I.-Continued

IL-IN.

IL-IN-Continued

L-Continued

L-Continued

M.

N-Continued

N-Continued

O.

P.

P-Continued

PE-PL.

PE-PL-Continued

PE-PL-Continued

PO-PR.

PO-PR-Continued

PRO.

PRO-Continued

PRO-Continued

PU-Q.

PU-Q-Continued

R.

R-Continued

R-Continued

R-Continued

S.

SH-SP.

ST.

ST-Continued

SU.

SU-Continued

SU-Continued

T.

T-Continued

TIMELINES--DISCIPLINE (A-C) (Continued)
--Change of placement for disciplinary removals:
  o Of more than 10 consecutive "school days".....300.519(a)
  o That cumulate to more than 10 "school days".....300.519(b)

T-Continued

T-Continued

T-Continued

TIMELINES--DISCIPLINE (A-C) (Continued)
--Change of placement for disciplinary removals:
o Of more than 10 consecutive "school days".....300.519(a)
o That cumulate to more than 10 "school days".....300.519(b)

U.

U.-Continued

V-W.

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PART 303—EARLY INTERVENTION PROGRAM FOR INFANTS AND TODDLERS WITH DISABILITIES

2. The authority citation for part 303 continues to read as follows:

Authority: 20 U.S.C. 1431–1445, unless otherwise noted.

§ 303.1 [Amended]

3. Section 303.1 is amended by removing the word ''program'' in paragraph (a), and adding, in its place, ''system.''

§ 303.4 [Amended]

4. Section 303.4 is amended by revising the authority citation to read as follows:

(Authority: 20 U.S.C. 1419(h))

5. Section 303.5 is amended by adding '', and'' at the end of paragraph (a)(1)(vi), by revising paragraph (a)(3), and by revising the authority citation to read as follows:

§ 303.5 Applicable regulations.

* * * * *

(a) * * *

(3) The following regulations in 34 CFR part 300 (Assistance to States for the Education of Children with Disabilities Program): §§ 300.560–300.577, and §§ 300.580–300.585.

* * * * *

(Authority: 20 U.S.C. 1401, 1416, 1417)

§§ 303.6, 303.12, and 303.18 [Amended]

6. The note preceding § 303.6 and following the heading ''Definitions'' is amended by removing the phrase '''natural environments'' in § 303.12(b)(2)'' and adding, in its place, '''natural environments' in § 303.18''.

7. Section 303.10 is revised to read as follows:

§ 303.10 Developmental delay.

As used in this part, ''developmental delay,'' when used with respect to an individual residing in a State, has the meaning given to that term under § 303.300.

(Authority: 20 U.S.C. 1432(3))

§ 303.12 [Amended]

8. Section 303.12(d)(11) is amended by removing the reference to ''§ 303.22'' and by adding in its place ''§ 303.23''.

9. Section 303.19 is revised to read as follows:

§ 303.19 Parent.

(a) *General.* As used in this part, ''parent'' means—

(1) A natural or adoptive parent of a child;

(2) A guardian;

(3) A person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare); or

(4) A surrogate parent who has been assigned in accordance with § 303.406.

(b) *Foster parent.* Unless State law prohibits a foster parent from acting as a parent, a State may allow a foster parent to act as a parent under Part C of the Act if—

(1) The natural parents' authority to make the decisions required of parents under the Act has been extinguished under State law; and

(2) The foster parent—

(i) Has an ongoing, long-term parental relationship with the child;

(ii) Is willing to make the decisions required of parents under the Act; and

(iii) Has no interest that would conflict with the interests of the child.

(Authority: 20 U.S.C. 1401(19), 1431–1445)

10. Section 303.100 is amended by revising paragraph (d)(2) to read as follows:

§ 303.100 Conditions of assistance.

* * * * *

(d) * * *

(2) A new interpretation is made of the Act by a Federal court or the State's highest court; or

* * * * *

§ 303.140 [Amended]

11. In § 303.140 paragraph (b) is amended by adding the words, ''in the State'' after ''services are available to all infants and toddlers with disabilities''.

§ 303.145 [Amended]

12. Section 303.145 is amended by revising the heading for paragraph (c) to

read ''Maintenance and implementation activities''; and by removing the words ''planning, developing'' in paragraph (c)(1), and adding, in their place, ''maintaining''. 3. Section 303.344 is amended by adding ''and'' after ''§ 303.12(b)'' in paragraph (d)(1)(ii), and by revising paragraph (h)(1) to read as follows:

§ 303.344 Content of an IFSP.

* * * * *

(h) *Transition from Part C services.* (1) The IFSP must include the steps to be taken to support the transition of the child, in accordance with § 303.148, to—

(i) Preschool services under Part B of the Act, to the extent that those services are appropriate; or

(ii) Other services that may be available, if appropriate.

* * * * *

14. Section 303.403 is amended by removing the word ''and'' at the end of paragraph (b)(2); by revising paragraph (b)(3); by adding a new paragraph (b)(4); and by revising the authority citation to read as follows:

§ 303.403 Prior notice; native language.

* * * * *

(b) * * *

(3) All procedural safeguards that are available under §§ 303.401–303.460 of this part; and

(4) The State complaint procedures under §§ 303.510–303.512, including a description of how to file a complaint and the timelines under those procedures.

* * * * *

(Authority: 20 U.S.C. 1439(a)(6) and (7))

15. Section 303.510 is revised to read as follows:

§ 303.510 Adopting complaint procedures.

(a) *General.* Each lead agency shall adopt written procedures for—

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that any public agency or private service provider is violating a requirement of Part C of the Act or this Part by—

(i) Providing for the filing of a complaint with the lead agency; and

(ii) At the lead agency's discretion, providing for the filing of a complaint with a public agency and the right to have the lead agency review the public agency's decision on the complaint; and

(2) Widely disseminating to parents and other interested individuals, including parent training centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's procedures under §§ 303.510–303.512.

(b) *Remedies for denial of appropriate services.* In resolving a complaint in which it finds a failure to provide appropriate services, a lead agency, pursuant to its general supervisory authority under Part C of the Act, must address:

(1) How to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and

(2) Appropriate future provision of services for all infants and toddlers with disabilities and their families.

(Authority: 20 U.S.C. 1435(a)(10))

16. Section 303.511 is revised to read as follows:

§ 303.511 An organization or individual may file a complaint.

(a) *General.* An individual or organization may file a written signed complaint under § 303.510. The complaint must include—

(1) A statement that the State has violated a requirement of part C of the Act or the regulations in this part; and

(2) The facts on which the complaint is based.

(b) *Limitations.* The alleged violation must have occurred not more than one year before the date that the complaint is received by the public agency unless a longer period is reasonable because—

(1) The alleged violation continues for that child or other children; or

(2) The complainant is requesting reimbursement or corrective action for a violation that occurred not more than three years before the date on which the complaint is received by the public agency.

(Authority: 20 U.S.C. 1435(a)(10))

17. Section 303.512 is revised to read as follows:

§ 303.512 Minimum State complaint procedures.

(a) *Time limit, minimum procedures.* Each lead agency shall include in its complaint procedures a time limit of 60 calendar days after a complaint is filed under § 303.510(a) to—

(1) Carry out an independent on-site investigation, if the lead agency determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part C of the Act or of this Part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the lead agency's final decision.

(b) *Time extension; final decisions; implementation.* The lead agency's procedures described in paragraph (a) of this section also must—

(1) Permit an extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint; and

(2) Include procedures for effective implementation of the lead agency's final decision, if needed, including—

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) *Complaints filed under this section, and due process hearings under § 303.420.* (1) If a written complaint is received that is also the subject of a due process hearing under § 303.420, or contains multiple issues, of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved within the 60-calendar-day timeline using the complaint procedures described in paragraphs (a) and (b) of this section.

(2) If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties—

(i) The hearing decision is binding; and

(ii) The lead agency must inform the complainant to that effect.

(3) A complaint alleging a public agency's or private service provider's failure to implement a due process decision must be resolved by the lead agency.

(Authority: 20 U.S.C. 1435(a)(10))

18. Section 303.520 is amended by adding a new paragraph (d); and revising the authority citation to read as follows:

§ 303.520 Policies related to payment for services.

* * * * *

(d) *Proceeds from public or private insurance.* (1) Proceeds from public or

private insurance are not treated as program income for purposes of 34 CFR 80.25.

(2) If a public agency spends reimbursements from Federal funds (*e.g.*, Medicaid) for services under this part, those funds are not considered State or local funds for purposes of the provisions contained in § 303.124.

(Authority: 20 U.S.C. 1432(4)(B), 1435(a)(10))

(Note: This attachment will not be codified in the Code of Federal Regulations.)

Attachment 1—Analysis of Comments and Changes

The following is an analysis of the significant issues raised by the public comments received on the NPRM published on October 22, 1997 (62 FR 55026), and a description of the changes made in the proposed regulations since publication of the NPRM.

Except for relevant general comments relating to the overall NPRM, which are discussed at the beginning of this analysis, specific substantive issues are discussed under the subpart and section of the regulations to which they pertain. References to subparts and section numbers in this attachment are to those contained in the final regulations.

This analysis generally does not address—

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

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

(c) The organizational structure of these regulations and the extent to which statutory language is used; and

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

General Comments

Comment: Some commenters stated that the notes in the regulations are extremely important because they provide additional information and clarification. Other commenters expressed concerns about the extensive use of notes throughout the NPRM and raised questions about their legal status. Several of the commenters stated that the number of notes should be dramatically reduced because they go well beyond clarification, creating a new interpretation that differs from the statutory language.

Many of the commenters stated that any note that is intended to be a requirement should be incorporated into the text of the regulations. Some of the commenters felt that all other notes that are not requirements should be deleted or otherwise moved to a nonregulatory format, such as a technical assistance document. Other commenters indicated that notes should be used only for guidance and examples, or clarifying information, including appropriate references to recent legislative history.

Discussion: In light of the comments received, certain changes with respect to notes in these final regulations are appropriate and should be made. The Department does not regulate by notes. Therefore, the substance of any note that should be a requirement should be incorporated into the text of the regulations. Information that was contained in a note that provides meaningful guidance is reflected in the discussion of the relevant section of these regulations in this Attachment so that the public will have access to the information. Information in any note that is not considered to be useful should simply be removed.

Changes: Consistent with the above discussion, all notes have been removed as notes from these final regulations. The substance of any note considered to be a requirement has been added to the text of the regulations. Information in any note considered to provide clarifying information or useful guidance has been incorporated into the discussion of the applicable comments in this Attachment or, as appropriate, in Appendix A (Notice of Interpretation on IEPs). Notes that are no longer relevant have simply been deleted. A table is included in attachment 3 that describes the disposition of all notes in the NPRM.

Comment: A few commenters stated that the NPRM should have focused only on implementing the IDEA Amendments of 1997, and expressed concern that it was used to regulate on subjects addressed in previous policy letters that should be published separately for public comment. These commenters stated that the attempt to bring forward in the NPRM policy letters that interpret prior law is inappropriate because the new law has a goal of including children with disabilities in the general curriculum and improving results for these children, in contrast to the focus in prior law of simply providing disabled children access to public schools.

Discussion: Publishing a separate NPRM on longstanding policy letters is not in the best interests of the general public because it would impose an added burden on the reviewers and would be inefficient, ineffective, and very costly. In fact, by incorporating the positions taken in these policy letters into the NPRM, they already have been subjected to the public comment process. It also would be confusing both to parents and public agencies if the longstanding policy interpretations were not included in these final regulations, because it would imply that the provisions were no longer in effect. Moreover, it is important for parents, public agency staff, and others to be able to review all proposed changes to the regulations at one time and in a single context.

Although the new amendments place greater emphasis on the participation of disabled children in the general curriculum and on ensuring better results for these children, the essential rights and protections in prior law, including the concept of the least restrictive environment have been retained under the IDEA Amendments of 1997, and, in many respects, have been strengthened. Many of the interpretations of prior law—including those relating to the rights and protections afforded under the law—continue to be relevant to implementing Part B. Therefore, it would be inappropriate to exclude them from the final regulations.

Changes: None.

Comment: Some commenters stated that, in the preamble to the NPRM, the characterization of prior law as focusing simply on ensuring access to education is a misstatement and should be deleted. The commenters indicated that the courts have traditionally acknowledged that disabled children were entitled to participate fully in all educational programs and services available to all other students, and added that a correct interpretation of prior law is necessary because of pending and new court cases.

