transportation is required. Section § 300.454(b)(1)(iii) has been revised to specify that where services are provided is a subject of consultation between the LEAs and representatives of private school children. The notes following this section in the NPRM have been removed.

Complaints (§ 300.457)

Comment: Several commenters objected to § 300.457(a) because they believed that a child in a private school should be able to receive a due process hearing on complaints about services once the LEA has decided to provide services to that child. Most of those commenters indicated that there may be legitimate issues regarding whether the LEA complied with obligations to a specific child it had agreed to serve.

One commenter agreed with the position in the NPRM that if FAPE does not apply to private school children, due process also would not apply. Another commenter suggested that due process also should not apply to the child find obligations described in § 300.451.

Discussion: Section 615(a) of the Act specifies that the procedural safeguards of the Act apply with respect to the provision of FAPE to children with disabilities. The special education and related services provided to parentally-placed private school children with disabilities are independent of the obligation to make FAPE available to these children.

While there may be legitimate issues regarding the provision of services to a particular parentally-placed private school child with disabilities an LEA has agreed to serve, due process should not apply, as there is no individual right to these services under the IDEA. Disputes that arise about these services are properly subject to the State complaint procedures, which are available to address noncompliance with any requirement of Part B.

On the other hand, child find is a part of the basic obligation to make a FAPE available to all children with disabilities in the jurisdiction of the public agency, and so failure to properly evaluate a parentally-placed private school child would be subject to due process.

Changes: A new paragraph (b) has been added to specify that due process procedures do apply to child find activities, including evaluations.

Requirement That Funds not Benefit a Private School (§ 300.459)

Comment: One commenter asked how an LEA is to discern whether funds are being used to benefit the private school. Another questioned whether this provision is consistent with other provisions that allow funds to be used by an LEA to provide staff development for special and regular education personnel, consultative services and provisions that permit other children to also benefit when a teacher or other provider is providing special education or related services to a child with a disability.

Discussion: LEAs should use reasonable measures in assessing whether Federal funds are being used to benefit private schools. This provision does not prohibit private school teachers from participating in staff development activities regarding the provisions of IDEA when their participation can be accommodated.

If consultation services are provided to a private school teacher as a means of providing special education and related services to a particular private school child with a disability and that teacher uses the acquired skills in providing education to other children, whatever benefit those other children receive is incidental to the publicly funded services and is not prohibited by this provision.

On the other hand, if an LEA simply gave a private school an amount of money rather than itself providing or purchasing services for parentally-placed private school children with disabilities, in addition to violating the requirements of §§ 300.453 and 300.454, would raise very significant concerns about compliance with § 300.459(a).

In the interest of regulating only where necessary, the regulations do not further specify measures of when a private school is benefiting from the Federal funds.

Changes: None.

Use of Private School Personnel (§ 300.461)

Comment: One commenter noted that private school personnel used to provide services to private school children under Part B should be required to meet the same standards as public school employees providing those services to public or private school children.

Discussion: Section 300.455 specifies that services provided to private school children must be provided by personnel meeting the same standards as those providing services in public schools. This would apply to private school personnel who, under § 300.461, are being used to provide services under §§ 300.450–300.462 to private school children with disabilities.

Changes: A technical change has been made to § 300.461 to make clear that the services addressed are those provided in accordance with §§ 300.450–300.462.

Requirements Concerning Property, Equipment and Supplies for the Benefit of Private School Children With Disabilities (§ 300.462)

Comment: One commenter asked whether costs for inventory control can be considered as a part of the proportionate share of the LEA's Part B funds that are to be expended for providing services to private school children. The commenter also asked for specificity regarding the procedures to be used for maintaining administrative control of all property, equipment and supplies acquired for the benefit of private school children.

Discussion: Reasonable and necessary costs for inventory control of property, equipment and supplies located in a private school related to providing special education and related services to private school children with disabilities can be considered a part of the cost of providing special education and related services to private school children with disabilities. Effective procedures for ensuring administrative control will vary depending on local considerations.

Changes: None.

Subpart E Procedural Safeguards

General Responsibility of Public Agencies; Definitions (§ 300.500)

Comment: One commenter asked whether the definition of ''evaluation'' at § 300.500(b)(2) precludes the use of tests which are based on the general curriculum and which may be used with all children in a school or class as the primary means of evaluation. Another commenter asked if any evaluation after an initial evaluation is considered a reevaluation. It was also suggested that the revocation of consent only be allowed before the first day of the child's placement. There was also a request that the note (which concerns the non-retroactivity of a revocation by a parent of their consent) be included in the text of the regulation.

Some commenters also wanted a definition of ''educational placement'' included in § 300.500(b), consistent with prior policy issuances regarding the definition.

Discussion: The statutory changes to the evaluation procedures that are reflected in §§ 300.530–300.536 make clear that an ''evaluation'' will include review of existing data, which may include results on tests or other procedures that are based on the general curriculum and may be used with all children in a grade, school, or class. The definition of ''evaluation'' in the NPRM

at proposed § 300.500(b)(2) had not been updated to recognize this change in the statute. Therefore, a change has been made to eliminate the last sentence in the proposed definition of ''evaluation'' so that it does not imply that an evaluation may not include a review of a child's performance on a test or procedure used with all children in a grade, school or class. This change does not mean that a public agency must obtain parental consent before administering a test used with all children unless otherwise required. (See § 300.505(a)(3)). Section 300.532 sets forth the procedures required to individually evaluate a child. Section 300.533 addresses the use of existing evaluation data which can include information available on the results of tests and procedures used for all children in a school, grade or class.

To distinguish an initial evaluation from a reevaluation, an initial evaluation of a child is the first completed assessment of a child to determine if he or she has a disability under IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated the first time in a State, a decision has been rendered that a child is eligible under IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation.

Regarding revocation of parental consent, parents cannot be forced to consent to decisions related to their child's education. However, it would be impractical to allow a parent to retroactively apply a revocation of consent where parental consent is required. Thus, once a parent consents to an educational decision concerning their child, be it an evaluation or provision of service(s), any revocation of their consent once the action to which they initially consented has been carried out will not affect the validity of the action. Since the non-retroactivity of a parent's revocation of consent is based on the Department's interpretation of the statute, and is important to make clear to all parties, it should be set forth in the regulation itself.

The educational placement of a child focuses on the implementation of a child's IEP and cannot be defined generally given that each child has different educational needs. Section 300.552 addresses the meaning of educational placement by describing the factors involved in making a placement decision and explains the concept in the context of the least restrictive environment. There is no additional benefit to defining further the term educational placement at § 300.500.

Changes: The note following this section has been deleted and § 300.500(b)(1)(iii) has been amended by adding language to clarify that a revocation of consent does not have retroactive effect if the action consented to has already occurred. Section § 300.500(b)(2) has been amended by removing the last sentence of that paragraph.

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

Comment: Some commenters asked that the term ''all'' with respect to meetings in § 300.501(a)(2) be deleted as that term is not used in the statute, as well as delete the term ''all'' with respect to the term ''education records'' and replace it with ''special.'' Another suggestion was to require in § 300.501(a)(1) that copies of tests given to a child and manuals to interpret such tests be made available for the parents to review. One commenter asked whether therapy notes are considered educational records and another asked that the public agency be required to specify time periods within which the inspection and review right must be carried out.

Several commenters expressed concern that the definition of ''meetings'' was too narrow; the commenters recommended the definition be drafted to insure that it means any event where decisions are made regarding a child's identification, evaluation or placement. Others asked that the definition be removed entirely. It was also requested that the potential for any confusion regarding informal meetings held by school personnel be eliminated. Several commenters recommended deleting the reference at § 300.501(a)(2)(ii) to the provision of FAPE, claiming this would overly broaden the meetings at which parents should be given the chance to attend, precluding the ability for internal meetings without the parents. A commenter also asked that § 300.501(a)(2) include the opportunity to attend eligibility meetings.

Commenters also asked that § 300.501(b)(2) be amended to include in the definition of ''meetings'' those that occur via conference call or video conferencing, not just face-to-face meetings. Several comments advised that the language as proposed at § 300.501(b)(2) might result in parents being excluded from curriculum planning meetings for individual children under the guise of ''teaching methodology, lesson plans or coordination of service provision'' meetings. There were several recommendations that there be a specific timeline for giving parents notice of meetings, such as at least 10 business days before a meeting.

Regarding placements, many commenters stated that parents should be informed by public agencies of the various alternative placements available, not just the one ultimately chosen, and the reasons for rejecting the other potential placements. Further, it was suggested that the language in § 300.501(c)(1) be placed in the IEE section of the regulations.

Several commenters also stated that video-conferencing (referenced in § 300.501(c)(3)) would be costly and prohibitive for many schools. Some thought the language in § 300.501(c)(5), ''whatever action is necessary'', was too broad and should be a reasonable or feasible standard. There were also concerns that § 300.501(c)(5) should not require schools to ensure participation and comprehension by the parents, but that they should make reasonable attempts to ensure parents participate and understand.

Discussion: The statute specifically states that parents have the right to participate in meetings regarding identification, evaluation, placement or FAPE. Paragraph (b)(2) describes the types of discussions that do not fall within this requirement. The term ''all'' should be deleted to be consistent with the statutory language.

The term ''all education records'' is from the statutory reference to ''all records relating to such child'' at section 615(b)(1) of the Act. The Department has always interpreted the term to mean all of the child's education records to be consistent with the purpose of IDEA and the applicable confidentiality provisions of the General Education Provisions Act at 20 U.S.C. 1232g, also known as the Family Educational Rights and Privacy Act of 1974 (FERPA) as directed by section 617(c) of the Act.

Education records are defined at § 300.560 by reference to the definition of education records in 34 CFR part 99 (the regulations implementing FERPA). The term means those records that are directly related to a student and are maintained by an educational agency or institution or by a party acting for the agency or institution. Given the definition, it follows that tests taken by a child are included in the education records available for review by a parent. The discussion following § 300.562 in the attachment further discusses what is considered an education record of a child and the timelines for parental inspection and review of education records.

Regarding the definition of ''meetings,'' the proposed definition was

intended to make clear that parents have the right to be notified of and attend meetings which, generally, are scheduled in advance, and in which public agency personnel are to come together at the same time, whether face-to-face or via conference calls or video-conferencing, to discuss, and potentially resolve, any of the issues described in paragraph (b)(2).

Informal discussions among teachers and administrators, which may or may not be pre-arranged, are not meetings for which parents must receive notice and the opportunity to attend. Whether or not a meeting is prearranged is not the deciding factor in determining whether parents would have the right to attend; rather, the fact that the meeting is to discuss and potentially resolve one or more of the issues identified in paragraph (b)(2) triggers the parents' right to be involved.

In practical terms, this means that meetings to which the child's parents must be afforded the opportunity to attend cannot be convened without providing parents with reasonable notice. However, in the interest of regulating only where necessary, the first sentence of paragraph (b)(2) would be removed and no specific timeline regarding parental notice of meetings would be added.

The right of parents to participate in meetings where the provision of FAPE to their child is being discussed is statutory. The point of the provision is to ensure parents have the opportunity to participate in discussions where substantive decisions regarding their child's education are made—a key principle of the IDEA Amendments of 1997. Eligibility determinations are the focus of the identification process and are already part of § 300.501(a)(2). A parent's role in the eligibility determination also is addressed under § 300.534 of these regulations.

With respect to placement, if parents are to be meaningfully involved in the placement decision for their child it is necessary that they understand the various placement options. It is implicit in the requirement that parents be ensured the opportunity to be members of any group making the placement decision, that whatever placement options are available to a child will be fully discussed and analyzed at placement meetings, allowing input from all the participants.

Relocating the language at § 300.501(c)(1) in the IEE section of the regulations does not make sense since the purpose of § 300.501(c) is placement and that of IEE's is evaluation.

Whether or not video-conferencing, as well as other methods for enabling full participation in meetings by those with a right to attend, are used is dependent on the particular circumstances, and no one method is mandated. If one effective option would be more costly in a particular situation than another, there is no mandate that the more costly alternative be chosen.

Section 300.501(c)(4) explains that placement decisions may be made by public agencies without the parents if the agency is unable to obtain the parents' participation in the decision and documents its attempts to ensure their involvement. Once a parent makes clear that he or she will be involved in the placement decision-making process, § 300.501(c)(5) requires that the agency ensure that the parent is actually able to participate in, which includes understanding, the process. However, it is possible that even if an agency makes reasonable efforts, consistent with § 300.501(c)(5), to ensure a parent's participation, the parent is still not able to meaningfully participate. Thus, it appears useful to clarify the regulation.

Changes: Section 300.501(a)(2) has been amended to delete the word ''all'; § 300.501(b)(2) (definitions of ''meetings'') has been amended by replacing ''a prearranged event in which'' with ''when;'' and deleting ''and place;'' and § 300.501(c)(5) has been revised to refer to reasonable efforts to ensure parent participation.

Independent Educational Evaluation (§ 300.502)

Comment: Some commenters thought that allowing the public agency to initiate a hearing regarding parental requests for independent educational evaluations (IEE), without allowing parents the right to likewise initiate a hearing, would cause excessive litigation. Further, it was suggested that States be required to develop clear criteria for acceptance of IEEs as the primary means of determining eligibility.

One commenter asked that a formula be established for reimbursing parents who assume the responsibility of establishing eligibility for their children. Several commenters urged that an IEE must be consistent with the requirements of a full and individual evaluation under §§ 300.530–300.536. It was also suggested that although the criteria under which an IEE is obtained at public expense should be the same as the criteria used by the public agency when it initiates an evaluation, reasonable travel should be allowed when community professional resources are limited.

A few comments requested limiting the cost of an IEE to a reasonable and customary charge, as well as restricting the type of evaluation conducted, such as evaluating only educational, not medical, needs.

Comments were received recommending that before a parent may request an IEE, there must have been an LEA evaluation, the results with which the parents disagree. The commenters stated that parents who refuse to consent to a public evaluation and then demand an IEE at public expense should not receive an IEE, unless they can demonstrate a legitimate reason for refusing to consent to the undertaking of a public evaluation.

Commenters both supported and opposed Notes 1 and 2, some wishing their deletion and some wanting them included as part of the regulations. Many commenters suggested that parents should explain why they disagreed with the public evaluation, or that the public agency should be able to request such information and have time to alleviate the parents' concerns, and that the parent should request a hearing if he or she wants one so the burden to demonstrate that the evaluation was appropriate would not fall solely on the public agency.

There were several requests for a definition of unnecessary delay in § 300.502(b), some proposing 10 calendar or school days from the receipt of a request for an IEE.

Discussion: The purpose of requiring the public agency to either initiate a due process hearing if it wishes to challenge a parent's request for an IEE, or otherwise provide an IEE at public expense, is to require public agencies to respond to IEE requests and to ensure parents are able to obtain an IEE as set forth in section 615(b)(1) of the Act. There is no corresponding need to specify that a parent also has the right to initiate a due process hearing since if a public agency does not do so it must provide the IEE at public expense.

