the statute, the current provisions in §300.121(b) regarding

submission of State documentation, such as statutes and court orders, would be removed. The current provisions in §300.121(c), regarding FAPE beginning at age three, generally would be retained. The current provisions in §300.121(e), regarding children advancing from grade to grade, also would be retained. These provisions provide useful information on appropriate implementation of public agency responsibilities under Part B. Section 300.121(d) of the current regulations would not be retained in these proposed regulations. Instead, the obligation to ensure the right to FAPE for children who have been suspended or expelled from school would be addressed in **proposed** §300.530(d) in subpart E.

**Proposed** §300.102 would retain the current exceptions to FAPE in §300.122. For consistency with the statute, references to "students" would be changed to "children." The proposed regulation would contain a new provision regarding children who are eligible for services under section 619 of the Act, but who are receiving early intervention services under Part C, consistent with the statutory language in section 612(a)(1)(c) of the Act. **Proposed** §300.102(b) also would include a new provision that would require that information regarding exceptions to FAPE be current and accurate. This information is necessary for the Department to allocate funds accurately among the States.

### **Other FAPE Requirements**

**Proposed** §§300.103, 300.104, and 300.105(b), regarding methods and payments; residential placement; and proper functioning of hearing aids would retain the provisions from §§300.301 through 300.303 of the current regulations, respectively. **Proposed** §300.105(a), regarding assistive technology, would retain the provisions in current §300.308.

**Proposed** §§300.106 through 300.108, regarding extended school year services, nonacademic services, and physical education, would retain the current provisions in §300.309, §300.306, and §300.307, respectively. **Proposed** §300.109, regarding a full educational opportunity goal, generally would retain the current provisions in §§300.123 and 300.124, but would combine them, consistent with section 612(a)(2) of the Act.

**Proposed** §300.110, regarding program options, would retain the current provisions in §300.305.



**Proposed §300.111**, regarding child find, generally would retain the current provisions in §300.125 and, consistent with changes in section 612(a)(3) of the Act, would specifically reference children who are homeless or are wards of the State. In addition, **proposed §300.111(b)** would incorporate the provisions related to developmental delay currently in §300.313(a). The proposed regulation would remove the current provisions in §300.313(b) regarding use of individual disability categories and §300.313(c) regarding a common definition of developmental delay as they are unnecessary. States have the option of using developmental delay and other eligibility categories for children with disabilities aged three through nine and subsets of that age range and of using a common developmental delay definition for Parts B and C of the Act. The proposed regulations generally would retain the current provisions in §300.125(a)(2) and (d), regarding other children included in child find and the construction of Part B of the Act as not requiring that children be classified by their disability, as long as each child who needs special education and related services is regarded as having a disability under the Act. Consistent with other changes in these regulations to remove eligibility documentation requirements, the proposed regulation would remove the provision in §300.125(b) of the current regulations that the State must have policies and procedures on file with the Secretary. The proposed regulation also would remove the provision in §300.125(c) of the current regulations, regarding child find for children from birth through age two when the SEA is the lead agency for the Part C program, because this is a clarification that does not need to be in the regulations. The child find requirement under these regulations has traditionally been interpreted to mean identifying and evaluating children from birth. While child find under Part C of the Act overlaps, in part, with Part B of the Act, the coordination of child find activities under Part B and Part C is an implementation matter that would be best left to each State. Nothing in the Act prohibits the Part C lead agency's participation, with the agreement of the SEA, in the actual implementation of child find activities for infants and toddlers with disabilities.

**Proposed §300.112**, regarding individualized education programs (IEPs), would revise the current provisions in §300.128 by adding an exception that references the requirement in **proposed §300.300(b)(3)(ii)**. That exception would provide that if the parent of a child with a disability refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a

request to provide consent for the initial provision of special education and related services, the public agency is not required to convene an IEP meeting to develop an IEP for the child for which the public agency requests such consent. Consistent with other changes in these proposed regulations, the proposed regulation would remove §300.128(b), which requires the State to have policies and procedures on file with the Secretary.

#### **Least Restrictive Environment**

**Proposed §300.114**, regarding LRE, generally would retain the current provisions in §300.550(b). The proposed regulation would remove the documentation requirements of §300.130(a) and §300.550(a) and (b), consistent with other changes in these proposed regulations. The current provision related to an assurance regarding a State's funding mechanism in §300.130(b)(2) would be retained in **proposed §300.114(b)(1)**. This section would provide that a State funding mechanism must not result in placements that violate the LRE provisions and that the State must not use a funding mechanism that distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child, as described in the child's IEP. This change is consistent with language in section 612(a)(5)(B)(i) of the Act.

With regard to section 612(a)(5)(B)(i) of the Act, note 89 in the Conf. Rpt. states that some States continue to use funding mechanisms that provide financial incentives for, and disincentives against, certain placements and these new provisions in the statute were added to prohibit States from maintaining funding mechanisms that violate appropriate placement decisions, not to require States to change funding mechanisms that support appropriate placement decisions. Note 89 of the Conf. Rpt. indicates that it is the intent of the changes to section 612(a)(5)(B) of the Act to prevent State funding mechanisms from affecting appropriate placement decisions for children with disabilities. As also set out in note 89, the law requires 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. The note further explains that State funding mechanisms must be in place to ensure funding is available to support the requirements of this provision, not to provide an

incentive or disincentive for placement and that the LRE principle is intended to ensure that a child with a disability is served in a setting where the child can be educated successfully in the least restrictive setting. Proposed paragraph (b)(2) would replace §300.130(b)(2) and require a State that does not have policies and procedures to this effect to provide an assurance as soon as feasible to ensure that the mechanism does not result in placements that violate the LRE principle. The other provisions regarding LRE would be retained with appropriate updating of cross-references, as described in the following paragraphs.

**Proposed §300.115**, regarding continuum of placements, would retain the language currently in §300.551. **Proposed §300.116**, regarding placements, would retain the language currently in §300.552, except that paragraph (b)(3) would be revised to clarify that a child’s placement must be as close as possible to the child’s home unless the parent agrees otherwise. Finally, §300.116(c) would be revised to require that each public agency ensure that, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school he or she would attend if not disabled, unless the parent agrees otherwise. This additional language, “unless the parent agrees otherwise,” in paragraphs (b)(3) and (c) would clarify that parents can choose to send their child to a charter school, magnet school, or other specialized school without causing a violation of the LRE mandate.

**Proposed §300.117**, regarding nonacademic settings, would retain the current provisions in §300.553. **Proposed §300.118**, regarding children in public or private institutions, would retain the current provisions in §300.554.

**Proposed §300.119**, regarding technical assistance and training, would retain the current provisions in §300.555.

**Proposed §300.120**, regarding LRE monitoring activities, would retain the current provisions in §300.556.

#### **Additional Eligibility Requirements**

**Proposed §300.121**, regarding procedural safeguards, would retain the current provision in §300.129(a), but would remove the provision in §300.129(b) regarding having the safeguards on file with the Secretary, consistent with statutory changes eliminating requirements that States file documentation with the Secretary.

**Proposed §300.122** would remove the current requirement in §300.126 that evaluation policies and procedures be on file with the Secretary, consistent with statutory changes discussed previously. Consistent with the provision in section 612(a)(7) of the Act, **proposed §300.122** would require that children with disabilities be evaluated consistent with the requirements in subpart D of these proposed regulations. The relevant requirements are addressed elsewhere in this preamble in the discussion of subpart D.

**Proposed §300.123** would remove the current requirement in §300.127 that policies and procedures related to confidentiality be on file with the Secretary and the criteria the Secretary uses to evaluate those policies and procedures, consistent with statutory changes discussed previously. Instead, the proposed regulation would require that public agencies comply with subpart F of these regulations relating to the confidentiality of records and information. The relevant requirements are addressed elsewhere in this preamble in the discussion of subpart F.

**Proposed §300.124**, regarding the transition of children from the Part C program to preschool programs under Part B, would remove the current requirement in §300.132 that policies and procedures related to confidentiality be on file with the Secretary, as discussed previously. The proposed regulation generally would retain the other provisions of §300.132. **Proposed §300.124(c)** would clarify that only affected LEAs must participate in transition planning conferences arranged by the designated lead agency under Part C of the Act.

#### **Children in Private Schools**

**Proposed §300.129**, concerning State responsibilities regarding children in private schools, would revise the current requirements in §300.133, by removing the requirement that a State must have on file with the Secretary policies and procedures that ensure that the requirements of current §§300.400 through 300.403 and current §§300.460 through 300.462 are met. **Proposed §300.129** would make clear that the State must have in effect policies and procedures that ensure that LEAs and, if appropriate, the SEA, meet the private school requirements in **proposed §§300.130 through 300.148**.

#### **Children with Disabilities Enrolled by Their Parents in Private Schools**

**Proposed §300.130**, regarding the definition of parentally-placed private school children with disabilities, would incorporate the current provisions in §300.450.

**Proposed §300.131**, regarding child find for parentally-placed private school children with disabilities, generally would retain the current requirements in §300.451, but would clarify, consistent with the changes in **proposed §§300.132** and **300.133**, that the provisions governing parentally-placed private school children with disabilities apply to children who are enrolled in private schools located in the school district served by the LEA. The new statutory requirements in section 612(a)(10)(A)(ii) of the Act should ensure that parentally-placed private school children will not be denied the opportunity to receive services that would otherwise be available to them because of practical obstacles posed when they attend a private school located outside their district of residence.

Proposed regulations in §300.131(b) through (e) also would include new provisions that incorporate the new requirements in section 612(a)(10)(A)(ii) of the Act, designed to ensure that child find for parentally-placed private school children suspected of having disabilities is comparable to child find for public school children suspected of having disabilities. **Proposed §300.131** would require that the participation in child find for parentally-placed private school children with disabilities be equitable, the counts be accurate, the activities undertaken be similar to child find activities for public school children with disabilities, and the period for completion of the child find process be comparable to the period for completion for public school children with disabilities when a parent consents to the evaluation. Similar to the current provision in §300.453(c), and consistent with section 612(a)(10)(A)(ii)(IV) of the Act, **proposed §300.131(d)** would provide that the costs of carrying out the child find requirements for parentally-placed private school children with disabilities, including individual evaluations, may not be considered in determining whether an LEA has met its obligations under **proposed §300.133**.

The proposed regulation would remove current §300.453(d), regarding the permissibility of additional services, as it merely provides clarification for which a regulation is not necessary. Nothing in the Act prohibits SEAs and LEAs from providing other services to parentally-placed private school children with disabilities in addition to the services that are required under Part B of the Act.

**Proposed §300.132(a)**, regarding the provision of services for parentally-placed private school children with disabilities, would revise current §300.452(a) in light of changes in section 612(a)(10)(A) of the Act, which refers to children “enrolled in private elementary schools and secondary schools in the school district served by a local educational agency.” Therefore, **proposed §300.132(a)** would clarify that the provision of services under the proposed regulations refers only to children with disabilities enrolled by their parents in private schools located in the school district served by the LEA. The proposed regulation also would add a reference to the by-pass provisions in **proposed §§300.190** through **300.198**. **Proposed §300.132(b)** generally would retain current §300.452(b), regarding a services plan for each private school child with a disability designated to receive special education and related services under Part B. **Proposed §300.132(c)** would require each LEA to maintain and provide to the SEA records on the number of private school children with disabilities evaluated, the number determined to be children with disabilities, and the number of private school children with disabilities served, consistent with section 612(a)(10)(A)(i)(V) of the Act.

**Proposed §300.133**, regarding expenditures for providing special education and related services to parentally-placed private school children with disabilities, would revise current §300.453(a), regarding the formula used in determining the proportionate amount of expenditures, in light of changes in section 612(a)(10)(A)(i)(II) of the Act. **Proposed §300.133(a)** would provide that the calculation of the proportionate amount of funds allocated for services for parentally-placed private school children be based on the count of parentally-placed private school children attending private schools located in the LEA. The proposed regulation would establish the formula as the number of children with disabilities, ages 3 through 21, who are enrolled by their parents in private schools located in the school district served by the LEA, divided by the total number of children with disabilities, ages 3 through 21, in the LEA’s jurisdiction. **Proposed §300.133(b)** would incorporate the provision in section 612(a)(10)(A)(i)(II) of the Act regarding a thorough and complete child find process. **Proposed §300.133(c)**, regarding child count, generally would retain the current provision in §300.453(b), but for clarity, would use the term parentally-placed private school children with disabilities. The existing provision in §300.453(c) would be removed, as similar content would be more fully addressed in

**proposed §300.131(d).** **Proposed §300.133(d)** would incorporate the statutory provision regarding supplementing not supplanting in section 612(a)(10)(A)(i)(IV) of the Act.

**Proposed §§300.134 and 300.135** would incorporate new provisions in section 612(a)(10)(A)(iii) and (iv) of the Act, regarding timely and meaningful consultation with private school representatives and representatives of parents of parentally-placed private school children with disabilities, including a discussion of: how parentally-placed children identified through the child find process can meaningfully participate; how, where, and by whom special education and related services will be provided; and how, if the LEA disagrees with the views of the private school officials and the services to be provided, the LEA will provide a written explanation of why the LEA chose not to provide services directly or through a contract. **Proposed §300.135** would require, in accordance with section 612(a)(10)(A)(iv) of the Act, a written affirmation signed by the representatives of the participating private schools that timely and meaningful consultation has occurred. The current provisions in §300.454(b)(1) through (3), regarding the consultation process, would be removed because they were superseded by new statutory requirements related to consultation in section 612(a)(10)(A)(v) of the Act.

**Proposed §300.136**, regarding the right of a private school official to submit to the SEA a complaint related to the LEA's compliance with the timely and meaningful consultation requirements, would incorporate the new provisions in section 612(a)(10)(A)(v) of the Act.

**Proposed §300.137(b) and (c)**, regarding determination of services to parentally-placed private school children with disabilities, generally would retain the current provisions in §300.454(a), (b)(4), and (c). **Proposed §300.137(a)** also would include language from current §300.455(a)(3), providing that a parentally-placed private school child with a disability has no individual entitlement to receive some or all of the special education and related services that the child would receive if enrolled in a public school. This is an important clarification of the different responsibilities that public schools have for providing special education and related services to parentally-placed private school children with disabilities. Under the Act, LEAs have an obligation to provide the group of parentally-placed private school children with disabilities with equitable participation in the services funded with Federal

IDEA funds. Because Federal funding constitutes only a portion of the excess costs of providing special education and related services to a child with disabilities, LEAs, in consultation with representatives of the private schools, will have to make decisions about how best to use the available Federal funds to address the needs of the parentally-placed private school children with disabilities as a group. In some LEAs, geography, school location, and the needs of the parentally-placed private school children with disabilities may make it possible for most, or even all of those children to receive some services under section 612(a)(10)(A) of the Act. In other cases, the Federal funds available may not be sufficient to provide all of these children with special education and related services. Decisions about how best to use the available Federal funds to ensure equitable participation of the group of parentally-placed private school children with disabilities are left to LEA personnel, in consultation with the private school representatives, who understand what is feasible and appropriate in particular situations.

**Proposed §300.138**, regarding equitable services provided to parentally-placed private school children with disabilities, would retain the current provisions in §300.455(a)(1) and (2), and (b), regarding standards for personnel who provide services to parentally-placed private school children, different amounts of services that may be provided to parentally-placed private school children as compared with those provided to children in public schools, and the provision of services for each parentally-placed private school child who has been designated to receive services in accordance with a services plan. The proposed regulation also would include language from section 612(a)(10)(A)(vi) of the Act, which provides that the special education and related services be provided directly by employees of the public agency or through contract and that special education and related services, including materials and equipment, be secular, neutral and nonideological.

**Proposed §300.139**, regarding the location of services and transportation, generally would retain the current provisions in §300.456 that clarify that LEAs may provide special education and related services funded under Part B of the Act on site at the private, including religious, schools to the extent consistent with law. It should be noted that LEAs should provide such services for parentally-placed private school children with disabilities on site at their school, unless there is a compelling rationale for these services to be provided off site.

**Proposed §300.140**, regarding the unavailability of due process complaints, except for child find and the availability of State complaints, would retain the current provisions in §300.457. **Proposed §300.140(b)** would clarify that the State complaint procedures would be used to address complaints about the implementation of the consultation process in **proposed §300.134**. **Proposed §300.141**, regarding the requirement that funds not benefit a private school, would retain the current provisions in §300.459. **Proposed §300.142** would combine the requirements of current §§300.460 and 300.461 regarding the use of public school personnel and private school personnel. **Proposed §300.143**, regarding the prohibition of separate classes, would retain the requirements in current §300.458.

**Proposed §300.144** would incorporate provisions in section 612(a)(10)(A)(vii) of the Act regarding property, equipment, and supplies for the benefit of private school children with disabilities and would replace the current provisions in §300.462(a). The proposed regulation would retain the current provisions in §300.462(b) through (e).

#### **Children With Disabilities in Private Schools Placed or Referred by Public Agencies**

**Proposed §§300.145, 300.146, and 300.147**, regarding children with disabilities placed in or referred to private schools by public agencies, generally would retain the current provisions in §§300.400, 300.401, and 300.402, which provide that children so placed or referred receive special education and related services in conformity with an IEP at no cost to the parents. This would be consistent with the requirement in section 612(a)(10)(B)(ii) of the Act, which provides that the SEA determine whether such private schools meet the standards that apply to the SEA and LEAs and that children served have all the rights the children would have if served by these agencies. **Proposed §300.146(b)** would continue to provide that publicly-placed children with disabilities be provided an education that meets the standards that apply to education provided by the SEA and LEAs, including the requirements of part 300, except for the requirements of §§300.18 and 300.156(c). This provision is intended to ensure that children with disabilities who are publicly-placed in or referred to a private school or facility as a means of providing these children with special education and related services would continue to retain the same right to FAPE that they would have if served directly by a public agency. However, because of statutory language in the ESEA that the requirements

regarding highly qualified teachers apply only to public school teachers, as well as related language in section 602(10) of the Act and **proposed §300.18**, we do not read **proposed §300.146(b)** as requiring teachers of children with disabilities who are placed in or referred to private schools by a public agency to meet either the "highly qualified teacher" standard in the ESEA or the "highly qualified special education teacher" standard in the Act. **Proposed §300.147**, regarding implementation by the SEA, would incorporate, without change, the provisions in current §300.402.

#### **Children With Disabilities Enrolled by Their Parents in Private Schools When FAPE is at Issue**

**Proposed §300.148**, relating to placement of children with disabilities in private schools when the provision of FAPE is at issue, generally would retain the current provisions in §300.403(a), (c), and (d). **Proposed §300.148** would remove, as unnecessary, language currently in §300.403(b), which provides that disagreements regarding the availability of an appropriate program for the child and the question of financial responsibility are subject to due process procedures. Disputes about these matters would be subject to the due process procedures even without this provision, because the central issue in such disputes is whether the public agency has made FAPE available to the child. Consistent with statutory language, **proposed §300.148(b)** would include the term "school" after "elementary." **Proposed §300.148(d)** would modify current §300.403(e), based on the specific provisions in section 612(a)(10)(C)(IV) of the Act.

The current provision on documentation of SEA responsibility for general supervision in §300.141(a) and (b) would be removed consistent with statutory changes regarding documentation. **Proposed §300.149**, regarding SEA responsibility for general supervision, would replace current §300.600(a) and incorporate language in section 612(a)(11) of the Act to include a new provision referencing the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11431. We also are adding a phrase to §300.149(a)(2) to clarify that the SEA is not responsible for exercising general supervision for education programs for children with disabilities in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. Current §300.600(b) also would be removed as a result of statutory changes regarding submission of State information.

New language referencing the State monitoring and enforcement responsibilities in **proposed §§300.602 and 300.606 through 300.608** would be added in §300.149(b) because State monitoring and enforcement are central to the SEA's exercise of general supervision. **Proposed §300.149(c)** and (d) respectively, would incorporate current §300.600(c), clarifying that Part B does not limit the responsibility of agencies other than educational agencies to provide or pay for some or all of the cost of FAPE and §300.600(d), regarding the ability of a Governor or other individual to assign to a public agency, other than the SEA, responsibility for ensuring that the requirements of Part B are met for students with disabilities convicted as adults and incarcerated in adult prisons. As a general matter, for educational purposes, students who had been enrolled in a BIA funded school and are subsequently convicted as an adult and incarcerated in an adult prison are the responsibility of the State where the adult prison is located. The Secretary is seeking comment on whether further clarification on this issue is warranted.

**Proposed §300.150** would incorporate language from current §300.143 regarding SEA implementation of procedural safeguards, with a revision. Consistent with other changes to remove State documentation requirements, **proposed §300.150** would require States to have policies in effect, rather than on file with the Department. The cross-reference also would be updated. Current §300.145, regarding recovery of funds for misclassified children, would be removed. Under section 611 of the Act, funds are no longer distributed based on a count of the children with disabilities served in a given fiscal year.

#### State Complaint Procedures

In 1992, the Department moved these procedures into part 300 from 34 CFR 76.780 through 76.782 based on a decision to place the complaint procedures into the specific program regulations to which they relate. **Proposed §300.151**, regarding the adoption of State complaint procedures, would incorporate the current provisions in §300.660, with one substantive change. **Proposed §300.151(b)(1)** would remove the reference to monetary reimbursement, so as not to imply that reimbursement would be appropriate in the majority of State complaints. **Proposed §300.152**, regarding minimum State complaint procedures, would retain the current provisions in §300.661, with several changes. **Proposed §300.152(a)(3)** would be added in order to incorporate into the State complaint procedures an opportunity for a public agency to

respond to a complaint, including a chance to make a proposal to resolve the complaint, and, with the consent of the parent, to engage the parent in mediation or other alternative means of dispute resolution. This change would encourage meaningful informal resolution of disputes between the parties to the dispute. **Proposed §300.152(b)(1)** would add a provision that would allow extensions of the 60-day time limit if the parties agree to extend the timelines so that they can engage in mediation or other alternative means of dispute resolution. This change is intended to support cooperative dispute resolution efforts, and not to result in uniform extensions. **Proposed §300.152(c)(1)** would revise the language in current §300.661(c)(1) to provide a simplified process for setting aside complaints that also are the subject of a due process hearing, which should aid State implementation of the State complaint process. Finally, current §300.661(c)(3) regarding a complaint involving a public agency's failure to implement a due process decision would be removed. The enforcement and implementation of due process hearing decisions are matters in the province of State and Federal courts.

**Proposed §300.153**, regarding the filing of a complaint, would retain the current provisions in §300.662, with some changes. **Proposed §300.153(b)(3)** and (4) would add new information requirements for complaints, similar to the basic notice requirement for filing a due process complaint, in order to give the public agency the information that would allow it to attempt to resolve the complaint at the earliest opportunity. **Proposed §300.153(c)** would revise the language in current §300.662(c) to require that the complaint must allege a violation that occurred not more than one year prior to the date the complaint is received, removing references to longer periods for continuing violations and for compensatory services claims, to ensure expedited resolution for public agencies and children with disabilities. A one-year timeline is reasonable, and will assist in smooth implementation of the State complaint procedures. Finally, **proposed §300.153(d)** would add a new requirement that the party filing a complaint forward a copy to the public agency involved at the same time as the party files the complaint with the SEA. This will ensure that the public agency involved has knowledge of the issues raised, and an opportunity to resolve them directly with the complaining party.

#### Methods of Ensuring Services

**Proposed §300.154**, regarding methods of ensuring services, generally would retain the current

provisions in §300.142. Consistent with changes in section 612(a)(11) of the Act, the proposed regulation would clarify in §300.154(b)(1)(i), that a public agency may fulfill its obligation to ensure FAPE either directly or through contracts or other arrangements pursuant to §300.154(a) or (c). Likewise, the proposed regulation would clarify, in §300.154(b)(2), that the LEA or State agency is authorized to claim reimbursement and, in §300.154(c)(3), that other appropriate written methods also must be approved by the Secretary. Consistent with statutory changes regarding submission of State information, the proposed regulation would remove the current regulatory language in §300.142(d), that the State have on file with the Secretary, information to demonstrate that the requirements of this regulation are met. However, as reflected in **proposed §300.704(a)(3)**, section 611(e)(1)(C) of the Act requires that States certify to the Secretary that agreements to establish responsibility for services are current before the State may expend section 611 funds for State administration.

**Proposed §300.154(d)(2)(iv)** would include a new provision that to access the parent's public insurance proceeds, the public agency must obtain parental consent, in accordance with **proposed §300.622** the first time that access is sought, and notify parents that refusal to allow access to their public insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. Under Part B of the Act, special education and related services, as well as supplementary aids and services and supports that an IEP Team determines a child with a disability needs in order to receive FAPE, must be provided at no cost to the parents or the child. Use of a parent's insurance often imposes costs to the parent that are not, and often cannot be known at the time the costs are billed to the insurance provider. Under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA), a child's records cannot be released without parental consent, except for a few specified exceptions. No FERPA exception permits public agencies to release educational records for insurance billing purposes without a parent's consent. We must ensure that a parent consents to the release of a child's records for that purpose and that the parents are informed that refusing to give consent to the release of education records for that purpose will not prevent a child from receiving the services that are in the child's IEP.

**Proposed §300.154(e)** would retain the current requirements regarding children with disabilities who

are covered by private insurance. **Proposed §300.154(f), (g), and (h)**, respectively, regarding use of Part B funds, proceeds from public and private insurance, and construction are essentially the same as paragraphs (g), (h), and (i) of §300.142 of the current regulations.

#### **Additional Eligibility Requirements**

**Proposed §300.155**, regarding hearings for LEA eligibility, would remove the current requirements in §300.144 that States have procedures on file with the Secretary, but generally would retain the requirement that States have procedures to give an LEA notice and an opportunity for a hearing prior to a final determination that it is not eligible for funds under Part B.

Current §§300.135 and 300.136, regarding a comprehensive system of personnel development and personnel standards, would be removed consistent with the statutory removal of these provisions in the Act (see section 612(a)(14) and (15) of the Act in effect before December 3, 2004) relating to the comprehensive system of personnel development and personnel standards.