Discussion: The broader interpretation of prior law raised by commenters is the correct one. That characterization is reflected in the definition of FAPE (that, among other things, FAPE includes preschool, elementary, or secondary school education in the State), and in the provisions under §§ 300.304 (Full educational opportunity goal) and 300.305 (Program options). The statement in the preamble, however, was reflective of the status of the education of disabled children prior to 1975—in which approximately one million of those children were excluded from public education, and of the evolution of the program over a 22-year period.

Experience and research over that period have demonstrated that, as reflected in the statutory findings, the education of disabled children can be

more effective by having higher expectations for those children, and ensuring their access to the general curriculum, as well as other findings (see section 601(c)(5) of the Act). Therefore, it is correct to state that the 1997 amendments place greater emphasis on a results-oriented approach related to improving educational results for disabled children than was true under prior law.

Changes: None.

Comment: Commenters requested clarification relating to the ''reserved'' sections in the regulations, and indicated that if regulatory language is inserted into those reserved sections, the inserted language should be subjected to the same field input process that was used for the rest of the regulations.

Discussion: The reserved sections are simply placeholders for future regulations, if further regulations become necessary. Any regulations that would be added to those reserved sections in the future would be subject to notice and comment in accordance with the Department's rulemaking procedures. These procedures include a 90-day public comment period as required by section 607(a) of the Act.

Changes: None.

Subpart A

Purposes (§ 300.1)

Comment: Some commenters requested that § 300.1 be amended to include the new purposes under sections 601(d)(2) of the Act (relating to the early intervention program for infants and toddlers with disabilities under Part C of the Act), and 601(d)(3) (relating to ensuring that educators and parents have the tools necessary to improve educational results for children with disabilities).

Some commenters expressed their support of the emphasis on independent living and preparation for employment in the Act and regulations. A few commenters stated that the note following § 300.1 (that includes the definition of ''independent living'' from the Rehabilitation Act of 1973), sets forth the spirit of these regulations. Other commenters requested that the note be revised to clarify that the purpose of the note is not to disturb the longstanding understanding of FAPE for children with disabilities, and that maximization of educational services is not required under Part B.

Several commenters recommended that the note be deleted. Some of these commenters stated that it is misleading and confusing to include the purposes of other statutes in these regulations, that it implies that school districts are responsible for some rehabilitation services, and that ''independent living'' is a term of art, and not just an educational enterprise.

Discussion: Section 300.1 includes the statutory purposes that are specifically related to the Assistance for Education of All Children with Disabilities Program under Part B of the Act and to these regulations, which are codified at 34 CFR Part 300. Therefore, the list of statutory purposes contained in § 300.1 should be retained.

Although statutory purposes relating to Part C have not been included in these regulations, these purposes were included as part of the regulations in 34 CFR Part 303 implementing Part C published in the **Federal Register** on April 14, 1998 (63 FR 18289). In addition, although the second purpose in section 601(d)(3) of the Act is relevant to the successful implementation of these regulations, (i.e., ensuring that educators and parents have the tools necessary to improve educational results for children with disabilities) this statutory purpose is directed at the discretionary programs under Part D of the Act, and not to the requirements under Part B.

Independent living is an important concept in the education of children with disabilities, as set forth in § 300.1(a). However, because the note goes beyond the stated purposes of these regulations and focuses on a provision from another law, it is confusing, and the note should be deleted.

Changes: The note following § 300.1 has been deleted. A discussion of independent living has been incorporated into Appendix A with respect to transition services.

Applicability to State, Local, and Private Agencies (§ 300.2)

Comment: A few commenters recommended that charter schools be included in the list of public agencies to which these regulations apply, because these schools are sometimes treated by State law as political subdivisions, and, thus, would be subject to the requirements of these regulations. Other commenters emphasized the importance of clarifying the formal obligations of agencies other than educational agencies, particularly with respect to mental health services.

Discussion: Because of the increasing attention that charter schools are receiving, it is appropriate to specifically clarify that under the statute public charter schools that are not otherwise already included as LEAs or ESAs and are not a school of an LEA or ESA in the list of political subdivisions that are subject to the requirements of these regulations. Charter schools are also addressed in other sections of these regulations (see analysis of comments under §§ 300.18, 300.22, 300.241, and 300.312).

A change is not necessary to address responsibility of an agency other than an educational agency for services necessary for ensuring a free appropriate public education including mental health services. Section 300.142 addresses interagency agreements and the requirements of section 612(a)(12) of the Act regarding methods of ensuring services. See discussion of § 300.142 in this Analysis.

In light of the general decision to remove all notes from these final regulations, the note following this section of the NPRM should be deleted. The substance of this note, regarding the applicability of these regulations to each public agency that has direct or delegated authority to provide special education and related services in a State receiving Part B funds, regardless of that agency's receipt of Part B funds, should be incorporated into the text of this regulation.

Changes: Section 300.2 has been amended by redesignating the existing paragraph (b) as paragraph (b)(1), by adding public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA to the list of entities to which these regulations apply, and by removing the note to this section of the NPRM and adding the substance of that note as paragraph (b)(2) of this section.

Definitions—General Comments

Comment: Commenters recommended that the final regulations should (1) include a master list of all terms used in these regulations and the specific section in which each term is defined; (2) add other relevant statutory terms in the IDEA that were omitted from the NPRM (e.g., institution of higher education, nonprofit, parent organization, parent training and information center, and SEA etc.); (3) update § 300.28 to add ''elementary school,'' ''nonprofit,'' and ''SEA'' to the list of relevant terms defined in the Education Department General Administrative Regulations (EDGAR); (4) define terms used in two or more subparts of these regulations, such as consent, direct services, evaluation, personally identifiable, private school children with disabilities, and public expense; and (5) that the master list of definitions in note 1 to this section of the NPRM was not complete because it omitted the definitions of the thirteen terms defined within the definition of

''child with a disability,'' the fifteen terms defined within the definition of ''related services,'' and the four terms defined within the definition of ''special education.''

Some commenters requested that the following definitions be deleted: ''comparable services'' (§ 300.455); ''extended school year'' (§ 300.309); ''meetings'' (§ 300.501); and ''financial costs'' (§ 300.142(e)), because none of the terms is defined in the statute, and the regulations should not exceed the statute. Other commenters recommended adding definitions of ''change of placement;'' ''competent eighteen year old;'' ''developmental delay;'' ''school day;'' ''extra curricular activities;'' ''functional behavioral assessment;'' ''impeding behavior;'' ''other agency personnel;'' ''paraprofessional;'' ''positive behavior support or intervention plan;'' and ''positive behavioral intervention strategies.''

A few commenters expressed concern with the use of ''adversely affects educational performance'' throughout § 300.7(b) as potentially limiting the services that are provided to disabled children, especially those children who are academically gifted but who still need transition services to postsecondary education, and recommended that a definition of this term be added to the regulations.

Discussion: It would make the regulations more useful to parents and others by: (1) Adding to Subpart A the definitions of terms of general applicability (e.g., consent, evaluation, and personally identifiable) that are used in two or more subparts of these final regulations, and (2) adding to § 300.30, previously § 300.28 of the NPRM, relevant terms used in these regulations that are defined in EDGAR (e.g., elementary school, secondary school, nonprofit, and State educational agency).

It also would make the regulations more useful to include an alphabetical master list of the definitions of terms used in this part, and the specific section in which each term is defined, including terms of general applicability (e.g., FAPE and IEP), terms used in a single section or subpart (e.g., ''illegal drug'' and ''weapon''), and individual terms used in the definitions of ''child with a disability,'' ''related services,'' and ''special education.'' These regulations should include an index that identifies the key terms used in the regulations and lists the specific section in which each term is used; and the master list of definitions of the terms should be included in the index.

A definition of the term ''parent training and information center'' should not be added, but the statutory definition of that term in section 602(21) of the Act is referenced in the sections of these regulations that use the term (§ 300.506(d)(1)(i) (relating to mediation) and § 300.589(c)(4) (relating to waiver of the nonsupplanting requirement)), and the term ''parent training centers'', which has been dropped from § 300.660(b), would be replaced by a reference to the statutory term.

The disposition of the terms defined in §§ 300.142(e), 300.309, 300.455, and 300.501 of the NPRM is addressed in each of the pertinent sections of this attachment.

With respect to the term ''adversely affects educational performance,'' in order for a child to be eligible for services under Part B, the child must meet the two-pronged test established under § 300.7(a), which reflects the statutory definition in section 602(3) of the Act. This means that the child has one of the listed conditions that adversely affects educational performance, and who, because of that condition, needs special education and related services. Revising this language in the manner suggested by commenters could result in an unwarranted expansion of eligibility under Part B. It should be pointed out that a child who is academically gifted but who may not be progressing at the rate desired is not automatically eligible under Part B. Neither is the child automatically ineligible. Rather, determinations as to a child's eligibility for services under Part B must be made on a case-by-case basis in accordance with applicable evaluation procedures.

In light of the general decision to remove all notes from these final regulations, Notes 1 and 2 following the subheading ''Definitions'' and immediately preceding § 300.5 in the NPRM should be deleted. Note 1 listed the terms defined in specific sections of the NPRM. As stated earlier in this discussion, those terms should be included in a master list of definitions in a newly-created index to these final regulations. Note 2 contained abbreviations of common terms used in these regulations (e.g. the use of ''FAPE'' for ''free appropriate public education''). In lieu of listing those abbreviations in a note, each term should be included parenthetically in the text of the regulations as that term appears; and, thereafter, either the abbreviation or the full term may be used interchangeably, depending on the context in which it is used.

Changes: References to the terms defined in § 300.500—''consent,'' ''evaluation,'' and ''personally identifiable''—have been added as §§ 300.8, 300.12, and 300.21 of these final regulations. Relevant terms from EDGAR referenced throughout these regulations have been added to § 300.30. Notes 1 and 2 immediately preceding § 300.5 have been removed. An index to these regulations have been added as a new Appendix B, and a master list of the definitions of all terms used in this part has been included in the index under the heading ''Definitions of terms used under this part.'' The abbreviations listed in Note 2 have been included in the text of the regulations, as described in the above discussion.

Assistive Technology Devices and Services (§§ 300.5 and 300.6)

Comment: Some commenters recommended that assistive technology devices and services be listed as a related service under § 300.22, as well as defined separately under §§ 300.5 and 300.6. Some commenters also recommended changes that would alter the statutory definitions of these terms. A few commenters requested that §§ 300.5 and 300.6 be amended to add language clarifying that assistive technology devices and services are only required for a disabled child if necessary for the child to benefit from special education. A few commenters stated that the regulations should clarify public agency responsibility for providing personal devices, such as eyeglasses, hearing aids, braces and medication, while other commenters recommended that the regulations make explicit that public agencies are not responsible for providing personally-prescribed devices under these regulations. Commenters also requested that the regulations include examples of assistive technology devices for children, including a range of high to low technology devices, such as postural supports, mobility aids, and positioning equipment. Commenters also requested clarification on how school districts draw distinctions between a child's need for an assistive technology device and a parent's desire for the child to have the newest and best device on the market.

Discussion: As stated in the note following § 300.6 of the NPRM, the definitions of ''Assistive technology device'' and ''Assistive technology service'' in sections 602(1) and 602(2) of the Act are substantially identical to the definitions of those terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988, as amended (Tech Act). Since

§§ 300.5–300.6 essentially adopt the statutory definitions of these terms, no changes to these statutory definitions should be made in these final regulations. However, consistent with Part B, the words ''child with a disability'' were substituted for the statutory reference to individual with a disability found in the definitions contained in the Tech Act. In addition, in light of the general decision not to use notes in these final regulations, the note to § 300.6 of the NPRM should be removed.

Section 300.308 of these regulations specifies that an assistive technology device or service is only required if it is determined, through the IEP process, to be (1) special education, as defined in § 300.26, (2) related services, as defined in § 300.24, or (3) supplementary aids and services, as defined in § 300.28. No further clarification should be provided, and references to § 300.308 should not be included in the definitions of ''related services'' under § 300.24 or ''special education'' under § 300.26. Section 300.308 is sufficient to explain how a determination about a child's need for an assistive technology device or service is made.

As a general matter, public agencies are not responsible for providing personal devices, such as eyeglasses or hearing aids or braces, that a disabled child requires regardless of whether he or she is attending school. However, if a child's IEP team specifies that a child requires a personal device in order to receive FAPE, the public agency must provide the device at no cost to the child's parents. Consistent with section 612(a)(12) of the Act, public agencies that are otherwise obligated under Federal or State law or assigned responsibility under State policy or interagency agreement or other mechanisms to provide or pay for any services that are also considered special education or related services, including devices that are necessary for ensuring FAPE, must fulfill that obligation or responsibility, either directly or through contract or other arrangement.