IEEs would be only one element in the eligibility determination since the evaluation team reviews the existing evaluation data and then determines what additional data are needed to determine whether the child has or continues to have a covered disability, the child's present levels of performance and whether the child needs or continues to need special education and related services (see § 300.533(a) and (b)). Methods in addition to IEEs are to be used to determine whether a child is eligible under IDEA. Therefore, the results of IEEs cannot be the sole determining factor for eligibility.

Under IDEA, it is the public agency's responsibility to establish eligibility. If parents are willing to assume the

responsibility, on behalf of the public agency, for having the assessment of their child under IDEA done, they should be reimbursed for the assessment methods agreed upon by the public agency and parents. The agreement between the parents and public agency would depend on their special circumstances so regulating on this issue would not be helpful. However, this procedure would not be an IEE.

Since § 300.502(e)(1) states that IEEs at public expense are to be conducted pursuant to the same criteria that apply to evaluations conducted by public agencies, it follows that the requirements at §§ 300.530–300.536 would apply to the IEEs. Note also that for an IEE obtained by a parent either at public or private expense to be considered by the public agency, such IEE must meet agency criteria. Therefore, the parents must be able to have access to the relevant agency criteria. To that end, Note 2 should be deleted and, in modified form, included in the text of the regulation at §§ 300.502(a)(2), 300.502(c)(1), and 300.502(e)(1).

There is nothing in the regulations with respect to IEEs, or evaluations in general, that would prevent reasonable travel for necessary services not available in the community.

Since public agencies must provide parents with information about where IEEs may be obtained, provided the options are consistent with §§ 300.530–300.536, public agencies have some discretion in the cost if it is at public expense. Further, evaluations of children under IDEA are to cover all areas of suspected disability, which may include medical examinations for purposes of determining the child's disability. There may be situations in which a child's educational needs are intertwined with a child's health needs, therefore, stating that the types of evaluations conducted are only those regarding educational need does not add any useful clarity.

The right of a parent to obtain an IEE is triggered if the parent disagrees with a public initiated evaluation. Therefore, if a parent refuses to consent to a proposed public evaluation in the first place, then an IEE at public expense would not be available since there would be no public evaluation with which the parent can disagree. If the parent believes the proposed public evaluation is inappropriate, he or she may pursue an appropriate publicly-funded evaluation via the mediation or due process procedures under §§ 300.506–300.509.

With respect to Note 1, while it would be helpful for parents to explain their disagreement over a public evaluation, there is nothing in the statute which prevents parents from obtaining an IEE if they did not express their concerns first. Therefore, Note 1 would be deleted and the regulation changed to state that the public agency may request an explanation from the parents regarding their concerns when the parent files a request for an IEE at public expense. However, such an explanation may not be required of the parents and the provision of an IEE, or initiation of a due process hearing to defend the public evaluation, may not be delayed unreasonably regardless of whether or not the parent explains his or her concerns to the public agency.

Since the necessity or reasonableness of a delay is case specific, no definition of these terms has been added.

Changes: Note 2 has been deleted and § 300.502(a)(2) and (e)(1) have been amended to provide that on request for an IEE, parents are provided with information about where an IEE may be obtained and the agency criteria applicable to IEEs and that those criteria are consistent with the parent's right to an IEE.

Note 1 has been deleted and § 300.502(b) has been revised to explain that an explanation of parent disagreement with an agency evaluation may not be required and the public agency may not delay either providing the IEE at public expense or, alternatively, initiating a due process hearing.

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

Comment: One commenter stated that § 300.503(b)(8) should be removed, believing it to exceed the statute and because an explanation of State complaint procedures is given in the procedural safeguards notice. The commenter also believed it is inconsistent to inform parents about the State complaint process without the other two (mediation and due process appeals) being explained.

Several commenters asked for specific types of organizations to be listed in § 300.503(b)(7), such as parent training institutes. Another commenter wanted the title of § 300.503 to be changed to ''Prior Notice by the Public Agency Before Implementing an IEP.''

Several commenters asked that a note be added to explain when the notice needs to be sent.

Requests were received to delete § 300.503(b)(6) and to insert the phrase ''unless it is clearly not feasible to do so'' as stated in § 300.503(c)(ii) whenever language or mode of communication is addressed. It was also suggested that a note be added that an LEA must document its attempts at accessing resources to assist in translating or interpreting information.

Discussion: Section 300.503(b)(8) was proposed to enhance the awareness of parents of low cost and less adversarial mechanisms for resolving disputes with school districts. Therefore, it makes sense to require State complaint procedures to be explained along with due process and mediation rather than in this notice. Since § 300.503(b)(6) requires that parents be advised of the existence of procedural safeguards and, if the written notice is not part of an initial referral for an evaluation, be told how a copy of the procedural safeguards notice can be obtained, it would be useful and appropriate to add a specific requirement for an explanation of the State complaint process in § 300.504(b).

Procedural safeguard notices must be given to the parents, at a minimum, upon the four events set forth at § 300.504(a); between those events and the statement mandated at § 300.503(b)(6), agencies should have ample instances in which they must provide parents with effective notice of the various processes for challenging proposed action. Therefore, § 300.503(b)(8) should be deleted and moved to § 300.504(b).

The types of organizations which exist to help parents understand IDEA are varied and depend on the particular State. Therefore, a list of such organizations in the regulations would not be feasible.

The regulation is already clear on when the prior written notice must be given: a reasonable time before the public agency proposes or refuses to initiate or change the child's identification, evaluation, educational placement or provision of FAPE. If parental consent is required for the proposed action, the notice may be given when parental consent is requested. Further, the notice is required at times other than only before implementing a child's IEP so the title should not be changed.

Section 300.503(b)(6) is taken directly from the statute. In addition, it is difficult to understand when it would not be feasible to add the statement required by § 300.503(b)(6).

It is not necessary to add a note requiring an agency to document its efforts to translate or interpret the notice pursuant to § 300.503(c)(2)(i) and (ii) since § 300.503(c)(2)(iii) requires that the agency can show that § 300.503(c)(2)(i) and (ii) have been met.

Changes: Section 300.503(b)(8) has been deleted and moved to § 300.504(b).

Procedural Safeguards Notice (§ 300.504)

Comment: Several commenters were opposed to specifying the times procedural safeguards notice are to be given to the parents, claiming such requirements are expensive and burdensome. One commenter asked that the terms ''opportunity to present complaints'' and ''due process hearings'' be clarified since the two terms seem to mean the same thing for purposes of the procedural safeguards notice. Other commenters objected to §§ 300.504(a)(2), 300.504(b)(7), and 300.507(c)(2)(iii).

There were several suggested additions to the timing and contents of the procedural safeguards notice. Commenters suggested that the procedural safeguards notice: (1) Also be required when there is a decision to remove a child from his or her current educational placement for disciplinary actions resulting from behaviors described in § 300.520 or § 300.521, or for a period of more than 10 school days for other violations; (2) contain information with respect to the transfer of rights at the age of majority and the circumstances under which tuition reimbursement may be denied; (3) contain information on the use of private and public insurance to pay for Part B services; (4) contain information as to where parents can receive help in understanding procedural safeguards; (5) state that a public agency may not deny a parent's right to a due process hearing if the parent fails to participate in a meeting to encourage mediation; and (6) include a complete listing of all times when the safeguards notice is to be provided.

Discussion: The minimum times the procedural safeguards notice must be given to parents is set forth in the statute at section 615(d)(1). The fourth requirement, that the notice be given upon receipt of request for a due process hearing, comes from the requirement at section 615(d)(1)(C) that the notice be given upon registration of a complaint under section 615(b)(6).

The longstanding interpretation of the statutory mandate at section 615(b)(6) that parents have the opportunity to present complaints relating to their child's identification, evaluation, educational placement and provision of FAPE, is that they have an opportunity to request a due process hearing. Therefore, § 300.504(b)(5) should be modified to make clear that the opportunity to be explained is that of presenting complaints to initiate due process hearings pursuant to § 300.507. Section 300.504(b)(10) as stated is then clearer in that it refers to an explanation of the actual due process hearing procedures. Also, in adding § 300.504(b)(14), a corresponding change to the first paragraph of § 300.504(b) must be made to reference State complaint process.

Sections 300.504(a)(2) and (b)(7) are required by the statute. The provision in § 300.504(c)(2)(iii) has been in the regulations since 1977 and there is no basis for changing the requirement given that purpose is to ensure that parents receive assistance in understanding the notice.

Regarding the several suggested additions to the timing and contents of the procedural safeguards: (1) § 300.504(b)(7) as written addresses situations where children are disciplined and placed in interim alternative educational placements; (2) § 300.504(b)(8) as written addresses situations resulting in reduction of reimbursement of private school tuition; (3) § 300.347(c) requires that at least one year before the student reaches the age of majority under State law the parents and the student will receive notice of the projected transfer of rights through the IEP; (4) § 300.142(e) specifies that private insurance can only be used with informed parent consent and that public insurance can only be used if it will not result in a cost to parents; (5) § 300.503(b)(7) already includes sources for parents to use to help in understanding their rights; and (6) § 300.504(b)(9) already requires that the mediation process, which includes parental rights therein, be fully explained.

The information on the content and timing of the procedural safeguards notice is not included in the statutory description of the contents of this notice.

Changes: As discussed under § 300.503, a new § 300.504(b)(14) has been added to address State complaint procedures. The first paragraph of § 300.504(b) is amended to recognize this change. Section 300.504(b)(5) is amended to refer to presenting complaints to initiate due process hearings.

Parental Consent (§ 300.505)

Comment: A few comments suggested that the term ''informed'' be inserted before ''parental consent'' in § 300.505(a)(1).

Several commenters believe that parental consent should be required for all reevaluations, not just those where new tests are necessary. Other commenters also requested that the term ''new test'' be changed to encompass other evaluation procedures. Others stated that the term ''new test'' confused rather than clarified when consent needed to be obtained and requested that it be clarified or deleted. Some commenters suggested that an explanation be added to clarify that where additional data are needed in order to reevaluate a child, parental consent is required. There were also questions regarding the necessity of consent for adapted or modified assessments if not part of a reevaluation, such as ongoing classroom evaluations (e.g. the Brigance) and counseling.

Several commenters believe that parental consent should be required before special education services are discontinued, for example, upon graduation. A few commenters recommended that reevaluations for children who are suspended for more than 10 days or expelled should be able to proceed even if parental consent is not given.

The use of § 300.345(d) procedures to meet the reasonable measures requirement of § 300.505(c) was opposed by some commenters, several of whom believe that documenting efforts to obtain parental consent should be sufficient. Some also wanted reasonable measures to be defined more specifically.

Several comments advocated deleting Note 3 and others believed Note 3 should be incorporated into the regulation. Further, it was recommended that the clarification in Note 2 be revised to state that the public agency consider implementing its procedures to override a parent's refusal to consent to services the public agency believes are necessary for the child to receive FAPE, rather than requiring the public agency to implement such override procedures.

Discussion: Parental consent must be informed to be consistent with the statute and meaningful. Further, adding the word ''informed'' at § 300.505(a)(1) is consistent with the definition, in § 300.500(b)(1), of consent.

In order for children to receive FAPE, the IDEA Amendments of 1997 emphasized the importance of parent involvement in their children's evaluation and placement. The statute requires informed parental consent prior to a child's initial evaluation for special education and related services, as well as any reevaluations. The intent of this statutory change was not to require school districts to obtain parental consent before reviewing existing data about the child and the child's performance, an activity that school districts, as a matter of good practice, should be engaged in as an on-going practice.

To require parental consent for collection of this type of information would impose a significant burden on school districts with little discernable benefit to the children served under these regulations. The statute provides that in some instances, an evaluation team may determine that additional data are not needed for an evaluation or reevaluation. In all instances, parents have the opportunity to be part of the team which makes that determination. Therefore, no parental consent is necessary if no additional data are needed to conduct the evaluation or reevaluation.

To make this clear and to respond to commenters who believed that requiring parental consent only when conducting a new test as part of the reevaluation was too narrow, the regulation should be revised to specify that parental consent must be obtained before conducting an evaluation or reevaluation, to delete proposed paragraph (a)(1)(iii) and add a new provision to state that parental consent need not be obtained before reviewing existing data as a part of an evaluation or reevaluation or before administering a test or other evaluation that is administered to all children unless consent is required of all parents.

Parental consent would be necessary if a test is conducted as a part of an evaluation or reevaluation, and when any assessment instrument is administered as part of an evaluation or reevaluation. However, schools would not be required by these regulations to obtain parental consent for teacher and related service provider observations, ongoing classroom evaluation, or the administration of or review of the results of adapted or modified assessments that are administered to all children in a class, grade, or school.

If a child is about to graduate or otherwise stop receiving special education and related services, § 300.503's prior notice requirements would be triggered. Section 300.503 requires that written notice must be sent to the parents before a proposed change in identification, evaluation, placement, or the provision of FAPE is effective, thereby allowing the parent the opportunity to object to the proposal. It is not appropriate to regulate further on this issue here.

Paragraph (b) of this section addresses the procedures an agency can use if it wants to pursue an evaluation or reevaluation, but the parents have refused consent. The agency may seek to do the evaluation or reevaluation by using the due process or mediation procedures under Part B of the Act unless doing so would be inconsistent with State law relating to parent consent. Proposed Notes 1 and 3, and the second part of proposed Note 2 were attempts to clarify the interplay between the Federal requirement to provide FAPE and any State laws and policies which may not permit educational agencies to override refusals of parents to consent to evaluations and reevaluations.

In practical terms, if a State does not allow the agency to override a parent's refusal for an initial evaluation or reevaluation which the agency deems necessary in order to provide FAPE, the agency, under paragraph (b), must follow the requirements of State law. In cases where the evaluation or reevaluation is necessary in order to determine that the child is or continues to be a child with a disability under Part B of the Act, and State law prohibits an agency from overriding a parental refusal to consent, the agency may have no recourse but to not provide, or not continue to provide, services under the Act to the child.

On the other hand, if State law does not prohibit the agency from overriding a parental refusal to consent to an evaluation or reevaluation, and the agency believes that an evaluation or reevaluation is necessary in order to provide FAPE, the agency would have to take appropriate action.

If State law provided a mechanism different than due process or mediation under Part B as the means to override a parent refusal of consent, and the agency deems the evaluation or reevaluation necessary in order to provide FAPE, the agency would use the State mechanism to pursue the evaluation. If State law permits agencies to override a parental refusal to consent to an evaluation or reevaluation, but does not specify the procedures to use, and the agency determines that the evaluation or reevaluation was necessary in order to provide FAPE to the child, the agency would use the due process and mediation procedures under Part B of the Act.

Of course, if an agency proposed an evaluation or reevaluation and the parent refused consent, the agency could reconsider whether its proposed evaluation or reevaluation was necessary, if the circumstances warrant. However, in light of the general decision to remove all notes from the regulations implementing Part B of the Act, the notes should be removed.