**Proposed §300.156**, regarding personnel qualifications, would include the statutory provisions related to States' establishment and maintenance of personnel qualifications for special education teachers that align Part B of the Act with the highly qualified teacher provisions in section 1119(a)(2) of the ESEA; and also address personnel qualifications for related services providers and paraprofessionals. As provided in note 21 of the Conf. Rpt., the incorporated provisions require that special education teachers obtain full State certification as special education teachers, but it does not prevent regular education and other teachers who are highly qualified in particular subjects from providing instruction in core academic subjects to children with disabilities in those subjects. For example, a reading specialist who is highly qualified in reading instruction, but who is not certified as a special education teacher, would not be prohibited from providing reading instruction to children with disabilities. **Proposed §300.156(a)** contains the general requirement that a State's qualifications ensure that personnel carrying out the purposes of part 300 are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

**Proposed §300.156(b)** would incorporate the provisions in section 612(a)(14)(B) of the Act

regarding personnel qualifications for related services providers and paraprofessionals. This would include the requirement that the State's standards must ensure that related services personnel and paraprofessionals meet qualifications that are consistent with any State-approved or recognized certification, licensing, registration or other comparable requirements for their professional discipline. These procedures also must ensure that related services personnel who deliver services meet applicable qualification standards and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis. **Proposed §300.156(b)** reflects the comment in note 97 of the Conf. Rpt. that the current regulations requiring related services providers to meet the highest State standard applicable to their profession across all State agencies have established an unreasonable standard for SEAs to meet, and as a result, have led to a shortage of the availability of related services for students with disabilities. Conferees intended for SEAs to establish rigorous qualifications for related services providers to ensure that students with disabilities receive the appropriate quality and quantity of care. SEAs are encouraged to consult with LEAs, other State agencies, the disability community, and professional organizations to determine the appropriate qualifications for related services providers, including the use of consultative, supervisory, and collaborative models to ensure that students with disabilities receive the services described in their individual IEPs. To that end, **proposed §300.156(b)(2)(iii)**, similar to the current regulation in §300.136(f), generally would permit States to allow paraprofessionals and assistants who are appropriately trained and supervised to assist in providing special education and related services under Part B of the Act to children with disabilities.

**Proposed §300.156(c)** would incorporate the new requirement in section 612(a)(14)(C) of the Act that all special education teachers be highly qualified by the deadline established in the ESEA (the end of the 2005-2006 school year). It would also specify that this requirement applies only to public school special education teachers, in light of the statutory definition of "highly qualified" in section 602(10) of the Act. **Proposed §300.156(d)** would include the statutory authorization for a State to adopt a policy requiring LEAs to take measurable steps to recruit, hire, train, and retain highly qualified personnel.

**Proposed §300.156(e)** would incorporate the language in section 612(a)(14)(E) of the Act, regarding the rule of construction that these provisions do not create a right of action on behalf of an individual student for the failure of a particular

SEA or LEA staff person to be highly qualified or prevent a parent from filing a State complaint with the SEA about staff qualifications under §§300.151 through 300.153 of the proposed regulations.

**Proposed §300.157**, regarding performance goals and indicators, would revise the current §300.137, consistent with the revised provisions in section 612(a)(15) of the Act. **Proposed §300.157(a)(2)** would include a new provision that aligns the goals and indicators with the State's definition of adequate yearly progress, including progress by children with disabilities, under section 1111(b)(2)(C) of the ESEA. **Proposed §300.157(a)(3)** would retain the current provision in §300.137(b), that public agencies must address graduation and dropout rates. In order to conform to the language in section 612(a)(15) of the Act, the proposed regulation would contain the following changes: **proposed §300.157(a)(4)** would remove from the current provision in §300.137(a)(2), the term "maximum" before "extent appropriate" and add the word "any" before "other goals and standards for all children established by the State." Likewise, **proposed §300.157(b)** would remove from the current provision in §300.137(b), the words appearing after the word, "achieving" and add, in their place, the words, "the goals described in paragraph (a) of this section, including measurable annual objectives for progress by children with disabilities under section 1111(b)(2)(C)(v)(II)(cc) of the ESEA; and". **Proposed §300.157(c)** would change the requirement for reporting to the public and to the Secretary in current §300.137(c) from every two years to annually and would provide that elements of the report under section 1111(h) of the ESEA may be included in the annual report under Part B of the Act.

**Proposed §300.160**, regarding participation in assessments, would replace §§300.138 and 300.139 of the current regulations and would incorporate the changes in section 612(a)(16) of the Act. For reasons of burden reduction described throughout this preamble, the proposed regulation would remove the current requirement in §300.138 that the State have information on file with the Secretary.

Consistent with language in section 613(a)(16) of the Act, **proposed §300.160(a)** would add to the current provision in §300.138(a) the word "all" before the word "children", and before the phrase "general State and districtwide assessment programs" and would clarify that this requirement includes assessments described in section 1111 of the ESEA. **Proposed §300.160(a)** also would remove, from the current provision in §300.138(a), "modifications in



administration” and add, in its place, “alternate assessments” and would add after the word “necessary”, the words, and “as indicated in their respective IEPs.”

**Proposed §300.160(b)** would require that States, (or, in the case of districtwide assessments, LEAs) develop guidelines for providing appropriate accommodations in assessments. **Proposed §300.160(c)(1)** would address guidelines for participation in alternate assessments for those children who cannot participate in regular assessments as indicated in their IEPs. **Proposed §300.160(c)(2)** would include a provision that, in the case of assessments of student academic progress, alternate assessments and guidelines under **proposed §300.160(c)(1)** are aligned with the State’s challenging academic content and challenging student academic achievement standards or the alternate achievement standards, if adopted under the regulations implementing section 1111(b)(1) of the ESEA. **Proposed §300.160(c)(3)** would require that the State conduct the alternate assessments described in section 1111(b)(1) of the ESEA.

**Proposed §300.160(d)** would incorporate the requirement in section 612(a)(16)(D) of the Act for the SEA, in the case of a statewide assessment, and the LEA, in the case of a districtwide assessment, to report to the public on the assessment of children with disabilities with the same frequency and in the same detail that it reports on the assessment of nondisabled children, and replace the current requirements in §300.139.

**Proposed §300.160(e)** would incorporate the new requirement in section 612(a)(16)(E) of the Act that the SEA, in the case of statewide assessments, and the LEA, in the case of districtwide assessments, to the extent possible, use universal design in developing and implementing assessments.

Consistent with section 612(a)(17) of the Act, the current provisions in §300.155, regarding use of funds; §300.152, regarding non-commingling; and §300.153, regarding State-level nonsupplanting, would be combined into **proposed §300.162**. The proposed regulation generally would retain the requirements that Part B funds be expended in accordance with Part B of the Act, that Part B and State funds not be commingled, and that Part B funds be used to supplement, and in no case to supplant other Federal, State, and local funds expended for special education and related services. Consistent with statutory changes discussed previously, the proposed regulation would eliminate the current

provision in §300.155, that States have policies and procedures on file with the Secretary; would replace the current provisions in §300.152(a), that States provide the Secretary an assurance; and would replace the current provision in §300.153(a)(2), that the State have information on file with the Secretary demonstrating compliance with the use of Part B funds to supplement and not supplant, with straightforward statements of the statutory requirements. These changes would be consistent with changes in section 612(a) of the Act regarding State submission of information. **Proposed §300.162(b)(2)** would retain the current provision in §300.152(b) clarifying that use of a separate accounting system including an audit trail of expenditures of Part B funds would satisfy the prohibition on commingling.

**Proposed §300.162(c)(1)** would retain the current provision in §300.153(a)(1), regarding the basic non-supplanting requirement. **Proposed §300.162(c)(2)** would retain the current provision in §300.153(b), regarding the Secretary’s ability to waive, in whole or in part, the State-level nonsupplanting requirement if the State provides clear and convincing evidence regarding the availability of FAPE to all children with disabilities. This waiver would be addressed further in **proposed §300.164**.

**Proposed §300.163** generally would retain the current provisions in §300.154, regarding maintenance of State financial support. However, consistent with the language in section 612(a) of the Act, the proposed regulation would eliminate the provision regarding information that States must have on file with the Secretary demonstrating, on either a total or per-capita basis, that the State will not reduce the amount of State financial support for special education and related services for children with disabilities.

**Proposed §300.164**, regarding waiver of the requirement regarding supplementing and not supplanting Part B funds, would retain the current provisions in §300.589, except that to reduce regulatory burden, **proposed §300.164(c)(4)** would reduce the number of entities with which a State must consult when determining that FAPE is currently available to all eligible children with disabilities in the State, and eliminate the requirement for a summary of the input of the entities consulted.

**Proposed §300.165(a)** would incorporate the language in section 612(a)(19) of the Act regarding public participation in the adoption of policies and procedures to implement Part B of the Act, which is

the same as the current provision in §300.148(a)(1). Current §300.148(a)(2) and (b), regarding alternate ways of meeting the public participation requirement and the requirement that the State documentation be on file with the Secretary, would be removed. The current provisions in §§300.280 through 300.284 regarding public participation also would be removed. Removing the requirement for States to submit extensive documentation to the Secretary on how the public participation requirements are met should reduce regulatory burden on States. States are required to comply with the public participation requirements of the General Education Provisions Act, in 20 U.S.C. 1232d(b)(7), as provided for in **proposed** §300.165(b), as well as State-specific requirements, in adopting policies and procedures relating to Part B of the Act, which should provide sufficient opportunities for public participation.

**Proposed** §300.166 would incorporate the language in section 612(a)(20) of the Act, regarding the rule of construction on use of Federal funds to satisfy State-mandated funding of obligations to LEAs for purposes of complying with **proposed** §§300.162 and 300.163.

#### State Advisory Panel

**Proposed** §300.167, regarding State advisory panels, would incorporate the provisions in section 612(a)(21)(A) of the Act and would remove from current §300.650, language regarding information on file with the Secretary. The proposed regulation also would remove the provision from current §300.650 permitting modification of existing advisory panels to be consistent with section 612(a)(21)(A) of the Act.

**Proposed** §300.168, regarding the membership of State advisory panels, generally would retain the current provisions in §300.651. In addition, **proposed** §300.168(a)(5) and (10), would incorporate the statutory references to officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11431 et seq., and a representative from the State child welfare agency responsible for foster care, respectively. Consistent with the Act, **proposed** §300.168(b) would include a provision in the special rule that clarifies that for panel membership a majority of the members of the panel must be individuals with disabilities or parents of children with disabilities (ages birth through 26).

**Proposed** §300.169, regarding duties of the advisory panel, generally would retain the current provisions of §300.652, except that the current language in

§300.652(b), regarding advising on eligible students with disabilities in adult prisons, would be removed. Given the breadth of its statutory responsibilities, nonstatutory mandates on the State advisory panels would be removed.

To provide greater flexibility for States in the operations of advisory panels, the current provision in §300.653, regarding procedures of the advisory panel, would be removed.

#### Other Provisions Required for State Eligibility

**Proposed** §300.170, regarding suspension and expulsion rates, would retain most of the current provisions in §300.146, but would remove the language that the States have information on file with the Secretary, consistent with statutory changes on State submission of information. In addition, consistent with section 612(a)(22) of the Act, **proposed** §300.170(b) would replace, from the current §300.146(b), “behavioral interventions” with “positive behavioral interventions and supports.”

**Proposed** §300.171, regarding the annual description of the use of Part B funds, would clarify the current §300.156(a)(1) that addresses the amounts retained for State administration and State-level activities, generally would retain the current provisions in §300.156(a)(2) and (b), and would remove the current provision in §300.156(c) regarding percentages distributed to LEAs since this information does not assist the Department in determining whether an SEA is complying with Part B of the Act in this regard. **Proposed** §300.171 also would add a new paragraph (c) to clarify that, based on section 611(g)(2) of the statute, the provisions of this section do not apply to the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated States.

**Proposed** §300.172, regarding access to instructional materials, would incorporate the new language in section 612(a)(23) of the Act regarding the timely provision of instructional materials to blind persons or other persons with print disabilities. **Proposed** §300.172 uses “persons” to conform to the language in the Act. However, in the context of this regulatory provision, “persons” means “children.” **Proposed** §300.172(a) would repeat the requirement from section 612(a)(23)(A) of the Act that the State must adopt the National Instructional Materials Accessibility Standard (NIMAS) in a timely manner after its publication in the Federal Register by the Department. The NIMAS will be the subject of a

separate rulemaking process. In that proposed rulemaking document, we will propose to add the NIMAS to part 300 as an appendix.

**Proposed §300.172(b)** would incorporate the provision in section 612(a)(23)(B) of the Act that a State is not required to coordinate with the National Instructional Materials Accessibility Center (NIMAC) and the requirements that apply if an SEA chooses not to coordinate with the NIMAC. **Proposed §300.172(b)(3)** would provide that nothing in this section would relieve an SEA of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats, but who do not fall within the category of children for whom the SEA may receive assistance from NIMAC, receive those instructional materials in a timely manner. Timely access to appropriate and accessible instructional materials is an inherent component of public agencies' obligations under the Act to ensure that FAPE is available for children with disabilities and that they participate in the general education curriculum as specified in their IEPs. The provisions in section 612(a)(23) of the Act will assist SEAs in carrying out that responsibility for most children with disabilities who need accessible instructional materials. Section 674(e)(3)(A) of the Act limits the authority of the NIMAC to provide assistance to SEAs and LEAs in acquiring instructional materials for children who are blind, have visual disabilities, are unable to read or use standard printed materials because of physical limitations, and children who have reading disabilities that result from organic dysfunction, as provided for in 36 CFR §701.10(b). Clearly, SEAs and LEAs that choose to use the services of the NIMAC will be able to assist blind persons or other persons with print disabilities who need accessible instructional materials through this mechanism. However, SEAs and LEAs still have an obligation to provide accessible instructional materials in a timely manner to other children with disabilities, who also may need accessible materials even though SEAs and LEAs may not receive assistance for these children from NIMAC.

**Proposed** paragraph §300.172(c) would incorporate the provision in section 612(a)(23)(C) of the Act regarding preparation and delivery of files if an SEA chooses to coordinate with the NIMAC.

In accordance with section 612(a)(23)(D) of the Act, §300.172(d) would require an SEA, to the maximum extent possible, to collaborate with the State agency responsible for assistive technology programs. **Proposed §300.172(e)** contains, in accordance with

section 612(a)(23)(E) of the Act, definitions of blind persons or other persons with print disabilities, NIMAC, NIMAS, and specialized formats.

**Proposed §300.173**, regarding State policies and procedures designed to prevent inappropriate overidentification and disproportionality, would incorporate the new provision in section 612(a)(24) of the Act. This proposed regulation would require the State to have in effect, consistent with section 618(d) of the Act, policies and procedures to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment.

**Proposed §300.174** would incorporate the new provision in section 612(a)(25) of the Act and would prohibit State and LEA personnel from requiring parents to obtain prescriptions for controlled substances for a child as a condition of the child's school attendance, the child's receipt of a Part B evaluation, or the child's receipt of services. **Proposed** paragraph §300.174(b) would contain the statutory rule of construction in section 612(a)(25)(B) of the Act and would clarify that this provision does not create a Federal prohibition against teachers and other school personnel consulting or sharing with parents their observations on the student's functional or academic performance, and behavior in the classroom or school, or the child's possible need for an initial evaluation for special education and related services.

**Proposed §300.175**, regarding the SEA as provider of FAPE or direct services, generally would retain the current provisions in §300.147. The proposed regulation would remove the provision that States must have information on file with the Secretary demonstrating that they meet these requirements, consistent with statutory changes discussed previously.

Consistent with the statutory changes, **proposed §300.176**, regarding exceptions for prior State plans and modifications to the plans, generally would combine and retain the current provisions in §§300.111 and 300.112, with some minor changes. The date in **proposed §300.176(a)** would be changed to December 3, 2004, the date on which the Act was signed into law. Consistent with the statute, **proposed §300.176(b)(1)** would revise the current language from "State decides are necessary" to "State determines necessary." Consistent with the Act, **proposed §300.176(b)(2)** would replace references to

“policies and procedures” with “application” and “original” State plan. Consistent with the Act, **proposed** §300.176(c)(1) would reference December 3, 2004, the date on which the Act was signed into law.

### Department Procedures

**Proposed** §300.178, regarding the Secretary’s determination of State eligibility to receive a grant, would retain the current requirements in §§300.113(a) and 300.580.

**Proposed** §300.179, regarding notice and hearing before determining a State is not eligible to receive a grant, would retain the current requirements in §§300.113(b) and 300.581.

**Proposed** §300.180, regarding the hearing official or panel, would retain the current requirements in §300.582.

**Proposed** §300.181, regarding the hearing procedures, would retain the current requirements in §300.583.

**Proposed** §300.182, regarding the initial and final hearing decisions, would retain the current requirements in §300.584 except **proposed** §300.182(h) would be revised to clarify that the Secretary rejects or modifies the initial decision of the Hearing Official or Hearing Panel if the Secretary finds that it is clearly erroneous.

**Proposed** §300.183, regarding filing requirements, would retain the current requirements in §300.585.

**Proposed** §300.184, regarding judicial review, would retain the current requirements in §300.586.

**Proposed** §300.186, regarding assistance under other Federal programs, would incorporate the provisions in section 612(e) of the Act. **Proposed** §300.186 would clarify the current requirements in §300.601, regarding the relation of Part B to assistance under other Federal programs, and would continue to provide that Part B of the Act may not be construed to permit a State to reduce or alter eligibility for medical or other assistance for children with disabilities under titles V and IX of the Social Security Act, but would reference “with respect to the provision of FAPE for children with disabilities” instead of “services that are part of FAPE.”

### By-pass for Children in Private Schools

The proposed regulations regarding by-pass for children in private schools would incorporate changes in section 612(f) of the Act and would represent the first amendments to these regulations since they were adopted in 1984. Because the statutory changes related to the participation of parentally-placed private school children with disabilities should make it more likely that these procedures will be implemented, these proposed revisions would align the by-pass provisions from Part B of the Act with the general by-pass procedures in the Department’s general administrative regulations in 34 CFR 76.670 through 76.677 that apply to other Department programs, including programs under titles I and IX of the ESEA. This alignment should help to ensure consistent implementation of the by-pass provisions throughout the Department.

**Proposed** §300.190, regarding the general by-pass provision, would revise the current requirements in §300.480. Consistent with changes in section 612(f)(1) of the Act, the proposed regulation would retain the current authority for a by-pass and would add additional authority in cases where the Secretary determines that an SEA, LEA, or other entity has substantially failed or is unwilling to provide for equitable participation. The proposed regulation generally would retain the current provision in §300.480(b) regarding waiver of the requirements in these proposed regulations governing parentally-placed private school children with disabilities.

**Proposed** §300.191, regarding services under a by-pass, generally would retain the current provisions in §300.481, but with some exceptions. **Proposed** §300.191(a)(1) would replace “The prohibition” with “Any prohibition” and would add “and” at the end of §300.191(a)(1). The current provision in §300.481(a)(3), regarding policies and procedures, would be removed consistent with other burden reduction changes in these proposed regulations. **Proposed** §300.191(a) would add “and, as appropriate, LEA or other public agency officials” and paragraphs (b) and (c)(1) of **proposed** §300.191 would add “LEA or other public agency.” These changes are necessary to ensure effective implementation of the by-pass provision within an affected State because, in general, a by-pass would be implemented only in a specific LEA or other public agency within the State and not statewide. Thus, the change in **proposed** §300.191(a) would ensure that the Secretary also consults with appropriate agency

officials in any affected LEA or public agency within the State.

**Proposed §300.191(c)(1)**, regarding the calculation of the amount per child that is to be paid to providers, would revise the current provision in §300.481(c)(1) to reflect the provision in section 612(f)(2)(A) of the Act.

**Proposed §§300.192 and 300.193**, regarding notice of intent to implement a by-pass and request to show cause, would retain the current provisions in §§300.482 and 300.483, but would add “LEA or other public agency” for consistency with statutory language.

**Proposed §300.194**, regarding the show cause hearing, would retain the current provisions in §300.484 and would add language to address statutory changes and align the proposed regulation with the by-pass regulations in 34 CFR 76.673 and 76.674 that apply to other Department programs. **Proposed §300.194(a)** would add “LEA or other public agency” to make the provisions consistent with language in section 612(f) of the Act. **Proposed §300.194(a)(3)** is a new provision that would provide an opportunity for an SEA, LEA, or other public agency and representatives of private schools to be represented by legal counsel and to submit oral or written evidence and arguments. **Proposed §300.194(d)** would incorporate the by-pass provision in 34 CFR 76.763(b), and would specify that the designee conducting the hearing has no authority to require or conduct discovery. **Proposed §300.194(g)** would incorporate the by-pass provision in 34 CFR 76.674(b), and would specify that within 10 days after the hearing, the designee indicates that a decision will be issued on the basis of the existing record or requests further information from one or more of the parties to the hearing.

**Proposed §300.195**, regarding the show cause hearing decision, would retain the current provisions in §300.485 and add language to address statutory changes and to align the proposed regulation with the by-pass regulations in 34 CFR 76.675. **Proposed §300.195(a)(1)** would incorporate the 120-day time period for closing the record of the hearing from the by-pass provision in 34 CFR 76.675(a)(1). **Proposed §300.195(b)** would replace the 15-day time period to submit comments and recommendations on the designee’s decision with the 30-day time period consistent with 34 CFR 76.675(b). **Proposed §300.195(c)** would replace “SEA” with “all parties to the show cause hearing” in order to make the

provision consistent with language in section 612(f) of the Act.

**Proposed §§300.196 and 300.197**, regarding filing requirements and judicial review, would retain the current regulations in §§300.486 and 300.487, respectively.

**Proposed §300.198**, regarding continuation of a by-pass, is a new provision that would incorporate the continuation of a by-pass requirement in 34 CFR 76.677 and would permit continuation of the by-pass until the Secretary determines that the SEA, LEA, or other public agency will meet the requirements for providing services to private school children.

**Proposed §300.199**, regarding State administration, would incorporate the requirements in section 608 of the Act requiring that rulemaking conducted by the State conform to the purposes of Part B of the Act, that States minimize the number of rules, regulations, and policies to which LEAs and schools are subject to under the Act, and identify in writing any rule, regulation, or policy that is State-imposed and not required under the Act and its implementing regulations.

#### Subpart C--LEA Eligibility

**Proposed §300.200** would be similar to the current §300.180 regarding the conditions of LEA eligibility, but would be revised consistent with the change in section 613(a) of the Act to require LEAs to provide assurances, rather than demonstrate, to the State that they meet the eligibility conditions. Cross-references to those eligibility conditions would be updated.

**Proposed §300.201**, regarding consistency with State policies, would be essentially the same as the current §300.220(a), with appropriate updating to reflect the structure of these proposed regulations. Current §300.220(b) concerning policies on file with the SEA would be removed in light of the statutory change requiring only that an LEA provide assurances regarding its policies and procedures.

**Proposed §300.202** would combine the provisions addressed in current §§300.184(c) and 300.185, regarding excess cost requirements, and current §300.230, regarding use of funds, with appropriate updating. Current §300.184(a) would be removed because it is duplicative of the requirement in **proposed §300.202(a)(2)** that Part B funds must be used only to pay the excess costs of special education and related services to children with disabilities. The definition of excess costs in the current §300.184(b)

would be moved to **proposed** §300.16 of subpart A of these proposed regulations.

**Proposed** §300.203 would incorporate current §300.231 on LEA maintenance of effort, with appropriate updating to reflect the structure of these proposed regulations. The standard for determining whether an LEA is complying with the LEA maintenance of effort requirement would be in **proposed** §300.203(b) and would be substantively the same as current §300.231(c). The language in current §300.231(b) would be removed, based on the statutory change requiring LEAs to provide assurances in their applications to the State, rather than information that demonstrates their compliance.

**Proposed** §300.204 would replace current §300.232, regarding the exceptions to the LEA maintenance of effort provision, with language that more closely reflects the language in section 613(a)(2)(B) of the Act and clarifies the conditions under which the LEA may reduce the level of expenditures under Part B of the Act below the level of expenditures for the preceding year. As a result, we would remove the provisions in the current §300.232(a) that limit the circumstances under which LEAs may reduce expenditures as a result of the voluntary departure of special education personnel only to situations in which those departing personnel are replaced with qualified, lower-salaried staff. In addition, the requirements that the voluntary departures be in conformity with existing board policies, collective bargaining agreements, and applicable State statutes would be removed. These changes would reduce regulatory burden on school districts and provide increased flexibility in funding decisions. However, the basic requirement that LEAs must ensure the provision of FAPE to eligible children, regardless of the costs, would remain the same.

**Proposed** §300.204(e) would add a condition based on section 611(e)(3) of the Act, regarding the assumption of costs by the high cost fund, under which an LEA may reduce its level of expenditures. **Proposed** §300.204(e) is needed because LEAs should not be required to maintain a level of fiscal effort based on costs that are assumed by the SEA's high cost fund.

Section 613(a)(2)(C)(i) of the Act was substantially revised to provide an adjustment to local fiscal effort in certain years in place of a provision in the prior law that permitted LEAs to use a portion of the Federal funds they received as local funds for special education. As a result, we would remove the current §300.233, which was based on the prior statutory

language, and replace it with **proposed** §300.205, which is based on the revised statute. **Proposed** §300.205 would add an exception that, if an SEA exercises its authority under §300.230(a), LEAs in the State may not reduce local effort under §300.205 by more than the reduction in the State funds they receive. Section 300.230 only applies if an SEA pays or reimburses all LEAs in the State 100 percent of the non-Federal share of the costs of special education and related services.

Under **proposed** §300.205, in years when the LEA receives an allocation of formula funds that exceeds the amount it received in the prior year, the LEA would be permitted to reduce the level of its local maintenance of effort amount by not more than 50 percent of the increase in its section 611 allocation. The LEA would then be required to use local funds equal to the reduction to carry out activities authorized under the ESEA, as explained in **proposed** §300.205(b). In subsequent years, an LEA that reduced local fiscal effort in accordance with **proposed** §300.205(a) would be required to meet this lower fiscal effort amount, unless it could again reduce local fiscal effort based on **proposed** §300.205. **Proposed** §300.205(c) would describe circumstances under which the SEA may prohibit an LEA from reducing the level of local expenditure. **Proposed** §300.205(d) would implement the provision in section 613(a)(2)(C)(iv) of the Act that provides that the amount of funds expended for early intervening services will count toward the maximum amount by which an LEA may reduce local maintenance of effort.

LEAs wanting to exercise the authority in section 613(a)(2)(C)(iv) of the Act in conjunction with the authority to use not more than 15 percent of the LEA's total grant for early intervening services under **proposed** §300.226 should use caution, however, because as noted in **proposed** §§300.205(a) and (d), and 300.226(a), the operation of the local maintenance of effort reduction provision and the authority to use Part B funds for early intervening services under section 613(f)(1) of the Act and **proposed** §300.226(a) would be interconnected. The decisions that an LEA makes about the amount of funds that it would use for one purpose would affect the amount that it may use for the other. The following examples illustrate how these provisions affect one another:

Example 1: In this example, the amount that is 15 percent of the LEA's total grant (see **proposed** §300.226(a)), which is the maximum amount that the LEA may use for early intervening services (EIS), is

greater than the amount that may be used for local maintenance of effort (MOE) reduction (50 percent of the increase in the LEA's grant from the prior year's grant) (see **proposed** §300.205(a)).