Regarding responsibilities relative to medication under § 300.5, medication is an excluded ''medical service,'' and is not the responsibility of a public agency under these regulations; therefore, the change suggested by commenters is not warranted.

Further examples of assistive technology are not necessary within these regulations. Because the definitions of assistive technology devices and services have been included in these regulations for over five years and have been included in the Tech Act since 1988, most public agencies should be informed about those devices and services for purposes of implementing these regulations. Examples of assistive technology devices and services and other relevant information may be available through one of the technical assistance providers funded by the National Institute on Disability and Rehabilitation Research in the Office of Special Education and Rehabilitative Services (OSERS) or other technical assistance providers funded by OSERS.

Changes: The note following § 300.6 has been removed.

Comment: Some commenters asked for clarification that (1) the statutory provision encompasses both a child's own assistive technology needs (e.g., electronic note takers, cassette recorders, and speech synthesizers), as well as access to general technology used by all students, (2) a child with a disability may take assistive technology devices home for use on homework and other assignments, as well as for use in the community, and (3) school districts have continuing responsibility for installation, repair, and maintenance of devices. These commenters added that in order to fully benefit from assistive technology, children with disabilities must be able to use it on all school-work assignments, whether done in the classroom or at home or in the community; and LEAs must ensure that children, their teachers, and other personnel receive the necessary in-service instruction on the operation and maintenance of technology. Other commenters requested that the final regulations specify in the text of the regulations or in a note (1) the right of children with disabilities to take devices home or to other settings, as needed, and (2) the issue of ownership and responsibility.

Discussion: The provision of assistive technology devices and services is limited to those situations in which they are required in order for a disabled child to receive FAPE. However, subject to this limitation, commenters are correct that (1) ''assistive technology'' encompasses both a disabled child's own personal needs for assistive technology devices (e.g., electronic note-takers, cassette recorders, etc), as well as access to general technology devices used by all students, and (2) if an eligible child is unable, without a specific accommodation, to use a technology device used by all students, the agency must ensure that the necessary accommodation is provided. Further, commenters are correct that LEAs must ensure that students, their teachers, and other personnel receive the necessary in-service instruction on the operation and maintenance of technology.

Finally, § 300.308 of these final regulations should be amended to clarify that, on a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP team determines that the child needs to have access to those devices in order to receive FAPE. The assistive technology devices that are necessary to ensure FAPE must be provided at no cost to the parents, and the parents cannot be charged for normal use, and wear and tear. However, while ownership of the device in these circumstances would remain with the public agency, State law, rather than Part B, generally would govern whether parents are liable for loss, theft, or damage due to negligence or misuse of publicly owned equipment used at home or in other settings in accordance with a child's IEP.

Changes: No change has been made to this section in response to these comments. However, § 300.308 has been amended, consistent with the above discussion.

Child With a Disability (§ 300.7)

Comment: A number of commenters requested that the definition of developmental delay be consistent across both Part B and the early intervention program under Part C. The commenters stated that defining the term consistently across all age ranges will help to avoid confusion, enhance transition, and conform to diagnostic procedures. Other commenters requested that States not be allowed to establish their own definitions of developmental delay because of the risk of inequitable services across State lines.

Several commenters requested that children with sensory disabilities (such as deafness or blindness) not be included under the developmental delay designation, because a sensory disability is a permanent condition and not a delay. Some commenters requested that LEAs be required to justify, through assessment and elimination of specific disabilities, why a child is identified as developmentally delayed. One of the commenters stated that LEAs must be required to include assessment of uneven patterns of development as part of the determination of developmental delay, and added that developmental delay should be utilized for individual cases where the child's disability cannot be identified, although delays are manifested in the child.

A few commenters recommended that the regulations make clear that (1) the broad definition of developmental delay must not be used to deny proper evaluations, and (2) a full, comprehensive evaluation of each child must be conducted in all areas of suspected disability so that the child's particular educational and other disability-related needs can be effectively addressed.

Some commenters disagreed with the language in Note 2 prohibiting States that have adopted developmental delay from requiring LEAs to also adopt the provision, since LEAs, as agents of the State, may be directed by the State to enforce what the State has adopted. Other commenters recommended that the regulations make clear that an LEA is not required to indicate why a child is in a developmental delay category rather than in a disability category, and that an LEA is not required to categorize the child as having one of the thirteen disabilities before using the developmental delay designation.

Discussion: The term ''developmental delay'' is a statutory term that is included in both Parts B and C of the Act. A definition of developmental delay, substantially similar to the definition in § 300.7(a)(2) of the NPRM, should be retained in these final regulations. Because of the numerous questions raised by commenters about the application of this definition, it is determined that a new paragraph describing requirements governing the use of the developmental delay designation should be added to these final regulations as § 300.313. In light of these changes, the definition of ''developmental delay'' would be placed in paragraph (b) of § 300.7 of these final regulations, and paragraph (b) of this section of the NPRM would be redesignated as a new paragraph (c).

Also, in light of the general decision not to use notes in these final regulations, Notes 2 and 3 following this section of the NPRM should be removed, and the substance of these notes would be incorporated into the new § 300.313. This new section will (1) set out the requirements for States and LEAs in using the developmental delay designation; (2) clarify that States and LEAs may use the developmental delay designation for any child who has an identifiable disability, provided all of the child's identified needs are addressed; and (3) clarify that a State may, but is not required to, adopt a common definition of developmental delay for Parts B and C.

States electing to adopt the term developmental delay are not prohibited from also continuing to use the disability categories in § 300.7(a) and (c) for those children who have been evaluated in accordance with §§ 300.530–300.536 as having one of the listed disabilities and who because of that disability need special education and related services. Although States traditionally have had the authority to require LEAs to adopt State policies, new section 602(3)(B) of the Act, unlike the provision in prior law, provides that implementation of the provision related to serving children under the developmental delay designation is at the discretion of both the State *and* the LEA. New § 300.313 reflects this statutory change.

Under the statute, States also have the discretion to apply the term developmental delay to children who have an identified sensory disability (such as deafness or blindness) or any other permanent condition (such as a significant cognitive disability), or to use the specific categories. However, States must ensure that children with sensory impairments or other permanent conditions are evaluated in all areas of suspected disability, and that the educational and other disability-related needs of these children identified through applicable evaluation procedures are appropriately addressed.

It is important to ensure that the broad definition of developmental delay is not used to deny children proper evaluations. In all cases, evaluations must be sufficiently comprehensive to ensure that children's needs are appropriately identified. The provisions in §§ 300.530–300.536 of these regulations should ensure that evaluations of children in States and LEAs that use the developmental delay designation are sufficiently comprehensive to address the full range of these children's needs. It would not be appropriate to require public agencies to justify why a child is identified as developmental delay rather than under one of the other disability designations in these regulations.

Changes: Section 300.7 has been amended by adding a new paragraph (a)(2) to clarify that if a child has one of the disabilities listed in paragraph (a) of this section but only needs a related service and not special education that child is not a *child with a disability* under this part, unless the related service is considered special education rather than a related service under State standards. Paragraph (a)(2) of the NPRM has been redesignated as paragraph (b) of these final regulations, entitled ''children aged three through nine experiencing developmental delays,'' which incorporates the definition in § 300.7(a)(2)(i) and (ii) of the NPRM; and a new § 300.313 has been added that clarifies the circumstances under which the DD designation is used, reflecting the substance of proposed § 300.7(a)(2)(iii) and Notes 2 and 3 to this section of the NPRM. Notes 2 and 3 to this section of the NPRM have been deleted. Paragraph (b) of the NPRM has been redesignated as paragraph (c) in these final regulations.

Comment: A variety of comments proposing various changes in definitions was received regarding the terms ''deaf-blindness,'' ''emotional disturbance,'' ''hearing impairment,'' ''multiple disability,'' ''speech or language impairment,'' ''mental retardation,'' ''orthopedic impairment,'' ''specific learning disability,'' ''traumatic brain injury,'' and ''visual impairment including blindness.'' Other commenters supported the existing definitions but suggested some modifications. Some commenters stated that the term deaf-blindness, as defined in the NPRM, mistakenly labels these children's disability as causing educational problems as if the child is a burden to the system. These commenters requested that the definition be amended to replace ''problems'' with ''needs''. The commenters made the same statement with respect to the term ''multiple disability.''

Discussion: In light of the general decision not to use notes in these final regulations, Note 1 to this section of the NPRM should be removed. While the characteristics of ''autism'' are generally evident before age three, a child who manifests characteristics of the category ''autism'' after age three still can be evaluated as having autism, if the criteria in the definition are satisfied. Because of the importance of this clarification, the definition of autism in § 300.7(c)(1) should be amended to incorporate the substance of Note 1 to this section of the NPRM. While there is merit to many of the proposed changes to definitions and terms, modifications to the substance of existing definitions should be subject to further review and discussion before changes are proposed. For example, as indicated in the preamble to the NPRM (62 FR 55026–55048 (Oct 22, 1997)), the Department plans to carefully review research findings, expert opinion, and practical knowledge over the next several years to determine whether changes should be proposed to the procedures for evaluating children suspected of having specific learning disabilities. Any changes to the definition of this term should also be considered in light of that review.

As indicated in the NPRM, no substantive changes are made to the definition of the term ''emotional disturbance'' in § 300.7(c)(4). With respect to the use of the term ''emotional disturbance'' instead of ''serious emotional disturbance,'' the Senate and House committee reports on Pub. L. No. 105–17 include the following statement:

> The Committee wants to make clear that changing the terminology from ''serious emotional disturbance'' to ''serious emotional disturbance [hereinafter referred to as 'emotional disturbance']'' in the definition of a ''child with a disability'' is intended to have no substantive or legal significance. It is intended strictly to eliminate the pejorative connotation of the term ''serious.'' It should in no circumstances be construed to change the existing meaning of the term under 34 CFR § 300.7(b)(9) as promulgated September 29, 1992. (S. Rep. No. 105–17, p. 7; H.R. Rep. No. 105–95, p. 86 (1997).)

In light of the general decision not to use notes in these final regulations, Note 4 to this section of the NPRM should be removed. In response to suggestions of commenters, the definitions of deaf-blindness and multiple disability should be revised to eliminate the negative connotation of the language in the current definitions, and the word ''needs'' should replace the word ''problems.'' However, these changes, in no way, are intended to alter which children are considered eligible under these categories.

Changes: Note 1 to this section of the NPRM has been removed, and the definition of ''autism'' in § 300.7(c)(1) of these final regulations has been amended to specify that if a child manifests characteristics of ''autism'' after age three, the child could be diagnosed as having ''autism'' if the criteria in the definition of ''autism'' are satisfied. The definitions of deaf-blindness and multiple disability have been revised to replace ''problems'' with ''needs.''

Note 4 to this section of the NPRM has been removed, and the substance of Note 4 is reflected in the above discussion.

Comment: A large number of commenters expressed support for retaining Note 5, and agreed with the clarification that attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD) are conditions that may make a child eligible under § 300.7. As an alternative, these and other commenters suggested that ADD/ADHD be listed as examples of conditions that could make a child eligible under the ''other health impairment'' category at § 300.7(c)(9). A few commenters requested that ADD/ADHD be specified as a separate disability category under these regulations. Many of these commenters, parents of children with ADD/ADHD, described the tremendous problems they have had, and are having, in obtaining appropriate services for their children. Of particular concern to these commenters was that ADD/ADHD is not expressly listed in the regulations; additionally, commenters were concerned that discussing ADD/ADHD in a note would not be adequate. One commenter noted that the regulations should clarify that a disabled child needs only one, not two, disabilities in order to be eligible under these regulations. A few commenters recommended that schools not require an additional evaluation for a child with ADD/ADHD under other health impairment once the child has been diagnosed and has qualified under another disability category, noting that schools have placed burdens on children and their families by requesting that ADD/ADHD be re-diagnosed by using different procedural qualification requirements when the child with ADD/ADHD moves from one qualifying category (such as learning disabilities or emotional disturbance) to the other health impairment category.

Other commenters requested that Note 5 be deleted because it exceeds statutory authority and would increase the regulatory burden on LEAs by giving the false impression that children with ADD/ADHD are automatically protected by the IDEA Amendments of 1997. Some of these commenters stated that children with ADD/ADHD may be eligible for services under the Act, and, if they are eligible, are receiving services, but added that it is not appropriate to enumerate in the Act or regulations all conditions, e.g., Tourette's Syndrome, that may qualify children for special education and related services. Other commenters indicated that the definition of ADD/ADHD is so vague it fits all children, and added that the most damaging potential abuse comes from over-identification of poor and minority children who will get the label and the reduced expectations that accompany it. Some commenters stated that the discussion in Note 5 of ''limited alertness'' as ''heightened alertness'' is exceptionally loose and could result in the largest expansion of eligible children in IDEA history.