Paragraph (c) of this section addresses situations in which an agency seeks parental consent for a reevaluation, but the parent fails to respond. Given the importance of parental involvement, the procedures a public agency must use to demonstrate that it has taken reasonable measures to obtain parental consent pursuant to § 300.505(d) should be consistent with the procedures in § 300.345(d) that a public agency must use to inform and encourage parents to attend IEP meetings. The methods described in § 300.345(d) are examples of how to attempt and document the steps that the public agency has taken to obtain parental participation in an IEP meeting, and are applicable to a public agency's attempts to obtain parental consent pursuant to 34 CFR 300.505.

Section 300.345(d) does not require a public agency to take all of the steps mentioned before conducting the meeting. A public agency may use a method which is different from the ones listed at § 300.345(d) to demonstrate that it has attempted to obtain parental consent as long as it can demonstrate that its methods were appropriate. Therefore, the language concerning the use of the § 300.345(d) procedures to meet the reasonable measure requirement of § 300.505(c) should be retained.

Under paragraph (d) of this section if a State adopts consent requirements in addition to those required in § 300.505(a)(1), public agencies are not excused from their obligation to provide FAPE because a parent refuses to consent unless the public agency has taken the steps necessary to resolve the matter. In order to resolve the disagreement with the parent, it is appropriate for the public agency to use informal means initially, such as a parent conference. However, if these informal means prove unsuccessful, the public agency must use its override procedures if it continues to believe that the disputed service or activity is needed in order for the child to receive FAPE.

Paragraph (e) of this section contained a typographical error because it should have referred to consent required under paragraphs (a) and (d), consistent with the prior regulations. With regard to paragraph (e), it is important to recognize that except for the service or activity for which consent is required under paragraphs (a) and (d), parent refusal to consent to one service or benefit may not be used to deny the parent or child any other service or benefit available to them. For example, if a State requires parental consent to the provision of all services identified in the IEP, and the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents. Similarly, a parent

refusal to consent to a reevaluation may not be used to deny a child the right to participate in a class trip. A parent refusal to consent to the collection of additional data that a public agency believes is needed as a part of a reevaluation may not be used to deny the child the services that are not in dispute. In addition, a parent refusal to consent to the collection of additional data that the agency thinks necessary to determine whether the child continues to be a child with a disability may not result in the exclusion of the child from special education and related services because § 300.534(c)(1), which reflects the statutory requirements of section 614(c)(5), requires a full evaluation before determining that a child is no longer a child with a disability. To make this point more clearly, paragraph (e) would be revised.

Changes: Section 300.505(a)(1) has been amended to refer to ''informed parent consent,'' and to delete the unnecessary reference to programs providing special education and related services. A reference to reevaluation has been added to paragraph (a)(1)(i), paragraph (a)(1)(iii) has been deleted, and a new paragraph (a)(3) added to specify that parental consent is not required before reviewing existing evaluation data as a part of an evaluation or reevaluation or for administering a test used with all children unless consent is required of all parents. Paragraph (e) has been revised to provide that a public agency may not use a parental refusal to consent to one service or benefit under paragraphs (a) and (d) to deny the parent or child another service, benefit, or activity, except as may be required by these regulations. The notes following this section have been removed.

Mediation (§ 300.506)

Comment: Several commenters asked that the terms ''SEA'' and ''LEA'' be used in lieu of ''public agency'' since the statute uses those terms. There were also requests for a clarification of the State's responsibility for the costs of the mediation process.

There were a few requests for clarification of who may be mediators, such as whether or not former LEA employees would be able to be mediators. There were comments asking for more restrictions on who could be a mediator and comments asking for fewer restrictions, especially where a public school district already has certain mediators under state law or regulation. The latter commenters believe the restrictions should only address employees of an agency that is providing direct services to a child who is the subject of the mediation or any state agency described in § 300.20.

There was also the suggestion that LEA employees be permitted to serve as mediators, however, either party would have the right to reject such selection. The commenters pointed out that there is no similar prohibition against LEA employees being hearing officers and several questioned whether the restrictions were therefore necessary. Some commenters suggested that the regulation make clear that multiple mediators or mediation panels are allowed, i.e., that a single mediator is not required for each mediation.

Other comments recommended that Note 1 be deleted, while others asked that it be included in the text of the regulation. With regard to Note 1, for situations in which agreement on a mediator could not be reached, commenters sought additional guidance in the regulation.

Other suggestions for the mediation process included promoting mediation even before a due process hearing is requested and allowing an LEA to select a mediator who it believes is best able to resolve issues in dispute. There were comments that mediation should be allowed to occur via telephone when necessary. Several commenters asked that the agreement reached in mediation be added to the child's IEP as soon as possible after the agreement is reached, however not later than 10 days from the agreement. Commenters also requested that the regulation specify that the written mediation agreement would be as enforceable as a due process hearing decision, and that mediation discussions may be disclosed in any proceeding brought to enforce a mediation agreement.

Some comments stated that there appeared to be a conflict between §§ 300.506(d)(1) and 300.506(d)(2). The former allows a public agency to require parents who elect not to go to mediation to meet with a disinterested party to learn about the mediation process. The latter states that if a parent does not participate in the informational meeting regarding mediation the public agency may not deny or delay the parent's right to due process hearing. The comments suggested changing § 300.506(d)(1) to state that the procedures may ''request'' not ''require'' the parents to learn about mediation. A few comments requested a specific definition of the term ''disinterested party'' and parent information and training centers, as well as clarification of any supervision required over disinterested parties. There were also comments which asked that LEAs be required to mediate if the parents agree, as well as be required to attend a mediation informational meeting if it chooses not to mediate.

Discussion: Mediation is an important alternative system for resolution of disputes under Part B. However, in order for mediation to be effective, it must be an attractive alternative to both public agencies and parents and it must be an impartial system which brings the proper parties into a confidential discussion of the issues and allows for a binding agreement that resolves the dispute.

The statute clearly states that the option of mediation must be available whenever a due process hearing is requested. No further requirement would be added to the regulations. However, States or other public agencies are strongly encouraged to offer mediation or other alternative systems of dispute resolution prior to the filing of a request for a due process hearing, and whenever a dispute arises.

An expanded use of mediation should enable prompt resolution of disputes and lead to a decrease in the use of costly and divisive due process proceedings and civil litigation. Mediation may also be useful in resolving State complaints under §§ 300.660–300.662.

The term ''public agency'' in the regulation appropriately includes State and local educational agencies as well as other agencies in the State that may have responsibility for the education of children with disabilities because it ensures access to the mediation process, regardless of the agency that provides educational services. The requirement that the State bear the cost of the mediation process is clearly set out in the regulation; however, the regulation should be revised to correctly refer to the meetings to encourage the use of mediation. In addition, the potential savings of mediation, when compared to litigation, make it an attractive, low-cost option for most public agencies.

While there is nothing in the Part B regulations that precludes parents and LEA employees from attempting to resolve disputes through an informal process, the use of current LEA employees as mediators would make mediation a much less attractive alternative to parents. The regulatory provisions regarding the impartiality of mediators and the requirement of specialized expertise in laws and regulations relating to the provision of special education and related services are intended to be more stringent than the Federal requirements for impartial hearing officers to ensure that mediation is a more attractive option for parents, and an effective option for both parties. The use of a single mediator in the

mediation process is important for clear communication and accountability.

Paragraph (b)(1)(iii) of this section, which repeats statutory language, is clear that each mediation be conducted by one mediator, as opposed to a panel or multiple mediators.

Another factor that will determine the success of mediation within a State is the selection process for mediators. It is important to note that with respect to paragraph (b)(2) of this section, the Senate and House Committee Reports on Pub. L. 105–17 include the following statement:

> * * * the bill provides that the State shall maintain a list of individuals who are qualified mediators. The Committee intends that whenever such a mediator is not selected on a random basis from that list, both the parents and the agency are involved in selecting the mediator, and are in agreement with the individual who is selected. (S. Rep. No. 105–17, p. 27 (1997); H. Rep. No. 105–95, p. 106 (1997).)

The success of a mediation system will be closely related to both parties' trust and commitment to the process. The first test of that process will be the selection of the mediator. Parties that mistrust the mediator selection process may be less likely to reach agreement on substantive issues. Therefore, reflecting the language of the Committees' reports on this topic, a change should be made to the regulation to specify that if a mediator is not selected on a random basis from the State-maintained list, both parties are involved in selecting the mediator and are in agreement with the selection of the individual who will mediate.

Like hearing officers, mediators must be able to be paid by the State, without impacting their impartiality. Language similar to that used for impartial hearing officers should be added to the regulation to clarify that even though a mediator is paid for his or her services as a mediator, such payment does not make that mediator an employee for purposes of impartiality.

The regulatory requirement for the use of a qualified mediator instructed in effective mediation techniques will ensure that decisions about the effectiveness of specific techniques, such as the need for face-to-face negotiations, telephone communications, or IEP implementation provisions, will be based upon the mediator's independent judgment and expertise. Therefore, it is not necessary to regulate on these issues.

The enforceability of a mediation agreement, like the enforceability of other binding agreements, including settlement agreements, will be based upon applicable State and Federal law. With regard to the provision in paragraph (b)(6) of this section that mediation discussions must be confidential and may not be used in any subsequent due process hearings or civil proceedings, the Senate and House Committee Reports on Pub. L. 105–17 note that ''nothing in this bill shall supersede any parental access rights under the Family Educational Rights and Privacy Act of 1974 or foreclose access to information otherwise available to the parties.'' (S. Rep. No. 105–17, p. 27 (1997); H. Rep. No. 105–95, p. 107 (1997)). The Reports also include an example of a confidentiality pledge, which makes clear that the intent of this provision is to protect discussions that occur in the mediation process from use in subsequent due process hearings and civil proceedings under the Act, and not to exempt from discovery, because it was disclosed during mediation, information that otherwise would be subject to discovery.

Regarding the perceived conflict between § 300.506(d)(1) and (d)(2), the mediation process, including meetings to discuss the benefits of mediation, should not be used to deny or delay parents' due process hearing rights. The purpose behind § 300.506(d)(2) is to ensure that in situations where parents are unwilling or unable to cooperate with a public agency regarding a meeting to discuss the benefits of mediation, there is still a timely resolution of the due process hearing. In general, a hearing officer should not extend the timelines for a due process hearing based on the fact that there is a pending mediation in the case unless both parties have agreed to that extension. If mediation is used in the resolution of a State complaint, it should not be viewed as creating, in and of itself, an exceptional circumstance justifying an extension of the 60 day time line. While the State or local educational agency may require that the parent attend the meeting to receive an explanation of the benefits of mediation and to encourage its use, a parent's failure to attend this meeting prior to the due process hearing should not be used to justify delay or denial of the hearing or the hearing decision.

It is not necessary to define the terms ''parent training and information centers'' or ''community parent resource center'' since they are established by statute. To allow flexibility with regard to the designation of a ''disinterested party'' by the parent organizations or an appropriate alternative dispute resolution entity, no definition would be provided. Consistent with the general decision to remove all notes from these final regulations, Notes 1 and 2 would be removed.

Changes: A new paragraph (b)(2)(ii) is added to specify that the mediator be selected from the list on a random basis, such as a rotation, or that both parties are involved in selecting the mediator and agree with the selection of the individual who will mediate. Notes 1 and 2 have been removed. Paragraph (b)(3) has been revised to refer to the meetings to encourage the use of mediation.

Another new paragraph (c)(2) is added to clarify that payment for mediator services does not make the mediator an employee for purposes of impartiality.

Impartial Due Process Hearing; Parent Notice (§ 300.507)

Comment: There were several comments requesting changes to § 300.507. With regard to the model form for hearing requests, some commenters requested that where the public agency requests the due process hearing, the public agency would provide the notice requested of the parents at § 300.507(c)(1) and (c)(2). Others requested that parent information and training centers and the general public be required to assist in developing the model form required in § 300.507(a)(3).

The Department also received comments asking that § 300.507(c)(4) be modified so that LEAs can ask a hearing officer to delay a due process hearing for a reasonable period of time until the parents provide the district with the required pre-hearing notice. Some commenters suggested that parents be informed of free and low cost legal advocacy as a matter of routine, not just after requesting a due process hearing. Other commenters sought additional language specifying that LEAs be barred from coming to a due process hearing with a new IEP developed without direct parental input and based on the information given by the parents in the hearing request.

Commenters also requested that the statutory provisions regarding attorneys' fees at sections 615(i)(3)(D) and (F) of the Act be included in this regulation. Others requested that the term ''or refusal to initiate or change'' be added to § 300.507(c)(2)(iv).

Some commenters asked that the Department delete Note 1, while others asked that Note 1 be written into the regulation itself.

Discussion: The prior written notice requirement of § 300.503 is sufficient to inform parents of what the public agency is proposing. Therefore, any hearing request by the public agency on

that proposal would not require an additional notice by the agency. Another notice would be repetitive and overly burdensome. Likewise, many public agencies already have existing model forms for hearing requests. Since the statute and regulation specify the information which parents must disclose in the hearing request, additional input from parent information and training centers or the general public is unnecessary and would create additional burdens without much benefit.

The Senate and House Committee Reports on Pub. L. 105–17 note that attorneys' fees to prevailing parents may be reduced if the attorney representing the parents did not provide the public agency with specific information about the child and the basis of the dispute described in paragraphs (c)(1) and (2) of this section. With respect to the intent of the new notice provision, the Reports include the following statement:

* * * The Committee believes that the addition of this provision will facilitate an early opportunity for schools and parents to develop a common frame of reference about problems and potential problems that may remove the need to proceed to due process and instead foster a partnership to resolve problems. (S. Rep. No. 105–17, p. 25 (1997); H. R. Rep. No. 105–95, p. 105 (1997)).

The changes to § 300.513 clarify the potential for reduction of attorneys' fees in cases where proper notice is not given by the parents' attorney. Therefore, a reference to attorneys' fees is not necessary here.

Matters such as what evidence should and should not be presented and requests for extensions of time, should be handled on a case-by-case basis by the impartial hearing officer presiding over the hearing. It has also been the Department's long-standing position that Part B of the Act and the regulations under Part B do not provide any authority for a public agency to deny a parent's request for an impartial due process hearing, even if the agency believes that the parent's issues are not new. Thus, the determination of whether or not a parent's request for a hearing is based on new issues can only be made by an impartial hearing officer.

The request for modification of the regulation at § 300.507(c)(2)(iv) to include situations where the nature of the problem is the public agency's refusal to initiate or change the provision of a free appropriate public education, is consistent with the requirements of § 300.507(a)(1). In light of the general decision to remove all notes from these final regulations, Notes 1 and 2 should be removed.

Changes: Section 300.507(c)(2)(iv) is amended to make clear that a problem may have arisen as a result of an agency's proposal or refusal to act. Notes 1 and 2 have been removed.