**Wrightslaw Note:** In the interest of space, we deleted the table of allocations and dollar amounts. They are available in the original Notice of Proposed Rulemaking at the U.S. Department of Education's website.

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With regard to the new statutory provision on which **proposed** §300.205 is based, note 122 of the Conf. Rpt. states:

The Conferees intend for school districts to have meaningful flexibility to use local funds that are generated from their reduction in the maintenance of effort. The Conferees do not intend that school districts have to use these local funds for programs exclusively authorized under the Elementary and Secondary Education Act of 1965. The conferees recognize that most state and local education programs are consistent with the broad flexibility that is provided in section 5131 of the Elementary and Secondary Education Act of 1965.

The Conferees intend that in any fiscal year in which the local educational agency or State educational agency reduces expenditures pursuant to section 613(a)(2)(C) or section 613(j), the reduced level of effort shall be considered the new base for purposes of determining the required level of fiscal effort for the succeeding year.

In order to effectuate the flexibility in the use of local funds suggested by this language, **proposed** §300.205(b) would provide that the local funds equal to the reduction in local expenditures for special education and related services authorized by **proposed** §300.205(a) may be used to carry out activities that could be supported with funds under the ESEA regardless of whether the LEA is actually using funds under the ESEA for those activities. An LEA can demonstrate that it meets the requirements in **proposed** §300.205(b) by showing that it has expended, for elementary and secondary education, an increased amount of local funds equal to the reduction under **proposed** §300.205(a) when compared to local expenditures for elementary and secondary education for the prior year.

**Proposed** §300.206, regarding schoolwide programs under title I of the ESEA, would be essentially the

same as the current §300.234, with appropriate updating.

**Proposed** §300.207, regarding personnel development, would reflect the new requirement under section 613(a)(3) of the Act that LEAs ensure that all needed personnel be appropriately and adequately prepared subject to the requirements that apply to SEAs regarding personnel qualifications and requirements under section 2122 of the ESEA.

Current §300.221 on implementation of the State's comprehensive system of personnel development (CSPD) would be removed, as section 612(a) of the Act no longer requires that a State develop and implement a CSPD.

**Proposed** §300.208 on permissive uses of LEA funds would revise the current §300.235 in the following ways: Paragraph (a)(2) from the current §300.235 would be removed, as the authority to use Part B funds to develop and implement an integrated and coordinated services system was removed from the statute. Paragraphs (a)(2) and (3) of **proposed** §300.208 would incorporate the new statutory provisions permitting LEAs to use Part B funds for early intervening services and to establish and implement cost or risk sharing arrangements for high cost special education and related services, consistent with section 613(a)(4)(A)(ii) and (iii) of the Act. Paragraph (b) of **proposed** §300.208 would incorporate the new statutory authority for LEAs to use Part B funds for administrative case management services related to serving children with disabilities in section 613(a)(4)(B) of the Act. Current §300.235(b) would be removed because that information would be conveyed by the introductory material in **proposed** §300.208(a), with the cross-references updated.

**Proposed** §300.209 would revise current §300.241, concerning treatment of charter schools and their students (based on changes in section 613(a)(5) of the Act), and would also incorporate current §300.312, regarding children with disabilities in public charter schools. Paragraph (a) of **proposed** §300.209 would include current §300.312(a), to clarify that children with disabilities who attend public charter schools retain all rights afforded under this part. **Proposed** §300.209(b) would include the provisions from section 613(a)(5) of the Act to clarify (in paragraph (b)(1)(i)) that, in providing services to children with disabilities attending charter schools that are public schools of the LEA, the LEA must provide supplementary and related services on site at the charter school to the same extent as it does at its other public schools. Paragraph (b)(1)(ii) of **proposed**

§300.209 would specify that an LEA must provide funds under Part B of the Act to the LEA's charter schools on the same basis as it provides funds to its other schools, including proportional distribution based on the relative enrollment of children with disabilities, and that it must provide those funds at the same time as the LEA distributes funds to its other public schools.

**Proposed §300.209(b)(2)** would include current §300.312(c), to provide that if the public charter school is a school of an LEA that receives funding under §300.705 and includes other public schools, the LEA is responsible for ensuring that the requirements of this part are met (unless State law assigns that responsibility to some other entity), and must meet the requirements of proposed paragraph (b)(1) of this section.

**Proposed §300.209(c)** would add current §300.312(b) (regarding public charter schools that are LEAs), to specify that a charter school covered by this paragraph is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity.

**Proposed §300.209(d)** would include current §300.312(d). Paragraph (d)(1) of **proposed §300.209** would provide that if a public charter school is not an LEA receiving funding under this part or a school that is part of an LEA receiving funding, the SEA is responsible for ensuring that the requirements of this part are met. **Proposed §300.209(d)(2)** would clarify that a State would not be precluded from assigning that responsibility to another entity, but the SEA must maintain the ultimate responsibility for ensuring compliance with this part.

**Proposed §300.210** would incorporate the new requirement in section 613(a)(6) of the Act that not later than two years after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004 (that is, not later than December 3, 2006), an LEA, when purchasing print instructional materials, must acquire those materials in the same manner as an SEA under **proposed §300.172**. **Proposed §300.210(b)(1)** also would make clear that an LEA would not be required to coordinate with the NIMAC, and **proposed §300.210(b)(2)** would explain that if it chooses not to so coordinate, the LEA would be required to provide an assurance to the SEA that the LEA will provide instructional materials to blind and other print disabled persons in a timely manner. For the reasons explained elsewhere in this preamble under the discussion of **proposed §300.172**, we would add paragraph (b)(3)

to **proposed §300.210** specifying that nothing in **proposed §300.210** would relieve an LEA of its obligations to ensure that children with disabilities who need instructional materials in accessible formats receive those instructional materials in a timely manner, even if it could not obtain assistance from NIMAC in doing so.

**Proposed §300.211** on LEAs providing information to the SEA to enable the SEA to carry out its duties under Part B of the Act would be essentially the same as the current §300.240(a), but would be appropriately updated. The current §300.240(b) regarding assurances the LEA would have to file with the SEA would be removed as unnecessary because that condition would be covered by **proposed §300.200**.

**Proposed §300.212** on public availability of LEA eligibility information would be essentially the same as current §300.242, but with appropriate updating.

**Proposed §300.213** would reflect the new provision in section 613(a)(9) of the Act regarding LEA cooperation with the Secretary's efforts under section 1308 of the ESEA to ensure the linkage of health and educational information pertaining to migratory children among the States.

**Proposed §300.220** on an exception for prior local plans would essentially consolidate the requirements in current §§300.181 and 300.182. In **proposed §300.220**, we use the term "policies and procedures" in place of the term "application," which is used in section 613(b)(2) of the Act because we use the term policies and procedures in the current regulation. The statutory authority for **proposed §300.220** is not new, and was not changed from prior law.

**Proposed §300.221** on notification of the LEA or State agency if determined ineligible, **proposed §300.222** on LEA and State agency compliance determinations, **proposed §300.223** on joint establishment of eligibility, and **proposed §300.224** on the requirements for establishing joint eligibility are essentially the same as current §§300.181, 300.196, 300.197, 300.190 and 300.192, respectively, but with appropriate updating.

The requirements in current §300.244 regarding permissible use of a portion of the LEA's Part B funds on coordinated services systems and current §§300.245 through 300.250 regarding LEA use of Part B funds in school based improvement plans would be removed, as the statutory authority for those uses has been eliminated.



**Proposed §300.226** would implement the new authority under section 613(f) of the Act, which provides that an LEA may use not more than 15 percent of the Part B funds it receives for a fiscal year, less certain reductions, if any, to develop and implement coordinated, early intervening services for children who have not been identified as eligible under the Act but who need additional academic and behavioral support to succeed in a general education environment. Paragraph (c) of **proposed §300.226** would clarify that nothing in **proposed §300.226** is construed to either limit or create a right to FAPE under Part B of the Act or to delay appropriate evaluation of a child suspected of having a disability. We have included the language regarding evaluation of children suspected of having a disability in **proposed §300.226(c)** because we believe it is critical to ensure that any child suspected of being a child with a disability is evaluated in a timely manner and without any undue or unnecessary delay. Proposed paragraph §300.226(d) would reflect the reporting requirement in section 613(f)(4) of the Act. The term “children” would be used in this provision, in lieu of the statutory term “students” to be consistent throughout part 300. **Proposed §300.226(e)** would implement the provision in section 613(f)(5) of the Act that funds to provide early intervening services may be used in conjunction with ESEA funds for early intervening services aligned with ESEA activities under certain circumstances.

**Proposed §300.227** would incorporate provisions from the regulations in current §§300.360 and 300.361 on direct services by the SEA when an LEA or State agency has not demonstrated its eligibility or has failed to apply for funds, is unable to establish and maintain programs of FAPE consistent with Part B of the Act, is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain programs of FAPE, or has one or more children best served by a regional or State program or service delivery system. **Proposed §300.227(a)(1)** would include the phrase “or elected not to apply for its Part B allotment” because there could be situations in which an LEA chooses not to accept funds under Part B of the Act. Finally, **proposed §300.227** would reflect editorial changes made to eliminate repetition.

**Proposed §300.228** on State agency eligibility would be essentially the same as current §300.194, but with the appropriate updating of cross-references.

**Proposed §300.229** regarding disciplinary information would be the same as current §300.576.

**Proposed §300.230** would incorporate the new provision from section 613(i) of the Act on exceptions to SEA maintenance of effort requirements for a State for which the amount of the State’s allocation under section 611 of the Act exceeds the amount available to the State for the preceding fiscal year and the State pays or reimburses all LEAs in the State, from State revenues, 100 percent of the non-Federal share of the costs of special education. Under these conditions, the SEA would be permitted to reduce its level of expenditures from State sources for the education of children with disabilities by not more than 50 percent of the amount of the increase in its section 611 allocation from the prior fiscal year, unless prohibited from doing so by the Secretary, as provided in **proposed §300.230(b)**. Paragraph (e)(2) of **proposed §300.230**, which is not in section 613(i) of the Act, would specify that if an SEA used its authority to reduce its effort under **proposed §300.230**, LEAs in the State would not be able to reduce local effort under **proposed §300.205** by more than the reduction in State funds that they receive. **Proposed §300.230(e)(2)** is necessary to ensure that SEAs and LEAs are not independently calculating the reduction in maintenance of effort permitted when a State is providing 100 percent of the non-Federal share of the costs of special education and related services.

#### **Subpart D--Evaluations, Eligibility Determinations, IEPs, and Educational Placements**

The provisions in subpart D of these proposed regulations would reflect the requirements of section 614 of the Act. As a result, the provisions on parental consent and evaluations and reevaluations contained in subpart E of current regulations would be moved to subpart D of these proposed regulations. Also, the provisions on IEPs contained in subpart C of the current regulations would be renumbered, and in some cases, have been moved to subpart D of these proposed regulations.

#### **Parental Consent**

**Proposed §300.300** regarding parental consent for initial evaluations, reevaluations, and the initial provision of services would replace §300.505 of the current regulations and would incorporate new requirements regarding parental consent contained in section 614(a)(1)(D) of the Act. Some of the provisions contained in **proposed §300.300** would be

similar to those contained in §300.505 of the current regulations, but with some differences.

**Proposed §300.300(a)(1)(i)** would incorporate section 614(a)(1)(D)(i)(I) of the Act, and would provide that with the exception of children who are wards of the State, the public agency proposing to conduct the evaluation must obtain informed parental consent before conducting an initial evaluation of a child to determine if the child qualifies as a child with a disability under the Act.

**Proposed §300.300(a)(1)(ii)** would retain the provision in §300.505(a)(2) of the current regulations that consent for the initial evaluation may not be construed as consent for the initial provision of special education and related services. The proposed regulations would use the term “initial provision” rather than the statutory term “receipt” of special education and related services. This would make clear that consent does not need to be sought every time a particular service is provided to the child. The proposed regulation would continue to refer to consent for the initial provision of services, in lieu of using the statutory language, which refers to “consent for placement for receipt of special education and related services.” This would be consistent with the revised language in section 614(a)(1)(D)(i)(I) of the Act and the Department’s position that placement refers to the provision of special education services rather than as a specific place, such as a specific classroom or specific school.

**Proposed §300.300(a)(2)(i)**, which would incorporate the new requirement in section 614(a)(1)(D)(iii) of the Act regarding informed parental consent prior to the initial evaluation for wards of the State, would set out the general rule that the public agency must make reasonable efforts to obtain informed consent from the parent for an initial evaluation if the child is a ward of the State and is not residing with the parent. **Proposed §300.300(a)(2)(ii)** would incorporate the language in section 614(a)(1)(D)(iii)(II) of the Act, which identifies the exceptions to this general rule. These include when the public agency cannot find the parent, despite reasonable efforts to do so, when parental rights have been terminated under State law, or when parental rights have been subrogated by a judge in accordance with State law, and consent has been given by an individual appointed by the judge to represent the child. With regard to this last exception, note 146(b) of the Conf. Rpt. explains Congressional intent that “. . . in the case of children who are wards of the State, consent may be provided by individuals legally responsible for the child’s

welfare or appointed by the judge to protect the rights of the child.” This should ensure that consent for a child who is a ward of the State is obtained from an appropriate individual who has the legal authority to provide consent.

Proposed paragraph (a)(3) of §300.300 would replace §300.505(b) of the current regulations and would reflect language in section 614(a)(1)(D)(ii) of the Act regarding absence of consent. As was true under §300.505(b) of the current regulations, the proposed regulations would provide that if a parent does not provide consent or if the parent fails to respond to a request for consent, the public agency may pursue the initial evaluation of a child by using the procedural safeguards in subpart E of these proposed regulations, including applicable mediation and due process procedures, except to the extent inconsistent with State law. However, consistent with the Department’s position that public agencies should use their consent override procedures only in rare circumstances, **proposed §300.300(a)(3)** would clarify that a public agency is not required to pursue an initial evaluation of a child suspected of having a disability if the parent does not provide consent for the initial evaluation. States and LEAs do not violate their obligation to locate, identify, and evaluate children suspected of being children with disabilities under the Act if they decline to pursue an evaluation to which a parent has failed to consent.

In addition, paragraph (a)(3) of this section would permit consent override only for children who are enrolled in public school or seeking to be enrolled in public school. For children who are home schooled or placed in a private school by the parents at their own expense, consent override is not authorized. The district can always use the override procedures to evaluate the child at some future time should the parents choose to return their child to public school.

Of course, public agencies do have an obligation to actively seek parental consent to evaluate private school (including home school, if considered a private school under State law) children who are suspected of being children with disabilities under the Act. However, if the parents of a private school child withhold consent for an initial evaluation, the public agency would have no authority to conduct an evaluation under **proposed §300.131** and no obligation to consider that child as eligible for services under **proposed §§300.132 through 300.144**.

**Proposed §300.300(b)(1)**, which is essentially the same as, and would replace, §300.505(a)(1)(ii) of the current regulations, would incorporate the provision

in section 614(a)(1)(D)(i)(II) of the Act specifying that the public agency responsible for making FAPE available to the child must seek to obtain informed parental consent before the initial provision of special education and related services.

**Proposed §300.300(b)(2)** would incorporate the new requirement added by section 614(a)(1)(D)(ii)(II) of the Act that prohibits a public agency from providing special education and related services by using the procedural safeguards in subpart E of these proposed regulations if the parents fail to respond or do not provide consent to services. We believe that the Act gives parents the ultimate choice as to whether their child should receive special education and related services, and this proposed regulation would reflect this statutory interpretation.

**Proposed §300.300(b)(3)** would incorporate the new provision in section 614(a)(1)(D)(ii)(III) of the Act, that relieves public agencies of any potential liability for failure to convene an IEP meeting or for failure to provide the special education and related services for which consent was requested but withheld.

**Proposed §300.300(c)(1)** would reflect the requirement in current §300.505(b)(1)(i) that parental consent be obtained before a reevaluation.

**Proposed §300.300(c)(2)** would incorporate the provision in §300.505(c)(1) of the current regulations that informed parental consent need not be obtained for a reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent and the parent failed to respond.

However, in lieu of prescribing “reasonable measures,” and to reduce regulatory burden, §300.505(c)(2) of the current regulations, which refers to the reasonable measures that public agencies must use in this situation, would be removed. As a practical matter, because public agencies take seriously their obligation to obtain parental consent for a reevaluation because of their ongoing obligation to ensure the provision of FAPE to eligible students with disabilities, they typically would use a number of informal measures to obtain such consent. Eliminating the provision currently in §300.505(c)(2) from these proposed regulations should give public agencies increased flexibility to use the measures they deem reasonable and appropriate.

Proposed paragraph (d)(1) of §300.300 is the same as §300.505(a)(3) of the current regulations and would provide that public agencies are not required to obtain parental consent before reviewing the existing

data as part of an evaluation or reevaluation, or before administering a test or evaluation that is administered to all children, unless consent is required of parents of all children. Proposed paragraph §300.300(d)(2) is the same as §300.505(d) of the current regulations, regarding additional State consent requirements, and would continue to permit a State to maintain such requirements, provided its public agencies establish and implement effective procedures to ensure that the failure to provide consent does not result in the failure to provide FAPE to a child with a disability. **Proposed §300.300(d)(3)** would incorporate the provision, in §300.505(e) of the current regulations, consistent with the Department’s longstanding policy that a public agency may not use a parent’s refusal to consent to one service or activity as a basis for denying the child any other service, benefit, or activity of the public agency, except as required by Part B of the Act.

### Evaluations and Reevaluations

Most of the provisions contained in subpart E of the current regulations governing procedures for evaluation and determination of eligibility would be moved to subpart D of the proposed regulations. Section 300.530 of the current regulations governing the SEA’s obligation to ensure that LEAs establish and implement conforming evaluation procedures would be removed as unnecessary. It is covered elsewhere by **proposed §300.122** governing the SEA’s responsibilities regarding evaluations.

**Proposed §300.301(a)** would incorporate the requirements in §300.531 of the current regulations that a public agency conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability. The cross-references to the regulations governing the initial evaluation would be updated. Proposed paragraph (b) of this section would incorporate section 614(a)(1)(B) of the Act and would provide that, consistent with the parental consent requirements in **proposed §300.300**, either a parent or a public agency may initiate a request for an initial evaluation to determine if a child is a child with a disability. This clarification underscores that a public agency may only conduct an evaluation of a child subject to the informed consent requirements discussed previously.

**Proposed §300.301(c)(1)** would incorporate the new provision in section 614(a)(1)(C)(i)(I) of the Act regarding conducting the initial evaluation within 60 days of receiving parental consent for the evaluation, or within another timeframe if the State establishes a

timeframe for conducting the initial evaluation. Section 300.343(b) of the current regulations requires that the public agency ensure, within a reasonable period of time following receipt of parental consent, that the child is evaluated, and if found eligible, that special education and related services are made available to the child. The current regulation does not specify a timeframe for conducting the initial evaluation following receipt of parental consent.

**(Wrightslaw Note:** The statute and the proposed regulation mandate completion of the evaluation within 60 days “or “within another timeframe if the State establishes a timeframe . . .” By failing to clarify that the evaluation must be completed with *at least* 60 days, or a shorter timeframe if “the State establishes a *shorter* timeframe . . .” the Department of Education has unwittingly encouraged school districts to establish a timeframe that can extend far beyond 60 calendar days. Congress intended a timeframe that would be no longer than sixty calendar days.)

**Proposed §300.301(c)(2)**, regarding procedures for the initial evaluation, would incorporate the provision in section 614(a)(1)(C)(i)(I) of the Act as well as portions of §300.320(a)(1) and (2) of the current regulations, and would clarify that the initial evaluation must consist of procedures to determine whether the child is a child with a disability under §300.8 and to determine the child’s educational needs. The remainder of §300.320 of the current regulations would be removed as these requirements are addressed in **proposed §§300.304 through 300.306**.

**Proposed §300.301(d)** would incorporate the new provision in section 614(a)(1)(C)(ii) of the Act, which provides an exception to the timeframe requirement for conducting the initial evaluation following receipt of parental consent and specifies when this exception would apply. However, for greater clarity, the proposed regulations would reorder the statutory language to make clear that the 60-day timeframe or a timeframe established by State law is inapplicable to a public agency if the child’s parent repeatedly refuses to produce the child for an evaluation or the child enrolls in a school after the timeframe has commenced for the child’s previous public agency to have completed an evaluation of the child, and the parent and subsequent public agency agree to a specific timeframe by which the evaluation must be completed. **Proposed §300.301(d)(2)(ii)** would clarify, in accordance with section 614(a)(1)(C)(ii) of the Act, that this exception would apply only if the subsequent public agency is making

sufficient progress to ensure a prompt completion of the evaluation and the parent and the public agency agree to a specific timeframe when the evaluation will be completed.

**Proposed §300.302** would incorporate the new requirement in section 614(a)(1)(E) of the Act to clarify that screening for instructional purposes by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not considered an evaluation for eligibility for special education and related services, and therefore could occur without obtaining informed parental consent for the screening.

**Proposed §300.303**, regarding reevaluations, would incorporate section 614(a)(2)(A) of the Act, and would supersede §300.536 of the current regulations, which does not reflect the new requirements governing the timing and conduct of reevaluations.

**Proposed §300.303(a)** would require a public agency to ensure that a reevaluation is conducted in accordance with **proposed §§300.304 through 300.311** if it determines that the educational or related services needs, including the need for improved academic achievement and functional performance of the child, would warrant a reevaluation, or if the child’s parent or teacher requests a reevaluation.

Under the circumstances set forth in the Act and **proposed §300.303(a)**, proposed paragraph (b)(1) of this section would provide that the reevaluation occur not more than once a year unless the parent and the public agency agree otherwise. **Proposed §300.303(b)(2)** would continue the general requirement for three-year reevaluations from current §300.536(b), except that in accordance with section 614(a)(2)(B) of the Act, a parent and a public agency could agree that a three-year reevaluation is unnecessary.

**Proposed §§300.304 and 300.305** would incorporate some of the evaluation procedures contained in §§300.532 and 300.533 of the current regulations, with appropriate updates to reflect statutory changes in section 614(b) of the Act. **Proposed §300.304(a)** would incorporate the new requirement in section 614(b)(1) of the Act that the public agency provide notice to the parents of a child with a disability, in accordance with §300.503 of these proposed regulations, of any evaluation procedures that the agency proposes to conduct. (Under **proposed §300.503(b)(3)**, public agencies are required to include in the prior written notice to parents a description of each evaluation procedure, test, record,

or report the agency used as the basis for the proposal or refusal, not the tests the agency would be proposing to conduct.)

### Evaluation Procedures

**Proposed §300.304(b)(1)** would incorporate the procedures governing conduct of evaluations in section 614(b)(2) of the Act. This proposed regulation would replace §300.532(b)(1) and (2) of the current regulations and would require that the public agency use a variety of assessment tools and strategies, including information provided by the parent, to gather relevant functional, developmental, and academic information about the child.

**Proposed §300.304(b)(2)** would incorporate the language from §300.532(f) of the current regulations, based on section 612(a)(6)(B) of the Act, prohibiting the use of a single measure or assessment as the sole criterion for determining whether a child is a child with a disability or for determining an appropriate educational program for the child.

**Proposed §300.304(b)(3)** would replace §300.532(i) of the current regulations and would require, in accordance with section 614(b)(2)(c) of the Act, that the public agency, in conducting the evaluation, use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to developmental factors.

**Proposed §300.304(c)** would address other evaluation procedures and would incorporate the requirements of sections 612(a)(6)(B) and 614(b)(3) of the Act regarding the use of assessments and other evaluation materials. Unlike the current regulations, which refer to standardized tests, the proposed regulations would refer to assessments and other evaluation materials, which is the terminology used in section 614(b)(3) of the Act.

**Proposed §300.304(c)(1)(i)** would incorporate the provision in section 612(a)(6)(B) of the Act and continue the longstanding requirement that procedures used for evaluation and placement of children with disabilities not be discriminatory on a racial or cultural basis. This proposed regulation would replace §300.532(a)(1)(i) of the current regulations, which contains a similar requirement.

In order to provide information and guidance regarding evaluation and assessment in one place, **proposed §300.304(c)(1)(ii)** would incorporate section 614(b)(3)(A)(ii) of the Act, and also would include language from the requirement in section

612(a)(6)(B) of the Act regarding the form of assessments and other evaluation materials used to assess limited English proficient children under the Act. Based on additional clarity provided in the statute, the proposed regulation would require public agencies to provide and administer assessments in the child's native language, including ensuring that the form in which the test is provided or administered is most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer the assessment in this manner. This proposed regulation would replace §300.532(a)(1)(ii) of the current regulations, which contains the general standard for assessing limited English proficient children, and provides, in accordance with section 612(a)(6)(B) of the Act, that the child be assessed in his or her native language or other mode of communication, unless clearly not feasible to do so.

**Proposed §300.304(c)(1)(iii) through (v)** would incorporate the requirements of section 614(b)(3)(A)(iii) through (v) of the Act. This proposed regulation would replace similar requirements contained in 300.532(a)(2)(i) and (ii) of the current regulations. Proposed paragraph (c)(1)(iii) would reflect new language in section 614(b)(3)(A)(iii) of the Act, which requires assessments or measures to be used for purposes that are valid and reliable. Current §300.532(c)(2), which requires that the evaluation report include a description of the extent to which the evaluation varied from standard conditions, has been removed from these proposed regulations. This is standard test administration practice and need not be repeated in the regulations.

**Proposed §300.304(c)(2)** would be substantially the same as §300.532(d) of the current regulations and would reflect the longstanding regulatory requirement that assessments and other evaluation materials be tailored to address individual educational needs, rather than merely designed to provide a single general intelligence quotient.

**Proposed §300.304(c)(3)(v)(C)** would replace §300.532(e) of the current regulations and would reflect the longstanding regulatory requirement that assessment selection or administration ensures that the assessment results accurately reflect the child's aptitude or achievement levels, or whatever other factors the assessment purports to measure, not the child's impaired sensory, manual, or speaking skills, unless the assessment purports to measure those skills.