Several commenters stated that the diagnosis of ADHD/ADHD does not require a medical evaluation if the disability is diagnosed by a school or licensed psychologist, and the need for special education is determined through the eligibility process in §§ 300.534–300.535. A suggestion was made by commenters that the regulations emphasize that educational impact must be the basis for determining eligibility of those children for special education because, according to commenters, at least 25 percent of the children referred for evaluation, who had been diagnosed medically as ADD/ADHD, were experiencing few, if any, educational problems at the time of their referrals.

Discussion: Note 5 following § 300.7 was included in the NPRM to reflect the Department's longstanding policy memorandum relating to the eligibility of children with ADD/ADHD. However, although some of the commenters who favor deleting Note 5 indicate that some children with ADD/ADHD are receiving services under these regulations, experience and the numerous comments received have demonstrated that the Department's policy is not being fully and effectively implemented.

It is important to take steps to ensure that children with ADD/ADHD who meet the criteria under Part B receive special education and related services in the same timely manner as other children with disabilities. Therefore, the definition of ''other health impairment'' at § 300.7(c)(9) of these final regulations should be amended to add ADD/ADHD to the list of conditions that could render a child eligible under this definition, and the list of conditions in § 300.7(c)(9) should be rearranged in alphabetical order. Following the phrase ''limited strength, vitality or alertness,'' and prior to the phrase, ''that adversely affects educational performance,'' the words ''including a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment'' should be added.

These changes are needed to clarify the applicability of the ''other health impairment'' definition to children with ADD/ADHD. The clarification with respect to ''limited strength, vitality, or alertness'' is essential because many children with ADD/ADHD actually experience heightened alertness to environmental stimuli, which results in limited alertness with respect to their educational environment. In light of these regulatory changes, Note 5 to this section of the NPRM should be removed as a note, and other portions of Note 5 are reflected in the following discussion. A child with ADD/ADHD may be eligible under Part B if the child's condition meets one of the disability categories described in § 300.7, and because of that disability, the child needs special education and related services. Children with ADD/

ADHD are a very diverse group; some children with ADD/ADHD who are eligible under Part B meet the criteria for ''other health impairments.'' Those children would be classified as eligible for services under the ''other health impairments'' category if (1) the ADD/ADHD is determined to be a chronic health problem that results in limited alertness, that adversely affects educational performance, and (2) special education and related services are needed because of the ADD/ADHD. All children with ADD/ADHD clearly are *not* eligible to receive special education and related services under these regulations, just as all children who have one of the other conditions listed under the other health impairment category are not necessarily eligible (e.g., children with a heart condition, asthma, diabetes, and rheumatic fever).

Some children with ADD/ADHD may be eligible under other categories, such as ''emotional disturbance'' (§ 300.7(c)(4)) or ''specific learning disability'' (§ 300.7(c)(10)) if they meet the criteria under those categories. Regardless of what disability designation is attached, children with ADD/ADHD meeting the criteria for any of the listed disabilities under these regulations must receive the specialized instruction and related services designed to address their individualized needs arising from the ADD/ADHD. No child is eligible for services under the Act merely because the child is identified as being in a particular disability category. Children identified as ADD/ADHD are no different, and are eligible for services only if they meet the criteria of one of the disability categories in Part B, and because of their impairment, need special education and related services.

Other children with ADD/ADHD may have a diagnosed medical condition (and need medication) but may not require any special education or otherwise be eligible under these regulations. These children may be covered by the requirements of section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation in 34 CFR Part 104.

With respect to commenters' suggestions that the diagnosis of ADD/ADHD does not require a medical evaluation if the disability is diagnosed by a school or licensed psychologist, a change is not needed in these regulations. Also, it would not be appropriate to make a change to respond to commenters' suggestion that a medical evaluation is required for a child with ADD/ADHD to establish eligibility under the other health impairment category. Part B does not require that a particular type of evaluation be conducted to establish any child's eligibility under these regulations; rather, the evaluation requirements in §§ 300.530–300.536 are sufficiently comprehensive to support individualized evaluations on a case-by-case basis, including the use of professional staff appropriately qualified to conduct the evaluations deemed necessary for each child.

In accordance with these procedures, if a determination is made that a medical evaluation is required in order to determine whether a child with ADD/ADHD is eligible for services under Part B, such an evaluation must be conducted at no cost to the parents. In all instances, as is true for all children who may be eligible for services under Part B, each child with ADD/ADHD who is suspected of having a disability must 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. (§ 300.532(g)).

There is no requirement under these regulations that a medical evaluation be conducted to accomplish these assessments. Even if a State requires that a medical evaluation be included as part of all evaluations to determine eligibility for the other health impairment category, it must also ensure that any necessary evaluations by other professionals, such as psychologists, are conducted and considered as part of the eligibility determination process. Whether or not public agencies will be required to conduct an additional evaluation for a child with ADD/ADHD under other health impairment once the child has been evaluated and has qualified under another disability category will depend on whether sufficient evaluation information exists to enable school district officials to ensure, consistent with § 300.532(g), that each child is assessed in all areas of suspected disability.

Because these determinations will necessarily depend on the individual needs of the child and the circumstances surrounding the evaluation, a change is not needed.

With respect to the concern of commenters that the most damaging potential abuse from the definition will be the over-identification of poor and minority children, there is no indication that children from minority backgrounds have been disproportionately identified as ADD/ADHD even as the numbers of children in this category have increased. Further, the definition of ADD/ADHD is not so loose that it could result in the largest expansion of eligible children in IDEA history. As previously stated, many children with ADD/ADHD are not eligible under Part B. If appropriate evaluations are conducted in accordance with §§ 300.530–300.536, the result of the evaluations should be the inclusion of only those children with ADD/ADHD who are eligible for, and have an entitlement to, special education and related services under Part B.

Changes: The definition of ''other health impairment'' at § 300.7(c)(9) has been amended to add ADD/ADHD to the list of conditions that could render a child eligible under this definition, and the list of conditions in § 300.7(c)(9) has been rearranged in alphabetical order. Following the phrase ''limited strength, vitality, or alertness,'' and prior to the phrase, ''that adversely affects educational performance,'' the words ''including a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment'' have been added to clarify the applicability of the other health impairment definition to children with ADD/ADHD. Note 5 to this section of the NPRM has been removed.

Day; Business Day; School Day (§ 300.9)

Comment: Some commenters indicated support for the definition of ''day'' as written. Many commenters requested that the term be revised to define ''school day'' and ''business day,'' since these are key terms that are used throughout the Act and regulations. Some of the commenters recommended similar definitions of the terms, ''school day'' and ''business day'' (e.g., ''school day'' means days when children are attending school and ''business day'' means days when a school is open for business and administrative personnel are working). One definition proposed by commenters included staff development day as a school day. Several commenters asked when a partial day might be considered a ''day,'' if inservice or staff development days are considered business days, and what holidays are to be used, as school districts and States vary in this regard. Other commenters requested that there be no reference to ''calendar day'' or ''day,'' but that instead the definitions of ''school day'' and ''business day'' be incorporated into these regulations. Some of the commenters indicated that the use of ''calendar day'' can place an impractical time standard on school systems when

actions are required and a school may not be open for business.

Discussion: It is necessary, to avoid confusion and ensure clarity, to amend the definition of ''day'' to include definitions of both ''school day'' and ''business day.'' Both ''school day'' and ''business day'' are used to implement new provisions added by Pub. L. 105–17: The term ''school day'' is used only with respect to discipline procedures and appears in §§ 300.121(c)(1) and (c)(2), and 300.520(a)(1) and (c). The term ''business day'' is used in §§ 300.509(b) (Additional disclosure of information requirement); 300.520(b) (Authority of school personnel); and 300.528(a)(1) (Expedited due process hearing). In addition, the phrase ''business days (including holidays that fall on a business day)'' is used in § 300.403(d)(1)(ii) (Placement of children by parents in a private school or facility if FAPE is at issue.)

''School day'' means any day that children are in attendance at school for instructional purposes. If children attend school for only part of a school day and are released early (e.g., on the last day before Christmas or summer vacation) that day would be considered to be a school day. However, it is expected that the term ''school day,'' including partial school day, has the same meaning for all children in school, including children with and without disabilities.

The term ''business day'' is used in the statute and regulations in relation to actions by school personnel and parents. While school personnel could reasonably be expected to know when administrative staff are working, very often this information is not readily available to parents, nor is it likely to be consistent from one LEA to another, or from the SEA to an LEA. If ''business day'' were interpreted to be days when school offices are open and administrative staff are working, it could actually be impossible for parents to know with any certainty the date in advance of a due process hearing on which they would have to share evidence to be introduced at the hearing with the other party to the hearing (see § 300.509). Therefore, this term is interpreted to be a commonly understood measure of time, Monday through Friday except for Federal and State holidays, unless holidays are specifically included, as in § 300.403(d)(1)(ii).

Including definitions of ''school day'' and ''business day'' will reduce confusion about the meaning of these terms and should facilitate meeting the various timelines in the Act and regulations.

The definition of ''day,'' while that term was not previously defined in the regulations, represents the Department's longstanding interpretation that the term ''day'' means calendar day. (*See,* e.g., NPRM published August 4, 1982, 47 FR 33836–33840 describing the 30-day time line from determination of eligibility to initial IEP meeting as ''30 calendar days.'') This interpretation is consistent with generally-recognized authority on statutory interpretation. (*See Sutherland Stat. Const.* § 33.12 (5th Ed.)). In addition, the statute itself uses three different terms, ''day,'' ''business day,'' and ''school day,'' so it would be inappropriate to interpret ''day'' to be the same as either ''business day'' or ''school day.''

Finally, altering the interpretation of ''day'' from the longstanding interpretation as ''calendar day'' would raise significant concerns about compliance with the terms of section 607(b) of the Act, especially as to timelines that affect the rights of parents and children with disabilities such as (1) the timeline in § 300.343 (relating to holding an initial IEP meeting for a child), and (2) the procedural safeguards in Subpart E, including § 300.509(a)(3) (hearing rights—timeline for disclosure of evidence); § 300.511(a) and (b) (timelines for hearings and reviews); and § 300.562(a) (access rights relating to records).

There also are other provisions in these regulations that include timelines that have always been interpreted to be calendar day timelines—including the (1) 30-day public comment period in § 300.282, (2) by-pass procedures under Subpart D, (3) notice and hearing procedures in §§ 300.581–300.586 that the Department uses before determining that a State is not eligible under Part B, and (4) 60-day timeline under the State complaint procedures in § 300.661. The majority of those timelines have been in effect since 1977, and, in light of the clear distinction in the IDEA Amendments of 1997 between days, school days, and business days, there is no basis for changing other timelines in the regulations.

Changes: The name of the section in the NPRM has been changed to ''Day; business day; school day'' in these final regulations. Definitions of ''school day'' and ''business day'' have been added to reflect the above discussion.

Educational Service Agency (§ 300.10)

Comment: None.

Discussion: The definition of ''educational service agency'' in § 300.10 of these final regulations adopts the statutory definition of this term in section 602(4) of the Act. This definition replaces the definition of the term ''intermediate educational unit'' (IEU) in § 300.8 of the current regulations. The use of the term ''educational service agency'' was not intended to exclude those entities that were considered IEUs under prior law. This interpretation is supported by the legislative history, which makes explicit that most definitions in prior law have been retained, and, where appropriate, updated. S. Rep. No. 105–17 at 6., and H.R. Rep. No. 105–95 at 86. With respect to ''educational service agency,'' the Reports explain that this definition has been updated ''to reflect the more contemporary understanding of the broad and varied functions of such agencies.'' *Id.*

Although there were no comments regarding this definition, the application of the term ''educational service agency'' to entities covered under the definition of IEU in prior law has been questioned. The definition of IEU did not refer explicitly to public elementary and secondary schools. However, the definition of ''educational service agency'' makes specific references to an entity's administrative control over public elementary and secondary school. This definition could be misinterpreted as excluding from the educational service agency definition those entities in States that serve preschool-aged children with disabilities but do not have administrative control and direction over a public elementary or secondary school. Therefore, to avoid any confusion about the use of this new terminology, a statement should be added to the definition to clarify that the term ''educational service agency'' includes entities that meet the definition of IEU in section 602(23) of IDEA as in effect prior to June 4, 1997.