Impartial Hearing Officer (§ 300.508)

Comment: The Department received several comments requesting amendments to the regulation on hearing officers in two main aspects—qualifications and public notice of such qualifications. In the first area, commenters stated that persons who are employees of any LEA, persons who were employees of an SEA or LEA and were involved in the care or education of any child in the past 5 years, and attorneys who represent primarily the school district or parents cannot be hearing officers. In the second area, commenters requested that hearing officers be required to take training and competency examinations designed by this Department and supplemented with State-specific elements. Several commenters also want SEAs to publish the criteria they use to choose hearing officers and that the list of all the hearing officers and their credentials be provided to parents requesting a due process hearing. Commenters also suggested that the regulation require that if a sublist of hearing officers is generated for a particular hearing, the parents or their representative be present at the meetings where the sublist is selected. Further, commenters asked that the statement of the qualifications of hearing officers be updated annually and the impartiality of a hearing officer be determined by an objective standard, such as a State's Code of Judicial Conduct.

Discussion: The regulation, in conjunction with State ethics requirements for attorneys and judges, are sufficient to address the concerns raised by commenters with regard to potential conflicts. In States where there are no formal ethical standards for administrative hearing officers, the issue should be addressed within the State. A prior employee of an LEA or SEA should not be barred from serving as a hearing officer where there is no personal or professional interest that would conflict with his or her objectivity in the hearing. Hearing officers, like judges, are capable of making independent determinations of potential conflicts of interest, including a determination of whether he or she has knowledge or information about a particular child derived from outside the hearing process which would impact upon his or her impartiality.

Although numerous commenters asked for national standards, training, and examinations for impartial hearing officers, decisions about training and hearing officer selection, including the use of sublists, should be left to States. Since hearing officers' decisions are subject to judicial review, there is a strong incentive for States to choose qualified hearing officers, conduct appropriate training and establish standards of expertise. Hearing decisions that are not soundly decided will lead to further litigation, be more likely to be reversed and create higher costs. In addition, reviewing courts are less likely to give judicial deference to a hearing officer where his or her qualifications show no expertise in the area of special education.

Changes: None.

Hearing Rights (§ 300.509)

Comment: There were several specific comments regarding hearing rights. With respect to the additional disclosure of information, some commenters stated that the time frame should be 5 school days, not business days, prior to a hearing, and the recommendations should be clarified as written recommendations which may be summaries of oral recommendations. A few commenters also suggested that § 300.509(a)(3) and (b) use the same standard of business days to avoid confusion.

With respect to the parental hearing rights, some commenters suggested that since it sometimes not in the interest of the child to be present at the hearing, the parents should have the right to have the child who is the subject of the hearing present for only a portion of the hearing. There were also comments that a free written record is too expensive for States to provide, as well as comments that a verbatim recording should be at no cost to the parents.

With respect to general hearing rights, commenters asked that evidence that has not been disclosed within the appropriate time frame not be allowed unless agreed to by both parties or for good cause shown for the failure to disclose in advance. Commenters also asked that the regulations state that the only pre-hearing discovery allowed is the exchange of information set forth in § 300.509. Finally, commenters requested that hearing decisions be made available to the public at least on a quarterly basis.

Discussion: The establishment of two separate time frames for the prehearing disclosure of documents because the term ''5 business days'' is used in § 300.509(b)(1) and the term ''5 days'' is used in paragraph (a)(3) of this section will lead to confusion and additional litigation and costs. In order to prevent

this, the time frame for disclosure would be set to 5 business days prior to the hearing. This change would be consistent with prior interpretations by the Department, which recognized that the intent of prehearing disclosure is to avoid surprise by either party at the hearing. The hearing officer has discretion to determine the consequences of not meeting the disclosure time line, and may prohibit the introduction of the evidence or may allow the rescheduling of the hearing so that timely disclosure is possible.

Some States chose to allow the use of other discovery procedures prior to a due process hearing. States should continue to have this discretion as they are not prohibited from doing so by Part B.

Access to a written verbatim record of the hearing is vital for parents to exercise their full due process rights. Although there are costs associated with the statutorily mandated shift of the choice between an electronic or written record of the hearing from the public agency, as newer technologies are better capable of generating accurate transcriptions, these costs will decrease.

Parents must continue to have the choice to have the child be present for all or part of the hearing, at their discretion. For some youth with disabilities, observing and even participating in the hearing will be a self-empowering experience in which they can learn to advocate for themselves. This long-standing choice should not be taken away from parents. This choice takes on added significance in light of the new provisions that allow States to transfer parental rights to students at the age of majority. Under this new authority, there may be more situations where students will have to be present at and participate in due process hearings.

Implicit in the requirement that hearing decisions be made available to the public, is the requirement that they be made available within a reasonable amount of time. Therefore, no specific time requirement is needed in the regulation.

Changes: Paragraph (a)(3) of this section is changed to require disclosure at least 5 business days before the hearing.

Finality of Decision; Appeal; Impartial Review (§ 300.510)

Comment: Several comments regarding the availability of SEA hearing decisions, asked that such decisions be distributed directly to various organizations and allow parents to receive the findings under § 300.510(b)(2)(vi) in an electronic format. Other comments requested that hearing officers be allowed to amend decisions once they are final to correct for technical errors, similar to Rule 60 of the Federal Rules of Civil Procedure.

One commenter asked that Notes 1 and 2 be incorporated into the regulation itself and several commenters pointed out that the reference in § 300.510(b)(2)(iii) should be to § 300.509 not § 300.508.

Discussion: There were two typographical errors in the proposed regulation with respect to references to other sections. In § 300.510(b)(2)(iii) the reference to § 300.508 should be to § 300.509 consistent with the prior regulatory reference. In § 300.510(d), the reference to § 300.511 should be to § 300.512, also consistent with the prior regulatory reference.

The reference in § 300.510(b)(vi) to written findings and decision should be changed to be consistent with § 300.509(a)(5) and allow the choice of electronic or written findings of fact and decision.

It is not necessary to regulate on whether hearing officers are allowed to amend their decisions for technical errors. This matter is left to the discretion of hearing officers and States; however, proper notice should be given to parents if State procedures allow for amendments and a reconsideration process may not delay or deny parents' right to a decision within the time periods specified for hearings and appeals.

It has been the Department's position that the SEA may conduct its review either directly or through another State agency acting on its behalf. However, the SEA remains responsible for the final decision on review. In addition, all parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in § 300.509 relating to hearings also apply. However, in light of the general decision to remove all notes from these final regulations, Notes 1 and 2 would be removed.

Changes: In § 300.510(b)(2)(iii) the reference to § 300.508 has been changed to § 300.509. In § 300.510(d), the reference to § 300.511 has been changed to § 300.512. The reference in § 300.510(b)(2)(vi) to written findings and decision has been changed to be consistent with § 300.509(a)(5) and allow the choice of ''electronic or written findings of fact and decision.'' Notes 1 and 2 have been removed.

Timelines and Convenience of Hearings and reviews (§ 300.511)

Comment: A few comments were received regarding § 300.511 which requested that (1) the 45 and 30 day timelines be specified as 45 and 30 school days; (2) it be clear that hearing officers have discretion to deny requests for extensions of time since extensions may delay hearings for a long time; and (3) delete § 300.511(a) or change it to make the SEA responsible for timelines.

Discussion: There is not sufficient consensus or evidence of need to change the long-standing interpretation of the hearing and review timelines from calendar days to ''school days.'' In addition, the potential impact of no ''school days'' during the summer months would make the delay in parents' access to due process hearings and decisions unreasonable.

The use of the word ''may'' instead of ''shall'' in § 300.511(c), means that the granting of specific extensions of time are at the discretion of the hearing or review officer. It is not necessary to clarify that this discretion means that requests for extensions can be denied as well as granted since this is implicit in the regulation.

There is no need to change the regulation to reflect the State's responsibility for compliance with timelines because in addition to the language in this regulation, § 300.600 continues to hold the State ultimately responsible for noncompliance.

Changes: None.

Civil Action (§ 300.512)

Comment: A commenter pointed out that § 300.512 had a few typographical errors since the reference to § 300.510(b)(2) should be to § 300.510(b)(1) and the reference to § 300.510(e) should be to § 300.510(b).

Discussion: There were typographical errors in this section in the NPRM, however the reference to § 300.510(b)(2) should be to § 300.510(b) and the reference to § 300.510(e) should be to § 300.510(b).

Changes: The reference to § 300.510(b)(2) has been changed to § 300.510(b) and the reference to § 300.510(e) has been changed to § 300.510(b).

Attorneys' Fees (§ 300.513)

Comment: Many commenters requested that § 300.513 include the provisions from sections 615(i)(3)(D) and (F) of the Act regarding instances where attorneys fees are prohibited or may be reduced. Several commenters also asked that a note be added to state that attorneys' fees may be awarded if

an IEP team meeting occurs after a hearing request but before the hearing.

Several commenters requested that the note on hearing officers be deleted, stating that the awarding of attorneys' fees should be left to the courts. One commenter stated that if hearing officers are allowed to award attorneys' fees, they should be trained in, and use, the criteria used by Federal courts in determining attorneys' fees.

One commenter also asked that § 300.513(b) be deleted.

Discussion: By inserting all the statutory provisions regarding attorneys' fees into the regulations, most of the suggestions will be adequately addressed and additional clarity will be added.

Based upon the absence of consensus, the Department will continue to allow maximum flexibility to States for structuring the process by which parents who are prevailing parties under Part B of the Act may request attorneys' fees reimbursement.

It is important to maintain paragraph (b)(1) of this section, because the limited Federal resources under the Act should be used to provide special education and related services and not be used to promote litigation of disputes. Further, that paragraph has been modified to make it clear that the prohibition against using Part B funds for attorney's fees also applies to the related costs of a party in an action or proceeding, such as depositions, expert witnesses, settlements, and other related costs. In addition, a new paragraph (b)(2) of this section has been added to clarify that the prohibition in paragraph (b)(1) does not preclude a public agency from using funds under Part B of the Act to conduct an action or preceding under section 615 of the Act, such as the cost of paying a hearing officer and providing the place for conducting the action or proceeding.

In light of the general decision to remove all notes from the final regulations under the Act, the note following this section in the NPRM would be removed. The proposed note was merely intended to suggest that States could choose as a matter of State law to permit hearing officers to award attorneys' fees to parents who are prevailing parties under Part B of the Act, and not to require that they do so, or imply that IDEA would be the source of the authority for granting hearing officers that role. If a State allows hearing officer's to award attorney's fees, requirements regarding training on attorneys fees would be a State matter.

Changes: Paragraph (b) has been revised to prohibit use of funds provided under Part B for related costs. The regulation has been amended to include all of the provisions of section 615(i)(3)(C)–(G) of the Act. The note following this section has been removed.

Child's Status During Proceedings (§ 300.514)

Comment: Although a few commenters agreed with the provision in § 300.514(c), many commenters objected to it. Section 300.514(c) states that if the decision in a due process hearing or administrative appeal agrees with the parents that a change of placement is appropriate, the decision must be treated as an agreement between the State or local agency and the parents for purposes of maintaining the child's placement pursuant to § 300.514(a). Commenters saw this provision as one-sided and suggested that it be limited to where there is agreement by all the parties. In the alternative, commenters suggested that the provision be deleted and that decisions as to whether a hearing officer's or review official's decision constitutes an agreement be left to the courts.

Commenters requested a definition of the term ''current placement,'' with some suggesting that the definition include the current location where the child receives services.

Some of the comments indicated confusion as to which proceedings are referenced in § 300.514. Commenters were unsure whether the regulation references only the administrative and judicial due process proceedings established by section 615 of the Act, or also the State complaint procedures established by §§ 300.660–300.662.

Commenters requested that when referring to parents in this regulation, students who have reached the age of majority also be referenced. Further clarification also was requested regarding a parent's right to remove his or her child from the current placement and place them elsewhere during the pendency of the applicable proceedings if the parent believes FAPE is not being provided.

Discussion: The provisions maintaining the child's current educational placement pending proceedings regarding a complaint is a right afforded to parents to protect children with disabilities from being subjected to a new program that parents believe to be inappropriate. The provisions are intended to apply only to the due process proceedings and the subsequent civil action, if any, brought under section 615 of the Act, and not to the State complaint procedures in §§ 300.660–300.662, which are authorized by the General Education Provisions Act. This position is consistent with the Department's prior interpretation.

It is important to note that these provisions would only apply where there is a dispute between the parent and the public agency that is the subject of administrative or judicial proceedings. If there is no such dispute that is the subject of a proceeding, then the placement may be changed and this section does not apply.

This section does not permit a child's placement to be changed by the public agency during proceedings regarding a complaint, unless the parents and agency agree otherwise. While the placement may not be changed unilaterally by the public agency, this does not preclude the parent from changing the placement at their own expense and risk. It is also important to note that this provision does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others, including, as appropriate to the circumstances, seeking injunctive relief from a court of competent jurisdiction. In addition, even where there is disagreement between the parents and the public agency, the provisions of § 300.521 still allow a hearing officer to change the placement of a child with a disability who is substantially likely to injure self or others to an appropriate interim alternative educational setting for not more than 45 days.

Paragraph (c) is based on long-standing judicial interpretation of the Act's pendency provision that when a State hearing officer's or State review official's decision is in agreement with parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals. See, *e.g., Burlington School Committee* v. *Dept. Of Educ.,* 471 U.S. 359, 371 (1985); *Susquentia School District* v. *Raelee S.,* 96 F.3d 78, 84 (3rd Cir. 1996); *Clovis Unified* v. *Office of Administrative Hearings,* 903 F.2d 635, 641 (9th Cir. 1990). Paragraph (c) of this section incorporates this interpretation. However, this provision does not limit either party's right to seek appropriate judicial review under § 300.512, it only shifts responsibility for maintaining the parent's proposed placement to the public agency while an appeal is pending in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is appropriate.

The term ''current placement'' is not readily defined. While it includes the IEP and the setting in which the IEP is implemented, such as a regular classroom or a self-contained classroom, the term is generally not considered to be location-specific. In addition, it is not intended that a child with disabilities remain in a specific grade and class pending an appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade.

There is no need to add a reference to children with disabilities who reach the age of majority in this regulation. The transfer of parental rights at the age of majority is discussed in another section of the regulations, § 300.517, and will not be referenced in every other section to which it applies.

There is also no need to address the parents' ability to change the child's placement unilaterally at their own expense since this issue is addressed in § 300.403.

Consistent with the general decision to remove all notes from these regulations, the note would be removed.

Changes: The note has been removed.

Surrogate Parents (§ 300.515)

Comment: Several commenters suggested that the regulation include clear procedures for terminating surrogate parents who do not appropriately fulfill their responsibilities and include in those procedures the consideration of the student's opinion. Relatedly, some commenters recommended that the regulation state that LEAs cannot impose sanctions or threaten sanctions if surrogate parents make decisions the LEA opposes.

There were also comments regarding the selection of surrogate parents. Some commenters asked that surrogates not be employees of private agencies who are involved in the education or care of the child since there is a potential conflict of interest where the public agency contracts with and pays the private agencies to provide services for the child. Another suggestion was that child welfare workers not be surrogate parents, but that foster parents be allowed, if qualified. One commenter agreed that representatives of the welfare system should not be surrogate parents but believed foster care representatives should also be barred. One commenter asked that the regulation require public agencies to assign surrogate parents designated by a parent, provided such persons meet the qualifications, thereby giving parents the right to voluntarily designate a surrogate parent and rescind such designation at any time.