**Proposed §300.304(c)(4)**, which would incorporate section 614(b)(3)(B) of the Act, would require that the child be assessed in all areas related to the suspected disability, and would replace §300.532(g) of the current regulations. This proposed section would incorporate the longstanding requirement that the child be assessed in all areas related to the suspected disability including, if appropriate: health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

**Proposed §300.304(c)(5)** would incorporate the new requirement from section 614(b)(3)(D) of the Act that provides for expeditious coordination among school districts to better ensure prompt completion of full evaluations for children with disabilities who transfer from one public agency to another public agency in the same academic year. Section 300.532(h) of the current regulations would be reflected in **proposed §300.304(c)(6)**, and would continue to require that the evaluation be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. With regard to this requirement, note 152 of the Conf. Rpt. states:

Conferees intend the evaluation process for determining eligibility of a child under this Act to be a comprehensive process that determines whether the child has a disability, and as a result of that disability, whether the child has a need for special education and related services. As part of the evaluation process, conferees expect the multi-disciplinary evaluation team to address the educational needs of the child in order to fully inform the decisions made by the IEP Team when developing the educational components of the child's IEP. Conferees expect the IEP Team to independently review any determinations made by the evaluation team, and that the IEP Team will utilize the information gathered during the evaluation to appropriately inform the development of the IEP for the child.

Thus, **proposed §300.304(c)(6)** would emphasize the direct link between the evaluation and the IEP processes and should ensure that the evaluation is sufficiently comprehensive to inform the development of the child's IEP.

**Proposed §300.304(c)(7)**, in accordance with section 614(c) of the Act, would replace §§300.532(j) of the current regulations and would continue to require that the public agency use assessment tools and strategies providing relevant information that directly assists

persons in determining the educational needs of the child.

**Proposed §300.305**, which addresses additional requirements for evaluations and reevaluations, would combine §§300.533 and 300.534(c) of the current regulations. **Proposed §300.305(a)(2)** would include the language in section 614(c)(1)(B)(i) through (iv) of the Act regarding determinations about the child's eligibility under this part. Proposed paragraphs (b) through (d) of §300.305 would reflect §300.533 of the current regulations regarding procedures for determining whether additional data are needed as part of the initial evaluation or the reevaluation, but with minor modifications to incorporate section 614(c)(2) of the Act. For example, in accordance with section 614(c)(2) of the Act, proposed paragraph (c) of §300.305, regarding source of data, would replace §300.533(c) of the current regulations, regarding need for additional data.

**Proposed §300.305(e)**, regarding evaluations before change in placement, would replace §300.534(c) of the current regulations, regarding the requirement to conduct an evaluation before determining that the child is no longer a child with a disability, as well as the exception to that requirement for students who graduate from secondary school with a regular high school diploma or who exceed age eligibility for FAPE under State law. However, proposed paragraph (e)(3) would incorporate the new requirement in section 614(c)(5)(B)(ii) of the Act that the public agency provide a summary of academic and functional performance, including recommendations to assist the student in meeting postsecondary goals, for students whose eligibility terminates because of graduation with a regular high school diploma or because of exceeding the age eligibility for FAPE under State law.

**Proposed §300.306**, regarding determination of eligibility, would replace paragraphs (a) and (b) of §§300.534 and 300.535 of the current regulations and would incorporate the language in section 614(b)(4) and (5) of the Act, which is substantially the same as the language in the current regulations. This proposed regulation would provide that, upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals, including the child's parent, determine whether the child is a child with a disability and the educational needs of the child. As is true under the current regulation, the public agency would be required to provide a copy of the evaluation report to

the parent, including the documentation of determination of eligibility.

Proposed section §300.306(b) would include the provision in current §300.534(b)(2) that makes clear that a child must not be determined to be a child with a disability under this part if the determinant factor is lack of instruction in reading, lack of instruction in math, or limited English proficiency, and the child does not otherwise meet the eligibility criteria under 300.8(a).

Proposed paragraph (c) of §300.306 would replace §300.535 of the current regulations and would incorporate the longstanding regulatory requirements that public agencies use a multifaceted approach in determining eligibility and placement and develop an IEP for a child found eligible for services under the Act.

#### **Additional Procedures for Evaluating Children With Specific Learning Disabilities**

**Proposed §§300.307 through 300.311** would revise §§300.540 through 300.543 of the current regulations regarding additional procedures for evaluating children suspected of having specific learning disabilities and would implement the new requirements of section 614(b)(6) of the Act. **Proposed §300.307(a)** would generally require a State to adopt criteria for determining whether a child has a specific learning disability (SLD) as defined in **proposed §300.8**. Specifically, **proposed §300.307(a)(1)** would allow States to prohibit the use of a severe discrepancy between achievement and intellectual ability criterion for determining whether a child has an SLD. **Proposed §300.307(a)(2)** would make it clear that the State may not require LEAs to use a discrepancy model for determining whether a child has an SLD. In addition, **proposed §300.307(a)(3)** would require States to permit a process that examines whether the child responds to scientific, research-based intervention as part of the evaluation procedures. **Proposed §300.307(a)(4)** would allow States to permit the use of other alternative procedures for determining whether a child has an SLD as defined in §300.8. **Proposed §300.307(b)** would clarify that a public agency must use State criteria in determining whether a child has an SLD.

Recent consensus reports and empirical syntheses concur in suggesting major changes in the approach to the identification of an SLD. These reports recommend abandoning the IQ-discrepancy model and recommend the use of response to intervention

(RTI) models (Donovan & Cross, 2002; Lyon et al., 2001; President's Commission on Excellence in Special Education, 2002; Stuebing et al., 2002). These reports find that SLD is a group of heterogeneous disorders, but recommend changes in the seven domains identified in current §300.541(a)(2) because of areas of difficulty for students with SLD that have not been identified under current regulations (e.g., reading fluency).

There are many reasons why use of the IQ-discrepancy criterion should be abandoned. The IQ-discrepancy criterion is potentially harmful to students as it results in delaying intervention until the student's achievement is sufficiently low so that the discrepancy is achieved. For most students, identification as having an SLD occurs at an age when the academic problems are difficult to remediate with the most intense remedial efforts (Torgesen et al., 2001). Not surprisingly, the "wait to fail" model that exemplifies most current identification practices for students with SLD does not result in significant closing of the achievement gap for most students placed in special education. Many students placed in special education as SLD show minimal gains in achievement and few actually leave special education (Donovan & Cross, 2002).

The use of the IQ-discrepancy drives assessment practices for most special education services (President's Commission on Excellence in Special Education, 2002). Nationwide, virtually every student considered for special education eligibility receives IQ tests. This practice consumes significant resources, with the average cost of an eligibility evaluation running several thousand dollars (MacMillan & Siperstein, 2002; President's Commission on Excellence in Special Education, 2002). Yet these assessments have little instructional relevance and often result in long delays in determining eligibility and therefore services.

Alternative models are possible. The type of model most consistently recommended uses a process based on systematic assessment of the student's response to high quality, research-based general education instruction. The Department strongly recommends that States consider including this model in its criteria. Other models focus on the assessment of achievement skills identifying SLD by examining the strengths and weaknesses in achievement, or simply rely on an absolute level of low achievement. These models are directly linked to instruction. (Fletcher, et al., 2003). Other models use alternative approaches to determining aptitude-achievement discrepancies that do not involve IQ, including multiple

assessments of cognitive skills. However, these models do not identify a unique group of low achievers and maintain a focus on assessment as opposed to intervention. In considering alternative models for identification, we believe that the focus should be on assessments that are related to instruction, and that identification should promote intervention. For these reasons, models that incorporate response to a research-based intervention should be given priority in any effort to identify students with SLD. Identification models that incorporate response to intervention represent a shift in special education toward the goals of better achievement and behavioral outcomes for students identified with SLD because the students who are identified under such models are most likely to require special education and related services.

**Proposed §300.308**, regarding eligibility group members, would revise §300.540 of the current regulations. Under this proposed regulation, the group making the determination of whether a child has an SLD would include a special education teacher. Further, this proposed regulation would require that the group be collectively qualified to conduct individual diagnostic assessments relevant to SLD, interpret and apply critical analysis to assessment data, develop appropriate educational and transitional recommendations, and deliver specifically designed instruction and services to meet the needs of students with SLD. It is intended that the group described in **proposed §300.308** would serve as the required group under **proposed §300.306(a)(1)**.

The current requirements in §300.541 permit the group to determine that an SLD is present if the child does not achieve commensurate with his or her age and ability levels and if the group finds a severe discrepancy between achievement and intellectual ability. **Proposed §300.309** would address the elements required for determining the existence of an SLD and would revise §300.541 of the current regulations in light of the statutory provision in section 614(b)(6)(A) of the Act, which protects LEAs from being required to use a severe discrepancy between intellectual ability and academic achievement. Under the proposed regulations, the first element of a determination that a child has an SLD is a finding that the child does not achieve commensurate with the child's age in one or more of the eight specified areas when provided with learning experiences appropriate to the child's age.

The second element for a determination that a child has an SLD is a finding that the child failed to make

sufficient progress in meeting State-approved results when using a response to scientific, research-based intervention process, or the child exhibits a pattern of strengths and weaknesses that the team determines is relevant to the identification of an SLD. The pattern of strengths and weaknesses may be in performance, achievement, or both or may be in performance, achievement, or both relative to intellectual development. **Proposed §300.309(a)(3)** would incorporate the exclusions from section 602(30)(C) of the Act and would prohibit the eligibility group from finding an SLD if the SLD is primarily the result of other visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. These exclusions are in addition to the special rule for eligibility determination in section 614(b)(5) of the Act and **proposed §300.306(b)**.

**Proposed §300.309(b)** would require the group to consider evidence that the child was provided appropriate instruction prior to, or as a part of, the referral process. These requirements would emphasize the importance of using high-quality, research-based instruction in regular education settings consistent with relevant sections of the ESEA, including that the instruction was delivered by qualified personnel. Also important is evidence that data-based documentation reflecting formal assessment of progress during instruction through repeated assessments of achievement at reasonable intervals is provided to the parents and documentation that the timelines described in **proposed §§300.301** and **300.303** are adhered to, unless extended by mutual written agreement of the child's parents and a group of qualified professionals as described in §300.308. These requirements would be included in §300.309(c) and (d), respectively, of the proposed regulations.

**Proposed §300.310** would revise §300.542 of the current regulations regarding observation. **Proposed §300.310(a)** would require that at least one member of the group described in **proposed §300.308**, other than the child's teacher, who observes the child be trained in observation. This should ensure that the group member or members conducting the observation know what to look for when they observe the child. **Proposed §300.310(a)** also would provide additional parameters for conducting the observation, and would specify that the observation document academic performance and behavior in the areas of difficulty. **Proposed §300.310(b)** would be substantively unchanged from §300.542(b) of the current regulations.



**Proposed** §300.311, regarding a written report, would revise §300.543 of the current regulations and incorporate much of the content of that section. The proposed regulation would remove the reference in §300.543(a)(6) of the current regulation as to whether a child has a severe discrepancy between achievement and ability that is not correctable without special education and related services and the reference in current §300.543(a)(7) regarding the effects of environmental, cultural, and economic disadvantage. This language is included in **proposed** §300.306. **Proposed** §300.311(a)(5) would require that the report address only whether the child does not achieve commensurate with the child's age rather than the discrepancy model referred to in current §300.531(a)(2). The proposed regulation also would require that the written report address two additional factors: whether there are strengths and weaknesses in performance or achievement, or both, or relative to intellectual development that require special education and related services; and the instructional strategies used and the response to student data collected if the response to the scientific, research-based process was implemented. These additional provisions should ensure that the report is a more useful document for educators in determining the existence of an SLD. It is intended that the written report in this section would serve as the required evaluation report and documentation of the determination of eligibility as required by **proposed** §300.306(a)(2).

### Individualized Education Programs

**Proposed** §§300.320 through 300.328 would replace some of the provisions in §§300.340 through 300.350 of the current regulations regarding IEPs. **Proposed** §300.320 would contain a definition of individualized education program or IEP that would incorporate the definition in section 614(d)(1)(A)(i) of the Act as well as provisions contained in section 614(d)(6) of the Act. This definition would replace and expand §300.340(a) of the current regulations, which contains only a brief definition of the term IEP. The definition of "participating agency" contained in §300.340(b) of the current regulations would be removed from these proposed regulations as unnecessary. Many of the provisions in the new definition of IEP are taken from provisions in §§300.346 through 300.347 of the current regulations, but appropriate modifications also would be included in this definition to reflect new provisions of the Act.

The first sentence of the definition in §300.320 would refer to the IEP as a written statement for a child with

a disability that is developed, reviewed, and revised at a meeting in accordance with §§300.320 through 300.324. Proposed paragraph (a)(1) would require, in accordance with section 614(d)(1)(A)(i)(I) of the Act, that the IEP include a statement of the child's present levels of academic achievement and functional performance. This proposed regulation would supersede §300.347(a)(1) of the current regulations, which requires that the IEP include a statement of the child's present levels of educational performance. **Proposed** §300.320(a)(1)(i) would be the same as §300.347(a)(1)(i) of the current regulations, except that the phrase used in the Act, "general education curriculum," would be substituted for "general curriculum," and the proposed regulation would continue to explain, as do the current regulations, that the general education curriculum is the same curriculum as for nondisabled children. **Proposed** §300.320(a)(1)(ii), regarding the participation of preschool children in appropriate activities, is the same as §300.347(a)(1)(ii) of the current regulations.

**Proposed** §300.320(a)(2) is similar to §300.347(a)(2) of the current regulations, except for minor language changes from section 614(d)(1)(A)(i)(II) of the Act. **Proposed** §300.320(a)(2)(i)(A) and (B) would be the same as §300.347(a)(2)(i) and (ii) of the current regulations.

**Proposed** §300.320(a)(2)(ii) would add a new provision consistent with section 614(d)(1)(A)(i)(I)(cc) of the Act that would require the IEP to contain a statement of benchmarks or short-term objectives for children with disabilities who take alternate assessments aligned to alternate achievement standards. In accordance with changes made in section 614(d)(1)(A)(i)(III) of the Act, **proposed** §300.320(a)(3) would replace §300.347(a)(7) of the current regulations, and would require that the IEP include a statement of how the child's progress on the annual goals is being measured. In accordance with section 614(d)(1)(A)(i)(III) of the Act, **proposed** §300.320(a)(3)(ii) would clarify that periodic progress reports could be issued concurrently with quarterly report cards.

**Proposed** §300.320(a)(4) would replace §300.347(a)(3) of the current regulations, and would incorporate the language in section 614(d)(1)(A)(IV) of the Act regarding a statement of special education and related services and supplementary aids and services, based on peer-reviewed research, to the extent practicable. **Proposed** §300.320(a)(5), which would require an explanation of the extent, if any, to

which a child will not participate with nondisabled children in the regular class and in other activities, would incorporate current §300.347(a)(4), which is the same as section 614(d)(1)(A)(i)(V) of the Act. **Proposed §300.320(a)(6)** would replace §300.347(a)(5), regarding participation of children with disabilities in State and districtwide assessments of student achievement, and would incorporate section 614(d)(1)(A)(VI) of the Act. This section would require that the IEP include a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments, consistent with **proposed §300.160**. If the IEP Team determines that the child should take a particular alternate assessment on a particular State or districtwide assessment of student achievement, the IEP must include a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child. **Proposed §300.320(a)(7)**, regarding the projected date for the beginning of services and modifications and the anticipated frequency, location, and duration of those services and modifications, is the same as §300.347(a)(6) of the current regulations.

**Proposed §300.320(b)** would replace current §300.347(b), regarding transition services, and would incorporate some of the new statutory requirements regarding postsecondary goals in section 614(d)(1)(A)(VIII) of the Act. Beginning with the first IEP in effect after the child turns age 16 or younger if determined appropriate, and updated annually thereafter, this proposed paragraph would require that the IEP include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills, and the transition services, including courses of study needed to assist the child in reaching those goals. As under the current regulations, **proposed §300.320(b)** would continue to apply the requirements regarding transition services for students younger than age 16, if determined appropriate by the IEP Team. However, §300.347(b)(1) of the current regulations, regarding including a statement of transition services needs under the applicable components of the student's IEP in the IEPs of students beginning at age 14 or younger, would be removed from these proposed regulations because it is no longer required under the Act. **Proposed §300.320(c)** would replace §300.347(c) of the current regulations, regarding transfer of rights, and would incorporate section 614(d)(1)(A)(i)(VIII)(cc) of the Act to require that

beginning not later than one year before the rights transfer, the child is informed that his or her rights under Part B will transfer to the child upon reaching the age of majority under State law.

**Proposed §300.320(d)** would be based on section 614(d)(1)(A)(ii) of the Act and §300.346(e) of the current regulations. The first clause would provide that the IEP is not required to include additional information beyond what is explicitly required under section 614(d) of the Act. The second clause, which is the same as §300.346(e) of the current regulations, would provide that this section would not require the IEP to include information under one component of the child's IEP that is already contained under another component of the IEP.

Section 300.341 of the current regulations, regarding responsibility of the SEA and other public agencies for IEPs, would not be retained in these proposed regulations. The statutory authority for that section is not based on the IEP provisions in section 614(d) of the Act, and the substance of the provision is essentially covered by **proposed §300.149**, which would address the SEA responsibility for general supervision, including responsibility to ensure development and implementation of IEPs.

**Proposed §300.321** would include a requirement regarding the composition of the IEP Team, and is substantially the same as §300.344 of the current regulations addressing a public agency's responsibility to ensure that the IEP Team includes the required participants. **Proposed §300.321(a)** would replace §300.344(a) of the current regulations. As with the current regulation, proposed paragraph (a)(7) would provide that, in accordance with the Act, whenever appropriate, the child be a member of the IEP Team.

**Proposed §300.321(b)** would address transition services participants and would replace and modify §300.344(b) of the current regulations to reflect changes to the Act's requirements on transition services. **Proposed §300.321(b)(1)** would provide that the child be invited to the IEP meeting if a purpose of the meeting is consideration of the child's postsecondary goals and the transition services needed to achieve those goals. **Proposed §300.321(b)(2)** is substantially the same as §300.344(b)(2) of the current regulations, regarding the public agency's obligation to take other steps to ensure that the student's preferences and interests are considered if the child is unable to attend the meeting. **Proposed §300.321(b)(3)** would replace

and modify §300.344(b)(3)(i) of the current regulations and would require, to the extent appropriate, and with the consent of the parent or a child who has reached the age of majority, that a representative of a participating agency that is likely to be responsible for providing or paying for transition services be invited to the meeting. Current §300.344(b)(3)(ii), addressing the public agency's obligations to take steps to obtain the participation of the other agency in the planning for transition services if the other agency does not send a representative, would be removed as it is an unnecessary burden. **Proposed** §300.321(c), regarding determination of knowledge and special expertise of other individuals invited by the parent or public agency to be members of the IEP Team, is essentially the same as, and would replace, §300.344(c) of the current regulations. **Proposed** §300.321(d), regarding designating a public agency representative, is essentially the same as, and would replace, §300.344(d) of the current regulations.

**Proposed** §300.321(e) would add a new provision regarding IEP meeting attendance and would incorporate section 614(d)(2)(C) of the Act. **Proposed** §300.321(e)(1) would specify when a member of the IEP Team would not be required to attend the IEP meeting in whole or in part. **Proposed** §300.321(e)(2) would specify when a member of the IEP Team may be excused from attending the IEP meeting in whole or in part, subject to the parent's and public agency's written consent to the member's excusal, and subject to the member's written submission to the parent and public agency of input into the development of the IEP prior to the meeting.

**Proposed** §300.321(f) would incorporate a new requirement in section 614(d)(2)(D) of the Act for the initial IEP meeting for a child who was previously served under Part C of the Act, and would require, to ensure the child's smooth transition, that an invitation to that meeting, at the request of the parent, be sent to the Part C services coordinator or a representative of the Part C system.

Consistent with the statutory requirement that a parent, as a member of the IEP Team, provide significant input into the child's IEP, **proposed** §300.322 would address parent participation and would replace §300.345 of the current regulations. **Proposed** §300.322(a), regarding notifying the parents of the meeting early enough to ensure they will have an opportunity to attend and scheduling the meeting at a mutually convenient time and place, would be the same as §300.345(a) of the current regulations. **Proposed** §300.322(b), regarding

information in the notice, would be the same as §300.345(b) of the current regulations, except that paragraph (b)(2), regarding notifying a student age 14 or younger about an IEP meeting to develop a statement of needed transition services would be removed because the participation of a child age 14 or younger in the transition services planning process is not required under the Act. **Proposed** §300.322(b)(1), which would be the same as §300.345(b)(1) of the current regulations, would continue to require the public agency to notify the parents of the purpose, time, and location of the meeting and who will be in attendance, including informing parents of the provisions in §300.322 regarding the participation of other individuals with knowledge or special expertise about the child. Paragraph (b)(3) of current §300.345 would be modified, would become **proposed** §300.322(b)(2) and would require that the parent be notified, not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, if a purpose of the meeting will be the consideration of postsecondary goals and transition services for the child. The notice would indicate that the agency will invite the child to the meeting and also would identify any other agency that will be sending a representative to the meeting. **Proposed** §300.322(c), regarding other methods to ensure parent participation if neither parent can attend, would replace §300.345(c) of the current regulations, and would be modified to address the use of other methods, including individual or conference telephone calls, subject to §300.328 of the proposed regulations relating to alternative means of meeting participation. **Proposed** §300.322(d), regarding conducting a meeting without a parent in attendance, would replace §300.345(d) of the current regulations, except that the proposed regulation would not specify the methods that the public agency must use to keep a record of its attempts to convince the parent that he or she should attend the meeting. Current section 300.345(e), regarding the use of interpreters or other action, as appropriate, would be removed from these proposed regulations because public agencies are required by other Federal statutes to take appropriate actions to ensure that parents who themselves have disabilities and limited English proficient parents understand proceedings at the IEP meeting. The other Federal statutory provisions that apply in this regard are Section 504 of the Rehabilitation Act of 1973 and its implementing regulations in 34 CFR Part 104 (prohibiting discrimination on the basis of disability by recipients of Federal financial assistance) and title II of the Americans With Disabilities Act and its implementing regulations in 28 CFR Part 35 (prohibiting discrimination on the

basis of disability by public entities, regardless of receipt of Federal funds), and title VI of the Civil Rights Act of 1964 and its implementing regulations in 34 CFR Part 100 (prohibiting discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance).

**Proposed §300.322(f)** would replace §300.345(f) of the current regulations and would continue to require that public agencies give a parent a copy of their child's IEP at no cost to the parent.

**Proposed §300.323** would address when IEPs must be in effect and would replace some of the provisions of §300.342 of the current regulations. **Proposed §300.323(a)**, which is essentially the same as §300.342(a) of the current regulations, would require a public agency to ensure that an IEP is in effect for each child with a disability at the beginning of each school year. **Proposed §300.323(b)**, regarding an IEP or IFSP for children aged three through five, would replace and modify §300.342(c) of the current regulations. The proposed regulation would incorporate language in section 614(d)(2)(B) of the Act as well as language in section 636 of the Act to require the IEP Team to consider an IFSP that contains the IFSP content described in section 636 of the Act, and that is developed in accordance with §300.324 of these proposed regulations. Under both the Act and the proposed regulations, the IFSP could serve as the IEP if consistent with State policy and agreed to by the parent and the agency. **Proposed §300.323(b)(1)** would specify further that, in order for the IFSP to be considered as the IEP, the IFSP must contain the IFSP content, including the natural environments statement and an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children with IFSPs who are at least three years of age. **Proposed §300.323(b)(2)** would be consistent with the current regulation in §300.342(c)(2)(i) and (ii) that requires that the child's parents be provided a detailed explanation of the differences between an IFSP and an IEP, and written informed consent from the parent if the parent chooses an IFSP. **Proposed §300.323(c)**, regarding initial IEPs and provision of services, would combine §§300.342(b)(2)(ii) and 300.343(b)(2) of the current regulations and would continue the longstanding requirement in §300.343(b)(2) that an initial IEP be developed within 30 days of a determination that the child needs special education and related services. However, §300.342(b)(1)(i) of the current regulations, requiring that an IEP be in effect before special education and related services are provided to a child, would be removed from these proposed

regulations. This requirement is covered by **proposed §300.323(a)**, which would require that each public agency have an IEP in effect for each child with a disability in the public agency's jurisdiction at the beginning of each school year, and by section 614(d)(2)(A) of the Act.

**Proposed §300.323(c)(2)** would combine current §300.343(b)(2), which requires that a meeting to develop an IEP "be conducted within 30 days of a determination that the child needs special education and related services" with current §300.342(b)(1)(ii), which requires an IEP to be "implemented as soon as possible following the meetings described in §300.343." This combined language would provide a clearer, more direct, and more specific requirement than what is contained in current §§300.342((b)(1)(ii) and 300.343(b)(2).

**Proposed §300.323(d)**, regarding accessibility of the child's IEP to the regular education teacher and others responsible for its implementation, would replace §300.342(b)(2) of the current regulations. However §300.342(b)(3) of the current regulations, which requires that each person responsible for implementing the IEP be 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 IEP, would be removed from the proposed regulations as unnecessary. Public agencies are required to share this information with responsible individuals in order to meet their obligations under the Act.

**Proposed §300.323(e)** would implement the new requirement in section 614(d)(2)(C) of the Act regarding programs for children who transfer public agencies within the same academic year. **Proposed §300.323(e)(1)(i)** would implement the Act and the Department's longstanding policy regarding students who transfer public agencies within the same State. The proposed regulation would require that the new school district provide the child with FAPE, including services comparable to those described in a previously held IEP until the public agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law. **Proposed §300.323(e)(1)(ii)** would incorporate a statutory change that requires, in the case of a child who had an IEP in effect and who transfers from a public agency outside the State in the same academic year, that the public agency provide the child with FAPE, including services comparable to those described in the previously held IEP, until the public agency conducts an evaluation of the child,

if determined necessary by the public agency, and develops a new IEP for the child, if appropriate, that is consistent with Federal and State law.

**Proposed §300.323(e)(2)** would incorporate the new requirement in section 614(d)(2)(C)(ii) of the Act regarding transmittal of education records to facilitate the transition of a child who transfers public agencies within the same State. It also would address the responsibility of the new public agency and previous public agency to take reasonable steps regarding making prompt requests for, and transmission of, education records consistent with 34 CFR 99.31(a)(2), implementing FERPA.

Paragraph (d) of §300.342 of the current regulations, regarding effective dates for new IEP requirements, is unnecessary and would be removed from the proposed regulations. All the IEP requirements of Part B of the Act will take effect on July 1, 2005. Further, it is not anticipated that public agencies will need additional time to implement these new requirements, some of which provide additional flexibility to public agencies and parents and reduce regulatory burden.

#### Development of IEP

**Proposed §300.324** would address the development, review, and revision of IEPs. This section would incorporate some requirements regarding IEP development, review, and revision, which are currently addressed in §§300.343 and 300.346 of the regulations.