Changes: Consistent with the above discussion, a statement has been added at the end of the definition to clarify that the definition of ''educational service agency'' includes entities that meet the definition of IEU in section 602(23) of IDEA as in effect prior to June 4, 1997.

Equipment (§ 300.11)

Comment: One comment stated that the reference to ''books, periodicals, documents, and other related materials'' be deleted from § 300.10(b) because materials and equipment are accounted for differently in the budget. A few commenters recommended that the definition of ''equipment'' be amended to add that (1) any instructional or related materials be provided in accessible formats, as appropriate; and

(2) any technological aids and services be accessible.

Discussion: The definition of ''equipment'' is a standard statutory definition that is used in most elementary and secondary education programs funded by the Department. Therefore, efficient administration of Federal programs would not be served by revising the definition in the ways suggested by the commenters. In appropriate situations, public agencies are required by section 504 of the Rehabilitation Act of 1973 and title II of the Americans with Disabilities Act (ADA) to ensure that instructional or related materials are provided in accessible formats and that technological aids and services are accessible to students with disabilities or can be made accessible, to afford students with disabilities an equal opportunity to participate in their programs.

Changes: None.

General Curriculum

Comment: Several commenters indicated support for the definition of ''general curriculum,'' and for the note clarifying that the term relates to the content of the curriculum and not the setting in which it is used. Some commenters stated that, as written, the definition should preclude any likelihood of the ''general curriculum'' being identified with the ''low'' track.

Some commenters recommended that the substance of the note be integrated into the definition or made other suggestions to strengthen the idea that the general curriculum applies to children with disabilities wherever they are educated. Other commenters disputed that there is a ''general curriculum,'' pointing to the variety of common courses offered by many school districts, the need of some children for a functional life-skills curriculum or the needs of students in alternative programs (e.g., moderate disabilities, significant or profound, autism, etc.) who may be pursuing an alternative certificate rather than a diploma. Other commenters requested that the definition be dropped from the final regulations, because it (1) sets a dangerous precedent for the Federal government to dictate what the general curriculum should be in each school, and (2) violates the General Education Provisions Act.

Discussion: The concept of ''general curriculum'' in these regulations plays a crucial role in meeting the requirements of the Act. The IDEA Amendments of 1997 place significant emphasis on the participation of children with disabilities in the general curriculum as a key factor in ensuring better results for these children.

The definition in § 300.12 would not have imposed a national curriculum, but only clarified what the statutory term ''general curriculum'' means. As the term is used throughout the Act and congressional report language, the clear implication is that, in each State or school district, there is a ''general curriculum'' that is applicable to all children. A major focus of the Act—especially with respect to the new IEP provisions—is ensuring that children with disabilities are able to be involved in and progress in the ''general curriculum.'' For example, the Senate and House committee reports on Pub. L. No. 105–17 state that—

> [t]he new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to have access to the general education curriculum and the special services which may be necessary for appropriate participation in particular areas of the curriculum due to the nature of the disability. (S. Rep. No. 105–17, p. 20; H.R. Rep. No. 105–95, p. 100 (1997)).

Even as school systems offer more choices to students, there still is a common core of subjects and curriculum areas that is adopted by each LEA or schools within the LEA, or, where applicable, the SEA, that applies to all children within each general age grouping from preschool through secondary school. Appropriate access to the general curriculum must be provided. The development and implementation of IEPs for each child with a disability must be based on having high, not low, expectations for the child.

In light of the concerns of the commenters and the principle of regulating only to the extent necessary, proposed § 300.12 should be removed from the final regulations. Instead the regulations should emphasize the importance of the ''general curriculum'' concept in the IEP provision under which the term is used.

Changes: The definition of ''general curriculum'' in § 300.12 of the NPRM and the note following that section of the NPRM have been deleted. The term is explained where it is used in § 300.347 and in Appendix A regarding IEP requirements.

Individualized Education Program Team (§ 300.16)

Comment: None.

Discussion: In light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed. However, it is important to clarify that the IEP team may also serve as the placement team.

Changes: The note following this section of the NPRM has been removed.

Local Educational Agency (§ 300.18)

Comment: A number of commenters expressed concern about the note on public charter schools following § 300.17 of the NPRM, stating that it provides an inadequate and too limited explanation of the responsibilities of those schools under these regulations (i.e., it focuses only on public charter schools that are ''LEAs'' under State law and excludes public charter schools that are defined by State law as being part of an LEA).

Some of the commenters requested that the note be modified to clarify that public charter schools must comply with these regulations whether or not they receive Part B funds. Commenters believe that this clarification is particularly important because, according to the commenters, services to disabled children in some public charter schools have been dismantled, and parents have been asked to waive their children's rights under Part B as a condition of enrollment in the schools.

Other commenters requested that the note be dropped and that § 300.241 (Treatment of public charter schools and their students) clarify that all charter schools must comply with the requirements of Part B of the Act. The commenters added that this action would consolidate all public charter school requirements into one regulatory provision. A few commenters requested that the regulations include a provision requiring that LEAs in which charter schools are physically located describe to the State how they will ensure that children with disabilities receive special education and related services under this part, even when the charter school is not otherwise under the jurisdiction of the LEA.

Discussion: In light of the general decision not to use notes in these final regulations, the note following § 300.17 of the NPRM should be removed. However, it should be pointed out that the proposed note was inadequate and did not provide a full explanation of the responsibilities of public charter schools under these regulations.

In light of concerns raised about how public charter schools could meet their obligations to disabled students under Part B and obtain access to Part B funds for disabled students enrolled in their schools, two important provisions were included in the IDEA Amendments of 1997 at section 613(a)(5) and (e)(1)(B).

Some public charter schools can be LEAs if, under State law, they meet the

Part B definition of LEA. As a result of section 613(e)(1)(B) of the Act, public charter schools that are LEAs may not be required to apply for Part B funds jointly with other LEAs, unless explicitly permitted to do so under the State charter school statute. However, in many instances, charter schools are schools within LEAs. If this is so, section 613(a)(5) of the Act provides that the LEA of which the public charter school is a part must serve those disabled students attending public charter schools in the same manner as it serves students with disabilities in its other public schools and must provide Part B funds to charter schools in the same manner that it provides Part B funds to other public schools.

Still, in other instances, due to the provisions in States' charter school statutes, some public charter schools are not considered LEAs or a school within an LEA. In such instances, the SEA would have ultimate responsibility for ensuring that Part B requirements are met. Regardless of whether a public charter school receives Part B funds, the requirements of Part B are fully applicable to disabled students attending those schools. The legislative history of the IDEA Amendments of 1997 makes explicit that Congress ''expects that public charter schools will be in full compliance with Part B.'' *See* S. Rep. No. 105–17 at 17; H.R. Rep. No. 105–95 at 97.

Therefore, based on the concerns expressed by commenters and for the reasons clarified in the above discussion, it is determined that (1) the definition of LEA should be amended to clarify that the term ''LEA'' includes a public charter school established as an LEA under State law; (2) the provision in § 300.241 (Treatment of charter schools and their students) should be retained in these final regulations; and (3) a new § 300.312, entitled ''Children with disabilities in public charter schools,'' should be added to these final regulations.

The new section makes clear that children with disabilities and their parents retain all rights under these regulations and that compliance with Part B is required regardless of whether a public charter school receives Part B funds. Thus, charter school personnel, for example, may not ask parents to waive their disabled child's right to FAPE in order to enroll their child in the charter school. This new section also would address the responsibilities of (1) public charter schools that are LEAs, (2) LEAs if a charter school is a school in the LEA, and (3) the SEA if a charter school is not an LEA or a school in an LEA.

Changes: The note has been removed. The definition of LEA has been amended by adding after ''secondary school'' the words ''including a public charter school that is established as an LEA under State law.'' A new § 300.312 has been added to further address the treatment of charter schools.

Native Language (§ 300.19)

Comment: Some commenters requested that, in item (1) under the note, the Department change ''child'' to ''student''; add ''combination of languages'' used by the student; and add ''in the home and learning environments.'' A few commenters requested additional specificity in item 2 to clarify that the mode of communication used should be that used by the individual.

Discussion: In light of the general decision not to use notes in these final regulations, the note following § 300.18 of the NPRM should be removed. However, it is critical that public agencies take the necessary steps to ensure that the needs of disabled children with limited English proficiency (LEP) are adequately addressed. The term ''native language'' is used in the prior notice, procedural safeguards notice, and evaluation sections: §§ 300.503(c), 300.504(c), and 300.532(a)(1)(ii).

In light of concerns of commenters and the need to ensure that the full range of the needs of children with disabilities whose native language is other than English is appropriately addressed, the definition of ''native language'' in the NPRM should be expanded in these final regulations to clarify that (1) in all direct contact with the child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two; and (2) for individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual (such as sign language, Braille, or oral communication).

These changes to the regulatory definition of ''native language'' should enhance the chances of school personnel being able to communicate effectively with a LEP child in all direct contact with the child, including evaluation of the child.

Changes: The definition of ''native language'' in the NPRM has been amended to reflect the concepts contained in the note following that definition, and the note has been removed.

Parent (§ 300.20)

Comment: Several commenters indicated that (1) based on the definition of ''parent'' in the NPRM, States would be required to change their laws to include foster parents under the State definition of ''parent,'' and (2) language should be added to the NPRM so that foster parents can serve as parents, unless prohibited from doing so under State law.

These and other commenters also requested that

(1) the language in the note be included in the text of the regulations;

(2) a provision be added to the effect that the public agency must continue to afford the natural parents all protections of this part if their rights to make educational decisions have not been extinguished, even if the child does not live with the natural parents and even if other persons appear to be acting as the child's parents;

(3) the legal parent have the authority, not a grandparent or other person, unless parental authority is extinguished;

(4) ''legal'' be added in front of ''guardian''; and

(5) all references to ''parent'' in these regulations be changed to ''the child's parent.'' Some commenters felt that the note created a problem for school districts because a situation often arises where a child is living with a person acting as a parent, while the natural parents are still involved and have not had their rights terminated, and requested clarification for school districts in these situations.

Discussion: States should not have to amend their laws relating to parents in order to treat ''foster parents'' as parents. Therefore, conditional language in this regard is necessary if State law prohibits a foster parent from acting as a parent. This change would accomplish the intended effect of the provision (i.e., acknowledging that in some instances foster parents may be recognized as ''parents'' under the Act) without adding any burden to individual States whose State statutory provisions relating to parents expressly exclude foster parents.

In light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed, but the substance of the note on foster parents should be added to the text of the regulations. Under these regulations, the term ''parent'' is defined to include persons acting in the place of a parent, such as a grandparent or stepparent with whom the child lives, as well as persons who are legally responsible for a child's

welfare, and, at the discretion of the State, a foster parent who meets the requirements in paragraph (b) of this section. Commenters' concerns related to ensuring that the rights of natural parents are protected in a case in which a disabled child is living with a person acting as a parent, or providing that the parent retain authority even if a child is living with a grandparent, raise questions that the Department has traditionally held best to be left to each State to decide as a matter of family law.

It is not necessary to add ''legal'' before the word ''guardian'' since the statute regarding the term ''parent'' at section 602(19)(A) merely notes that it includes a legal guardian. A legal guardian would be considered to meet the regulatory definition of ''parent''. The regulatory definition of ''parent'' has always included more than just the term identified in the statute. An inclusive definition of parent benefits public agencies by reducing the instances in which the agency will have to bear the expense of providing and appointing a surrogate parent (see § 300.515) and benefits children with disabilities by enhancing the possibility that a person with ongoing day-to-day involvement in the life of the child and personal concerns for the child's interests and well-being will be able to act to advance the child's interests under the Act.

Regarding the use of the reference to the child's parent, no change is needed since it is implicit that the rights under Part B are afforded to a child with a disability and his or her parents, as defined under these regulations.

Changes: The note following the definition of ''parent'' in the NPRM has been removed; and the substance of the note has been reflected in the above discussion. The definition of ''Parent'' in these final regulations has been amended to permit States in certain circumstances to use foster parents as parents under the Act without amending relevant State statutes.

Public Agency (§ 300.22)

Comment: Some commenters requested that the definition of ''public agency'' be amended to include ''charter schools'' that are created under State law and are the recipients of public funds, because as proposed, a public agency would not include any charter school that is not an LEA or most of the nation's existing charter schools. Other commenters stated that, in order to support the provision on assistive technology under § 300.308, the definition of ''public agency'' must be amended to include other State agencies, since the proposed definition of ''public agency'' includes only the SEA, not other State agencies which arguably could be used to try to circumvent financial responsibility based on this omission.