Some comments also stated that § 300.19(b)(2) conflicts with § 300.515 because in § 300.515 the appointment of a surrogate parent is mandatory if the child is a ward of the State, regardless of whether the child has a foster parent who meets the ''parent'' criteria in § 300.19(b)(2). The comments recommended including an exception from the mandate of surrogate parent appointments for any ward of the State whose foster parent is a parent in accordance with § 300.19(b)(2).

Discussion: There is insufficient evidence of a wide-spread problem of irresponsible surrogate parents which would require regulatory procedures for termination. Therefore, the issue of the need for procedures for termination of surrogates is left to the discretion of States. There is also insufficient evidence of public agency retaliation against surrogate parents. Since there are other civil rights statutes and regulations that prohibit discrimination, including retaliation, against individuals who exercise their rights under Federal law, including the right of individuals to assist individuals with disabilities without retaliation or coercion, there is no need to address this issue in this regulation.

Proposed paragraph (c)(2)(i) of this section reflected the statutory requirement at section 615(b)(2) that a surrogate parent not be an employee of the SEA, LEA or any other agency that is involved in the education or care of the child. It is very important that the surrogate parent adequately represents the educational interest of the child, and not the interests of a particular agency. In the case of other governmental agencies, even agencies that are not involved in the education of the child, there is the possibility of a conflict between the interest of the child and those of the employee of the agency because some educational decisions will have an impact on whether an educational agency or some other governmental agency will be responsible for paying for services for the child. In situations where a child is in the care of a nonpublic agency that has no role in the education of the child, however, an employee of that agency may be the person best suited to serve as a surrogate for the child because of his or her knowledge of the child and concern for the child's well-being and would not, simply by virtue of his or her employment situation, have an interest that could conflict with the interest of the child. In such a case, that individual should not be prohibited from serving as a surrogate as long as he or she had no other interest that conflicts with the interest of the child and has knowledge and skills that will ensure adequate representation of the child.

Paragraph (a) of this section requires that the public agency ensure that the rights of the child are protected if the child is a ward of the State. Paragraph (b) sets out that the duty includes a determination of whether the child needs a surrogate parent and if so, the assignment of one. The proposed regulation at § 300.19(b)(2) has been renumbered at § 300.20 and now clarifies that the definition of a parent may include a foster parent unless State law prohibits it, and if certain other conditions are met. In situations where a child who is a ward of the State has a foster parent who meets the definition of parent in § 300.20 and the foster parent is acting as the parent, the public agency should determine if there is a need for a surrogate parent, and whether further steps are necessary to ensure that the rights of the child are protected. In most cases where the foster parent meets the definition of a parent and is acting as the parent, there would be no need to appoint a surrogate, unless the agency determined that in the particular circumstances of the case a surrogate was necessary to ensure that the rights of the child were protected.

Changes: Paragraph (c) has been amended to permit a public agency to appoint as a surrogate an employee of a nonpublic agency that provides only non-educational care to the child. Paragraph (d)(1) has been deleted. Paragraph (d)(2) has been redesignated as paragraph (d) and the reference to paragraph (d)(1) is deleted.

Transfer of Parental Rights at Age of Majority (§ 300.517)

Comment: There were several comments on the transfer of rights for incarcerated youths which requested clarification whether the transfer occurs regardless of age.

Commenters also requested clarification of what the transfer of rights to the child means for the parent, i.e., does the parent retain the right to any of the due process protections.

Commenters suggested that § 300.517 should refer to § 300.347(c) which deals with when and how students are to be notified of their impending transfer of rights. There was also a request for clarification regarding parental involvement in modifications to IEPs or placements when there is a bona fide security or compelling penological interest.

Commenters also requested guidelines for determining if a student cannot provide informed consent with respect

to his or her educational program. Some interpreted the proposed regulation as requiring a competency determination prior to every transfer, deemed this unreasonable, and proposed that notice to parents is sufficient. Some recommended that the IEP team make the decision of whether a competency assessment is required and appoint a surrogate when the team decides the child is not able to provide informed consent for his or her educational program. Several commenters asked why the term ''another appropriate individual'' was used instead of ''guardian or surrogate parent'' as defined in § 300.515.

Some commenters asked that the Department allow a State which doesn't have a law regarding transfer of rights at age of majority to implement an interim policy pending legislative change.

Commenters also recommended that an independent advocate, not a teacher or LEA administrator but who is paid by the LEA, be available for each student to whom rights have transferred, to be present at all IEP discussions when parents are not present so that coercion by the school is prevented.

Discussion: It is not necessary to delineate the specific parental rights that transfer under this section because the statute and regulations fully set out the rights afforded to parents under Part B. The statute and paragraph (a)(1) of this section allow States, under State law, to transfer all parental rights to children with disabilities who reach the age of majority, with the exception of the right to notice which is both retained by the parents and transfers to the student. For children with disabilities who are incarcerated in adult or juvenile Federal, State or local correctional institutions, the State, under State law, may transfer all parental rights, including the notice rights, at the age of majority.

The IEP provisions regarding notice prior to the age of majority, do not have to be explained or referenced in this section of the regulations. While the requirement in § 300.347(c) that beginning at least one year before the student reaches the age of majority under State law the IEP must include a statement that the student has been informed of the rights that will transfer to him or her upon reaching the age of majority, does relate to this regulation, it is separate and distinct from the notice provisions in § 300.517(a)(3) requiring notice to the parent and child at the time of transfer—when the child actually reaches the age of majority.

This regulation does not need to address specifically the right to parental participation in IEP meetings for youth with disabilities convicted as adult and incarcerated in adults prisons whose parental rights have not transferred at the age of majority. These individuals would have the same rights as other youth with disabilities whose parental rights have not transferred as set out in section § 300.345. There is also no further need to address IEP and placement requirements that do not apply to modifications of IEP or placement for youth with disabilities convicted as an adult and incarcerated in an adult prison because the provisions are already set out at § 300.311(c)(2).

The requirement in paragraph (a) of this section regarding State provision for transfers of parental rights at the age of majority under State law generally does not require a statutory change if the State already has a State law regarding age of majority that applies to all children (except in cases of incompetency). A State may not transfer rights at age of majority in the absence of a State law on age of majority that applies to all children, except those children determined incompetent under State law.

With regard to the transfer of rights in situations where the competency of an individual with a disability is challenged, currently, most States have laws, rules, and procedures that allow a general determination of incompetency for an individual with a disability who has reached the age of majority. These laws and procedures usually require a formal proceeding and provide for the appointment of a general guardianship where the individual is found not to be competent under the applicable legal standard. The transfer of the Part B parental rights under State law must be consistent with State competency laws, that is, where parental rights transfer to the individual at the age of majority, and the individual is found to be incompetent, the appointed guardian would exercise Part B rights pursuant to their guardianship. In some States, there may be additional laws and procedures that allow for a lesser determination of competency for specific purposes, such as competency for providing informed consent with respect to the individual's educational program.

The special rule at § 300.517(b) only applies to States who, under State law, allow for this lesser determination of competency—a determination of the ability to provide informed consent with respect to the educational program of the student. Under the provision in the special rule that specifies appointing ''the parent, or, if the parent is not available, another appropriate individual,'' a guardian or surrogate parent could be an appropriate individual to represent the educational interests of the student.

Changes: Paragraph (b) has been revised to make clear that it only applies if a State has a State mechanism lesser competency proceedings.

Discipline in general

(For a general overview of major changes in the discipline provisions from the NPRM to these final regulations, please refer to the preamble.)

Comment: Several commenters asked that the regulations include only the statutory language with respect to all provisions concerning discipline. The vast majority of commenters, however, asked that the regulations provide more specificity than the statute regarding discipline. In many cases, these commenters provided proposals for how the regulations should interpret the statute. Others asked that the regulations give schools the ability to deal differently with children with articulation problems and those with behavior disorders.

Discussion: Including only the statutory language on discipline in the final regulations, would not be helpful. The vast majority of the comments received concerning discipline demonstrate overwhelmingly the need to regulate in order to clarify the statutory language. To rely solely on the statutory language would encourage needless litigation. There is no statutory basis for treating children with disabilities differently under the discipline provisions because of the nature of their disability.

Change: None.

Authority of school personnel (§ 300.520)

Comment: A number of commenters were concerned about the provisions in the proposed regulations that required development of behavioral assessment plans and determinations regarding manifestation after the child had been removed for more than 10 school days in a school year because they believed that these responses should only be required if the removal constituted a ''change of placement.'' These commenters asked that the term ''change of placement'' be defined in the regulation as indicated in Note 1 to the proposed regulations, in order to incorporate what they saw as the law's intent to allow building-level administrators some discretion to temporarily remove a child from their current educational placement if necessary to prevent disruption or ensure the safety of other children. Many of these commenters asked that

the regulations clarify the distinction between removal of a student for disciplinary reasons and removal of a student for behavior management purposes.

Some commenters supported Note 1 as it clarified that schools continued to have the ability to remove children with disabilities from their current placement for limited periods of time when necessary, even though the child had previously been removed earlier that school year. Some commenters asked who is contemplated to be making the determination regarding a change in placement.

Some commenters proposed modifications to the change of placement standard described in Note 1 to this section to recognize that there could be circumstances when continued short term suspensions may be used without reconvening the IEP team if the IEP team has addressed the behavior through changes to the IEP or placement and agrees that removal from the child's current educational placement is an appropriate intervention.

Other commenters believed that the regulations should provide even more latitude to schools about when to convene an IEP meeting to review or develop a behavior assessment plan and conduct a manifestation determination, when for example, the behavior occurred repeatedly, or involved minor offenses. Some of these commenters thought that the IEP team should have the discretion to determine the need for a behavioral assessment or behavioral intervention plan on an individual basis.

Some commenters believed that paragraph (c) of the proposed regulations (and similar provisions in §§ 300.121 and 300.523(b)) exceed statutory authority by permitting school authorities to remove a child with disabilities from the child's current educational placement for up to 10 school days in a school year before the behavior assessment plan, services, or manifestation determination must be done. Many of these commenters indicated that any suspension is an indication that the child with a disability is having problems and the school should be required to initiate the behavioral assessment plan at the earliest indication of difficulty. For the same reasons, these commenters asked that the regulations not include references to suspensions without the provision of educational services.

Some commenters basically agreed with the position taken in paragraph (c) and §§ 300.121 and 300.523(b) but believed that the content of Note 2 should be strengthened by adding support for review of the IEP for any short suspension that in the judgment of the parent or other member of the IEP team, requires reconsideration of behavioral interventions or other IEP revisions. Some commenters noted that paragraph (c) needed further clarification, as school personnel cannot reasonably be expected to predict future conduct of a child.

Discussion: The obligation to conduct a functional behavioral assessment or to review an existing behavioral intervention plan is not linked in the statute only to situations that constitute a ''change of placement.'' As a policy matter, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement. In fact, IDEA now emphasizes a proactive approach to behaviors that interfere with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP team consider, as appropriate, and address in the child's IEP, ''strategies, including positive behavioral interventions, strategies, and supports to address the behavior.'' (section 614(d)(3)(B)(i)).

On the other hand, there is merit to the argument that schools should not have to repeatedly convene IEP team meetings to address the behavior of children who already have behavior intervention plans, unless there is a need. The position that services and the development of a behavioral assessment plan are not triggered if a child with disabilities is removed from his or her current placement for 10 school days or less in a given school year is based on the language of the statute at section 612(a)(1)(A) and section 615(k)(1)(B), as interpreted in light of the legislative history of the Act, which notes that the statute was designed to ''reinforce and clarify the understanding of Federal policy on this matter, which is currently found in the statute, case law, regulations, and informal policy guidance.'' (S. Rep. No. 105–17, p. 28; H.R. Rep. No. 105–95, p. 108 (1997)).

In light of the Department's longstanding position that children with disabilities could be removed from their current educational placement for not more than 10 consecutive school days without educational services, the 10 day in a school year window before the educational services and behavioral assessment plan are triggered is a reasonable interpretation of the statute. This interpretation gives school officials reasonable flexibility for dealing with minor infractions of school rules by children with disabilities, yet ensures that children with disabilities are not cut off from educational services and that their behavior is appropriately addressed.

In order to clarify the ability of school personnel to temporarily remove a child from the current educational placement when necessary to ensure the safety of other children or to prevent disruption of the learning environment, the concept of ''change of placement'' that was referred to in Note 1 to this section in the NPRM should be incorporated into the regulations. The Department has long interpreted the IDEA to permit schools to remove a child with a disability from his or her current placement when necessary, even though the child had previously been removed earlier that school year, as long as the removal does not constitute a ''change of placement.''

The ''change of placement'' description will also make clear that the new statutory language at section 612(k)(1)(A) of the Act regarding the authority of school personnel to remove children with disabilities for not more than 10 school days, to the same extent as nondisabled children, does not permit using repeated disciplinary removals of 10 school days or less as a means of avoiding the normal change of placement protections under Part B. Whether a pattern of removals constitutes a ''change of placement'' would be determined on a case by case basis by the public agency and subject to review through due process and judicial proceedings. The regulation concerning change of placement would only apply to removals for disciplinary reasons.

If a child who is being removed from his or her current educational placement has already been the subject of a special IEP team meeting to develop a behavioral intervention plan or review its implementation, the IEP team should not have to meet to review that plan as long as the team members individually review the plan, unless one or more of the team members believe that the plan needs to be modified. In this way, the IEP team will be monitoring the implementation of the behavioral intervention strategies in the IEP or behavioral intervention plan but would not have to repeatedly reconvene each time removals from the child's current placement are carried out.

In light of the comments received and the reasons previously discussed, proposed Note 2 would be deleted.

Comments concerning the timing of manifestation determinations, and changes made in response to those

comments are addressed in this attachment under § 300.523.

Change: A new section § 300.519 has been added regarding change of placement in the context of removals under §§ 300.520–300.529, reflecting concepts from proposed note 1. Section 300.520(a)(1) has been revised to clarify that more than one suspension each of which may be for up to 10 school days would be permitted in a school year, as long as repeated suspensions do not constitute a change of placement, and the removals are consistent with treatment of similarly situated children without disabilities. Paragraph (a)(1) of this section also has been revised to clarify the need to provide services when a child with a disability has been removed for more than 10 school days in a school year. Section 300.520(b) has been revised to require, when a child is first removed for more than 10 school days in a school year and for subsequent removals that constitute a change in placement, an IEP team meeting to develop a functional behavioral assessment plan and a subsequent behavioral intervention plan or to review an existing behavioral intervention plan and its implementation. Section 300.520(c) has been revised to specify that if the child is subsequently removed and that removal is not a change in placement, the IEP team does not have to meet to review the behavioral intervention plan unless one or more team members believes that modifications are needed to the plan or the plan's implementation. Proposed Notes 1 and 2 have been deleted.