**Proposed §300.324(a)** would incorporate section 614(d)(3)(A) of the Act regarding considerations in IEP development. Although most of the language from §300.346(a) of the current regulations would be retained, the requirement in §300.346(a)(1)(iii), regarding consideration in IEP development of the child's performance on State or districtwide assessments, as appropriate, would be removed. Instead, the proposed regulation would include language from section 614(d)(3)(A)(iv) of the Act regarding consideration of the academic, developmental, and functional needs of the child in IEP development. In accordance with section 614(d)(3)(B) of the Act, **proposed §300.324(a)(2)**, regarding consideration of special factors in IEP development, would be substantially the same as, and would replace, §300.346(a)(2) of the current regulations. **Proposed §300.324(a)(3)** would continue to require, in accordance with section 614(d)(3)(C) of the Act, that the regular education teacher, as a member of the IEP Team, to the extent

appropriate, participate in IEP development in the areas specified in the Act. This proposed regulation would replace §300.346(d) of the current regulations, which contains a similar provision regarding the role of the regular education teacher in the development, review, and revision of the IEP. Because the Act no longer requires the consideration of special factors in IEP review and revision, §300.346(b) of the current regulations would be removed. Section 300.346(c) of the current regulations, regarding the requirement to include a statement in the child's IEP about a child's need for a particular device or service in order to receive FAPE, would be removed because it is covered in **proposed §300.320(a)(4)**.

**Proposed §300.324(a)(4)** would incorporate section 614(d)(3)(D) of the Act and would permit the parent and the public agency to agree not to convene an IEP meeting to make changes to the child's IEP after the annual IEP meeting for the school year has taken place. Instead, in accordance with this new statutory provision, this proposed regulation would permit the parent and the public agency to develop a written document to amend or modify the child's current IEP without convening an IEP meeting.

To incorporate section 614(d)(3)(E) of the Act, **proposed §300.324(a)(5)** would address consolidation of IEP meetings and would require the public agency, to the extent possible, to encourage the consolidation of reevaluation meetings and other IEP meetings for the child.

To incorporate section 614(d)(3)(F) of the Act, **proposed §300.324(a)(6)** would permit changes to the IEP to be made either by the entire IEP Team, or in accordance with **proposed §300.324(a)(4)**, by amending the IEP, rather than redrafting the entire IEP. This proposed paragraph would also provide that a parent who requests a copy of the revised IEP with the amendments incorporated must be provided with it.

Section 300.343(a) of the current regulations, regarding the public agency's responsibility to initiate and conduct meetings to develop, review, and revise a child's IEP, would be removed because it is covered in §300.320(a) of the proposed regulations. **Proposed §300.324(b)(1)** would address review and revision of IEPs and is essentially the same as §300.343(c) of the current regulations. **Proposed §300.324(b)(2)** would require the participation of the regular education teacher in the review and revision of the child's IEP, consistent with **proposed §300.324(a)(3)**.

**Proposed §300.324(c)**, regarding failure to meet transition objectives, is essentially the same as, and would replace §300.348 of the current regulations. **Proposed §300.324(c)(1)** would implement section 614(d)(6) of the Act, which requires the public agency to reconvene the IEP Team to develop alternative strategies if the agency responsible for providing transition services fails to provide those services. **Proposed §300.324(c)(2)** would continue the longstanding regulatory requirement in current §300.348(b) that a participating agency, including a State vocational rehabilitation agency, is not relieved of its responsibility to provide or pay for transition services that the agency would otherwise provide if the student meets the eligibility requirements for those services.

**Proposed §300.324(d)(1)**, regarding children with disabilities in adult prisons, would conform to section 614(d)(7) of the Act. Unlike §300.347(d) of the current regulations, which merely cross-references other applicable regulatory requirements, **proposed §300.324(d)(1)** would specify the requirements from which public agencies would be exempt with respect to these children. Specifically, public agencies would be exempt from the requirements in §300.160 and §300.320(a)(6), regarding participation in State and districtwide assessments, and the requirements in §300.320(b), regarding transition services, which do not apply to children who exceed age eligibility under Part B of the Act prior to their release from prison, based on their sentence and eligibility for early release.

**Proposed §300.324(d)(2)(i)** would, consistent with section 614(a)(7) of the Act, continue to permit the IEP Team of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison to modify the child's IEP or placement if the State has demonstrated a bona fide security or penological interest that cannot otherwise be accommodated. **Proposed §300.324(d)(2)(ii)** would continue to provide that the requirements in current §§300.347(d) and 300.313, regarding LRE, would not apply to these IEP and placement modifications.

**Proposed §300.325**, regarding private school placements by public agencies, would be essentially the same as §300.349 of the current regulations, and would implement section 612(a)(10)(B) of the Act. The proposed regulation would require that children placed in private schools by public agencies receive required special education and related services at no cost to the parents in accordance with an IEP developed under Part B of the Act. Further, even if

the private school implements the child's IEP, responsibility for ensuring compliance with the Act rests with the SEA and the public agency.

Section 300.350 of the current regulations, regarding IEP accountability, would be removed from the proposed regulations as unnecessary. The requirement in §300.350(a) that each child eligible for services under Part B of the Act be provided services in accordance with an IEP is unnecessary because entitlement to FAPE under the Act includes the provision of special education and related services in accordance with an IEP. Paragraph (a)(2) and (b) of §300.350 is unnecessary as we believe that other federal laws, such as title I of the ESEA, already provide sufficient motivation for agency effort to assist children with disabilities in making academic progress. Section 300.350(c), regarding accountability, would be removed as it merely provides explanatory information.

**Proposed §300.327**, regarding educational placements, would replace §300.501(c)(1) of the current regulations, and would continue to require, in accordance with section 614(e) of the Act, that each public agency ensure that parents are members of any group that makes decisions on the educational placement of their child. Current §300.501(c)(2), regarding other methods to ensure parent participation, would be removed from these proposed regulations because it is covered by **proposed §300.328**.

**Proposed §300.328** would incorporate section 614(f) of the Act and would give a parent and a public agency the option of agreeing to use alternative means, such as video conferences and conference calls, to meet their obligations for participation in IEP and placement meetings and in carrying out administrative matters, such as scheduling, exchange of witness lists, and conference calls.

## **Subpart E --Procedural Safeguards**

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

**Proposed §300.500** on the responsibility of SEAs and other public agencies would include the current regulatory language in §300.500(a), appropriately updated. The definitions of the terms "consent," "evaluation," and "personally identifiable" in current §300.500(b) would be moved to subpart A of 34 CFR part 300.

**Proposed §300.501** concerning the opportunity to examine records and parent participation in meetings

generally would reflect the language in current §300.501 with appropriate updating of cross-references and two substantive changes. First, **proposed** §300.501(c)(4) would not include the current concluding phrase requiring that public agencies keep a record of attempts to involve parents in placement decisions, including information consistent with the records that must be maintained if an IEP meeting is to be held without a parent in attendance. The phrase would be removed to provide school personnel greater flexibility in how they document attempts to involve parents. However, public agencies still must maintain documentation of their efforts in this regard. Second, the regulatory requirement in current §300.501(c)(5) would be removed as unnecessarily duplicative. The requirement that agencies make reasonable efforts to enable parents to understand and participate in discussions about placement of their child is inherent in the obligation in **proposed** §300.501(b)(1) that parents be afforded an opportunity to participate in meetings about the identification, evaluation, educational placement and provision of FAPE to their child.

**Proposed** §300.502 would incorporate the provisions of the current §300.502, regarding independent educational evaluations, with some minor changes. References to hearings throughout would be modified to indicate that the hearing involved is a due process hearing, or a hearing on a due process complaint. **Proposed** §300.502(c)(2) also would be revised to clarify that the results of a parent-initiated independent educational evaluation at public expense may be introduced by any party as evidence at a hearing on a due process complaint.

**Proposed** §300.503, on prior written notice, would incorporate two substantive changes from current §300.503. First, current §300.503(a)(2) would be removed. It is not necessary to explain in the regulation that prior written notice can be provided at the same time as parental consent is requested because parental consent cannot be obtained without this notice. Second, the elements of the contents of the notice would be revised in §300.503(b) to reflect new statutory language in section 615(c)(1) of the Act.

**Proposed** §300.504(a) would be revised consistent with new statutory language in section 615(d)(1) of the Act regarding the timing of procedural safeguards notices. In addition, **proposed** §300.504(a)(2) would clarify that a procedural safeguards notice must be provided upon receipt of the first filing of a State complaint or request for a due process hearing in a

school year, as opposed to the first request at any point in a child's school career. This should aid implementation at the school district level without unduly burdening school districts, and ensure that parents have information about the due process procedures when they are most likely to need it.

Throughout these proposed regulations we use the term “due process complaint,” instead of the statutory term “complaint” in order to provide clarity and reduce confusion between a due process complaint and a complaint under the State complaint procedures in §§300.660 through 300.662 of the current regulations and provided for in these proposed regulations in §§300.151 through 300.153.

A new §300.504(b) would be added concerning Internet posting of the procedural safeguards notice, consistent with section 615(d)(1)(B) of the Act.

The contents of the procedural safeguards notice would be updated in **proposed** §300.504(c), reflecting revised statutory language in section 615(d)(2) of the Act. The notice also would have to explain the differences between the due process complaint and the State complaint procedures as provided for in **proposed** §300.504(c)(5)(iii). This change also should assist in reducing confusion about these alternatives. Cross-references would be updated, as appropriate.

**Proposed** §300.505 would incorporate language from section 615(n) of the Act providing that a parent may elect to receive required notices by electronic mail, if the public agency makes that option available. Provisions in current §300.505 concerning parental consent would be moved to subpart D of the proposed regulations that addresses parental consent in the context of evaluations, reevaluations and the initial provision of services to children with disabilities.

**Proposed** §300.506 would revise the current regulatory language on mediation to reflect changes in section 615(e) of the Act. In **proposed** §300.506(a), new language would be added providing that mediation be made available to resolve any dispute, including matters that arise before a party has requested a due process hearing. In **proposed** §300.506(b), language would be added to reflect section 615(e)(2)(B) of the Act and would provide that public agencies may establish procedures to offer parents and schools that choose not to use mediation the opportunity to learn about the benefits and use of mediation. In addition, **proposed** §300.506(b)(3)(ii) would replace the

current language in §300.506(b)(2)(ii), regarding party involvement in the selection of mediators, with more general language providing that the SEA select mediators on a random, rotational, or some other impartial basis. **Proposed §300.506(b)(2)(ii)** should provide SEAs additional flexibility in selecting mediators, while ensuring that mediators are impartial. **Proposed §300.506(b)(6), (b)(7), and (b)(8)** would include new provisions from section 615(e)(2)(F) and (G) of the Act concerning written agreements when mediation results in an agreement to resolve the dispute, and confidentiality of mediation agreements. However, each of these provisions would clarify that the limitation placed on the use of information discussed during mediation as evidence would apply only to actions arising out of the same dispute. Without this clarifying language, there could be a misperception that the Department would be attempting to restrict the powers of State courts. **Proposed §300.506(b)(9)** would be added in light of note 208 of Conf. Rpt. indicating the Conference Committee's intention that parties could be required to sign confidentiality pledges prior to the commencement of mediation, without regard to whether the mediation ultimately resolves the dispute.

**Proposed §300.506(c)** would be similar to current §300.506(c) concerning requirements for the impartiality of the mediator. However, consistent with the language in section 615(f)(3)(A)(i)(II) regarding due process hearing officers, and the Senate Report No. 108-185, p. 37, **proposed §300.506(c)(1)** would permit employees of LEAs that are not involved in the education or care of the child involved in the dispute being mediated to serve as mediators. In addition, the cross-references would be updated. Current §300.506(d), regarding a meeting to encourage mediation, would be removed, reflecting the change in section 615(e)(2)(B) of the Act.

**Proposed §300.507(a)(1)** would revise the current regulatory language regarding initiating a due process hearing on matters relating to the identification, evaluation, or educational placement of a child, or the provision of FAPE to the child to specify that a party could "file a due process complaint," as opposed to "initiate," a hearing on these matters. This change would be made in light of new language concerning the resolution process, particularly in section 615(b)(7)(B) of the Act, requiring that a sufficient due process hearing notice be provided, and section 615(f)(1)(B) of the Act, requiring that a resolution process occur (unless waived by joint agreement of the parties) before a hearing will be available.

Current §300.507(c)(4), regarding a parent's right to a due process hearing for failure to provide the requisite notice, would be removed as it is inconsistent with the new statutory language requiring that a resolution session occur, unless waived by joint agreement of the parties. Current §300.507(a)(2), providing that parents be advised of the availability of mediation whenever a hearing is initiated, would be removed. Under the proposed regulations, mediation must be available to resolve any dispute, not just when a hearing has been requested, as was the case under the prior law. In addition, under the new statute, additional opportunities will exist to resolve disputes when a hearing has been requested, such as through the resolution process. **Proposed §300.507(a)(2)** would reflect the new requirement in section 615(b)(6)(B) of the Act concerning the time period for filing a request for a due process hearing after the alleged violation has occurred. **Proposed §300.507(b)** would contain the information currently in the regulations in §300.507(a)(3) on available free or low-cost legal or other relevant services, but would be revised to refer to "requests a hearing" as opposed to "initiates a hearing" for the reasons discussed previously.

**Proposed §300.508(a), (b), and (c)** would incorporate new language from section 615(b)(7) of the Act concerning the obligation to provide a due process complaint to the other party, the required content of the complaint notice, and the requirement that a due process hearing may not be held until the party, or the attorney representing the party, files the due process complaint. These changes should also help clarify that the complaint and complaint notice would be the same document, which should aid in smooth implementation of these new provisions. **Proposed §300.508(a) and (b)** are similar to current §300.507(c)(1) and (2), but would be revised as required by the Act. **Proposed §300.508(a)(2)** would require that the party requesting the hearing forward a copy of the due process complaint to the SEA. **Proposed §300.508(c)** would address the contents of this due process complaint. **Proposed §300.508(d) and (e)** would incorporate the new language from section 615(c)(2) of the Act concerning due process complaint sufficiency and response to a due process complaint. **Proposed §300.508(e)** would address the public agency's responsibility to send a parent a response to the due process complaint if the public agency had not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint. The proposed regulation would outline what information must be contained in the response. **Proposed §300.508** would incorporate but reorder the statutory



provisions slightly to clarify and provide an organized discussion of each topic.

**Proposed §300.509** would incorporate the new requirement from section 615(b)(8) of the Act that SEAs develop a model form to assist parents in filing a due process complaint, including the content of the complaint. **Proposed §300.509** also would require States to develop model forms for filing State complaints, consistent with the changes regarding **proposed §§300.151 through 300.153** discussed elsewhere in this preamble. The proposed language would replace the current regulatory requirement in §300.507(c)(3).

**Proposed §300.510** would incorporate the new requirements concerning resolution process from section 615(f)(1)(B) of the Act. **Proposed §300.510(a)(1)** would clarify that the resolution meeting must be held within 15 days of receipt of notice of the due process complaint, and prior to the initiation of a due process hearing. **Proposed §300.510(a)(4)** would be added in light of note 212 of the Conf. Rpt. providing that parents and the LEA must determine the relevant members of the IEP Team to attend the resolution meeting. **Proposed §300.510(b)(2)** would clarify that the regulatory timeline for issuing a final due process hearing decision begins at the end of the new 30-day resolution period that starts when the due process complaint is received. This provision is based on the language in section 615(f)(1)(B)(ii) of the Act stating that the applicable due process timelines commence at the end of this 30-day period. **Proposed §300.510(b)(3)** would provide, however, that the resolution session and due process hearing would be delayed until the meeting is held if a parent filing a due process complaint fails to participate in the resolution meeting. **Proposed §300.510(b)(3)** is based on H. Rep. No. 108-77, page 114 that provides:

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

**Proposed §300.510** would incorporate the requirement from section 615(f)(1)(B) of the Act regarding the conducting of resolution sessions, unless waived by joint agreement of the parties prior to the opportunity for an impartial due process hearing.

**Proposed §300.511(a)** and (b) would incorporate the language from section 615(f)(1)(A) of the Act regarding impartial due process hearings. **Proposed §300.511(b)** is the same as the current §300.507(b). **Proposed §300.511(c)(1)** would incorporate the language regarding qualifications of hearing officers from section 615(f)(3)(A) of the Act, and would replace current language in §300.508(a) and (b) of the current regulations. **Proposed §300.511(c)(2)** and (3) would incorporate the regulatory language currently in §300.508(b) and (c) regarding the non-employee status of the hearing officer and the requirement for the public agency to keep a list of hearing officers and their qualifications. **Proposed §300.511(d)**, (e) and (f) would include the new requirements in section 615(f)(3)(B), (C), and (D) of the Act concerning the subject matter of the due process hearings, timelines for requesting hearings and exceptions to the timelines.

**Proposed §300.512(a)**, (b), and (c) would incorporate the due process hearing rights addressed in section 615(f)(2) and (h) of the Act, and the current regulatory language in §300.509(a), (b) and (c)(1). The language in current §300.509(c)(2) concerning providing the record of the hearing and decision at no cost to the parents would be moved to **proposed §300.512(c)(3)**. Under **proposed §300.512(a)(4)**, parents would have a right to obtain copies of a written, or, at the option of the parents, electronic, verbatim record of the hearing and copies of findings of fact and decisions, and public agencies would remain responsible for ensuring that these rights are effectively implemented.

**Proposed §300.513(a)** would reflect the new language in section 615(f)(3)(E) of the Act concerning the nature of hearing officer decisions, including the requirement that decisions be made on substantive grounds, standards for when procedural violations can be found to deny FAPE, and clarifying that a hearing officer can order an LEA to comply with procedural requirements. **Proposed §300.513(b)** would incorporate the construction clause from section 615(f)(3)(F) of the Act, but would clarify that language based on note 225 of the Conf. Rpt., which indicates that the statutory reference to a complaint was intended to address a State-level administrative appeal process, if available in that State. **Proposed §300.513(c)** would incorporate the requirement from section 615(o) of the Act that nothing prevents a parent from filing a separate due process complaint on an issue separate from the due process complaint that has already been filed. However, note 220 of the Conf. Rpt. states that “the Conferees intend to encourage the consolidation

of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint.”

**Proposed §300.513(d)** would incorporate the current regulatory language from §300.509(d) concerning the availability of hearing decisions to the public and the State advisory panel, based on section 615(h)(4) of the Act.

**Proposed §300.514**, on finality of decisions, appeals, and impartial reviews, and §300.515, regarding timelines and convenience of hearings, would be the same as current §§300.510 and 300.511 respectively, with cross-references updated. **Proposed §300.515(a)** also would be revised to start the 45-day timeline from the expiration of the 30-day period for resolution under **proposed §300.510**, rather than from the date when the agency receives a request for a due process hearing. This change is based on new language in section 615(f)(1)(B)(ii) of the Act providing that the timelines for due process commence at the expiration of the resolution period.

**Proposed §300.516**, on civil actions, would be essentially the same as the current §300.512 with updated references, and one substantive change. Specifically, **proposed §300.516(b)** would be added to reflect the new requirement in section 615(i)(2)(B) of the Act that provides for a time limit of 90 days from the date of the final State administrative decision to file a civil action, or if the State has an explicit time limitation for bringing a civil action under Part B of the Act, in the time allowed by that State law.

**Proposed §300.517**, concerning attorneys’ fees, would revise current §300.513 to reflect new language in section 615(i)(3)(B) through (G) of the Act. **Proposed §300.517(a)(1)** would reflect changes in section 615(i)(3)(B) of the Act providing that either the parents or an SEA or LEA could receive reasonable attorneys’ fees in appropriate circumstances. **Proposed §300.517(a)(2)** would be added to reflect the language in section 615(i)(3)(B)(ii) of the Act clarifying that the attorneys’ fees limitation in the District of Columbia Appropriations Act, 2005, P.L. 108-335, would not be affected by this regulation. **Proposed §300.517(c)(2)(iii)** would be added to incorporate language from section 615(i)(3)(D)(iii) of the Act providing that attorneys’ fees are not available for preliminary meetings that are a part of the new resolution proceedings.

Finally, **proposed §300.517(c)(4)(i)** would provide that action by either the parent, or the parent’s attorney, to unreasonably protract the final resolution of the controversy would be a basis to reduce the amount of attorneys’ fees, consistent with a corresponding change in section 615(i)(3)(F)(i) of the Act.

**Proposed §300.518**, concerning the child’s status during proceedings, would be substantially the same as the current regulation in §300.514, with appropriate updating of cross-references.

**Proposed §300.519** would revise the current regulation in §300.515 concerning surrogate parents in the following ways: In **proposed §300.519(a)(2)**, we would use the statutory word “locate” rather than the current “discover the whereabouts” of the parent. **Proposed §300.519(a)(4)** would be added to reflect the new language in section 615(b)(2)(A)(ii) of the Act requiring that a child’s rights be protected if the child is an unaccompanied homeless youth as defined under the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11431 et seq. **Proposed §300.519(c)** would be added to provide that a judge overseeing a child’s case could appoint a surrogate if the child were a ward of the State, consistent with section 615(b)(2)(A)(i) of the Act. **Proposed §300.519** would remove current §300.515(c)(3) regarding the option for a public agency to select as a surrogate an employee of a nonpublic agency that only provides noneducational care for the child, to ensure that surrogates do not have interests that conflict with the interest of the child. **Proposed §300.519(f)** would be added concerning the potential appointment of temporary surrogates for unaccompanied homeless youth based on language in note 189 of the Conf. Rpt. providing that:

The Conferees recognize that, because the parents of homeless unaccompanied youth may be unavailable or unwilling to participate in the youth’s education, homeless unaccompanied youth face unique problems in obtaining a free appropriate public education.

Accordingly, the Conferees intend that the surrogate parent process be available for such youth . . . the Conferees intend that appropriate staff members of emergency shelters, transitional shelters, independent living programs, and street outreach programs not be considered to be employees of agencies involved in the education or care of youth, for purposes of the prohibition of certain agency employees from acting as surrogates for parents . . . , provided that such role is temporary until a surrogate can be appointed that

meets the requirements and such role in no way conflicts with, or is in derogation of, the provision of a free appropriate public education to these youth.

Finally, in light of the new requirement in section 615(b)(2)(B) of the Act, **proposed §300.519(h)** would require that the SEA make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that a surrogate is needed. It is anticipated that only rare situations would cause the appointment of a surrogate to take 30 days.

**Proposed §300.520**, concerning the transfer of parental rights at the age of majority, would be unchanged from the current regulatory language in §300.517. With regard to the permissive transfer of rights to individuals who are in correctional institutions, we would not include the reference, from the statute, to Federal correctional institutions, as States do not have an obligation to provide special education and related services under the Act to individuals in Federal facilities.

#### Discipline Procedures

The discipline provisions of the regulations would be substantially revised or removed, in light of significant changes to section 615(k) of the Act. In light of these statutory changes, the current regulations in §§300.520 through 300.528 would be removed. **Proposed §300.530(a)** would provide that school personnel may consider unique circumstances, on a case-by-case basis when deciding whether a change in placement, consistent with the requirements of **proposed §300.530**, would be appropriate for a particular child for a violation of a school code of student conduct. This provision would be based on statutory language in section 615(k)(1)(A) of the Act, and the Conf. Rpt. in notes 237-245, which provides that “[It] is the intent of the Conferees that when a student has violated a code of conduct school personnel may consider any unique circumstances on a case-by-case basis to determine whether a change of placement for discipline purposes is appropriate.” **Proposed §300.530(b)** would reflect the language in section 615(k)(1)(B)(1) of the Act, permitting school personnel to remove a child with a disability who violates a school code of conduct for not more than 10 school days, except that the regulatory language would clarify that these removals could be for not more than 10 consecutive school days, and that additional removals in the same school year would be possible, as long as those removals do not amount to a change of placement for the child. It is important for purposes of school

safety and order to preserve the authority that school personnel have under the regulations to be able to remove a child for a discipline infraction for a short period of time, even though the child may have been removed for more than 10 days in that school year, as long as the pattern of removals does not itself constitute a change in placement of the child.

However, because it is also important to preserve the concept from the current regulations that discipline not be used as a means of disconnecting a child with a disability from education, the requirement in **proposed §300.530(b)(2)** would provide that a child receive educational services consistent with paragraph (d) of §300.530 after the first 10 days of removal in a school year.

Paragraphs (c) and (d)(1) and (2) of **proposed §300.530** would incorporate the statutory provisions from section 615(k)(1)(C) and (D) of the Act concerning removals for more than 10 school days and the provision of services during periods of removal. **Proposed §300.530(d)(3)** would clarify that public agencies need not provide services to a child removed for 10 school days or less in a school year, as long as the public agency does not provide educational services to nondisabled children removed for the same amount of time. This is the same policy as in the current regulations in §300.121(d)(1).

Paragraph (d)(4) of **proposed §300.530** would provide that where a child has been removed for more than 10 school days in the same school year, but not for more than 10 consecutive school days and not a change of placement, school personnel, in consultation with at least one of the child’s teachers, would determine the extent to which services are needed, if any, and the location where needed services would be provided. We believe that this requirement is important to ensure that children with disabilities in this situation receive appropriate services, while preserving the flexibility of school personnel to move quickly to remove a child when needed and determine how best to address the child’s needs during these relatively brief periods of removal. The consultation by school personnel with at least one of the child’s teachers does not require that a meeting be held.

**Proposed §300.530(d)(5)** would provide that the child’s IEP Team determines appropriate services, including the location of services when a child is removed for more than 10 consecutive school days, or the removal otherwise is a change of placement. We believe that in instances of these longer-term removals, the child’s IEP Team should make the

determination of what services are appropriate for the child.

**Proposed §300.530(e)** and (f) would incorporate the new requirements concerning manifestation determinations from section 615(k)(1)(E) and (F) of the Act, with one addition. An introductory phrase would be included in **proposed §300.530(e)(1)** to clarify that a manifestation determination would not need to be conducted for removals for not more than 10 consecutive school days or that do not otherwise constitute a change of placement. This added language is consistent with the regulatory policy in current §300.523(a).

**Proposed §300.530(g)** and (h) would incorporate the requirements from section 615(k)(1)(G) and (H) of the Act, which address the circumstances under which school personnel can remove a child for not more than 45 school days, including the new authority to remove a child who has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or LEA. In addition, **proposed §300.530(h)** would contain parental notification requirements. **Proposed §300.530(i)** would contain definitions drawn from section 615(k)(7) of the Act. The Act uses the definition of "serious bodily injury" from section 1365 of title 18, United States Code (i.e., "bodily injury which involves – (A) a substantial risk of death; (B) extreme physical pain; (C) protracted or obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty").