Discussion: Public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA should be added to the definition of ''public agencies'' in order to ensure that all public entities responsible for providing education to children with disabilities are covered. However, the definition of ''public agency'' should not be amended to address financial responsibility for assistive technology. If another State agency is responsible for providing education to children with disabilities, it is already included in the definition of ''public agency.'' Other State agencies, not responsible for educating children with disabilities, should not be held to the requirements imposed on public agencies by these regulations because they are not agencies with educational responsibilities.

Changes: Public charter schools as discussed previously has been added to the list of examples of a ''public agency'' in § 300.22.

Qualified Personnel (§ 300.23)

Comment: Numerous commenters stated that the definition of ''qualified'' should be renamed ''qualified personnel,'' updated to the highest standard, and should be cross-referenced to the exception to the maintenance of effort provision'' in the regulations. Some commenters requested that the definition be changed to link the term ''qualified'' to the statutory and regulatory provisions on personnel standards, i.e., the SEA standards that are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services. These commenters also stated that the more detailed definition is important to ensure that, under the exception to maintenance of effort in § 300.232, qualified lower-salaried staff who replace higher-salaried staff have met the highest requirements in the State consistent with § 300.136.

Other commenters, with similar recommendations, requested that the name of the section be changed to ''Qualified professionals and qualified personnel,'' and that a note be added to explain the basis and importance of qualified professionals. Several commenters requested that the definition be amended to require that personnel providing services to limited English proficient students meet SEA requirements for bilingual specialists in the language of the child or student.

Some commenters requested that the regulations be clarified to address qualifications for interpreters serving children who are deaf or have hearing impairments.

Discussion: It is appropriate to change the title of this section of these final regulations to ''qualified personnel.'' This change is consistent with the importance of ensuring that all providers of special education and related services, including interpreters, meet State standards and Part B requirements.

In order for interpreters to provide appropriate instruction or services to children with disabilities who require an interpreter in order to receive FAPE, States must ensure that these individuals meet appropriate State qualification standards.

It is not necessary to refer to § 300.136, as the definition already specifies that the person must meet State-approved or recognized requirements. Section 300.232 (exception to maintenance of effort), uses the term ''qualified'' in referring to the replacement of higher-salaried personnel by qualified lower-salaried personnel. Therefore it would be unnecessary and redundant to include a reference to that section.

The definition of ''qualified personnel'' is sufficiently broad to encompass the qualifications of bilingual specialists, and no further changes are required in this definition.

Changes: The name of this section has been changed to ''Qualified personnel,'' and a corresponding reference to ''qualified personnel'' has been included in the text of the definition.

Related Services (§ 300.24)

Comment: A number of comments were received relating to the general definition of ''related services'' under § 300.22(a) of the NPRM, and to Note 1 following that section of the NPRM. These comments included revising § 300.22(a) consistent with the definition in the statute, and adding services to the definition of related services; for example, assistive technology devices and services, school nursing services, travel training, and educational interpreter services. Some of these commenters stated that interpreter services are of utmost importance for deaf students to succeed in the educational setting and are essential for hearing impaired students to function in the mainstream. A few

commenters requested that ''qualified sign language interpreting'' be added, including the definition of the term from the ADA.

One commenter stated that a note should be added that related services not only can be used to ameliorate the disability but also to work toward independence and employability.

Several commenters recommended that changes be made in Note 1. Some of the commenters expressed concern about adding additional services (travel training, nutrition services, and independent living services) to an already lengthy list of services. Some commenters requested that the note be deleted because it is too expansive, or that the parenthetical phrase in the first paragraph be dropped because the listing is confusing without some further explanation or clarification. One comment stated that the menu of related services suggests that a disabled child might need all of the listed services. Other commenters stated that inclusion of terms such as dance therapy and nutrition is confusing, and that further clarification is needed as to how they are ''related'' to the student's access to special education and to making progress in the general curriculum.

Some commenters requested that ''artistic and cultural programs'' be deleted from the parenthetical statement in Note 1, stating (for example) that (1) these programs are areas of the curriculum and not related services (i.e., they are not necessary for a child to benefit from special education), and (2) ensuring that disabled children have an equal opportunity to participate in the type of cultural activities available to all children is different than considering those programs to be a related service ''therapy'' that implies specific certification requirements in many sectors.

A number of commenters requested that the statement that psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists depending on State standards be deleted from the second paragraph of Note 1. One comment stated that there is no national standard for this role, and thus it conflicts with evaluation requirements and personnel standards. Other commenters recommended that the third paragraph in Note 1 be amended to provide that the activities do not act to reduce the amount of the service specified by any child's IEP as necessary for FAPE.

Discussion: In light of the general decision not to use notes in these final regulations, Note 1 following this section of the NPRM should be removed, but the substance of the note is reflected in the following discussion. All related services may not be required for each individual child. As under prior law, the list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, art, music, and dance therapy) if they are required to assist a child with a disability to benefit from special education in order for the child to receive FAPE. Therefore, if it is determined through the Act's evaluation and IEP requirements that a child with a disability requires a particular supportive service in order to receive FAPE, regardless of whether that service is included in these regulations, that service can be considered a related service under these regulations, and must be provided at no cost to the parents.

The IEP process in §§ 300.340–300.350, and the evaluation requirements in §§ 300.530–300.536, are designed to ensure that each eligible child under Part B receives only those related services that are necessary to assist the child to benefit from special education, and there is nothing in these regulations that would require every disabled child to receive all related services identified in the regulations, as suggested by some commenters.

Commenters' suggestions that the second paragraph of Note 1 to this section of the NPRM is no longer needed should be addressed. The statement in Note 1—that ''psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists depending on State standards''—should not be retained, since States must establish their own qualification standards for persons providing special education and related services. Therefore, State standards would govern which individuals should administer these tests, consistent with Part B evaluation requirements.

As stated in the discussion under §§ 300.5 and 300.6 of this analysis, assistive technology devices and services may already be considered a related service. Therefore, it is not necessary to add assistive technology devices and services to the list of related services defined in this section. Second, because ''school health services'' is currently defined as services provided by a ''qualified school nurse'' or other qualified person, there is no reason to address further the issue of ''school nurses'' or school nursing services. Third, although interpreter services for children with hearing impairments are not specifically mentioned in the definition of related services, those services have been provided under these regulations since the initial regulations for Part B were issued in 1977. (See also discussion under Qualified personnel).

Regarding commenters' suggestions that related services are required not only to ameliorate the disability but to provide preparation for employment, a change is not needed. The Act's transition services requirements are sufficiently broad to facilitate effective movement from school to post-school activities, and if deemed appropriate by the IEP team, these transition services could be identified as related services for an individual student.

Changes: Note 1 following the definition of ''related services'' in the NPRM has been removed.

Comment: A number of commenters requested changes in the definitions of specific terms defined in the definition of ''related services,'' as follows:

Some commenters recommended that the definition of ''audiology'' be modified to include functions that are not contained in the current definition. Some commenters requested that the definition of ''occupational therapy'' be amended to add language to ensure that occupational therapy services are provided by qualified occupational therapists or occupational therapy assistants to ensure that those services can assist children to participate in the general curriculum, and achieve IEP/IFSP goals.

A number of commenters recommended that the final regulations clarify that orientation and mobility services may be required by children with other disabilities, and that the services may be provided by personnel with different qualifications other than those serving persons who are blind or visually impaired. Other commenters requested that (1) the term ''qualified personnel'' should be deleted because using this term in this definition creates personnel problems for rural areas and for many urban settings, that orientation and mobility personnel are not used for all purposes listed, and not every State has a classification called orientation and mobility specialist; and (2) the option of providing orientation and mobility services in a student's home would apply to students who may not be home-schooled and would violate the least restrictive environment requirements of the Act.

Several comments were also received on Note 2 (relating to orientation and mobility services and travel training). Some commenters requested that travel training be added as a separate related service with its own definition. The definition would be based on, or

incorporate, the language from Note 2 relating to travel training. Other commenters suggested that it would be more accurate to refer to this type of training as mobility training.

A number of commenters requested that Note 2 be deleted because it was too expansive. Other commenters stated that (1) all references to travel training be dropped, since the term is not defined or even mentioned in the statute; (2) Note 2 expands services beyond the statute and will make orientation and mobility services extremely expensive and adversarial by requiring new personnel that are not available in rural areas and many urban areas; (3) Note 2 should not require a deliverable standard against which a school system might be held liable; and (4) travel training may be appropriate for other children with disabilities, but orientation and mobility specialists are not the personnel to provide these services.

With respect to parent counseling and training, commenters recommended that (1) the title be changed to ''Parental training'' because the definition describes training, and schools cannot counsel parents as a related service; and (2) a training element be added at the end of the definition, to provide for assisting parents to acquire the necessary skills to help support the implementation of their child's IEP or IFSP. Other commenters proposed a specific definition of parent counseling and training that would emphasize helping parents to acquire the necessary skills to support the implementation of their child's IEP or IFSP. Another commenter recommended adding a note that training may include training in sign language or other forms of communication.

Several commenters requested that the definition of ''school health services'' at § 300.22(b)(12) of the NPRM be expanded to specifically include health care services that are not curative or treatment oriented, such as suctioning, gastronomy, tube feeding, blood sugar testing, catheterization, and administration of medication.

A few commenters requested that the definition of ''school health services'' be amended to add the three-part test adopted by the United States Supreme Court in *Irving Independent School District* v. *Tatro,* 484 U.S. 883 (1984). In *Tatro,* the Court stated that services affecting both the educational and health needs of a child must be provided under IDEA if: (1) The child is disabled so as to require special education; (2) the service is necessary to assist a disabled child to benefit from special education (thus, services which could be provided outside the school day need not be provided by the school, regardless of how easily a school could provide them); and (3) a nurse or other qualified person who is not a physician can provide the service. The commenters believe that by stating the *Tatro* holding in the regulation, longstanding Department policy would be formalized and litigation would decrease. Other commenters requested that the regulations clarify that specialized school health services should not be improperly or dangerously performed by individuals who lack the requisite training and supervision.

Discussion: The definition of ''audiology'' should not be amended since the changes suggested by commenters are more than technical changes, and thus would require further study and regulatory review. However, in response to suggestions of commenters, it is appropriate to modify the definition of ''occupational therapy'' to make it clear that this term encompasses services provided by a qualified occupational therapist. This makes the definition generally consistent with the other related service definitions. It is not necessary to incorporate the term ''certified occupational therapy assistant,'' because the option of using paraprofessionals and assistants to assist in the provision of services under these regulations is addressed in § 300.136(f).

As stated by the commenters, some children with disabilities other than visual impairments need travel training if they are to safely and effectively move within and outside their school environment, but these students (e.g., children with significant cognitive disabilities) do not need orientation and mobility services as that term is defined in these regulations. ''Orientation and mobility services'' is a term of art that is expressly related to children with visual impairments, and includes services that must be provided by qualified personnel who are trained to work with those children. No further changes to the definition of ''orientation and mobility services'' are needed, since the definition as written does not conflict with the Act's least restrictive environment requirements.

For some children with disabilities, such as children with significant cognitive disabilities, ''travel training'' is often an integral part of their special educational program in order for them to receive FAPE and be prepared for post-school activities such as employment and independent living. Travel training is important to enable students to attain systematic orientation to and safe movement within their environment in school, home, at work and in the community. Therefore, the definition of ''special education'' should be amended to include a provision relating to the teaching of travel training, as appropriate, to children with significant cognitive disabilities, and any other disabled children who require such services. The regulations should not substitute the term ''mobility training,'' since the legislative history (S. Rep. No. 105–17, p. 6; H.R. Rep. No. 105–95, p. 86) recognizes that ''orientation and mobility'' services are generally recognized as for blind children while children with other disabilities may need travel training. In light of this regulatory change, Note 2 following this section of the NPRM should be removed.

The definition of ''parent counseling and training'' should be changed to recognize the more active role acknowledged for parents under the IDEA Amendments of 1997 as participants in the education of their children. Parents of children with disabilities are very important participants in the education process for their children. Helping them gain the skills that will enable them to help their children meet the goals and objectives of their IEP or IFSP will be a positive change for parents, will assist in furthering the education of their children, and will aid the schools as it will create opportunities to build reinforcing relationships between each child's educational program and out-of-school learning.

For these reasons, the definition of ''parent counseling and training'' should be changed to include helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP. This change is in no way intended to diminish the services that were available to parents under the prior definition in these regulations.