Comment: A number of commenters had suggestions for clarifications of the terms used in paragraph (a). Some wanted the regulations to specify whether days of suspension includes days of in-school suspension, bus suspensions, or portions of a school day. Others asked whether an in-school suspension would be considered a part of the days of suspension if the student continued to receive the academic instruction called for in the student's IEP during that period. Others suggested that the term ''suspension'' be revised to specify that school personnel can order a short term suspension of 10 or fewer consecutive school days or cumulative days which may exceed 10 school days in a school year but do not constitute a change in placement.

Discussion: An in-school suspension would not be considered a part of the days of suspension addressed in paragraph (a) of this section as long as the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services specified on his or her IEP and continue to participate with nondisabled children to the extent they would have in their current placement. Portions of a school day that a child had been suspended would be included in determining whether the child had been removed for more than 10 cumulative school days or subjected to a change of placement under § 300.519.

Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation is a part of the child's IEP, a bus suspension would be treated as a suspension under § 300.520 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where all other services will be delivered. If the bus transportation is not a part of the child's IEP, a bus suspension would not be a suspension under § 300.520. In those cases, the child and his or her parents would have the same obligations to get to and from school as a nondisabled child who had been suspended from the bus. However, public agencies should attend to whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether bus behavior should be addressed in the IEP or behavioral intervention plan for the child.

It is important that both school personnel and parents understand that school personnel may remove a child with a disability from his or her current placement for not more than 10 school days at a single time, but that there is no specific limit on the number of days in a school year that a child may be removed. (See, discussion of § 300.121 regarding when services must be provided.) However, school authorities may not remove a child with disabilities from the child's current educational placement if that removal constitutes a change of placement under § 300.519, unless they are specifically authorized to do so under § 300.520(a)(2) (school personnel unilateral removal for weapons and drug offenses) or unless the parents of the child do not object to a longer removal or the behavior is determined to not be a manifestation of the child's disability. If a removal does constitute a change of placement under § 300.519 that is not permitted under § 300.520(a)(2), school personnel must follow appropriate change of placement procedures, including prior parent notice, and the right of the parent to invoke the ''stay-put'' rule of § 300.513.

Change: Paragraph (a)(1) of this section is revised to specify that school personnel may order removals of a child with a disability from the child's current placement for not more than 10 consecutive school days so long as the removal does not constitute a change in placement under § 300.519.

Comment: A number of commenters were concerned that the term ''carries'' in paragraph (a)(2)(i) is too narrow and wanted the regulation to also cover the child who was in possession of a weapon at school, including instances when the child obtained the weapon at school. Others thought that paragraph (a)(2)(i) should apply to situations when a child knowingly carries a weapon to school, similar to the standard in paragraph (a)(2)(ii) regarding knowing possession or use of illegal drugs.

Discussion: The statutory language ''carries a weapon to school or to a school function'' is ambiguous as to whether it includes instances in which a child acquires a weapon while at school. In light of the clear intent of Congress in the Act to expand the authority of school personnel to immediately address weapons offenses at school, the Department's opinion is that this language also covers instances in which the child is found to have a weapon at school that he or she obtained while at school.

Change: None.

Comment: A number of commenters asked for more clarification about the various provisions regarding removals from a child's current placement, suspensions of 10 days or less, 45-day placements, and, for children whose behavior is determined not a manifestation of their disability, other disciplinary measures, including the possibility of expulsion, related to one another. For example, some commenters asked for specificity about whether a child could be subject to a disciplinary suspension, including the 45-day interim alternative educational setting placements more than once in a school year.

Some commenters asked whether the behavior assessment plan and manifestation determination need to be done within the first 10 days of a 45-day placement. Some asked whether schools can keep children with disabilities in the 45-day placement even if the behavior is determined to be a manifestation of the child's disability, or even if program adjustments in the child's ''current placement'' are agreed on before the expiration of the 45-day placement.

Commenters also asked how the 45-day placement rules should be applied when the behavior leading to the removal occurs in the last few days of the school year. A few asked how 45-

day placements differ from any other removal for more than 10 days or whether 45-day placements should merely be considered exceptions to the ''stay put'' provision. Others also inquired about the total number of days that a child with disabilities could be suspended in a year.

Others asked for clarity about whether school districts could suspend beyond the 10 day and 45 day periods mentioned in this section and whether children with disabilities could ever be expelled. Some commenters asked that the regulations emphasize the optional nature of the ability to use the 45-day placement and encourage the return of children with disabilities to their regular educational placement at the earliest appropriate time.

Discussion: If parents and school personnel agree about a proposed change of placement for disciplinary reasons, the rules concerning the amount of time that a child with a disability may be removed from his or her educational placement in §§ 300.520 and 300.521 do not have to be used. However, services must be provided consistent with the requirements of § 300.121(a).

These regulations do not prohibit a child with a disability from being subjected to a disciplinary suspension, including more than one placement in a 45-day interim alternative educational setting in any given school year, if that is necessary in an individual case (*e.g.*, a child might be placed in an alternative setting for up to 45 days for bringing a weapon to school in the fall and for up to 45 days for using illegal drugs at school in the spring).

If a child engages in one of the behaviors identified in § 300.520(a)(2) (carrying a weapon to school or a school function or knowing possession or use of illegal drugs or selling or soliciting the sale of a controlled substance at school or a school function), the school may first remove the child for up to 10 consecutive school days (providing services as necessary under § 300.121(d)) while convening the IEP team to determine the interim alternative educational setting under § 300.522. At the end of that 10 day period, or earlier, if feasible, the child would be placed into the interim alternative educational setting for up to 45 days.

The placements contemplated under §§ 300.520(a)(2) and 300.521 (removal by hearing officer based on determination of substantial likelihood of injury in current placement) are specific exceptions to the obligation to maintain the child in the child's current placement if the parent disagrees with a proposed change of placement and therefore, may continue even if the child's behavior is determined to be a manifestation of the child's disability. The purpose of §§ 300.520(a)(2) and 300.521 placements is to enable school personnel to ensure learning environments that are safe and conducive to learning for all and to give those officials and parents the opportunity to determine what is the appropriate placement for the child.

Interim alternative educational settings under § 300.520(a)(2) are limited to 45 calendar days, unless extended under § 300.526(c) for a child who would be dangerous to return to the child's placement before the removal. The fact that school is in recess during a portion of the 45 days does not ''stop the clock'' on the 45 days during the school recess.

There is no specific limit on the total number of days during a school year that a child with disabilities can be suspended. In addition, as explained in more detail in the discussion under § 300.524, if a child's behavior is determined not to be a manifestation of the child's disability, the child may be disciplined in the same manner as nondisabled children, including suspension and expulsion, except that FAPE, consistent with § 300.121(d), must be provided.

The 45-day interim alternative educational settings are not mandatory. If the parents agree with school officials to a change in the child's placement there is no need to use a 45-day interim alternative educational setting. In some instances school officials or hearing officers may determine that a shorter period of removal is appropriate and that a child can be returned to his or her current educational placement at an earlier time.

Change: None.

Comment: A number of commenters asked for guidance regarding the terms in paragraph (b) regarding functional behavioral assessment, and behavioral intervention plan. Some asked that functional behavioral assessment should not be construed to be overly prescriptive. These commenters believed that behavioral assessments should be flexible so that the team can consider the various situational, environmental and behavioral circumstances involved.

Some commenters proposed that a functional behavioral assessment be defined as a process which searches for an explanation of the purpose behind a problem behavior, and that behavior intervention plan be defined as IEP provisions which develop, change, or maintain selected behaviors through the systematic application of behavior change techniques. Some commenters suggested that positive behavioral interventions and strategies should include strategies and services designed to assist the child in reaching behavioral goals which will enhance the child's learning and, as appropriate, the learning of others. Some asked whether a functional behavior assessment is an evaluation requiring parent consent before it is done. Others asked whether a behavioral assessment could be a review of existing data that can be completed at that IEP meeting. Some asked whether a behavioral intervention plan needed to be a component of a child's IEP, and the relationship of this to the positive behavioral interventions mentioned in the IEP sections of the regulations.

Discussion: In the interests of regulating only when necessary, no change is made regarding what constitutes a functional behavioral assessment, or a behavioral intervention plan. IEP teams need to be able to address the various situational, environmental and behavioral circumstances raised in individual cases. A functional behavioral assessment may be an evaluation requiring parent consent if it meets the standard identified in § 300.505(a)(3). In other cases, it may be a review of existing data that can be completed at the IEP meeting called to develop the assessment plan under paragraph (b)(1) of this section. If under § 300.346 (a) and (c), IEP teams are proactively addressing a child's behavior that impedes the child's learning or that of others in the development of IEPs, those strategies, including positive behavioral interventions, strategies and supports in the child's IEP will constitute the behavioral intervention plan that the IEP team reviews under paragraph (b)(2) of this section.

Change: None.

Comment: Some commenters stated that paragraph (b)(1) should not require the development of appropriate behavioral interventions within 10 days of removing a child from the current placement as it is operationally unworkable. Some commenters asked that the regulations also require that the IEP team determine whether an existing behavior plan has been fully implemented, and if not, take steps to ensure its implementation without delay. Other commenters stated that the term suspension'' in paragraph (b)(1) should be replaced with ''removal.''

Discussion: Paragraph (b)(1) in the NPRM was not intended to require the development of appropriate behavioral interventions within 10 days of

removing a child from the current placement. Instead, it was intended to require that the LEA implement the assessment plan and ensure that the IEP team, after that assessment, develops appropriate behavioral interventions to address the child's behavior and implements those interventions as quickly as possible. Because it is unlikely that these steps could occur at the same time, a change should be made to the regulations to clarify that the LEA convene an IEP meeting, within 10 business days of removing the child, to develop an assessment plan, and, as soon as practicable on completion of that plan, to develop appropriate behavioral interventions to address that behavior. This section also would be revised to clarify when the IEP team would have to meet in instances in which there is an existing behavioral intervention plan. The commenters are correct that the term ''removal'' should be used in paragraph (b)(1) rather than ''suspension'' because it applies to all disciplinary actions under § 300.520(a).

Change: Paragraph (b) has been amended by replacing ''suspension'' with ''removal'' and to specify that the LEA convene an IEP meeting to develop an assessment plan, and as soon as practicable on completion of that plan, to develop appropriate behavioral interventions to address that behavior.

Comment: Some commenters asked that the regulations permit school personnel, under § 300.520(a)(2), and hearing officers, under § 300.521, to remove for up to 45 school days as opposed to calendar days. Other commenters asked that the regulations use the term ''calendar days'' for all timelines in this section.

Some commenters asked that the regulations permit school personnel to remove to a 45-day interim alternative educational setting for an assault. Other commenters asked that the 45-day limitation not apply to behavior that is determined to be not a manifestation of the child's disability.

Discussion: As explained in detail in the discussion concerning the regulatory definition of ''day,'' the statute uses the term ''school day'' when that is intended. It also would be inappropriate to use ''calendar days'' for all timelines in this section as the statute uses the term ''10 school days'' when that is intended.

The statute does not authorize school personnel to remove children with disabilities to an interim alternative educational setting for 45 days in cases of an assault. However, under § 300.521, a public agency may ask a hearing officer to order a child removed to an interim alternative educational setting for not more than 45 days if maintaining the child in the current placement is substantially likely to result in injury to the child or to others.

In addition, if necessary, school officials can seek appropriate injunctive relief to move a child. The placements under §§ 300.520(a)(2) and 300.521 apply whether the behavior is or is not a manifestation of the child's disability under § 300.523. If the behavior is determined not to be a manifestation of the child's disability, the child may be subjected to the same disciplinary action as a nondisabled child (which could be a removal for more than 45 days) except that services must be provided consistent with § 300.121(d).

Change: None.

Comment: Some commenters asked that paragraph (d) of the regulations provide the complete definition of ''dangerous weapon'' and ''controlled substance.''

Discussion: It is not advisable to provide the complete statutory definitions of ''dangerous weapon'' and ''controlled substance'' in the text of the regulations as the statute ties these definitions to the content of other Federal law. If, for example, the Controlled Substances Act were to be amended to change the definition of ''controlled substance'' in section 202(c) of that Act, the Part B regulatory definition also would need conforming amendments. In addition, the definition of ''controlled substance'' in section 202(c) of the Controlled Substances Act is extensive and extremely detailed. The Department will make this information widely available through a variety of other means.

Change: None.

Authority of Hearing Officer (§ 300.521)

Comment: Several commenters stated that the hearing officer under this section, in order to deal with dangerous situations, must be able to immediately remove a child without the requirement of convening a hearing. A number of these commenters believed that the hearing officer under this section should be able to make a determination based on a review of available information presented by the LEA, much like an LEA requesting a temporary restraining order from a court. Other commenters asked that the regulations specify that the hearing officer must be impartial and qualified to assess the child's disability and the circumstances surrounding the removal.

Several commenters asked that the regulations explain that a school district has the right to seek injunctive relief, such as a temporary restraining order, when a student is a danger to self or others.

Discussion: The statute provides that the hearing officer must be able to determine that a public agency has demonstrated by substantial evidence, which is defined as beyond a preponderance of the evidence, that maintaining the child in the current placement is substantially likely to result in injury to the child or others. This evidentiary standard requires that the hearing officer weigh the evidence received from both parties, rather than just information presented by the public agency. Public agencies continue to have the right to seek injunctive relief from a court when they believe they have the need to do so. Hearing officers in expedited due process hearings must meet the same standards of impartiality and knowledgeability as other hearing officers under the Act.

Change: None.

Comment: Several commenters asked that paragraph (a) of this section be revised to specify that the injury to the child or others must be more than a minor injury. Others asked that the regulations not require that the child would be an imminent threat to the safety or health of other members of the school community before the child could be removed.

Several commenters requested that paragraph (c) be revised to require the hearing officer to determine, rather than consider, whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement. Other commenters asked that the regulations specify that if the hearing officer finds that the current placement is inappropriate, the hearing officer shall order that the current placement be made appropriate rather than ordering an interim alternative educational setting. Further, if the hearing officer finds that the public agency has not made reasonable efforts to minimize the risk of harm in the child's current placement, they urged, the hearing officer must order the public agency to make the reasonable efforts to minimize the risk of harm rather than ordering placement in an interim alternative educational setting.

Discussion: No changes will be made to the regulations regarding the amount of injury that would be substantially likely to result if the child is not removed. In addition, no changes will be made regarding a hearing officer's decision making. In fashioning appropriate relief, hearing officers will exercise their judgement in the context of all the factors involved in an individual case.

Change: None.

Comment: A number of commenters requested clarification of the term ''beyond a preponderance of the evidence.'' Others asked that the term be revised as the ''the preponderance of the evidence'' as that is the highest evidence standard in civil litigation.

Discussion: The phrase ''beyond a preponderance of the evidence'' is statutory.

Change: None.

Determination of Setting (§ 300.522)

Comment: A number of commenters asked that the regulations clarify the relationship between the authority of school personnel in § 300.520(a)(1) to order the removal of a child with a disability for not more than 10 school days, and the requirement in § 300.522 that the alternative educational setting be determined by the IEP team. These commenters noted that the school personnel need the authority to remove under § 300.520(a)(1) without input from the IEP team.