**Proposed §§300.531** and 300.532(a) and (b) reflect the new language in section 615(k)(2) and (3) of the Act concerning the determination of the interim alternative educational setting by the IEP Team, the right to request a hearing to appeal placement and manifestation decisions, and the authority of the hearing officer in appeals under the discipline procedures. We add **proposed §300.532(b)(3)** to the regulations to clarify that in appropriate circumstances, a school district could seek a subsequent hearing to continue a child in an interim alternative educational placement if the school district believes that the child would be dangerous if returned to his or her original placement at the end of a removal that was based on a determination that maintaining the child's regular placement was substantially likely to result in injury to the child or others. **Proposed §300.532(c)(1)** would incorporate the statutory right to a hearing from section 615(f)(1)(A) of the Act.

**Proposed §300.532(c)(2)** would reflect the language in section 615(k)(4)(B) of the Act regarding expedited timelines in cases of hearings under the discipline procedures. In **proposed §300.532(c)(3)** and (4), we propose shortened timelines for the resolution session process in expedited hearings in light of the shortened timelines for these expedited hearings under the statute. **Proposed §300.532(c)(5)** and (6) would repeat language from current §300.528(c) and (d) that provides useful flexibility for States in designing their expedited hearing procedures.

**Proposed §300.533** would address the issue of the child's placement during appeals. This section would reflect the language in section 615(k)(4)(A) of the Act providing that the child remain in the interim alternative educational setting pending the decision of the hearing officer or the expiration of the time period provided for removals based on a determination that the behavior is not a manifestation of the child's disability. We would add, however, in **proposed §300.530(g)**, that this provision also would apply to removals of up to 45 school days.

**Proposed §300.534** concerning, in the context of discipline, the protections for children not yet determined eligible for special education and related services would replace the current §300.527, and would reflect the new language in section 615(k)(5) of the Act. **Proposed §300.535** would be essentially the same as current §300.529, and is based on section 615(k)(6) of the Act. **Proposed §300.536** would include a description of when a change in placement occurs because of a disciplinary removal. The concept of change of placement under discipline is raised in section 615(k)(1)(A) and (k)(3)(B) of the Act, and it is important to have a clear understanding of when a change in placement occurs so as to ensure that discipline does not effectively result in the cessation of services to a child with a disability, in violation of the FAPE requirements in section 612(a)(1)(A) of the Act. **Proposed §300.536** is similar to current §300.519 but would include the additional provision that the child's behavior, if substantially similar to the child's behavior in the incidents that resulted in a series of removals, taken cumulatively, is a manifestation of the child's disability. This addition should assist in the appropriate application of the change in placement provisions.

**Current Sections Incorporated Elsewhere in This Part**

Current §§300.530 through 300.543 are incorporated into subpart D of these proposed regulations, as appropriate. Current §§300.550 through 300.556 are incorporated into subpart B of these proposed regulations, as appropriate. Current §§300.560 through 300.577 are incorporated into subpart F of these proposed regulations. Current §§300.580 through 300.586 and §300.589 are incorporated in subpart B of these proposed regulations. Current §300.587 is incorporated into subpart F of these proposed regulations, as appropriate.

**Subpart F -- Monitoring, Enforcement, Confidentiality, and Program Information  
Monitoring, Technical Assistance and Enforcement**

Subpart F reflects certain portions of section 616 of the Act that address State activities and those activities where the Department must establish and enforce particular procedures for withholding actions. **Proposed §300.600** would reflect the new provisions of section 616(a) and (b)(2)(c)(ii) of the Act concerning monitoring and enforcement, which sets forth the responsibility of States to monitor the implementation of, enforce, and annually report on performance under part 300. **Proposed §300.600** would further reflect the new statutory requirement that the primary focus of monitoring is on improving educational results and functional outcomes for children with disabilities. The provisions of current §300.600 have been moved to **proposed §300.149** to follow the order of the Act. **Proposed §300.600(c)** would reflect new requirements in section 616(a)(3) of the Act that States measure performance in monitoring priority areas using quantifiable indicators and such qualitative indicators as are needed to adequately measure performance. **Proposed §300.600(c)** clarifies that these indicators are established by the Secretary in the context of informing States of what they need to do under the State's performance plan.

**Proposed §300.601** would reflect new statutory language requiring States to have a performance plan that evaluates their efforts to implement the requirements and purposes of part 300 and describes how the State will improve implementation within one year of enactment of the Act. Under **proposed §300.601** the plan must establish measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in section

613(a)(3) of the Act and must be submitted to the Secretary for approval. Consistent with the new statutory language, **proposed §300.601** would require States to review their performance plans at least once every six years and submit any amendments to the Secretary. The proposed regulation also incorporates the statutory requirements from section 616(b)(2)(B)(ii) regarding data collection and specifies that nothing in these regulations authorizes the development of a nationwide database of personally identifiable information on individuals involved in studies or other data collections. These provisions are based on section 616(b)(1), (2)(A) and (2)(B) of the Act.

**Proposed §300.601(b)(1)** contains language requiring that each State must collect valid and reliable information on all the indicators in the performance plan concerning the priority areas in section 616(a)(3) of the Act.

**Proposed §300.602** would reflect new statutory language from section 616(b)(2)(C) of the Act requiring States to use the targets established in their performance plans to analyze the performance of each LEA. These targets will include the priority areas in section 616(a)(3) of the Act. Under **proposed §300.602**, which largely tracks the language in section 616(b)(2)(C) of the Act, States would be required to report annually to the public on the performance of each LEA in the State on the targets in the performance plan and make the performance plan available to the public. Notes 253 through 258 of the Conf. Rpt. explain that the expectation is that the State performance plans, indicators and targets are to be developed with broad stakeholder input and public dissemination. **Proposed §300.602(b)(1)(i)** would include the statutory requirements from section 616(b)(2)(C) of the Act that States report annually to the public on the performance of each LEA in the State on the targets in the State's performance plan, and make the State's performance plan publicly available. **Proposed §300.602(b)(1)(ii)** would add that if the State, in meeting the requirements of §300.602(b)(1)(i), collects performance data through State monitoring or sampling, the State must include in its report the most recently available performance data on each LEA and the date the data were obtained. When appropriate, monitoring or sampling can be an effective means of data collection, reduce burden on States, and provide meaningful information on LEAs' performance.

Reflecting new language in section 616(b)(2)(C) of the Act, **proposed §300.602(b)(2)** also would require

each State to report annually to the Secretary on the performance of the State under its performance plan, but the State would not be required to report to the public or the Secretary any information on performance that would disclose personally identifiable information about individual children. Furthermore, under **proposed** §300.602(b)(3), States would not be required to report their student data if the available data are insufficient to yield statistically reliable information.

**Proposed** §300.603 would reflect new language in section 616(d) of the Act requiring the Secretary to review the State's annual performance report and based on information in the annual performance report, or information obtained through monitoring visits or other public information, determine if the State (1) meets the requirements and purposes of Part B of the Act, (2) needs assistance in implementing the requirements of Part B of the Act, (3) needs intervention in implementing the requirements of Part B of the Act, or (4) needs substantial intervention in implementing the requirements of Part B of the Act. **Proposed** §300.603(b)(2) would reflect the language from section 616(d)(2)(B) of the Act that would provide States with notice and an opportunity for a hearing for determinations under **proposed** §300.603(b)(1)(iii) and (b)(1)(iv). **Proposed** §300.603(b)(2)(ii) also would clarify that the hearing would consist of an opportunity to meet with the Assistant Secretary for the Office of Special Education and Rehabilitative Services to demonstrate why the Department should not make the determination. We propose this regulatory provision because the Department has determined that this type of hearing would provide the appropriate amount of process due a State prior to one of these determinations. Should specific enforcement action subsequently be contemplated, as provided for in section 616(e) of the Act, other hearing procedures then may apply, as provided for in **proposed** §300.604 and in the General Education Provisions Act as amended, 20 U.S.C. 1221 et seq. (GEPA), and implementing regulations.

**Proposed** §300.604 (Enforcement) would reflect new requirements in section 616(e) of the Act that set forth the various actions the Secretary takes with respect to each State's level of compliance as determined by the Secretary's review of the state performance reports under **proposed** §300.603. Thus, if the Secretary determines that a State needs assistance, needs intervention, or needs significant intervention, there are specific enforcement actions that the Secretary may take. For example, if it is determined that a State needs substantial intervention,

the Secretary takes one or more of the actions described in paragraph (c) of **proposed** §300.604, including recovering funds under section 452 of GEPA, withholding in whole or in part any further payments to the State under Part B of the Act, referring the case to the Office of the Inspector General at the Department of Education, or referring the matter for appropriate enforcement action, which may include referral to the Department of Justice.

Under **proposed** §300.604(d), the Secretary reports to appropriate congressional committees within 30 days of taking enforcement action against a State for any of the levels of compliance described in the preceding paragraph, describing the specific action that has been taken, and the reasons why the action was taken.

**Proposed** §300.605(a), which reflects the language in section 616(e)(4)(A) of the Act on reasonable notice and the opportunity for a hearing prior to a withholding, would essentially be the same as current §300.587(c)(4). **Proposed** §300.605(b) would reflect new language from section 616(e)(4)(B) of the Act that, pending the outcome of any hearing to withhold payments, the Secretary may do one or both of the following: suspend payments to a recipient or suspend authority of the recipient to obligate funds under Part B of the Act provided that the recipient has been given reasonable notice and an opportunity to show cause why future payments or the authority to obligate Part B funds should not be suspended. **Proposed** §300.605(c) on the nature of withholding actions would reflect the current regulatory provisions in §300.587(c)(1) and (c)(2) with minor language revisions to make the section consistent with the language in section 616(e)(6) of the Act.

**Proposed** §300.606, on bringing pending withholding actions to the attention of the public, would reflect the new language in section 616(e)(7) of the Act, which is very similar to the language in current §300.587(c)(3), except that section 616(e)(7) of the Act would apply to States only and not to SEAs, LEAs, or other agencies.

**Proposed** §300.607 regarding divided State responsibility would reflect the regulatory language in current §300.587(e), which is consistent with the language from section 616(h) of the Act.

**Proposed** §300.608 would reflect the new language in section 616(f) of the Act that requires an SEA to prohibit an LEA from reducing the LEA's maintenance of effort under 613(a)(2)(C) if the SEA determines that the LEA is not meeting the

requirements of Part B of the Act, including the targets in the State's performance plan.

Consistent with the new statutory provisions in section 616(e) of the Act, **proposed §300.609** would provide that nothing in the proposed regulations restricts the Secretary from utilizing any authority under GEPA to monitor and enforce the requirements under the Act.

### Confidentiality of Information

**Proposed §300.610** would reflect the provision in section 617(c) of the Act regarding confidentiality of information. **Proposed §§300.611 through 300.627** on the confidentiality of information would be the same as current §§300.560 through 300.575 and 300.577, with minor updates to cross-references. (Current §300.576 would be addressed in **proposed §300.229**.)

### Reports--Program Information

**Proposed §§300.640 through 300.646** on program information would substantially reflect the regulatory provisions from current §§300.750 through 300.755, with some changes. **Proposed §300.640(a)** would remove the requirement from current §300.750 that the information required by section 618 of the Act be submitted no later than February 1 and would replace it with the requirement that the information be submitted at times specified by the Secretary. **Proposed §300.640(b)** on reporting on forms provided by the Secretary would be the same as the regulatory language in current §300.750(b).

**Proposed §300.641(a)** would revise the regulatory provisions in current §300.751 by removing the age spans listed in current §300.751(a)(1) through (a)(3). **Proposed §300.641** also would remove the requirement from current §300.751(c) that reports must include the number of children with disabilities within each disability category. SEAs must specify information required by these regulatory provisions on the forms provided by the Secretary pursuant to **proposed §300.640(b)**. Finally, **proposed §300.641(a)** would permit States to count children with disabilities for purposes of the reporting required by **proposed §300.640** on any date between October 1 and December 1 of each year. This change will provide States greater flexibility in coordinating their IDEA Part B child count date with counts they conduct for other State purposes, while providing reasonable consistency across States.

**Proposed §300.641(b)**, regarding age at count date, would be substantially the same as current regulation §300.751(b), but would reflect the revision in the count date proposed in paragraph (a) of this section. **Proposed §300.641(c)** and (d) would be substantially the same as the regulatory provisions in current §300.751(e) and (f) regarding how to meet the reporting requirements.

**Proposed §300.642(a)** would reflect the new provisions in section 618(b)(1) of the Act requiring each State to report data in a manner that does not result in disclosure of personally identifiable information. **Proposed §300.642(b)** on sampling, which reflects the language in section 618(b)(2) of the Act, would be substantially unchanged from current §300.751(d).

**Proposed §300.643** on certification of the annual report of children served is substantially unchanged from current §300.752.

**Proposed §300.644** on criteria for counting children in the annual report of children served would be substantially unchanged from current §300.753(a). Current 300.753(b) on reporting on children receiving special education that is solely funded by the Federal government would be removed as unnecessary because the funding formula is no longer based on child count. **Proposed §300.644(c)** clarifies current §300.753(a)(3) regarding the counting of children enrolled by their parents in private schools.

**Proposed §300.645** on other responsibilities of the SEA related to the annual report of children served would be the same as current §300.754.

**Proposed §300.646(a)** would revise the regulatory provisions in current §300.755 on determination of significant disproportionality to reflect changes in section 618(d) of the Act. **Proposed §300.646(a)** would include new language requiring States to collect and examine data on disproportionality based on ethnicity as well as race. **Proposed §300.646(a)** also would require States to determine if significant disproportionality is occurring in the State as well as within the LEAs of the State. **Proposed §300.646(a)(1)** and (a)(2) on collecting and examining data related to identification of children with disabilities would be the same as the regulatory language in current §300.755(a)(1) and (a)(2). **Proposed §300.646(a)(3)** would reflect the new provisions in section 618(d)(1)(C) of the Act requiring States to collect and examine race and ethnicity data with respect to the incidence, duration

and type of disciplinary actions, including suspensions and expulsions.

**Proposed §300.646(b)(1)** concerning the review and revision of policies, practices and procedures, which reflects the language in section 618(d)(2) of the Act, would be the same as current §300.755(b). **Proposed §300.646(b)(2)** would incorporate the new requirement in section 618(d)(2)(B) of the Act that States must ensure that any LEA identified under **proposed §300.646(b)(1)** as having policies, practices, or procedures that do not comply with Part B of the Act reserves the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to children in the LEA, particularly children in those groups that were significantly overidentified. **Proposed §300.646(b)(3)** would incorporate new language from section 618(d)(2)(C) of the Act that requires the LEA to report on the revision of policies, practices and procedures that do not comply with the Act.

**Subpart G: Authorization; Allotment; Use of Funds; Authorization of Appropriations**

Proposed subpart G would reflect the provisions in section 611 of the Act regarding the Department's allocation of Part B section 611 funds to States, outlying areas, the freely associated States, and the Secretary of the Interior. The proposed title of subpart G, "Authorization; Allotment; Use of Funds; Authorization of Appropriations," would be revised from "Allocation of Funds; Reports" to reflect the statutory headings listed under section 611 of the Act.

**Proposed §300.700**, regarding grants to States, would contain the language in current §300.701 but would be revised to reflect the order of, and revisions to, section 611(a) of the Act. Specific revisions would include the changes that were made in: (1) section 611(a)(1) of the Act to include a reference to freely associated States as receiving Part B grants; (2) section 611(a)(2)(A) of the Act to clarify that the current definition of the maximum amount a State may receive applies for fiscal years 2005 and 2006; and (3) section 611(a)(2)(B) of the Act to clarify the maximum amount a State may receive for fiscal year 2007 and subsequent fiscal years and to allow for adjustments described in 611(a)(2)(B)(iii) of the Act. The adjustments would be reflected in **proposed §300.700(b)(2)(iii)**. Current §300.700, regarding the special definition of the term State, and current §300.702, regarding the definition of average per-pupil expenditure in public elementary and secondary schools in the United States, would not be

substantively changed but would be moved to **proposed §300.717** to a general "Definitions" section for subpart G.

**Proposed §300.701**, regarding grants to outlying areas and freely associated States, and the Secretary of the Interior, would incorporate the language in the current regulations in §§300.715(a), 300.717, 300.719, and 300.720, as revised to reflect changes in section 611(b) of the Act. **Proposed §300.701** would not contain the definition of "freely associated states" from section 611(b)(1)(C) of the Act. The definition of "freely associated states," which is substantively unchanged, would be in **proposed §300.717** in the general "Definitions" section for subpart G. As noted in the preceding paragraph, current §300.701, regarding grants to States, would be moved to **proposed §300.700**, consistent with the structure of section 611 of the Act. **Proposed §300.701(a)(1)(ii)** would clarify the provision in section 611(b)(1)(A)(ii) of the Act that requires that, as a condition of receiving a grant under this part, each freely associated State must meet the "applicable requirements of Part B of the Act." The proposed revision would specify what the "applicable requirements" are, similar to what is done with respect to information requirements for the Secretary of the Interior in current §300.260 (**proposed §300.708**).

**Proposed §300.702**, regarding technical assistance, would contain the language in section 611(c) of the Act, which allows the Secretary to reserve Part B funds to support technical assistance activities authorized under section 616(i) of the Act.

**Proposed §300.703**, regarding allocations to States, would be revised to incorporate the language of current §§300.703 and 303.706 through 303.709. The proposed regulation would be revised to reflect section 611(d) of the Act, which: (1) requires the Secretary to allocate Part B funds to States after reserving funds for technical assistance under section 611(c) of the Act and making payments to outlying areas, the freely associated States and the Secretary of Interior under section 611(b); (2) removed language regarding interim and permanent formulas; and (3) established 1999 as the base year for minimum state allocations under section 611(d)(3)(A)(i)(I) and (B)(ii)(I) of the Act and calculations of ratable reductions if the amount available for allocations to States is less than the amount allocated for the preceding fiscal year under section 611(d)(4) of the Act.



**Proposed §300.704**, regarding State-level activities, would incorporate certain provisions of section 611(e) of the Act regarding the use of Part B funds under section 611 of the Act for authorized State-level activities. **Proposed §300.704(a)(1)** and (2) would contain the new maximum amount States and outlying areas may reserve for State administration. The proposed regulation would establish fiscal year 2004 as the base year for States (as defined under **proposed §300.717**) and the greater of \$35,000 or five percent of the Part B grant for outlying areas and would provide for cumulative annual adjustments based on the rate of inflation to the maximum amount a State may reserve, consistent with section 611(e)(1)(A) and (B) of the Act. **Proposed §300.704(a)(3)** would contain the new certification requirement language in section 611(e)(1)(C) of the Act that prior to the expenditure of funds under section 611(e)(1) of the Act, the State must certify to the Secretary that the arrangements to establish financial responsibility for services pursuant to section 612(a)(12)(A) of the Act are current. **Proposed §300.704(a)(4)** would contain a regulatory provision that would allow SEAs that reserve funds under §300.704(a) to use Part B State administration funds to administer Part C of the Act if the SEA is the lead agency designated under Part C, consistent with section 611(e)(1)(D) of the Act.

**Proposed §300.704(b)(1)** and (2) would generally reflect and clarify the new requirements in section 611(e)(2)(A) of the Act regarding the amount of funds that States may reserve for other State-level activities, depending on the amount they reserve for administration and whether they establish a high-cost fund under section 611(e)(3) of the Act. **Proposed §300.704(b)(3)** would incorporate the new provision in section 611(e)(2)(B) of the Act, but would clarify that some portion of funds reserved for other State-level activities under §300.704(b)(1) must be used for monitoring, enforcement and complaint investigation, and to establish and implement the mediation process required under section 615(e) of the Act. **Proposed §300.704(b)(3)** would not prohibit States from using State funds for these monitoring, enforcement, complaint investigation, or mediation activities.

**Proposed §300.704(b)(4)** would incorporate section 611(e)(2)(C) of the Act, which allows funds reserved for other State-level activities under §300.704(b)(1) to be used for certain authorized activities. These activities would include support and direct services, paperwork reduction activities and capacity building activities, and improving the delivery of services by LEAs, improving the use of technology in the classroom and supporting its use, developing and

implementing postsecondary transition programs, providing technical assistance to schools and LEAs identified for improvement under section 1116 of the ESEA, and assisting LEAs in providing positive behavioral interventions and supports and appropriate mental health services for children with disabilities and meeting personnel shortages.

**Proposed §300.704(c)** would contain a new provision that incorporates the language of section 611(e)(3) of the Act regarding the State's option to use ten percent of the amount it reserves for other State-level activities under §300.704(b)(1) for financing an LEA high cost fund and would set forth detailed content and timeline requirements for the State's plan for the high cost fund. **Proposed §300.704(c)(1)(i)(A)** would clarify the statutory language by providing that these funds would be used by a State to finance the high cost fund and to make disbursements from that fund. **Proposed §300.704(c)(1)(i)(B)** and (ii) would reflect the statutory language on using the high cost fund to support innovative cost sharing and the special definition of LEA that applies in this context. **Proposed §300.704(c)(2)(i)** would generally reflect the language in section 611(e)(3)(B)(i) of the Act, but also would clarify that the funds reserved for the high cost fund are solely for disbursement to the LEAs and may not be used for costs associated with establishing, supporting, and otherwise administering the high cost fund. This provision also would specify that the State may use State administration funds under §300.704(a) for those administrative costs, consistent with the language in section 611(e)(3)(B)(i) of the Act.

**Proposed §300.704(c)(2)(ii)** would limit States to not more than five percent of the funds they reserve each fiscal year under **proposed §300.704(c)** to support innovative cost sharing, consistent with section 611(e)(3)(B)(ii) of the Act.

**Proposed §300.704(c)(3)** would incorporate the requirements in section 611(e)(3)(C) of the Act, regarding the State plan for the high cost fund, with one addition. **Proposed §300.704(c)(3)(i)(C)** would add a requirement that the State plan establish criteria to ensure that the placements of children whose costs are supported under the high cost fund are made consistent with the LRE requirements. This would reinforce that the funds would not be used to encourage inappropriate placements outside of the general education environment. Nothing in the proposed regulations would prohibit an SEA from using high cost funds to support costs of providing appropriate services in a general education

environment when those costs meet the standard established by the State in its State plan. **Proposed §300.704(c)(3)(i)(A)(2)** would incorporate the requirement in section 611(e)(3)(C)(ii)(I)(bb) of the Act that the State must establish a definition of a high need child with a disability that, at a minimum, ensures that the cost of the high need child with a disability is greater than three times the average per pupil expenditure (APPE). Under this provision, a State could, for example, establish a definition that ensures that the cost of a high need child with a disability is four times greater than the APPE.

**Proposed §300.704(c)(4)** through (c)(6) would incorporate the requirements in section 611(e)(3)(D) through (F) of the Act regarding disbursements from the fund, legal fees, and assurance of FAPE, with two additions. In **proposed §300.704(c)(4)(ii)**, we would add language on appropriate costs to clarify that the costs of room and board for a necessary residential placement could be supported by the high cost fund. **Proposed §300.704(c)(4)(iii)** would provide that the funds in the high cost fund would remain under the control of the SEA until disbursed, under the State plan, to support a specific child, or until reallocated to LEAs in the subsequent year. This provision is needed to make clear that these funds must be distributed to LEAs under the high cost State plan formula.

**Proposed §300.704(c)(7)** through (9) would incorporate the provisions of section 611(e)(3)(G) through (I) of the Act regarding the special rule for risk pool and high need assistance programs that predated the new statute, the effect on Medicaid services, and the reallocation of funds remaining at the end of the fiscal year. **Proposed §300.704(c)(9)** generally would reflect and clarify the requirement in section 611(e)(3)(I) of the Act that funds reserved for a high cost fund, but not spent in accordance with section 611(e)(3)(D) of the Act before the beginning of their last year of availability for obligation, must be allocated to LEAs in the same manner as other funds from the appropriation for that fiscal year are allocated to LEAs under section 611(f) of the Act during their final year of availability. States that are not reserving funds for the high cost fund, but that offer LEAs support for extraordinary expenses for particular children from other funds would not need to develop a State plan for a high cost fund under the proposed regulations.

**Proposed §300.704(d)** would incorporate the language of section 611(e)(4) of the Act, which contains the exemptions of funds reserved for administration and other State-level activities from

Part B's commingling and nonsupplanting provisions in sections 612(a)(17)(B) and (C) of the Act. **Proposed §300.704(e)** would incorporate section 611(e)(6) of the Act, which allows a State to use funds reserved for administration under §300.704(a)(1) as a result of inflationary increases to carry out activities such as providing support and direct services, assisting LEAs in providing positive behavioral interventions and supports, assisting LEAs in meeting personnel shortages, and supporting capacity building, as authorized under §300.704(b)(4)(i), (iii), (vii), or (viii). **Proposed §300.704(f)** would incorporate the new provisions of section 611(e)(7) of the Act that allow flexibility in using certain Part B funds (identified in sections 611(e)(1)(A), 611(f)(3) and 619(f)(5) of the Act). States may use these funds to develop and implement a State policy option that is available under section 635(c) of the Act for making Part C early intervention services available to children beyond age three who are eligible under section 619 under the circumstances set forth under **proposed §300.704** and Part C of the Act.

**Proposed §300.705**, regarding subgrants to LEAs, would contain the language in current §§300.711, 300.712, and 300.714 and would incorporate section 611(f) of the Act regarding State subgrants to LEAs using Part B section 611 funds. **Proposed §300.705(a)** would specify that LEAs include public charter schools that operate as LEAs, consistent with section 611(f)(1) of the Act. The language in current §300.713 regarding former Chapter 1 State agencies would be removed as the corresponding statutory provision was also removed. **Proposed §300.705(b)(1)** and (2) would establish 1999 as the base year for allocation to LEAs, consistent with section 611(f)(2)(A) of the Act.

**Proposed §300.706** would contain the language in current §300.710 regarding allocations to a State in which a by-pass is implemented for parentally-placed private school children with disabilities, consistent with section 612(f) of the Act, with cross-references updated.

#### Secretary of the Interior-Eligibility

**Proposed §§300.707** through 300.716 would incorporate and update current §§300.260 through 300.267 and §§300.715 through 300.716 based on the requirements in section 611(h) of the Act concerning the payment to the Secretary of the Interior.

**Proposed §300.707(a)** would add new definitions of Reservation and Tribal governing body of a school to

apply for purposes of §§300.707 through 300.716. The term reservation would be defined to mean Indian Country under 18 U.S.C. 1151. The term tribal governing body of a school would be defined to mean the body or bodies of the Indian tribe involved and that represent at least 90 percent of the students served by the school. Adding these definitions should provide clarity to the responsibilities of the Department of the Interior under the IDEA.

The Department of Education seeks comment on the necessity of adding a new definition of LEA for the purposes of regulations related to schools operated or funded by the Secretary of the Department of the Interior. The Department of Education also seeks comment on the necessity of adding a new definition of SEA for the purposes of regulations related to schools operated or funded by the Secretary of the Department of the Interior.