It is not necessary to modify the definition of ''school health services'' in the NPRM to add more specificity because the current definition requires provision of health services, including those addressed by the comments, if they can be provided by a qualified nurse or other qualified individual who is not a physician, and the IEP team determines that any or all of the services are necessary for a child with a disability to receive FAPE. The commenters' description of the holding in the *Tatro* decision is consistent with the Department's longstanding interpretation regarding school health services.

In any case, the list of examples of related services in § 300.22 is not exhaustive, and other types of services not specifically mentioned may be required related services based on the needs of an individual child. The only type of service specifically excluded from ''related services'' are medical services that are not for diagnostic and evaluation purposes. ''Medical services,'' has always been defined by the regulations as services provided by a physician. The regulations already make clear that providers of school health services, as is the case for providers of special education and related services in general, must be qualified consistent with §§ 300.23 and 300.136 of these regulations.

Changes: Consistent with the above discussion, the definitions of ''occupational therapy'' at § 300.24(b)(5) of these final regulations and ''parent counseling and training'' at § 300.24(b)(7) of these final regulations have been revised; Note 2 has been deleted; and a reference to travel training has been added under § 300.26 (Special education).

Comment: Numerous comments were received relating to ''psychological services.'' Many of these comments addressed the role of school psychologists under this part (e.g., stating that a psychologist should be a member of the evaluation team, be involved in IEP meetings, and conduct behavioral assessments). A few commenters recommended that ''other mental health services'' be added at the end of proposed § 300.22(b)(9)(v), stating that this would ensure that schools use, and families have access to, a variety of strategies and interventions that go beyond psychological counseling. The commenters added that children and families have been denied these necessary mental health services because these services are not specifically stated.

Some commenters expressed concern about the provision in the NPRM that designated school psychologists and school social workers as the personnel responsible for assisting in the development of positive behavioral interventions and strategies for IEP goal development. These commenters stated that, although psychologists and school social workers may participate in actions relating to student behavior, this function is too critical to be listed under a specific category of related services. A few of these commenters stated that specifically linking development of positive behavioral interventions and strategies could be interpreted narrowly and result in excluding a broad array of other professionals (such as school counselors and teachers) who may know the students best. A number of commenters favored retaining the provision in the NPRM. One commenter recommended that the regulations be clarified to include an explicit ban on the use of aversive behavior management strategies under this part.

A few commenters requested that the definition of ''recreation'' in proposed § 300.22(b)(10) be eliminated. One commenter indicated that the definition will overreach the intent of IDEA. Others stated that (1) the services listed would add costs to IDEA as well as administrative burden because those services would be difficult to arrange and schedule, and (2) participation in community-based recreation is a family responsibility. A few commenters requested that the definition of rehabilitation counseling be amended to add that counseling should be provided on the basis of individual need and not on a specific disability category. The commenters stated that because vocational rehabilitation was provided under the transition grants for students with significant disabilities, some school systems consider vocational rehabilitation for these students only.

Some commenters also recommended that the definition of ''social work services in schools'' be broadened to include individual and group counseling and other mental health services. A few commenters requested that proposed § 300.22(b)(13)(iii) be revised to require that school social work services include working in partnership with parents on those problems in a child's living situation (home, school and community) that affect the child's adjustment in school. Other commenters requested that a new paragraph (vi) be added to the list of functions relating to working with classrooms of children to help students with disabilities develop or improve social skills, self esteem, and self confidence. (See also the comment and discussion under ''psychological services'' related to the role of psychologists and social workers in the development of positive behavioral interventions and strategies for IEP goal development.)

One commenter recommended that the function ''Provision of speech and language services for the habilitation or prevention of communication impairments'' be deleted from proposed § 300.22(b)(14)(iv), because it includes vague language, making the program more litigious and more difficult to administer.

Discussion: The definition of ''psychological services'' in the NPRM is sufficiently broad to enable psychologists to be involved in the majority of activities described by commenters, and, therefore, the definition should not be revised to add other, more specific functions.

Nor is there a need to make substantive changes to the definition of ''social work services in schools.'' Although psychologists (and school social workers) may be involved in assisting in the development of positive behavioral interventions, there are many other appropriate professionals in a school district who might also play a role in that activity. The standards for personnel who assist in the development of positive behavioral interventions will vary depending on the requirements of the State. Including the development of positive behavioral interventions in the descriptions of potential activities under social work services in schools and psychological services provide examples of the types of personnel who assist in this activity. These examples of personnel who may assist in this activity are not intended to imply either that school psychologists and social workers are automatically qualified to perform these duties or to prohibit other qualified personnel from serving in this role, consistent with State requirements.

Regarding the comment requesting clarification to impose a ban on aversive behavior under this part, the new requirements in section 614(d)(3)(B)(i) of the Act are sufficient to address this concern by strengthening the ability of the IEP team to address the need for positive behavioral interventions in appropriate situations. Under these new requirements, the IEP team must ''consider, if appropriate, including in the IEP of a student whose behavior impedes his or her learning or that of others, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.'' These new requirements are sufficiently broad to address the commenter's concerns. In meeting their obligations under section 614(d)(3)(B)(i) of the Act, public agencies must ensure that qualified personnel are used, and may select from a variety of staff for this purpose.

The definition of ''social work services in schools'' should not be expanded to include group counseling and other mental health services, since under the definition as written, social workers could provide these services if doing so would be consistent with State standards and the students required such services in order to receive FAPE. However, the technical change in § 300.22(b)(13)(iii) should be made to clarify that school social workers work

in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school. The current definition is sufficiently broad to enable school social workers to help disabled students work on social skills.

Recreation should not be deleted from the list of related services. This is a statutory provision that has been defined in the regulations since 1977.

The commenters' request relating to ''rehabilitation counseling'' (i.e., to add clarification that it should be provided based on individual need) is generally the case with all related services. Adding a specific limitation to rehabilitation counseling could inappropriately suggest that other services are to be provided without regard to individual need.

The definition of ''speech-language pathology services'' should not be revised. This is a longstanding definition that is useful to qualified speech-language pathologists who provide services to children with disabilities under these regulations.

Changes: A technical change has been made to the definition of ''social work services in schools.''

Comment: A few commenters supported Note 3 (relating to the use of paraprofessionals). Some commenters recommended that the note be amended by requiring proper training and supervision in the areas in which paraprofessionals are providing services.

Commenters also stated that the regulations must (1) ensure parents know which services are provided by paraprofessionals; (2) clarify the service limitations of paraprofessionals; (3) prohibit any independent development, substantive modification or unapproved provision of services independent of the supervising related services professional; (4) ensure that paraprofessionals are not used for IEP decision-making activities or development or revisions of the child's interventions or IEP; and (5) ensure these precautions are part of the policy requirements of § 300.136(f).

Other commenters requested that paraprofessionals who assist in providing speech-language pathology services must be supervised by a person who meets the highest requirements in the State for that discipline.

Discussion: In light of the general decision not to use notes in these final regulations, Note 3 following this section should be removed. When paraprofessionals are used to assist in the provision of special education and related services under these regulations, they must be appropriately trained and supervised in accordance with State standards. Since concerns raised by commenters about the use of paraprofessionals and assistants are addressed in the analysis of comments under § 300.136(f) of this attachment, it is not necessary to make further changes to this section.

Changes: Note 3 to this section of the NPRM has been removed.

Comment: Several comments were received on Note 4 relating to the definition of ''transportation.'' Some commenters recommended that the note be revised to include accommodations to achieve integrated transportation, including providing appropriate training to transportation providers, such as bus drivers, and including the use of aids.

A few commenters stated that the second sentence in Note 4 implies that there is no limit to the adaptations that a school must make to bus equipment to afford a disabled child an opportunity to ride the regular bus. The commenters added that (1) the IEP team must retain the authority to determine the appropriate mode of transportation based on child's needs and financial and logistical burdens of various options, and (2) as with other related services, transportation must only be provided to assist a child with disabilities to benefit from special education.

A number of commenters stated that transportation accommodations are an LRE issue and, as such, should be determined by each child's IEP team. These commenters added that accommodations also should be addressed through section 504 and the ADA, and recommended that the note be deleted. Another commenter recommended the need to clarify public agency responsibility to provide necessary transportation to disabled children even if that transportation is not provided to nondisabled children.

Other commenters also recommended that Note 4 be deleted. One commenter stated that the note goes beyond the statute and adds costs in an outrageous extension of Federal authority. Another commenter stated that the note could lead school districts to conclude that they had to buy specialized equipment (e.g., lifts) for even more of their buses in order to provide integrated transportation, a concept found nowhere in the Act.

Discussion: In light of the general decision not to use notes in these final regulations, Note 4 to this section of the NPRM should be deleted. In response to concerns of commenters, each disabled child's IEP team must be able to determine the appropriate mode of transportation for a child based on the child's needs. That team makes all other decisions relating to the provision of special education and related services; and transportation is a specific statutory service listed in the definition of related services.

It is assumed that most children with disabilities will receive the same transportation provided to nondisabled children, unless the IEP team determines otherwise. However, for some children with disabilities, integrated transportation may not be achieved unless needed accommodations are provided to address each child's unique needs. If the IEP team determines that a disabled child requires transportation as a related service in order to receive FAPE, or requires accommodations or modifications to participate in integrated transportation with nondisabled children, the child must receive the necessary transportation or accommodations at no cost to the parents. This is so, even if no transportation is provided to nondisabled children.

As with other provisions in these regulations relating to qualified personnel, all personnel who provide required services under this part, including bus drivers, must be appropriately trained.

Changes: Note 4 to this section of the NPRM has been removed, the substance of Note 4 is reflected in the above discussion, and it is further discussed in Appendix A of these final regulations.

Special Education (§ 300.26)

Comment: Some commenters requested that, in implementing the IEP for disabled students in school-funded placements outside of the school district, the cost of trips, phone calls, and other expenses incurred by parents should be covered. Some commenters stated that they are not reimbursed for official long-distance phone calls made regarding their child's needs or for trips to attend special IEP meetings. According to a commenter, one district will pay for the cost of driving the student to school, but not for the cost of the return trip of the parents.

Several commenters requested that the definition of ''physical education'' in proposed § 300.24(b)(2)(ii) be amended to change ''adaptive'' to ''adapted,'' because the term was used in the original regulations, and no rationale has been provided for changing it.

Some commenters expressed support for the definition of ''specially designed instruction'' as written, while other

commenters expressed support with modification. Other commenters took exception to the definition, characterizing it as overly prescriptive. Other commenters recommended dropping the reference to methodology, citing case law and the legislative history in support of their view that methodology should not be included in this definition.

A few commenters stated that the definition of ''vocational education'' in proposed § 300.24(a)(3) was not complete, and requested that it be amended to comply with the definition in the Carl D. Perkins Vocational and Applied Technology Education Act. Other commenters objected to including ''vocational education'' within the definition of ''special education,'' asserting that there is no statutory authority to do so. Other commenters recommended that some minor modifications be made to the current definition.

A few commenters requested that the regulations clarify the difference between accommodations that do not change the content of the curriculum and modifications that do change it. Other commenters requested that access to the general curriculum be to the maximum extent appropriate for the child. A few commenters recommended adding clarifying language to accommodate the distinction between providing disabled students with a meaningful opportunity to meet the standards and actually meeting the standards, and stated that the Act recognizes this distinction by referencing involvement and progress in the general curriculum.

Some commenters supported the note to proposed § 300.24 (that a related services provider may be a provider of specially designed instruction if State law permits). Other commenters stated that the note should be deleted to eliminate the possibility that individuals may interpret it to mean that the term ''child with a disability,'' as defined under proposed § 300.7, might include children who need only a related service.

Discussion: It is not necessary to revise the definition of ''at no cost'' under paragraph (b)(1) of this section, since that definition already addresses the comment relating to the cost of trips, phone calls, and other expenses incurred by parents of disabled children when those children are placed outside the school district by a public agency. If the school district places the child, and the IEP team determines that the costs of phone calls and trips are relevant to the student's receipt of FAPE, the public agency placing the child would be expected to pay for such expenses.

Paragraph (b)(2) concerning ''physical education'' should be amended to substitute the word ''adapted'' for the word ''adaptive,'' since this is the term that was in the original regulations.

With regard to the definition of ''specially designed instruction,'' some changes should be made. The committee reports to Pub. L. 105–17 make clear that specific day-to-day adjustments in instructional methods and approaches are not normally the sort of change that would require action by an IEP team. Requiring an IEP to include such a level of detail would be overly-prescriptive, impose considerable unnecessary administrative burden, and quite possibly be seen as encouraging disputes and litigation about rather small and unimportant changes in instruction. There is, however, a reasonable distinction to be drawn between a mode of instruction, such as cued speech, which would be the basis for the goals, objectives, and other elements of an individual student's IEP and should be reflected in that student's IEP, and a day-to-day teaching approach, i.e., a lesson plan, which would not be intended to be included in a student's IEP.