A number of commenters requested clarification on when the IEP team must make the determination of setting and where the child would be while that determination was being made, particularly for children with disabilities who already had been removed from their regular placement for 10 days during that school year. Some of these commenters noted that when a child is removed under §§ 300.520(a)(2) or 300.521 the alternative setting needs to be immediately available.

Some commenters question where the child would be while the hearing under § 300.521 is being held, noting that § 300.521(d) requires the hearing officer's determination include deciding whether the interim alternative educational setting meets the standards of § 300.522, and wondering when the IEP team would meet. Some commenters asked that the regulations make clear that a child with a disability can be removed from the child's current placement for up to 10 days before the IEP team would have to make the determination in § 300.522.

Some commenters stated that requiring the IEP team to determine the setting when a hearing officer removes a child exceeds the statute.

Other commenters thought that the provisions of § 300.522 are in conflict with the authority of school personnel to order removal under § 300.520.

Discussion: Under §§ 300.519 and 300.520(a)(1), school personnel have the authority to remove a child with disabilities for not more than 10 consecutive school days (to the same extent as for nondisabled children) except that the removal may not constitute a change of placement. School personnel need the ability to remove a child with a disability from the current educational placement under § 300.520(a)(1) and to provide educational services in some other setting without waiting for an IEP team to make a determination about that alternative educational setting in order to maintain a learning environment conducive to learning for all children.

At the same time there is a need to ensure that information about the child's special education needs and current IEP be brought to bear in decisionmaking about services to the child during short removals and for those short periods before the IEP team can meet to determine appropriate placement under § 300.520(a)(2) or a hearing officer determines the interim alternative educational setting under § 300.521. Therefore, a change should be made to § 300.522(a) to specify that the IEP team determines the interim alternative educational setting under § 300.520(a)(2).

A change to § 300.121(d) would specify that school personnel, in consultation with the child's special education teacher, determine the interim alternative educational setting for removals under § 300.520(a)(1)(removals by school personnel for 10 school days or less). A child whose behavior subjects him or her to an interim alternative educational setting under § 300.520(a)(2)(weapons or drugs) or § 300.521(substantial likelihood of injury), may first be removed by school personnel for not more than 10 consecutive school days, or until the removal otherwise constitutes a change of placement under § 300.519, and during that 10 day or less removal, services, as necessary under § 300.121(d), would be provided as determined by school personnel, in consultation with the child's special education teacher. This will ensure that the need of school personnel to be able to make these decisions swiftly is honored, while emphasizing the learning needs of the child in that removal period. While the child is in that 10 school day or less setting, the IEP team meetings and expedited due process hearings under §§ 300.522 and 300.521, respectively, can be conducted so that the IEP team or hearing officer, as the case may be, can determine the up to 45 day interim alternative educational setting.

When a hearing officer has determined that a child is substantially likely to injure self or others in his or her current placement and is ordering a 45 day interim alternative educational setting under § 300.521, the hearing officer is charged with determining whether the interim alternative educational setting meets the statutory requirements and not with selecting one that meets those requirements. Permitting the school personnel, in consultation with the child's special education teacher, to initially select and propose the interim alternative educational setting is less administratively cumbersome for school personnel than the scheme in the proposed regulation and helps ensure that there is no undue delay in placement. The review of the proposed placement by the hearing officer ensures that the setting will meet statutory standards, thus protecting the rights of the child. The hearing officer may revise or modify the proposed placement, or select some other placement as necessary to meet that statutory standard. Of course, in proposing an interim alternative educational setting, school personnel may rely on the judgments of the child's IEP team if they choose to do so. This position would be accomplished through the regulatory change to § 300.121(d) mentioned previously. The statute at section 615(k)(3)(A) is clear that when school personnel are removing a child for a weapons or drug offense, the IEP team determines the interim alternative educational setting.

Change: This section has been amended to specify that the alternative educational setting referred to in § 300.520(a)(2) is determined by the IEP team. Section § 300.521(d) has been revised to recognize that the hearing officer reviews the adequacy of the interim alternative educational setting proposed by school personnel who have consulted with the child's special education teacher.

Comment: A number of commenters suggested revisions to paragraph (b) to provide certain limitations on the services that must be provided in the interim alternative educational setting such as specifying that the setting must be one that is immediately available to students removed, the services on the child's current IEP will continue to the extent feasible, or the child will continue to participate in the general curriculum to the extent determined appropriate by the IEP team. Others urged that the regulations make clear that the interim alternative educational setting should not have to be a setting that can provide all the same level of courses or courses that are not a part of the core curriculum of the district (i.e., would not have to provide honors level courses, electives, advanced subject courses that are not part of the core

curriculum of the district) or are extracurricular activities and sports. Others asked about classes such as chemistry, shop or physical education that have specialized equipment or facilities. Some commenters noted that it would not be reasonable and would be prohibitively expensive and procedurally burdensome to require that interim alternative education settings provide the same courses as offered in regular schools. They argued that requiring that interim alternative educational settings include the same courses as in regular schools would discourage schools from taking appropriate measures to deal with weapons, drugs and children who are dangerous to themselves or others. Some commenters stated that they did not believe that the services required for students whose behavior is not a manifestation of their disability should be as extensive as those required for students whose behavior is determined to be a manifestation of their disability.

Some commenters asked that the regulations specify that services in the interim alternative educational setting must be provided by qualified personnel in a placement that is appropriate for the student's age and level of development. Others asked that the IEP written for the interim alternative educational setting should address the services and modifications that will enable the child to meet the child's current IEP goals in the alternative setting.

Discussion: The statute describes the services that must be provided to a child who has been placed in an interim alternative educational setting, which must be applied to removals under §§ 300.520(a)(2) and 300.521, and these standards, with a minor modification discussed later in this section, are reflected in § 300.522(b). The proposed regulation, at § 300.121(c), had indicated that the same standards should be applied to other types of removals as well, that is, removals that did not constitute a change in placement and long-term suspensions or expulsions under § 300.524 for behavior that is determined not to be a manifestation of a child's disability. However, as suggested by the comments received, there are reasons why what would be required for these other types of removals may be different than for 45 day interim alternative educational settings. Therefore, the regulation at § 300.121(d) would provide that for removals under §§ 300.520(a)(1) and 300.524, the public agency provides services to the extent necessary to enable the child to adequately progress in the general curriculum and advance toward achieving the goals set out in the child's IEP, as determined by school personnel, in consultation with the child's special education teacher, if the removal is under § 300.520(a)(1) or by the child's IEP team, if the removal is under § 300.524.

Under these rules, the extent to which instructional services need to be provided and the type of instruction to be provided would depend on the length of the removal, the extent to which the child has been removed previously, and the child's needs and educational goals. For example, a child with a learning disability who is placed in a 45 day placement will likely need far more extensive services in order to progress in the general curriculum and advance appropriately toward meeting the goals of the child's IEP than would a child who is removed for only a few days, and is performing at grade level. Because the services that are necessary for children with disabilities who have been removed for disciplinary reasons will vary depending on the individual facts of a particular case, no further specificity regarding those services is appropriate.

What constitutes the general curriculum is determined by the SEA, LEA or school that the student attends, as appropriate under State law. In some cases, honors level classes or electives are a part of the general curriculum, and in others they may not be. With regard to classes such as chemistry or auto mechanics that generally are taught using a hands-on component or specialized equipment or facilities, and that are considered to be a part of the general curriculum, there are a variety of available instructional techniques and program modules that could be used that would enable a child to continue to progress in the general curriculum, although the child is not receiving instruction in the child's normal school or facility. However, in order to assist in clarifying that a school or district does not have to replicate every aspect of the services that a child would receive if in his or her normal classroom, a change would be made to refer to enabling the child to continue to ''progress in'' the general curriculum, rather than ''participate in'' the general curriculum.

Changes: Paragraph (b) has been revised to apply to removals under §§ 300.520(a)(2) and 300.521. Paragraph (b)(1) has been revised to refer to enabling the child to continue to ''progress in'' the general curriculum. Language has been added to § 300.121(d) to provide that for a child who has been removed under § 300.520(a)(1) or § 300.524, the public agency provides services to the extent necessary to enable the child to adequately progress in the general curriculum and advance toward achieving the goals set out on the child's IEP, as determined by school personnel in consultation with the child's special education teacher if the removal is under § 300.520(a)(1) or by the child's IEP team if the removal is under § 300.524.

Comment: Several commenters asked that the statutory language in paragraph (b)(2) requiring that the interim alternative educational setting address the child's behavior ''so that it does not recur'' be replaced with language requiring the LEA to develop a program that attempts to prevent the inappropriate behavior from recurring.

Other commenters asked that a note be added to emphasize that the interim alternative educational setting be designed to ensure FAPE and to evaluate the behavior, the IEP services provided, and the previous placement and to develop an IEP that will reduce the recurrence of the behavior. Some commenters asked that the reference to other behavior in this paragraph be rephrased to limit it to other current relevant behavior. Others asked that the reference to days in a given school year be removed.

Discussion: In order to provide additional clarity on this point, a change should be made to specify that those services and modifications are designed to prevent the inappropriate behavior from recurring. In light of the changes previously discussed that limit the application of this section to removals under §§ 300.520(a)(2) and 300.521, the reference to other behavior would be removed, as these are now addressed in § 300.121(d).

Change: Paragraph (b)(2) has been revised to clarify that it applies to removals under §§ 300.520(a)(2) and 300.521 and to specify that the services and modifications to address the behavior are designed to prevent the behavior from recurring.

Comment: A number of commenters requested that the regulations specify that home instruction could not be used as an interim alternative educational setting. Others asked that the regulations clarify that an interim alternative educational placement may be any placement option, including, but not limited to home instruction. Others asked for clarification of when home instruction would be an appropriate placement for a child who is subject to disciplinary action. Some commenters asked that the regulations specify that home instruction and independent study would not generally be an interim

alternative educational setting. Others asked that home instruction be prohibited as an interim alternative educational setting unless the parents agree. Some commenters asked for guidance on what could be considered an appropriate interim alternative educational setting for rural or remote areas where there is only one school and no other appropriate public facility.

Discussion: Whether home instruction would be an appropriate alternative educational setting under § 300.522 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from their regular placement, and include consideration of the child's needs and educational goals. (The proposed note following § 300.551 regarding home instruction would be deleted.) In general, though, because removals under §§ 300.520(a)(2) and 300.521 will be for periods of time up to 45 days, care must be taken to ensure that if homebound instruction is provided for removals under § 300.522, the services that are provided will satisfy the requirements for a removal under § 300.522(b).

Change: None.

Comment: Some commenters asked that a provision be added to § 300.522 to specify that a hearing officer considering an interim alternative educational setting may modify the setting determined by the IEP team to meet the requirements of paragraph (b) of this section.

Discussion: Hearing officers have the ability to modify the interim alternative educational setting that has been proposed to them as necessary to meet the standards of enabling the child to continue to participate in the general curriculum, continue to receive those services and modifications that will enable the child to meet the goals on the child's current IEP and include services and modifications designed to address the behavior so that it does not recur. As previously explained, these final regulations do not require an IEP team to propose an interim alternative educational setting to a hearing officer under § 300.521, although school districts are encouraged to use the child's IEP team to make decisions about the interim alternative educational setting that is proposed to the hearing officer.

Change: None.

Manifestation Determination Review (§ 300.523)

Comment: A number of commenters expressed concern about paragraph (b) of this section. On the one hand, a number of the commenters asked that the reference to ''in a given school year'' be struck so that the provision would permit no manifestation determination review whenever the removal did not amount to a change of placement. On the other hand, other commenters thought there was no basis in the statute for any exception, and that a manifestation review would need to be conducted whenever discipline was contemplated for a child with a disability. Some commenters asked that the exception be expanded to include situations when the child's IEP includes the use of short term suspensions as an appropriate intervention, or where the IEP team has otherwise addressed in the IEP the behavior that led to the removal. Some commenters stated that paragraph (a)(1) should refer to procedural safeguards under § 300.504 rather than procedural safeguards under this section. Other commenters noted that advance notification of disciplinary action is unrealistic and that the regulations should note that fact. Others asked that the regulations specify that prior written notice was not required.

Discussion: A manifestation determination is important when a child has been removed and that removal constitutes a change of placement under § 300.519. If a removal is a change of placement under § 300.519, a manifestation determination will provide the IEP team useful information in developing a behavioral assessment plan or in reviewing an existing behavioral intervention plan under § 300.520(b). It will also inform determinations of whether or not a public agency may implement a disciplinary action that constitutes a change of placement for a child, other than those provided for in §§ 300.520(a)(2) and 300.521. Requiring a manifestation determination for removals for less than 10 consecutive school days that are not a change of placement under § 300.519, would be of limited utility and would impose unnecessary burdens on public agencies as the determination often would be made after the period of removal was over. Furthermore, limiting manifestation determination to removals that constitute a change of placement under § 300.519 is consistent with the statutory language of section 615(k)(4)(A).

However, if a child is being suspended for subsequent short periods of time, parents can request an IEP meeting to consider whether the child is receiving appropriate services, especially if they believe that there is a relationship between the child's disability and the behavior resulting in those suspensions. Public agencies are strongly encouraged to grant any reasonable requests for IEP meetings. Functional behavioral assessments and behavioral intervention plans are to be completed in a timely manner whether required under § 300.520(b) or otherwise determined appropriate by the child's IEP team (see § 300.346(a)(2)(i)). In addition, if a child is subsequently suspended for short periods of time, a parent or other individual could question whether a change of placement, which would require a manifestation determination, has occurred because of an alleged pattern of removals.

For clarity, a change should be made to refer to the procedural safeguards notice under § 300.504. Paragraph (a)(1) of this section does not require prior written notice. It does require notice to parents no later than the date on which the decision to take the action is made. To that extent, it constitutes a limited exception to the requirement to provide prior written notice in § 300.503. Other removals that do not constitute a change of placement do not require prior written notice.

Change: Paragraph (a) of this section has been revised to specify that the manifestation determination review is done regarding behavior described in §§ 300.520(a)(2) and 300.521 or any removal that constitutes a change of placement under § 300.519. Paragraph (a)(1) of this section has been amended to require that parents be provided notice of procedural safeguards consistent with § 300.504. Paragraph (b) has been removed.

Comment: A number of commenters requested clarification of the term ''other qualified personnel'' as used in proposed paragraph (c) of this section. Some of these commenters asked that the regulations include language like that in the note following § 300.344 that in the case of a child whose behavior impedes the learning of the child and others, the IEP team should include someone knowledgeable about positive behavioral strategies and supports. Others asked that the term not be interpreted as including only school personnel but should include persons familiar with the child and the child's disabilities, such as the child's treating physician. Others wanted the regulations to specify that the team include persons who are fully trained and qualified to understand the child's disability. Many asked that term also be added to references to the IEP team in proposed paragraphs (d), (e) and (f) of this section. Some commenters asked that proposed paragraph (c) clarify that the manifestation determination needs

to be made at an IEP meeting, as some districts are not holding IEP team meetings for this purpose.