**Proposed §300.707(b)** would incorporate current §300.715(b) and add the new requirement in section 611(h)(1)(A)(i) and (ii) of the Act that 80 percent of the amount allotted under section 611(b)(2) of the Act must be allocated to elementary schools and secondary schools operated or funded by the Secretary of the Interior by July 1, after the Secretary of the Interior reserves funds for administration under **proposed §300.710**. The remaining 20 percent must be allocated to those schools by September 30. Current §300.715(a) is reflected in section 611(b)(2) of the Act and would be incorporated in **proposed §300.701(b)** to align with the order of section 611. Current §300.715 (c) has been removed from the regulations because a State can no longer require a BIA funded school to attain or maintain State accreditation. This provision is not applicable at this time. Paragraph (c) of **proposed §300.707** would reflect the language in section 611(h)(1)(C) of the Act concerning children aged 3 through 21 on reservations. This provision would replace current §300.300(c) to align with the order of the statute. Under paragraph (c) of **proposed §300.707**, with respect to all other children aged 3 through 21 on reservations, the SEA of the state in which the reservation is located, must ensure that all of the requirements of Part B of the Act are implemented. Generally, if the reservation were located in more than one State, the State in which the student resides would be responsible for ensuring the requirements of Part B of the Act are met for that student.

**Proposed §300.708** would incorporate current §300.260, update references to the eligibility requirements that apply to the Secretary of the Interior to reflect the new requirements in the Act,

and add one new paragraph discussed as follows. Paragraph (a) of **proposed §300.708** would modify current §300.260(a) by updating references to section 612 of the Act and adding the new requirements in section 612 of the Act that apply to the Secretary of the Interior. Paragraph (b) of **proposed §300.708** would incorporate current §300.260(b). Paragraph (c) of **proposed §300.708** would incorporate current §300.260(c) with updated references to section 613 of the Act. Paragraph (c) of **proposed §300.708** also would clarify that references to LEAs in section 613 of the Act that are included in **proposed §300.708(c)** must be read as references to elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. **Proposed §300.708** would add a new paragraph (d) that would reflect the requirements in section 611(h)(2)(A) and (F) and section 611(h)(3) of the Act, which provide that the monitoring and enforcement requirements in section 616 of the Act apply to the Secretary of the Interior. Paragraph (d) of **proposed §300.708** would also clarify that references to LEAs in section 616 of the Act must be read as references to elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior.

Proposed paragraphs (e) through (j) of **proposed §300.708** would incorporate current §300.260(d) through (i), with cross-references updated. Consistent with section 611(h)(3) of the Act, **proposed §300.708(j)** would remove the sentence in current §300.260(i) that section 616(a) of the Act applies to the information described in this section. Instead, the proposed regulation would add a sentence providing that the Secretary withholds payments under §300.707 with respect to the requirements described in this section in the same manner as the Secretary withholds payments under section 616(e)(6) of the Act.

**Proposed §§300.709 through 300.710** would incorporate the current regulations in §§300.261 through 300.262 concerning public participation and use of Part B funds for administration, with cross-references updated.

**Proposed §300.711** would add a provision that would permit the Secretary of the Interior to allow each elementary school and secondary school for Indian children operated or funded by the Secretary of the Interior to use funds to develop and implement coordinated, early intervening services consistent with section 613(f) of the Act.

**Proposed §300.712** would incorporate the current regulation in §300.716 concerning payments for

education and services for Indian children with disabilities aged three through five with cross-references updated.

**Proposed §300.713** would incorporate the current regulation in §300.263 regarding the plan for coordination of services. This provision does not make the BIA responsible for services for children with disabilities not enrolled in BIA funded schools. The Department of Education seeks comment on the best way to implement section 611(h)(5) of the Act for developing a plan for coordination of services on reservations. The Department of Education seeks comments on how a plan would be developed to cover those reservations where the State provides all services and those reservations where the State and BIA provide services.

The proposed regulations would remove current §300.264, which sets out the definition of Indian and Indian tribe. **Proposed §300.21** would incorporate the definition of Indian and Indian tribe.

**Proposed §§300.714 through 715** would incorporate current §§300.265 through 300.266 regarding the establishment of the advisory board and annual reports.

**Proposed §300.716** would incorporate current §300.267 regarding the regulatory provisions that apply to the Secretary of the Interior, with cross-references updated and regulatory provisions added that implement the new statutory requirements that apply to the Secretary of the Interior.

**Proposed §300.717** would contain definitions that would be substantively unchanged from current regulations and that would apply only in subpart G. The defined terms would be: “freely associated States” (from section 611(b)(1)(C) of the Act), “outlying areas” (from section 602(22) of the Act), “State” (from section 611(g) of the Act), and “Average per-pupil expenditure in public elementary and secondary schools in the United States” (from section 611(g) of the Act). The definitions for “outlying areas,” “State,” and “Average per-pupil expenditure in public elementary and secondary schools in the United States” are contained in current §§300.718, 300.700, and 300.702, respectively.

**Proposed §300.718**, regarding the acquisition of equipment and the construction or alteration of facilities, would incorporate the requirements of current §300.756.

Current requirements in §§300.750 through 300.755 regarding State Part B data reporting requirements under section 618 of the Act would be moved to **proposed §§300.640 through 300.646** in subpart F, consistent with the structure of the Act.

#### **Subpart H-Preschool Grants for Children with Disabilities**

**Proposed §§300.800 through 300.818** would reflect an overall change in the placement of the Preschool Grants for Children with Disabilities Program from current 34 CFR part 301 to subpart H of part 300. **Proposed §§300.800 through 300.810 and §§300.812 through 300.818** would incorporate current language from 34 CFR part 301, but with minor changes to reflect statutory language and the structure of the Act. **Proposed §300.811** would be added to clarify how the Secretary would make allocations under section 619 of the Act for a State in which a by-pass is implemented for parentally-placed private school children with disabilities. **Proposed §300.813(b)** would reflect the statutory change in section 619(e) of the Act that a State may use funds reserved for administration for the administration of Part C of the Act even if the SEA is not the lead agency under Part C of the Act. **Proposed §300.814** would incorporate two new substantive amendments from section 619(f) of the Act concerning the use of funds reserved for other State-level activities.

**Proposed §300.800** would reflect the language in section 619(a) of the Act describing the general purpose of the program. This provision would replace current §301.1.

Consistent with a change made in subpart A, the current §301.4, regarding applicable regulations, would be removed, as those regulations apply by their own terms.

**Proposed §300.803** would specify the definition of State, which would be the same as the definition used in current §301.5, except that it would add the phrase, “As used in this subpart” to reflect different usages of the term in other subparts. Other definitions in current §301.5 would be removed as unnecessary or as already covered in subpart A.

**Proposed §300.804** would describe a State’s eligibility for grants under section 619 of the Act, consistent with section 619(b) of the Act. This provision would replace current §301.10.

**Proposed §300.806**, concerning sanctions, would update current §301.12(c) to be consistent with

section 681(e) of the Act. Paragraphs (a) and (b) of current §301.12 would be removed. Paragraph (a) of current §301.12 would be reflected in **proposed** §300.804. Paragraph (b) of current §301.12 appears in section 611(d)(2) of the Act and would be incorporated in **proposed** §300.703(b).

**Proposed** §300.807 on allocations to States would amend current §301.20 to reflect changes in the statutory language. Consistent with section 619(c)(1) of the Act, **proposed** §300.807 would remove the phrase, “After reserving funds for studies and evaluations under section 674(e) of the Act.” **Proposed** §300.807 would also update a cross-reference to allocations provisions in **proposed** §§300.808 through 300.810.

**Proposed** §300.808 on increases in appropriated funds would amend current §301.21 to reflect changes in statutory language. **Proposed** §300.808 would also update the cross-references to other allocations provisions to be consistent with other proposed regulations.

**Proposed** §300.809 on limitations in State allocations would update all cross-references to other proposed regulations from those in current §301.22, and make other minor changes to conform to the statutory language.

**Proposed** §300.810 would make minor technical changes to current §301.23 to reflect statutory language, but would retain most of the regulatory language on the decrease in funds. However, paragraph (b)(2) of current §301.23 would be removed as unnecessary, because it would be incorporated into **proposed** §300.810(b) by adding the words “or less than” after “is equal to” and by substituting “fiscal year 1997, ratably reduced, if necessary” for “that year.” **Proposed** §300.810 also would update the cross-reference to other regulations addressing allocations to States.

**Proposed** §300.811 would be added to clarify how the Secretary would make allocations under section 619 of the Act for States in which a by-pass is implemented for parentally-placed private school children with disabilities, consistent with section 612(f)(2) of the Act.

**Proposed** §300.812 on reservation for State activities would be substantively unchanged from current §301.24, but would make a few changes, including updating the cross-references to State administration and State-level activities provisions, and substituting the word, “reserve” for the word “retain.”

**Proposed** §300.813 on State administration would make technical changes to current §301.25 to conform to revised statutory language. Consistent with section 619(e)(2) of the Act, **proposed** §300.813(b) would remove the phrase “if the SEA is the lead agency for the State under that Part” from current §301.25(b) to clarify that a State may use funds reserved for administration for the administration of Part C of the Act even if the SEA is not the lead agency under that Part.

**Proposed** §300.814 relating to use of State funds for other State-level activities under section 619 of the Act reflects both substantive and technical changes to conform current §301.26 to revised language in section 619(f) of the Act. **Proposed** §300.814 would require States to use funds they reserve under §300.812, but do not use for administration under §300.813, for one or more of the activities outlined in §300.814(a) through (f). **Proposed** §300.814 also would update both the cross-references to other proposed regulations (reservation for State activities and State administration) and the cross-reference to the applicable sections in the Act.

**Proposed** §300.814(e) would, in conformity with section 619(f)(5) of the Act, provide that a State may use any funds reserved for State activities and not used for administration to provide early intervention services in accordance with Part C of the Act to children with disabilities who are eligible for services under section 619 of the Act, and who previously received services under Part C of the Act, until such children enter, or are eligible under State law to enter kindergarten.

**Proposed** §300.814(f) would, consistent with section 619(f)(6) of the Act, provide that a State that elects to provide early intervention services to children eligible under section 619 of the Act in accordance with section 635(c) of the Act may use funds reserved for State activities and not used for administration, to continue service coordination or case management for families who receive services under Part C of the Act, consistent with **proposed** §300.814(e).

**Proposed** §300.815 on subgrants to LEAs would amend current regulatory language in §301.30 by updating cross-references and by making a few technical amendments consistent with statutory language in section 619(g)(1) of the Act.

**Proposed** §300.816 on allocations to LEAs would update the cross-reference to subgrants to LEAs and

would make technical changes to current §301.31, consistent with minor changes to the language in section 619(g)(1) of the Act.

**Proposed §300.817** on reallocation of LEA funds would reflect technical changes to current §301.32 consistent with the statutory language in section 619(g)(2) of the Act. The proposed language would also be similar to current §300.32, except that current §301.32(b) would be removed. Current §301.32(b) reflects the requirement in section 613(g) of the Act and would be incorporated in the **proposed §300.227** consistent with the structure of the Act.

**Proposed §300.818** would incorporate the statutory language from section 619(h) of the Act on the circumstances of Part C inapplicability. This provision would replace current §301.6.

**Part 304—Service Obligations under Special Education--  
Personnel Development to Improve Services and Results for Children with Disabilities**

**(Wrightslaw Note:** The commentary about the proposed regulations §304.1 through §304.30 are not included in this file. They pertain to service obligations of special education personnel who obtain grants to further their education. Those proposed regulations are available at the U. S. Department of Education's website.)

...

**(Wrightslaw Note:** Also deleted was a portion of a discussion about an "analysis of the costs and benefits of the most significant statutory changes made by the Act that are incorporated into the proposed regulations governing the Assistance to States for the Education of Children with Disabilities program under Part B of the IDEA. In conducting this analysis, the Department examined the extent to which the proposed regulations would 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 this analysis, the Secretary has concluded that the statutory changes reflected in these proposed regulations would not impose significant net costs in any one year, and may result in savings to SEAs and LEAs. An analysis of specific provisions follows:

**Requirement for State certification for highly qualified special education teachers**

**Proposed §300.156(c)** would require that persons employed as special education teachers in elementary or secondary schools be highly qualified as defined in **proposed §300.18** by no later than the end of the 2005-2006 school year. **Proposed §300.18(b)(1)** would require that every public elementary and secondary school special education teacher obtain full State certification as a special education teacher or pass the State special education teacher licensing examination, and hold a license to teach in the State as a special education teacher as one of the conditions of being considered highly qualified to teach special education. Previously, special education teachers were not required by Federal law to be certified as special education teachers in their States. The proposed regulation would preclude teachers for whom the special education certification or licensure requirements were waived on an emergency, temporary, or provisional basis from meeting the definition of a highly qualified special education teacher. Teachers employed by a public charter school would be exempt from these requirements and subject to the requirements for highly qualified teachers in their State's public charter school law.

The impact of the requirement in the proposed regulation that all special education teachers have full special education certification by the end of the 2005-2006 school year will depend on whether States and districts comply with the requirement by helping existing teachers who lack certification acquire it, or by hiring new fully-certified teachers, or some combination of the two.

According to State-reported data collected by the Department's Office of Special Education Programs, certification or licensure requirements have been waived for eight percent of special education teachers or approximately 30,000 teachers. If States and districts responded to the proposed regulation by hiring certified teachers to fill these positions, it would cost well over \$1 billion to cover the salaries for a single year. (Occupational Employment and Wages Survey, November 2003, indicates a median national salary of \$42,630 for elementary school teachers and \$44,920 for secondary school teachers.) However, given that the Study of Personnel Needs in Special Education (SPENSE) found that in 1999-2000, 12,241 positions for special education teachers were left vacant or filled by substitute teachers because suitable candidates could not be found, it is

unlikely that States and districts would be able to meet this requirement through hiring.

The SPENSE study also found that 12 percent of special education teachers who lack full certification in their main teaching assignment field are fully certified in another State. This means that States should be able to certify an estimated 3,600 additional special education teachers at relatively little expense through reciprocal certification agreements with other States.

Responses to the 1999-2000 Schools and Staffing Survey indicate that nearly 10 percent (approximately 3,000 teachers) of special education teachers who lacked full certification, including those teaching under provisional, temporary, or emergency certification, were enrolled in a program to obtain State certification. If teachers already participating in a certification program are presumed to be within 10 semester hours of meeting their coursework requirements and the estimated cost of a semester hour in a university or college program is \$200, then it would cost \$6 million to help these teachers obtain full State certification. If teachers require more than 10 semester hours to complete their certification programs, they are unlikely to obtain certification through coursework by the end of the 2005-2006 school year.

States and districts are unlikely to be able to meet the requirements of the proposed regulation entirely through reciprocity agreements and college and university programs. The above estimates involve fewer than 7,000 of the approximately 30,000 teachers who lack full certification. Other options States and districts might use to certify the more than 23,000 remaining teachers include assessments of academic skill and subject matter knowledge and professional development. Assessment requirements for special education teachers vary across States and teaching assignment fields, but most States require at least two subject matter tests, a general test on core content knowledge, and a disability-specific test, for special education teacher certification. The average cost of each test is \$75. The SPENSE study found that one-fourth of beginning special education teachers who took a certification test reported having to take it more than once before passing. If States and districts certified the remaining 23,000 teachers through existing assessments and 25 percent of the teachers took the tests twice, the cost would be approximately \$4.3 million.

Some subset of special education teachers currently teaching through waivers will require additional

training to obtain special education certification. The cost of certifying these teachers will depend on State special education certification requirements and the types of professional development needed to help these teachers meet the requirements. Most studies found that district expenditures for professional development range from one to four percent of a district's total budget or \$2,062 per teacher in 2000 dollars. If 18,000 teachers need additional training, costing an average expenditure of \$2,000 per teacher for professional development, the cost of certifying these teachers through training would be \$36 million.

Because there is little information available on what would be required to implement this proposed regulation and the cost of doing so, the Secretary concludes that the cost may be significant given the number of special education teachers who lack certification. The Secretary further concludes that the benefits of State certification may not necessarily outweigh the costs.

The Secretary believes that teacher certification can be a valuable tool in ensuring that teachers have the knowledge and skills they need to help students meet high academic standards. Since the highly qualified teacher requirements in the No Child Left Behind Act, which focus on content knowledge, already applied to special education teachers providing instruction in core academic subjects, the benefits of requiring special education teachers to also meet State certification requirements for special education teachers will largely depend on the extent to which these requirements reflect pedagogical knowledge and other teacher characteristics that are likely to have a positive effect on achievement of students with disabilities. As of now, there is a dearth of research showing the relationship between special education certification and academic achievement for students with disabilities.

#### **Special education teachers teaching to alternate achievement standards**

Section 9101 of the ESEA requires that teachers of a core academic subject have full State teacher certification, hold at least a bachelor's degree, and be able to demonstrate knowledge of the subject matter they teach by the end of the 2005-2006 school year. Elementary level teachers may demonstrate subject matter expertise by passing a rigorous State test of their subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum, but middle or secondary school teachers must demonstrate a high

level of competence in each of the academic subjects that they teach.

**Proposed §300.18(c)** would permit special education teachers who teach core academic subjects exclusively to children who are assessed against the alternate achievement standards, established under 34 CFR 200.1(d), to fulfill the highly qualified teacher requirements in section 9101(23) of the ESEA as applied to an elementary school teacher, or, in the case of instruction above the elementary level, to meet the requirements for an elementary school teacher and have subject matter knowledge appropriate to the level of instruction being provided, including at a minimum, subject matter knowledge at the elementary level or above, as determined by the State, needed to effectively teach to those standards.

The cost of demonstrating subject area competence under current law depends on the number of special education teachers who teach core academic subjects exclusively to children assessed against alternate achievement standards, the number of these teachers who already would be considered highly qualified under section 9101(23) of the ESEA and the number who would not, and the cost of helping special education teachers who are not highly qualified meet the highly qualified teacher requirements for teaching core academic subjects at the middle and high school levels (or replacing them with highly qualified teachers). The proposed regulation would generate savings for public agencies to the extent that the cost of helping teachers demonstrate subject area competence at the elementary level and obtain the knowledge appropriate to the level of instruction needed to teach to alternate achievement standards is lower than the cost of demonstrating subject matter competence at the level (middle or high school) at which they are teaching.

Under 34 CFR 200.1(d), States are permitted to assess up to one percent of students against alternate achievement standards. Based on projections of school enrollment in 2005-2006 using school enrollment data collected by the National Center for Education Statistics (NCES) for the 2002-2003 school year, States could assess up to 257,650 students in the middle and secondary levels (grades 6-12) against alternate achievement standards. Based on a typical ratio of one teacher for every six students for instruction based on alternate achievement standards, as many as 43,000 special education teachers may be able to demonstrate that they fulfill the requirements for highly qualified teachers in section 9101 of the ESEA by demonstrating subject matter knowledge appropriate to the level of

instruction being provided instead of the student's grade level. The number of affected teachers will depend on the extent to which these special education teachers are teaching exclusively children assessed against alternate achievement standards.

Although it is difficult to estimate the potential savings from this proposed regulation, the Secretary would expect some savings to be produced because affected special education teachers would not be required to demonstrate the same level of content knowledge as other middle and high school teachers of core academic subjects, thereby reducing the amount of additional coursework or professional development that might have been needed to meet State standards. The savings would depend on the gap between what State standards require in terms of content knowledge for middle and high school teachers in various academic areas and what the affected teachers would have been able to demonstrate in the academic subjects they are teaching. Any savings will be offset in part by the cost of developing a means for the affected teachers to demonstrate subject matter knowledge appropriate to the level of instruction being provided. However, this cost is not expected to be significant. Since States have already developed standards for demonstration of core academic subject competence at the elementary level, States would not likely develop additional High Objective Uniform State Standards of Evaluation (HOUSSE) or subject matter competence evaluations for use with special education teachers to comply with the proposed regulation. On balance, the Secretary concludes that the proposed regulation could produce significant savings without adversely affecting the quality of instruction provided to children assessed against alternate achievement standards.

#### **Special education teachers teaching multiple subjects**

Consistent with current law, **proposed §300.18(d)** would permit special education teachers who are not new to the profession and teach two or more core academic subjects exclusively to children with disabilities to demonstrate competence in all the core academic subjects that the teacher teaches in the same manner as other teachers, including through a single HOUSSE covering multiple subjects. The proposed regulation would allow more time (two years after the date of employment) for new special education teachers who teach multiple subjects and who have met the highly qualified requirements for mathematics, language arts, or science to demonstrate



competence in other core academic subjects that they teach, as required by 34 CFR 200.56(c).

We are unable at this time to estimate the number of new teachers who teach two or more core academic subjects exclusively to children with disabilities who might be affected by the additional time afforded by the proposed regulation. However, the extent of savings would relate to the number of subjects taught by teachers of multiple subjects and the benefits of enabling the affected teachers to take whatever coursework they need to demonstrate competence in those additional areas over a longer period of time. Under prior law, public agencies might have needed to employ additional teachers (or redeploy some existing teachers) in those subject areas in which their newly hired teachers could not immediately demonstrate competence. The Secretary concludes that the benefits of being able to hire teachers who are qualified in at least one subject area outweigh any costs to students being taught by teachers who currently do not meet the requirements in other areas but are working to demonstrate their knowledge in other areas in which they teach.

**Limitation on number of reevaluations in a single year**

**Proposed §300.303(b)(1)** would prohibit conducting more than one reevaluation in a single year without the agreement of the school district and the parent. The current regulations require reevaluations when conditions warrant one or at the request of either the child's parent or teacher.

Multiple evaluations in a single year are rare and are conducted in instances in which parents are not satisfied with the evaluation findings or methodology, children have a degenerative condition that affects the special education and related services needed, or very young children (ages three through four) are experiencing rapid development that may affect the need for services. The proposed regulation would not significantly affect the number of evaluations in the latter two instances because public agencies and parents are likely to agree that multiple evaluations are warranted. These cases, however, account for a very small number of the cases in which multiple evaluations are conducted each year.

Because evaluation findings may be used to support complaints, we can use data on the number of requests for due process hearings to estimate the number of cases in which more than one evaluation in a single year would have been conducted because parents were not satisfied with the evaluation

findings or methodology. Based on data from the recent Government Accountability Office (GAO) report, "Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts" (GAO-03-897), in which States reported receiving 11,068 requests for due process hearings during 1999-2000, we estimate that States would receive 20 requests for every 10,000 students with disabilities during the 2005-2006 school year. Based on the prevalence of complaints by parents, we estimate that, of the 1.7 million children estimated to be eligible for reevaluation in 2005-2006, multiple evaluations would have been requested by parents for an estimated 3,400 children. If we assume that these additional evaluations would cost about \$1,000 each, public agencies could save \$3.4 million under the proposed regulation by not agreeing to more than one evaluation of children in these instances.

**Triennial evaluations**

The current regulations require a school district to conduct an evaluation of each child served under the Act every three years to determine, among other things, whether the child is still eligible for special education. The current regulations permit the evaluation team to dispense with additional tests to determine the child's continued eligibility if the team concludes that this information is not needed and the parents provide consent. **Proposed §300.303(b)(2)** would permit districts to dispense with the triennial evaluation altogether when the child's parents and the public agency agree that a reevaluation is unnecessary. The impact of this change will depend on the following factors: the number of children eligible for a reevaluation, the cost of the evaluation, and the extent to which districts and parents agree to waive reevaluations.

Published estimates of the cost of multidisciplinary evaluations range from \$500 to \$2,500, but these estimates may overestimate potential savings because testing is a significant factor in the cost of evaluations, and districts are already permitted to dispense with additional testing when extant data are sufficient for reevaluation. The extent to which States and districts eliminated unnecessary testing during triennial evaluations under the current regulations is unclear, but program officers estimate that additional testing or observation by a school psychologist is not needed for as many as half of the approximately 1.7 million children eligible for triennial evaluations each year. In the estimated 850,000 cases in which additional testing is not needed, review of the extant data may still be

warranted to determine if a child still needs special education and related services under the Act or to assess whether any additions or modifications to the special education and related services being provided are needed to help the child meet his or her IEP goals. Even if additions or modifications to special education and related services are not likely, parents may not want to dispense with the triennial evaluation if they believe further information could be gained from the extant data or they want to compare their child's progress against his or her previous assessments. If parents and the district agree that a reevaluation is not needed in 15 percent, or 127,500, of these cases and a reevaluation using only extant data would have cost \$150, the proposed regulation could save \$19.125 million.

These savings would be partially offset by increased administrative costs associated with obtaining consent from parents to dispense with reevaluation. To estimate the cost of obtaining parental consent, the Department assumes that schools could use a standard pre-printed document that would take approximately 15 minutes of administrative personnel time to fill out and send to parents. In addition, we estimate that an average of 2.5 additional written notices or telephone calls would be needed to obtain consent, requiring 15 minutes of administrative personnel time per additional contact. At an average hourly compensation of \$24, the cost to public agencies of obtaining parental consent would be \$2.7 million, resulting in estimated net savings to public agencies from the proposed regulation of \$16.4 million.

#### **IEP team attendance**

**Proposed §300.321(e)(1)** would permit a member of the IEP team to be excused from attending an IEP meeting, in whole or in part, if the parent of the child with a disability and the public agency agree in writing that the member's attendance is not necessary because the member's area of the curriculum or related services is not being modified or discussed. The current regulations require that all IEP meetings include the parents of the child, at least one regular education teacher (if the child is, or may be, participating in the regular education environment), at least one special education teacher, a representative of the public agency, and someone who could interpret the instructional implications of the evaluation results (who may be one of the other required IEP team members). The extent to which public agencies may realize savings from the proposed regulation depends on which team members are excused from how much of the meeting. If the

average IEP meeting lasts 1.5 hours and requires a half an hour of teacher preparation, then we estimate that the opportunity costs for a teacher of attending a meeting (based on average compensation per hour of \$46.25) would be \$92.50. If we assume an average of 1.2 IEP meetings are held for each of the 6.933 million children with disabilities, then 8.32 million IEP meetings will be held in 2005-2006. If one teacher could be excused from five percent of these meetings, the proposed regulation could result in savings of \$38.5 million.

These savings would be partially offset by increased administrative costs associated with obtaining written consent from parents and public agency staff. Based on the above estimate of the cost of obtaining consent from parents under **proposed §300.303(b)(2)**, the Department estimates that cost to public agencies of obtaining written consent for these parents would be \$8.7 million, resulting in net savings to public agencies from the proposed regulation of \$29.8 million.