Case law recognizes that instructional methodology can be an important consideration in the context of what constitutes an appropriate education for a child with a disability. At the same time, these courts have indicated that they will not substitute a parentally-preferred methodology for sound educational programs developed by school personnel in accordance with the procedural requirements of the IDEA to meet the educational needs of an individual child with a disability.

In light of the legislative history and case law, it is clear that in developing an individualized education there are circumstances in which the particular teaching methodology that will be used is an integral part of what is ''individualized'' about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP. For example, for a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy.

Other students' IEPs may not need to address the instructional method to be used because specificity about methodology is not necessary to enable those students to receive an appropriate education. There is nothing in the definition of ''specially designed instruction'' that would require instructional methodology to be addressed in the IEPs of students who do not need a particular instructional methodology in order to receive educational benefit. In all cases, whether methodology would be addressed in an IEP would be an IEP team decision.

Other changes to the definition of ''specially designed instruction'' are not needed. The distinction between accommodations that change the general curriculum and those that do not, as one commenter requests, would be difficult to make because of the individualized nature of these determinations. Regardless of the reasons for the accommodation or modification, it must be provided if necessary to address the special educational needs of an individual student.

The words ''maximum extent appropriate'' should not follow the reference to participation in the general curriculum, because such a qualification would conflict with the Act's IEP requirements and the unequivocal emphasis on involvement and progress of students with disabilities in the general curriculum, regardless of the nature or significance of the disability.

The term ''vocational education'' in paragraph (b)(5) should not be amended to conform to the definition in the Carl D. Perkins Vocational and Applied Technology Education Act. The definition of ''vocational education'' in the proposed regulations should be retained in these final regulations since it reflects the definition of that term contained in the original regulations for this program published in 1977. While the regulatory definition includes all of the activities in the Perkins Act definition, the substitution of the definition from the Perkins Act would be too limiting since that definition would not encompass those activities included in the current definition. The inclusion of ''vocational education'' in the definition of ''special education'' is needed to ensure that students with disabilities receive appropriate, individually-designed vocational educational services to facilitate transition from school to post-school activities.

In light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed. The removal of this note, however, should not be construed as altering eligibility requirements under these regulations—namely (1) a child is an eligible child with a disability under Part B if the child has a covered impairment and requires special education by reason of the

impairment; and (2) a child with a disability can receive a related service only if that service is required to assist the child to benefit from special education. However, consistent with § 300.26(a)(2), any related service that is considered special education rather than a related service under State standards may be considered as special education. A provision has been added under the definition of ''child with a disability'' to reflect this concept.

Changes: Paragraph (a)(2) has been amended to add travel training to the elements contained in the definition of ''special education,'' and a separate definition of travel training has been added to paragraph (b)(4) as discussed in this attachment under § 300.24. Paragraph (b)(2) concerning physical education has been revised to substitute the word ''adapted'' for the word ''adaptive.'' Paragraph (b)(3) has been revised to make clear that adaptations to instruction, in the form of specially designed instruction, are made as appropriate to the needs of the child. The note following this section of the NPRM has been removed, and the substance of the note is reflected in the above discussion.

Supplementary Aids and Services (§ 300.28)

Comment: A few commenters supported the definition of ''supplementary aids and services,'' as written. Some commenters requested that the regulations define the term ''educationally related setting,'' and that examples of supplementary aids and services be included. Another commenter recommended that the definition be amended to state that related services could be considered supplementary aids and services. Other commenters recommended that assistive technology be considered in the same context as supplementary aids and services.

Discussion: It is not necessary to define the terms used in this definition. As stated in the analysis of comments relating to §§ 300.5 and 300.6 (assistive technology devices and services), assistive technology devices and services are already recognized as supplementary aids and services. Under IDEA, aids, supports and services would be considered during the IEP meeting and if determined appropriate by the IEP team would be integrated under the appropriate components of the IEP. Further, with respect to the language about ''related services,'' a change is not needed. If a disabled child requires a related service in the regular classroom, that related service must be provided, and there is no reason to identify that service as a supplementary aid or service.

Changes: None.

Transition Services (§ 300.29)

Comment: Many commenters supported the transition services definition in these regulations, but recommended that the definition be amended to include, in paragraph (1)(c)(vi), self-advocacy, career planning, and career guidance. This comment also emphasized the need for coordination between this provision and the Perkins Act to ensure that students with disabilities in middle schools will be able to access vocational education funds.

One commenter recommended that the definition of ''transition services'' either be narrowed to post-school transition or that other transitions, such as transition from Part C to Part B, be defined elsewhere in these regulations.

Discussion: The Act's ''transition services'' definition should be retained as written. In light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed. It is important to clarify that transition services for students with disabilities may be special education if they are provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education, and that the list of activities in the definition is not intended to be exhaustive.

Additional examples of transition services are not needed because the current definition is sufficiently broad to encompass these activities. Nor is it necessary to amend the definition to reference the Perkins Act, since, under current law, students with disabilities, including those in middle schools, can participate in these Federally-funded programs, and must be provided necessary accommodations to ensure their meaningful participation.

Further, the definition of ''transition services'' should not be narrowed or expanded to include other transitions, because to do so could be inconsistent with congressional intent that public agencies provide students with disabilities the types of needed services to facilitate transition from school to post-school activities.

Changes: The note following this section of the NPRM has been removed, and the substance of the note has been added as a new paragraph (b).

Subpart B

Condition of Assistance (§ 300.110)

Comment: A few commenters stated that the proposed regulations at §§ 300.110–300.113, as written, would not ensure that States meet the requirements of section 612(a) and (c) of the Act.

Discussion: It is appropriate to amend § 300.110 to more explicitly state what is required for compliance with these provisions.

Changes: Section 300.110 has been amended, as noted in the above discussion.

Free Appropriate Public Education (§ 300.121)

(For a brief overview of the changes made regarding the discipline sections of these regulations, please refer to the preamble.)

Comment: A few commenters asked that the regulations be amended to adopt a ''no cessation of services'' policy, under which students with disabilities would be entitled to receive FAPE even during periods of less than ten days of suspension in a given school year. Some of these commenters stated that there is no basis to assume that Congress did not mean what is explicitly stated in section 612(a)(1)(A) of the Act—that all children are entitled to FAPE, including children who have been suspended or expelled from school.

A few commenters expressed support for the proposed language which defines the term ''children with disabilities who have been suspended or expelled from school'' as meaning children with disabilities who have been removed from their current educational placement for more than 10 school days in a given school year, but asked that the regulations clarify that the 10 school days are cumulative, not consecutive.

Several commenters recommended deleting the phrase ''in a given school year,'' stating that the statute allows school personnel to suspend a disabled child for not more than ten *consecutive* school days without the provision of educational services, and that there is no statutory basis for defining 10 school days to be within a given year. A number of commenters supported the proposed ''11th day'' rule (i.e., that the right to FAPE for disabled children who have been suspended or expelled begins on the eleventh school day in a school year that they are removed from their current educational placement). Other commenters recommended deleting proposed § 300.121(c)(2). Some of these commenters stated that they agreed with the Supreme Court decision in *Honig* versus *Doe* and with the Department's

long-standing interpretation of the Act—that a pattern of suspensions would constitute a change in placement, but objected to the regulations defining when the ''11th day'' occurs.

One commenter asked whether the provisions of proposed § 300.121(c) would apply if a child's disability is not related to the behavior in question. Some commenters were concerned that the standard from § 300.522 would be unwieldy for short-term suspensions or should be modified to permit different services for children suspended or expelled for behavior determined not to be a manifestation of their disability. Another commenter recommended strengthening the language of § 300.121 to ensure that the SEA is responsible for ensuring the provision of FAPE for children who are suspended or expelled.

Discussion: Section 612(a)(1)(A) of the Act now makes explicit that FAPE must be available to children with disabilities who are suspended or expelled, in light of the adverse impact a cessation of educational services can have on a child with disabilities ability to achieve in school and to become a self-supporting adult who is contributing to our society. The Act, however, should not be read to always require the provision of services when a child is removed from school for just a few days. School officials need some reasonable degree of flexibility when dealing with children with disabilities who violate school conduct rules, and interrupting a child's participation in education for up to 10 school days over the course of a school year, when necessary and appropriate to the circumstances, does not impose an unreasonable limitation on a child with disabilities right to FAPE.

On the other hand, at some point repeated exclusions of a child with disabilities from the educational process will have a deleterious effect on the child's ability to succeed in school and to become a contributing member of society. The law ensures that even children with disabilities who are engaged in what objectively can be identified as dangerous acts, such as carrying a weapon to school, must receive appropriate services. (See sections 615(k)(1)(A)(ii) and 615(k)(2)).

Therefore, it is reasonable that children with disabilities who have been repeatedly suspended for more minor violations of school codes not suffer greater consequences from exclusions from school than children who have committed the most significant offenses. For these reasons, once a child with a disability has been removed from school for more than 10 school days in a school year, it is reasonable for appropriate school personnel (if the child is to be removed for 10 school days or less, or the child's IEP team, if the child is to be suspended or expelled for behavior that is not a manifestation of the child's disability) to make informed educational decisions about whether and the extent to which services are needed to enable the child to make appropriate educational progress in the general curriculum and toward the goals of the child's IEP.

The change of placement rules referred to in the Supreme Court's decision in *Honig v. Doe,* which is based on the Department's long-standing interpretation of what is now section 615(j) of the Act, are addressed in the discussion of comments received under § 300.520 in this attachment, and changes are made in these final regulations as a result of those comments. However, determining whether a change of placement has occurred does not answer the question of at what point exclusion from educational services constitutes a denial of FAPE under section 612(a)(1)(A) of the Act.

With regard to the standard for services that must be provided to children with disabilities who have been suspended or expelled from school, the statute at section 615(k)(3) specifically addresses only the services to be provided to children who have been placed in interim alternative educational settings under sections 615(k)(1)(A)(ii) and 615(k)(2) (§§ 300.520(a)(2) and 300.521), which contemplate situations in which children are removed for up to 45 days, without regard to whether the behavior is or is not a manifestation of the child's disabilities.

In light of the comments received, the regulation would be revised to recognize that the extent to which services would need to be provided and the amount of service that would be necessary to enable a child with a disability to meet the same general standard of appropriately progressing in the general curriculum and advancing toward achieving the goals on the child's IEP may be different if the child is going to be out of his or her regular placement for a short period of time. For example, a one or two day removal of a child who is performing at grade level may not need the same kind and amount of service to meet this standard as a child who is out of his or her regular placement for 45 days under § 300.520(a)(2) or § 300.521. Similarly, if the child is suspended or expelled for behavior that is not a manifestation of his or her disability, it may not make sense to provide services in the same way as when the child is in an interim alternative educational setting.

As part of its general supervision responsibility under § 300.600, each SEA must ensure compliance with all Part B requirements, including the requirements of § 300.121(d) regarding FAPE for children who are removed from their current educational placement for more than ten school days in a given school year.

Changes: The regulation has been revised to provide that when a child with a disability who has been removed from his or her current educational placement for more than 10 school days in a school year is subjected to a subsequent removal for not more than 10 school days at a time and when a child with a disability is suspended or expelled for behavior that is not a manifestation of the child's disability, the public agency must provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in the child's IEP.

In the case of a child who is removed pursuant to § 300.520(a)(1) for 10 school days or less at a time, this determination is made by school personnel, in consultation with the child's special education teacher. In the case of a child whose removal constitutes a change of placement for behavior that is not a manifestation of the child's disability pursuant to § 300.524, this determination is made by the child's IEP team.

The regulation has also been revised to clarify that if a child is removed by school personnel for a weapon or drug offense under § 300.520(a)(2) or by a hearing officer based on a determination of substantial likelihood of injury under § 300.521, the public agency provides services as specified in § 300.522.

Comment: Some commenters expressed support for Note 1 (which clarifies the responsibility of public agencies to make FAPE available to children with disabilities beginning no later than their third birthday) and recommended that the substance of the note be incorporated into the text of the regulations. A few commenters suggested revising Note 1 to clarify that children with disabilities whose third birthday occurs during the summer are not entitled to receive special education and related services until school starts for the fall term.

Discussion: The responsibility of public agencies to make FAPE available to children with disabilities beginning no later than their third birthday means that an IEP (or an IFSP consistent with § 300.342) has been developed and is