**Proposed §300.321(e)(2)** would permit members of an IEP team to be excused from attending an IEP meeting that involves a modification to or discussion of the member's area of the curriculum or related service if the parent and the public agency consent in writing to the excusal and the member submits written input to the parent and the other members of the IEP team prior to the meeting. The proposed change is unlikely to generate notable savings because reduced time spent in meetings is likely to be offset by the time required to draft written input, send it to the parents and other IEP team members, and secure the consent of parents and public agency to the excusal. In cases in which IEP meetings take longer than the average time of 1.5 hours, there are likely to be controversial issues or significant modifications to the IEP under discussion. Parents are presumably less likely to consent to the excusal of team members in these instances.

#### **Definition of individualized education program**

**Proposed §300.320(a)(2)(i)** would require that each IEP include a statement of measurable annual goals, including academic and functional goals, for the child. The current regulations require that each IEP contain benchmarks or short-term objectives for each of the annual goals. By eliminating the need to develop benchmarks or short-term objectives, the proposed regulation could result in teachers spending less time on each IEP. Under **proposed §300.320(a)(2)(ii)**, however, IEPs for the estimated 488,000 children with disabilities who take alternate

assessments aligned to alternate achievement standards would still be required to include a statement of benchmarks or short-term objectives.

Based on average compensation for teachers of \$46.25 per hour, a reduction in time as modest as 15 minutes could save approximately \$11.56 per IEP or \$74.5 million total in opportunity costs for teachers related to the development of IEPs during the 2005-2006 school year for the 6.445 million children with disabilities who do not take alternate assessments aligned to alternate achievement standards.

#### **Amendments to an IEP**

When changes to a child's IEP are needed after the annual IEP meeting for the school year has been held, **proposed §300.324(a)(4)** would allow the parent of a child with a disability and the public agency to agree to forego a meeting and develop a written document to amend or modify the child's current IEP. Under the current regulations, the IEP team must be reconvened in order to make amendments to an IEP. Based on our estimate of an average of 1.2 IEP meetings per child per year, approximately 1.4 million IEP meetings beyond the required annual IEP meeting would be held during the 2005-2006 school year. If half of these meetings concerned amendments or modifications to an IEP and parents and agency representatives agreed to forego a meeting and develop a written document in half of these cases, then 346,650 IEP meetings would not be needed. The combined opportunity costs for personnel participating in a typical IEP meeting are estimated at \$297. If drafting a written document to amend or modify an IEP is assumed to cost half as much as a meeting, then this change could result in savings of \$51.4 million.

#### **Procedural safeguards notice**

**Proposed §300.504(a)**, which incorporates changes in section 615(d)(1) of the Act, would require that a copy of the procedural safeguards notice be given to parents of children with disabilities only once a year, except that a copy must also be given: when an initial evaluation or request for an evaluation occurs; the first time a due process hearing is requested during a school year; and when a parent requests the notice. The prior law required that a copy of the procedural safeguards notice be given to the parents upon initial referral for an evaluation, each notification of an IEP team meeting, each reevaluation of the child, and the registration of each request for a due process hearing. Under the proposed regulation, a copy of the procedural

safeguards notice would no longer have to be given to parents upon each notice for an IEP team meeting or every time a request for a due process hearing is received. Instead, the document only would have to be given to parents once a year, and the first time a due process hearing is requested in a year, when a copy of the document is specifically requested by a parent, or when an initial evaluation or request for a reevaluation occurs.

To determine the impact of this change, it is necessary to estimate the savings created by providing fewer notices to parents who are notified about more than one IEP meeting during the year or who file more than one request for a due process hearing. Given the small number of hearing requests in a year (about 20 per 10,000 children with disabilities), our analysis will focus on the number of parents involved in more than one IEP meeting. Although we lack detailed data on the number of IEP meetings conducted each year, we estimate that approximately 6.933 million children with disabilities will be served in school year 2005-2006. For the vast majority of these children, we believe there will only be one IEP meeting during the year. For purposes of estimating an upper limit on savings, if we assume an average of 1.2 meetings per year per child, 1.39 million children will have two IEP meetings each year and the change reflected in **proposed §300.504(a)** will result in 1.39 million fewer procedural notices provided to parents. While some people may believe this change represents a significant reduction in paperwork for schools, the actual savings are likely to be minimal given the low cost of producing a notice of this size (about 10 pages) and the small amount of administrative staff time involved in providing this notice to parents (about 10 minutes). Taking all of this into consideration, total savings are unlikely to exceed \$5 million.

#### **Due process request notices**

**Proposed §300.511(d)** would prohibit the party who requested the due process hearing from raising issues not raised in the due process request notice, unless the other party agrees. Under current regulations, there is no prohibition on raising issues at due process hearings that were not raised in the due process notice.

By encouraging the party requesting the hearing to clearly identify and articulate issues sooner, the proposed regulation could generate actual savings by facilitating early resolution of disagreements through less costly means, such as mediation or resolution

sessions. But early identification of issues could come at the cost of more extensive involvement of attorneys earlier in the process. At the same time, prohibiting the party requesting the hearing from raising new issues at the time of the hearing could result in additional complaints or protracted conflict and litigation. On balance, net costs or savings are not likely to be significant.

Using data from recent State data collections conducted by the Consortium for Appropriate Dispute Resolution in Special Education (CADRE), in which States reported receiving 12,914 requests for due process hearings during 2000-2001, we estimate that there will be approximately 14,031 requests in 2005-2006. Because some parties already hire attorneys or consult other resources such as advocates or parent training centers to develop the request for due process, the Department assumes that only a portion of the requests would be affected by this new requirement. Although we have no reliable data on average attorneys' fees in due process cases, for purposes of this analysis, the Department assumes an hourly rate of \$300 as an upper limit. The Department further assumes that each instance in which a party chooses to hire an attorney sooner as a result of this change will involve no more than three additional hours of work. Even if we assume that parties requesting the hearing will incur this additional cost in the case of 8,000 of the expected requests for due process, the total costs would not be significant (less than \$8 million), and could be outweighed by the benefits of early identification and resolution of issues. Although such benefits are largely unquantifiable, early identification and resolution of disputes would likely benefit all parties involved in disputes.

### Resolution sessions

**Proposed §300.510** would require the parents, relevant members of the IEP team, and a representative of the public agency to participate in a resolution session, prior to the initiation of a due process hearing, unless the parents and LEA agree to use mediation or agree to waive the requirement for a resolution session. The impact of this proposed regulation will depend on the following factors: the number of requests for due process hearings, the extent to which disagreements are already resolved without formal hearings, the likelihood that parties will agree to participate in mandatory resolution sessions instead of other potentially more expensive alternatives to due process hearings (e.g., mediation), and the likelihood that parties will avoid due process

hearings by reaching agreement as a result of mandatory resolution sessions.

Available data suggest that overall savings are not likely to be significant because of the small number of due process requests and the extent to which disagreements are already being successfully resolved through mediation.

Based on data reported in a recent CADRE State data collection in which States reported receiving 12,914 requests for due process hearings during 2000-2001, we estimate that there will be approximately 14,031 requests for due process hearings in school year 2005-2006. Based on data from the same study, we also estimate that the large majority of these disagreements will be successfully resolved through mediation or dropped. Out of the 12,914 requests for school year 2000-2001, approximately 5,536 went to mediation and only 3,659 ended up in formal hearings. Assuming no change in the use and efficacy of mediation, we predict that 6,021 requests would go to mediation in school year 2005-2006. We further predict that another 4,035 complaints will be dropped, leaving no more than 3,975 requests for due process that would require resolution sessions.

Because of the high cost of due process hearings and the low expected cost of conducting a resolution session, there would likely be some savings for all parties involved if resolution sessions are relatively successful in resolving disagreements. For example, California reports an average cost of \$18,600 for a due process hearing, while Texas reports having spent an average of \$9,000 for a hearing officer's services. Anticipating that attorneys will participate in approximately 40 percent of the predicted 3,945 resolution sessions (including drafting legally binding agreements when parties reach agreement), we expect resolution sessions to cost just over twice the average cost of IEP meetings, or approximately \$700 per session. Even with a very low success rate (eight percent), given the expected costs of these sessions compared to the high cost of conducting a hearing, all parties involved would likely realize some modest savings. However, because disputes that result in formal hearings tend to be the most difficult to resolve, we do not expect that mandatory resolution sessions will be highly successful in resolving such cases. By definition, these are cases in which the parties are not amenable to using existing alternatives to formal hearings such as mediation. Moreover, assuming an average cost of between \$10,000 and \$20,000 per due process hearing, even if as many as 20 percent of the 3,975 complaints were successfully resolved through resolution sessions, net savings still

would not exceed \$10 million. (Note that it is unclear to what extent data on average mediation and due process hearing costs account for LEA opportunity costs (e.g., cost per teacher and/or administrator participating). To the extent that these data do not reflect the opportunity costs of participating LEA officials and staff, we have underestimated the potential savings from resolution session).

Beyond those savings to all parties resulting from reductions in the total number of formal hearings, we would also expect some additional savings to the extent parties agree to participate in resolution sessions instead of mediation, particularly if the resolution sessions are as effective as mediation in resolving disagreements. However, unlike due process, the expected cost of conducting a resolution session (\$700 per session) is only somewhat less than the cost of a mediation session (between \$600 and \$1,800 per session). Because the cost differential between resolution sessions and mediations is relatively small (compared to the difference in cost between resolutions sessions and due process hearings) the potential for savings generated by parties agreeing to resolution sessions instead of mediation is minimal.

The Secretary concludes that requiring parties to participate in resolution sessions prior to due process hearings could generate modest savings for all parties to disputes, insofar as mandatory resolution sessions could result in fewer due process hearings and may be used as a less expensive alternative to mediation.

**Manifestation determination review procedures**

**Proposed §300.530(e) and (f)** would incorporate the change in the statutory standard for conducting manifestation determination reviews. Under the prior law, the IEP team could conclude that the behavior of a child with a disability was not a manifestation of his or her disability only after considering a list of factors, determining that the child’s IEP and placement were appropriate, and that FAPE, supplemental services, and behavioral intervention strategies were being provided in a manner consistent with the child’s IEP. Previous law also required the IEP team to consider whether a child’s disability impaired his or her ability to understand the impact and consequences of the behavior in question, and to control such behavior. The new statute eliminated or substantially revised these requirements. The proposed regulations would simply require IEP teams to review all relevant information in the student’s file to determine if the conduct in question was caused

by, or had a direct and substantial relationship to, the child’s disability, or if the conduct in question was the direct result of the LEA’s failure to implement the IEP. The purpose of the change in the law is to simplify the discipline process and make it easier for school officials to discipline children with disabilities when discipline is appropriate and justified.

Because fewer factors would need to be considered during each manifestation determination review, the time required to conduct such reviews would likely be reduced, and some minimal savings may be realized. However, the more significant impact relates to secondary effects. Because it would be less burdensome for school personnel to conduct manifestation determinations, it is reasonable to expect an overall increase in the number of these reviews as school personnel take advantage of the streamlined process to pursue disciplinary actions against those students with disabilities who commit serious violations of student codes of conduct. Even more importantly, the changes in the law would make it less difficult for review team members to conclude that the behavior in question is not a manifestation of a child’s disability, enabling school personnel to apply disciplinary sanctions in more cases involving children with disabilities.

We have minimal data on the number of manifestation determination reviews being conducted. However, State-reported data for the 2002-2003 school year suggest that schools are conducting a relatively small number of manifestation reviews. According to these data, for every 1,000 children with disabilities, approximately 11 will be suspended or expelled for longer than 10 days during the school year (either through a single suspension or as a result of multiple short-term suspensions)--the disciplinary action triggering a manifestation review. (Please note that we have no way of accurately estimating what portion of short-term suspensions that sum to 10 days would be determined by school personnel to constitute a change in placement. Therefore, we assume, for purposes of this analysis, that 100 percent of these instances would require a manifestation review because they would be deemed a change in placement). Based on a recent GAO study, which concludes there is little difference in how school personnel discipline regular and special education students, we assume that under previous law, at least 85 percent of manifestation reviews resulted in disciplinary actions (e.g., long-term suspensions or expulsion). In other words, approximately 15 percent of all manifestation reviews did not result in disciplinary action because the behavior in question

was determined to be a manifestation of the child's disability.

Without taking into consideration increases in the frequency of manifestation reviews, using suspension and expulsion data from previous years, we estimate that the total number of manifestation reviews in 2005-2006 would be approximately 87,701. If we assume that the streamlining reflected in the proposed regulation would produce a 20 percent increase in the total number of manifestation reviews, we predict that 17,540 additional meetings would occur, for a total of 105,241 meetings.

Under the proposed regulation, the Secretary also expects an increase in the total number of manifestation reviews resulting in disciplinary actions, but it is not likely to be a significant increase. GAO's finding that there is little practical difference in how school personnel disciplined regular and special education students under previous law suggests that manifestation reviews are already highly likely to result in disciplinary actions.

The Secretary concludes that the proposed regulation would generate some minimal savings from the reduction in time required to conduct the manifestation reviews. Schools would also realize some unquantifiable benefits related to the increased likelihood that the outcome of the review will result in disciplinary action, thereby fostering a school environment that is safer, more orderly, and more conducive to learning. The Secretary acknowledges that the proposed regulation could create additional costs for parents of children who, but for this change, would not have been subject to disciplinary removals to the extent that such parents disagree with the manifestation determination and choose to appeal it. On balance, the Secretary believes that the benefits likely to result from this change relating to school safety and order outweigh the costs to families.

**Authority to remove students with disabilities to interim alternative educational settings**

**Proposed** §§300.530(g) through 300.532 would incorporate two significant statutory changes relating to the authority of school personnel to remove children with disabilities to interim alternative educational settings. First, the Act now gives school personnel the authority to remove students who have inflicted serious bodily injury to interim alternative educational settings. Under previous law, school personnel were only authorized to remove students to alternative settings for misconduct involving: 1) the use and possession of weapons; and 2) the knowing

possession, sale, or use of illegal drugs or controlled substances. The Act added the commission of serious bodily injury to this list. In cases involving serious bodily injury, school personnel would be able to unilaterally remove children with disabilities to interim alternative educational settings for up to 45 school days without having to request a hearing officer review of the facts to determine whether or not the student is substantially likely to harm himself or others. Second, the 45-day rule has changed. Under previous law, students could not be removed to interim alternative settings for more than 45 days. Now, under the Act, the comparable time limitation is 45 school days.

Although the addition of serious bodily injury significantly simplifies the process for removing a student who has engaged in such misconduct, the data suggest that the savings from the proposed regulation would be minimal. Recent Department of Justice data show that "fighting without a weapon" is by far the most common type of serious misconduct engaged in by all students. However, State-reported data suggest that of the 20,000 instances in 2002-2003 in which children with disabilities were suspended or expelled for longer than 10 days, only 1,200 involved serious bodily injury or removal "by a hearing officer for likely injury." We estimate that approximately 6.933 million students with disabilities will be served during the 2005-2006 school year. Using these data, we project that there would have been approximately 1,258 instances in 2005-2006 in which a school district might have requested approval from a hearing officer to remove a child for inflicting serious bodily injury, if the law had not been changed. Taking into account the time that would have been spent by both relevant school administrators and the hearing officers and their estimated hourly wages (about \$125 per hour for hearing officers and \$50 per hour for school administrators), we conclude that the unilateral authority afforded school officials under the proposed regulation produces only minimal savings (less than \$1 million).

A much more significant benefit relates to the enhanced ability of school officials to provide for a safe and orderly environment for all students in the 1,258 cases in which school officials would have been expected to seek and secure hearing officer approval for removing a student to an alternative setting and the other cases in which they might not have taken such action, but where removal of a student who has caused injury is justified and produces overall benefits for the school.

The change in how days are to be counted (e.g., from “calendar days” under previous law to “school days” under the proposed regulation) would allow school officials to extend placements in alternative settings for approximately two additional weeks. This would generate some savings to the extent that it obviates the need for school officials to seek hearing officer approval to extend a student’s placement in an alternative setting.

While school personnel are not required to use the new authority to remove children who have inflicted serious bodily injury or to remove children for the total amount of time that is authorized, we acknowledge that it would create additional costs for schools that choose to take full advantage of this authority because of the added costs of providing educational services in an alternative setting. Using data from a recent GAO study, we estimate that approximately 3,000 students will be removed to an alternative interim setting in 2005-2006 for misconduct involving drugs or weapons and at least another 1,258 for misconduct involving serious bodily injury. Although we do not have data on the costs of educating these students in an alternative setting for 45 school days, the Secretary concludes that the costs of doing so would be outweighed by the unquantifiable benefits to schools associated with ensuring students a safe and orderly environment that is conducive to learning.

**Costs and Benefits of Proposed Non-statutory Regulatory Provisions**

The following is an analysis of the costs and benefits of the proposed non-statutory regulatory provisions that includes consideration of the special effects these changes may have on small entities.

The proposed regulations would primarily affect SEAs and LEAs, which are responsible for carrying out the requirements of Part B of the Act as a condition of receiving Federal financial assistance under the Act. Some of the proposed changes would also affect children attending private schools and consequently indirectly affect private schools.

For purposes of this analysis as it relates to small entities, the Secretary has focused on LEAs because these regulations most directly affect local public agencies. The analysis uses a definition of small school district developed by the NCES for purposes of its recent publication, Characteristics of Small and Rural School Districts. In that publication, NCES defines a small school district as “one having fewer students in membership than the sum of (a) 25

students per grade in the elementary grades it offers (usually K-8) and (b) 100 students per grade in the secondary grades it offers (usually 9-12)”. Using this definition, approximately 38 percent of the nation’s public agencies in the 2002-2003 Common Core of Data were considered small and served three percent of the Nation’s students. Approximately 17 percent of students in small districts had IEPs.

Both small and large districts would be affected economically by the proposed regulations, but no data are available to analyze the effect on small districts separately. For this reason, this analysis assumes that the effect of the proposed regulations on small entities would be roughly proportional to the number of children with disabilities served by those districts.

For school year 2005-2006, we project that approximately 48.8 million children will be enrolled in public elementary and secondary schools. Using the NCES definition and assuming that all districts grew at the same rate between school year 2002-2003 and 2005-2006, we estimate that in the 2005-2006 school year approximately 1.48 million children will be enrolled in small districts. Based on the percentage of students in small districts with IEPs in 2002-2003, we estimate that in the 2005-2006 school year these districts will serve approximately 251,000 children with disabilities of the 6.9 million children with disabilities served nationwide.

There are many provisions in the proposed regulations that are expected to result in economic impacts, both positive and negative. The following analysis estimates the impact of the proposed regulations that were not required by the Act:

**Procedures for Evaluating Children With Specific Learning Disabilities**

**Proposed §300.307(a)** would require that States adopt criteria for determining whether a child has a specific learning disability. Under the proposed regulation, States may not require, but may prohibit, that LEAs use criteria based on a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability. The proposed regulation would also require that criteria adopted by States permit the use of a process that determines if the child responds to scientific, research-based intervention. States would also be permitted to use other alternative procedures to determine if a child has a specific learning disability.

Before determining that a child has a specific learning disability, **proposed** §300.309(b) would require that the evaluation team consider data that demonstrate that prior to, or as part of the referral process, the child received appropriate high-quality, research-based instruction in regular education settings and that data-based documentation of repeated assessments of achievement during instruction was provided to the child's parents. If the child had not made adequate progress under these conditions after an appropriate period of time, the proposed regulation would further require that the public agency refer the child for an evaluation to determine if special education and related services are needed. Under the proposed regulation, the child's parents and the team of qualified professionals, described in **proposed** §300.308, would be permitted to extend the evaluation timelines described in **proposed** §§300.301 through 300.303 by mutual written agreement.

If the estimated number of initial evaluations each year is 1.7 million and the percentage of evaluations involving children with specific learning disabilities is equivalent to the percentage of all children served under Part B of the Act with specific learning disabilities, then the proposed regulation would affect approximately 816,000 evaluations each year. Depending on the criteria adopted by their States pursuant to **proposed** §300.307(a), public agencies could realize savings under the proposed regulation by reducing the amount of a school psychologist's time involved in conducting cognitive assessments that would have been needed to document an IQ discrepancy. However, these savings could be offset by increased costs associated with documenting student achievement through regular formal assessments of their progress, as required under **proposed** §300.309(b).

Although the cost of evaluating children suspected of having specific learning disabilities might be affected by the proposed regulations, the Department expects that the most significant benefits of the proposed changes would be achieved through improved identification of children suspected of having specific learning disabilities. By requiring that States permit alternatives to an IQ-discrepancy criterion, the proposed regulation would facilitate more appropriate and timely identification of children with specific learning disabilities, so that they can benefit from research-based interventions that have been shown to produce better achievement and behavioral outcomes.

The proposed regulations may impose additional costs on small public agencies that lack capacity

currently to conduct repeated assessments of achievement during instruction and provide parents with documentation of the formal assessments of their child's progress. These costs are likely to be offset by reduced need for psychologists to administer intellectual assessments. To the extent that small districts may not employ school psychologists, the proposed criteria may alleviate testing burdens felt disproportionately by small districts under an IQ discrepancy evaluation model.

### Transition requirements

**Proposed** §300.321(b) would modify current regulations regarding transition services planning for children with disabilities who are 16 through 21 years old. Public agencies would still be required to invite other agencies that are likely to be responsible for providing or paying for transition services to the child's IEP meeting. If the invited agency does not send a representative, public agencies would no longer be required to take additional steps to obtain the participation of those agencies in the planning of transition, as required under current §300.344(b)(3)(ii).

Public agencies would realize savings from the proposed change to the extent that they would not have to continue to contact agencies that declined to participate in IEP meetings on transition planning. In school year 2005-2006, we project that public agencies will conduct 1,191,218 meetings for students with disabilities who are 16 through 21 years old. We used data from the National Longitudinal Transition Study 2 (NLTS2) on school contacts of outside agency personnel to project the number of instances in which outside agencies would be invited to IEP meetings during the 2005-2006 school year. Based on these data, we project that schools will invite 1,490,241 personnel from other agencies to IEP meetings for these students during the 2005-2006 school year. The NLTS2 also collected data on the percentage of students with a transition plan for whom outside agency staff were actively involved in transition planning. Based on these data, we project that 436,047 (29 percent) of the contacts will result in the active participation of outside agency personnel in transition planning for students with disabilities 16 through 21.

We base our estimate of the potential savings from the proposed change on the projected 1,054,194 (71 percent) instances in which outside agencies would not participate in transition planning despite school contacts that, under the current regulations, would include both an invitation to participate in the child's



IEP meeting and additional follow-up attempts. If public agencies made only one additional attempt to contact the outside agency and each attempt required 15 minutes of administrative personnel time, then the proposed change would save \$6.3 million (based on an average hourly compensation for office and administrative support staff of \$24).

Studies of best practices conducted by the National Center on Secondary Education and Transition indicate that effective transition planning requires structured interagency collaboration. Successful approaches cited in the studies included memoranda of understanding between relevant agencies and interagency teams or coordinators to ensure that educators, State agency personnel and other community service providers share information with parents and children with disabilities. The current regulation focuses on administrative contact instead of active strategic partnerships between agencies that facilitate seamless transitions for students with disabilities between school and adult settings. For this reason, the Department believes that the proposed elimination of the non-statutory requirement that public agencies make additional attempts to contact other agencies would reduce administrative burden and allow public agencies to focus their efforts on interagency collaborative transition planning for children with disabilities.

**(Wrightslaw Note:** Additional comments and explanations about reporting, recordkeeping and collection of information was deleted but is available in the NPRM on the U. S. Department of Education's website.)

#### **Information about Pete and Pam Wright**

Pete and Pam Wright developed and maintain the [www.wrightslaw.com](http://www.wrightslaw.com), [www.harborouselaw.com](http://www.harborouselaw.com), [www.fetaweb.com](http://www.fetaweb.com), [www.yellowpagesforkids.com](http://www.yellowpagesforkids.com) special education law and advocacy websites. Wrightslaw.com is the top ranked website in regard to special education advocacy for children with disabilities. He and his wife have also published the best selling special education law books entitled *Wrightslaw: Special Education Law*, *Wrightslaw: From Emotions to Advocacy* and *Wrightslaw: No Child Left Behind*. Over 100,000 copies of their books have been sold. They have an online newsletter with over 60,000 subscribers. Pete and Pam also participated in the production of a DVD video of a special education due process hearing entitled *Jeffers v. School Board* available for sale on their website.

**END  
of  
U. S. Department of Education's Discussion  
and  
Commentary  
about the  
proposed regulations to IDEA 2004.**

# Wrightslaw: IDEA 2004

by Peter W. D. Wright & Pamela Darr Wright

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) was signed into law on December 3, 2004. Most provisions of the law take effect on July 1, 2005.

The authorization of any new law brings about a spate of interpretations and questions. To find answers to your questions about IDEA 2004, you need to do your own legal research. The intention of this book is to bridge the gap between the law and one's understanding of the legal language within it, in an accurate, objective manner and through direct reference to the law itself.

## Highlights

What does the law say about initial evaluations, parental consent, and reevaluations? Test procedures and eligibility decisions? Discrepancy formulas and specific learning disabilities?

What are the requirements for highly qualified special education teachers? When do these requirements go into effect? How can special education teachers meet the highly qualified teacher requirements?

What does the law say about child find? Special education services to children who attend private schools? Special education services to children who attend charter schools? What does the law say about least restrictive environment, mainstreaming and inclusion?

What does the law say about Individualized Educational Programs (IEPs) and IEP teams? What does the law say about reviewing and revising IEPs? Multi-year IEPs? Transition plans? Who can be excused from IEP meetings and under what circumstances?

What does the law say about who must be tested on state and district assessments? What does the law say about accommodations and alternate assessments?

What does the law say about independent educational evaluations? Parent access to educational records? Mediation? Parent notice? Prior written notice? Due process notice?

What are the new requirements and timelines for due process hearings? Resolution sessions? Attorneys' fees?

What does the law say about discipline? Manifestation Review Hearings? Placements in interim alternative educational settings? Functional behavioral assessments and behavior intervention plans?

*Wrightslaw: IDEA 2004* will help you find answers to your questions in the statute. This publication includes the full text of Parts A Part B of the Individuals with Disabilities Education Improvement Act (IDEA), with extensive commentary, strategies, and cross-references. The format, layout, and statutory explanations are similar to *Wrightslaw: Special Education Law* and *Wrightslaw: No Child Left Behind*.

## To Order

*Wrightslaw: IDEA 2004* (ISBN: 1-892320-05-3) by Peter Wright, Esq. and Pamela Wright will be available in paperback (bound) and electronic formats in July 2005. For information about how to order this and other Wrightslaw publications, please go to: [www.wrightslaw.com/pubs.htm](http://www.wrightslaw.com/pubs.htm)