Discussion: The language regarding the IEP team and other qualified personnel is taken directly from the statute. The term ''other qualified personnel'' may include individuals who are knowledgeable about how a child's disability can impact on behavior or on understanding the impact and consequences of behavior, and persons knowledgeable about the child and his or her disabilities. For the sake of clarity, references to the IEP team in paragraphs (c) and (d) of this section should be expanded to include ''and other qualified personnel.'' In order to clarify that the manifestation determination review is done in a meeting, a change should be made to paragraph (b). This review involves complex decision making that will be significantly different from the very limited review that is done under § 300.520(b)(2) if no modifications are needed to a child's behavioral intervention plan.

Change: Redesignated paragraph (b) has been revised to specify that the manifestation determination review is conducted at a meeting. Redesignated paragraphs (c) and (d) have been amended by adding ''and other qualified personnel'' after ''IEP team'' each time it is used.

Comment: Several commenters were concerned that proposed paragraph (d)(2)(ii) and (iii) put schools at a significant disadvantage by having to prove the negative—that disability did not impair the ability of the child to understand the impact and consequences of the behavior and that disability did not impair the child's ability to control behavior. Other commenters asked that the review process also include consideration of any unidentified disability of the child and the antecedent to the behavior that is subject to discipline and permit record expungement if it is later determined that the child did not commit the act that is the subject of the manifestation determination.

Some commenters stated that proposed paragraph (e) created too rigid a standard and asked that it be modified to give districts more leeway if a mistake has been made.

Discussion: The language in paragraphs (c)(2)(ii) and (iii) is taken directly from the statute. Given that the review process includes consideration of all relevant information, including evaluation and diagnostic results, information supplied by the parents, observations of the child and the child's current IEP and placement, the review could include consideration of a previously unidentified disability of the child and of the antecedent to the behavior that is subject to discipline. If it is later determined that the child did not commit the act that is subject to discipline, the question of record expungement would be handled the same way such matters are addressed for nondisabled children.

The interpretation in paragraph (d) on how the manifestation determination is made, using the standards described in paragraph (c), is based on the explanation of the decision process in the congressional committee reports on Pub. L. 105–17. Those reports state that the determination described in § 300.523(d):

> . . . recognizes that where there is a relationship between a child's behavior and a failure to provide or implement an IEP or placement, the IEP team must conclude that the behavior was a manifestation of the child's disability. Similarly, where the IEP team determines that an appropriate placement and IEP were provided, the IEP team must then determine that the remaining two standards have been satisfied. This section is not intended to require an IEP team to find that a child's behavior was a manifestation of a child's disability based on a technical violation of the IEP or placement requirements that are unrelated to the educational/behavior needs of the child. (S. Rep. No. 105–17, p. 31; H. Rep. No. 109–95, pp. 110–111 (1997))

In light of the general decision to remove all notes from these final regulations, however, Note 1 should be removed.

Change: Note 1 has been removed.

Comment: Many commenters asked that the content of the first sentence of Note 2 be integrated into the regulations. The commenters were divided, however, over the second sentence of Note 2. Some supported the statement in the second sentence of the note, others wanted the sentence to be revised to specify that children with disabilities who have been placed in 45 day placements under §§ 300.520 and 300.521 must be returned to their regular placement if their behavior is determined to be a manifestation of their disability because of the principle that children with disabilities may not be disciplined for behavior that is a manifestation of their disability.

Still others wanted the sentence revised to indicate that changes to the child's IEP or placement or the implementation of either ''could'' as opposed to ''often should'' enable the child to return to the regular placement. Other commenters asked that the second sentence to Note 2 be removed as they believed that it was inconsistent with the authority granted in §§ 300.520 and 300.521 to change the placement of a child with a disability to an interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days. Other commenters asked that the regulations make clear that if behavior is a manifestation of the child's disability, disciplinary action cannot be taken against the child.

Discussion: For clarity, the regulation should specify that if the behavior is determined to be a manifestation of the child's disability, the public agency must take immediate steps to remedy any deficiencies found in the child's IEP or placement or their implementation. It would be inconsistent with the public agency's obligation to ensure the provision of FAPE to children with disabilities to fail to take appropriate action to correct identified deficiencies in a child's IEP or placement or the implementation of either.

The 45-day placements in §§ 300.520(a)(2), 300.521 and 300.526(c) are exceptions to the general rule that children with disabilities may not be disciplined through a change of placement for behavior that is a manifestation of their disability. If a child has been placed in a 45-day placement under one of these sections and his or her behavior is determined to be a manifestation of the disability under § 300.523, it may be possible to return the child to the current educational placement before the expiration of the up to 45-day period by correcting identified deficiencies in the implementation of a child's IEP or placement. However, public agencies are not obliged to return the child to the current placement before the expiration of the 45-day period (and any subsequent extensions under § 300.526(c)) if they do not choose to do so.

Consistent with the general decision to remove all notes from these final regulations, Note 2 would be removed.

Change: A new paragraph has been added to clarify that if deficiencies are identified in the child's IEP or placement or in their implementation, the public agency must act to correct those deficiencies. Note 2 has been removed.

Comment: Some commenters asked that the regulations provide distinctions between the types of services that must be provided in interim alternative educational settings when behavior is and is not a manifestation of the child's disability. For children whose behavior is not a manifestation of their disability, these commenters asked that FAPE be

defined as the LEA's ''core curriculum'' (the basic courses needed to fulfill high school graduation requirements) unless the IEP team determined that some more extensive services are required, so that it would be clear that the LEA would not have to duplicate every possible course offering at the alternative site. The commenters asked that this rule also apply to the services provided to children who have properly been long-term suspended or expelled for behavior that is determined not to be a manifestation of disability.

For children whose behavior is determined to be a manifestation of disability, these commenters asked for clarification that an IEP team can still take disciplinary action, if the IEP team feels that providing consequences is appropriate. In addition, they asked that the regulations make clear that an IEP team can change a student's placement for behavior that is a manifestation of the disability, if taking such action would be appropriate and consistent with the student's needs.

Discussion: A manifestation determination is necessary to determine whether the placement for a child with a disability can be changed over the objections of the child's parents through a long-term suspension (other than the 45-day placement addressed in §§ 300.520, 300.521 and 300.526(c)) or an expulsion. However, there is no basis in the statute for differentiating the services that must be provided to children with disabilities because their behavior is or is not a manifestation of their disability. (See discussion of comments for §§ 300.121 and 300.522 for further discussion about services during periods of disciplinary removal).

Under section 504 of the Rehabilitation Act of 1973, if the behavior is a manifestation of a child's disability, the child cannot be removed from his or her current educational placement if that removal constitutes a change of placement (other than a 45 day placement under §§ 300.520(a)(2), 300.521, and 300.526(c)), unless the public agency and the parents otherwise agree to a change of placement. If the behavior is related to the child's disability, proper development of the child's IEP should include development of strategies, including positive behavioral interventions, strategies and supports to address that behavior, consistent with §§ 300.346(a)(2)(i) and (c). If the behavior is determined to be a manifestation of a child's disability but has not previously been addressed in the child's IEP, then the IEP team must meet to review and revise the child's IEP so that the child will receive services appropriate to his or her needs. Implementation of the behavioral strategies identified in a child's IEP, including strategies designed to correct behavior by imposing consequences, is appropriate under the IDEA and section 504, even if the behavior is a manifestation of the child's disability. However, if a child's IEP includes behavioral strategies to address a particular behavior of the child, the appropriate response to that behavior almost always would be to use the behavioral strategies specified in the IEP rather than to implement a disciplinary suspension. A change in placement that is appropriate and consistent with the child's needs may be implemented subject to the parent's procedural safeguards regarding prior notice (§ 300.503), mediation (§ 300.506), due process (§§ 300.507–300.513) and pendency (§ 300.514).

Change: None.

Comment: Several commenters noted that a manifestation review should not be required prior to determining punishment for incarcerated students because prison disciplinary infractions raise bona fide security and compelling penological interests that are outside the purview of the education staff. However, commenters noted that a manifestation review for these students may be useful in developing appropriate behavior interventions.

Discussion: Section 614(d)(6)(B) of the Act provides that for children with disabilities who are convicted as adults under State law and incarcerated in an adult prison, the child's IEP team may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated. (See also § 300.311(c)(1)). A manifestation determination would still be required for these individuals, in the instances specified in paragraph (a) of this section.

Change: None.

Comment: Several additional notes were proposed. Several commenters asked that a note be added to clarify that when a student with disabilities has been properly expelled, the student does not have to petition for readmission when the period of expulsion ends as the school system must accept and serve the student in its schools. Others asked for a note specifying that under section 504 of the Rehabilitation Act children with disabilities may not be disciplined for behavior that is a manifestation of their disability, and that prior to taking any punitive action against a child with a disability, appropriate personnel must determine that the behavior in question is not a manifestation of the child's disability.

Discussion: No new notes will be added. All notes are being removed from these final regulations. Whether a student who has been properly expelled must petition for readmission when the period of expulsion ends generally will depend on how the public agency deals with children without disabilities who return to school after a period of expulsion. However, public agencies are reminded that for children with disabilities, they have an ongoing obligation to make a FAPE available, whether the child is expelled or not. Under Section 504 of the Rehabilitation Act of 1973, children with disabilities may not be disciplined for behavior that is a manifestation of their disability if that disciplinary action constitutes a change of placement. That principle is consistent with the changes made in this section.

Change: None.

Determination That Behavior Was Not Manifestation of Disability (§ 300.524)

Comment: Some commenters asked that the regulations make clear that if the behavior was not related to the child's disability the discipline could include long-term suspensions and expulsions. Others asked that the regulations clarify whether discipline would be limited to the 45-day interim alternative educational placement or would be the same disciplinary measures as for nondisabled students as long as FAPE is provided and IEP services continued in another setting. Others thought that the regulation should specify that no suspension or expulsion could be for more than 45 days. Some commenters asked for clarification of what would constitute an acceptable alternative setting for children whose behavior is determined to not be a manifestation of their disability.

Several commenters requested that the regulations delete the provisions of paragraph (c) of this section concerning placement pending a parent appeal of a manifestation determination and the note following, which addresses paragraph (c). Others stated that the regulations should specify that if parents challenge a manifestation determination, the child should remain in the alternative educational setting until the resolution of that challenge. Still others asked that the note mention that under § 300.514, placement could change if the parent and agency agreed to that other placement.

Discussion: Under this section, if a determination is made consistent with § 300.523 that a child's behavior is not

a manifestation of his or her disability, the child may be subject to the same disciplinary measures applicable to nondisabled children, including long-term suspensions and expulsions, except that FAPE must be provided consistent with section 612(a)(1) of the Act. In these instances, the disciplinary removal from a regular placement could be as long as the disciplinary exclusion applied to a nondisabled child, and need not be limited to a 45-day interim alternative educational placement, except that appropriate services must be provided to the child. To make the point more clearly that if the behavior is determined not to be a manifestation of the child's disability, that child may be subjected to long-term suspension and expulsion with appropriate services. To clarify what would constitute an acceptable alternative setting for a child if the child's behavior is determined to not be a manifestation of his or her disability, the reference in paragraph (a) of this section has been changed to refer to § 300.121(c), which implements that statutory provision.

Section 615(j) of the Act provides that the only exceptions to the ''pendency'' rule (§ 300.514) are those specified in section 615(k)(7) of the Act, concerning placement during parent appeals of 45-day interim alternative educational placements, which is implemented by § 300.526. Paragraph (c) of this section merely reflects that statutory arrangement. Section 300.526 governs a child's placement if a parent challenges a manifestation determination while a child is in a 45-day interim alternative educational placement under §§ 300.520(a)(2) or 300.521. Section 300.514 makes clear that placement may change if the agency and parent agree on an alternative placement while a due process hearing is pending on other issues.

Changes: The reference to section 612(a)(1) of the Act in paragraph (a) is replaced with a reference to § 300.121(c), paragraph (c) is revised to refer to the placement rules of § 300.526, and the note is removed.

Parent Appeal (§ 300.525)

Comment: Some commenters asked that the regulations specify that parents must request a hearing in writing under this section. Other commenters asked that the regulations make clear that any hearing requested under this authority must be expedited, rather than suggesting that only those hearings when the parent requests an expedited hearing.

Some commenters wanted the regulations to reflect that mediation was an alternative to the expedited hearing procedure and encourage parents to seek mediation before an expedited hearing. Some asked that the regulations make clear that a parent's request for an expedited hearing would not apply to removals for less than 10 days and would not negate the discretion of school districts to use alternative judicial remedies, such as temporary restraining orders. Some commenters noted that paragraph (a)(1) of this section should be revised to apply only to placements made pursuant to the discipline provisions of the Act, and not other placement issues under the Act.

Several commenters asked that proposed paragraph (b)(2) of this section be revised to make clear that the standard of § 300.521 that is to be applied to 45-day placements under § 300.520(a)(2) is the ''substantial evidence'' standard and does not include the ''substantially likely to result in injury'' test or other program factors in § 300.521, so as not to damage the new ability of school districts to move students for up to 45 days for certain offenses related to weapons and drugs.

Discussion: The statute does not specify that parents request a hearing in writing under the appeal procedures in this section. The statute provides for expedited hearings in three circumstances, and those are reflected in §§ 300.521, 300.525, and 300.526. Mediation is always encouraged as an alternative to a due process hearing, and § 300.506(a) makes clear that mediation must be available whenever a hearing is requested under the provisions of §§ 300.520–300.528. Under the statute, it seems clear that a parent's right to an expedited hearing is limited to placements pursuant to the discipline provisions of the Act and not to other placement issues, such as disputes about the adequacy of a child's current placement (unless raised in the context of a manifestation issue).

In addition, since the statute refers to decisions regarding placement, rather than to disciplinary actions, a parent's right to an expedited hearing is limited to disciplinary situations involving a change of placement, which would occur if a child were removed from the child's current placement for more than 10 school days at a time or if there were a series of removals from the child's current educational placement in a school year as described in § 300.519. A parent's request for an expedited due process hearing does not prevent a school district from seeking judicial relief, through measures such as a temporary restraining order, when necessary.

The provisions of paragraph (b) of this section are statutory. Section 615(k)(6)(B)(ii) does not refer solely to the ''substantial evidence'' test in section 615(k)(2)(A), but to all the ''standards'' in section 615(k)(2)(§ 300.521 of these regulations).

Changes: Paragraph (a)(1) has been changed to refer to any decision regarding placement under §§ 300.520–300.528.

Placement During Appeals (§ 300.526)

Comment: Several commenters requested that paragraph (a) of this section be amended by specifying that a parent's appeal of a hearing officer decision must be heard by another hearing officer. Some commenters thought that LEAs should not be required to seek expedited hearings for students that remain a danger after 45 days and sought a simplified procedure for extensions of the 45-day placement.

Others thought that the possibility of an extension of an interim alternative educational placement because a child remains dangerous should be limited to a one-time extension that would require the hearing officer to determine that there were no programmatic changes, related services or supplemental aids or services that could be used to mitigate the dangerousness of the original placement. These commenters thought that any further efforts to keep the student in an alternative placement should be heard by a court. Some commenters asked that the note be deleted or modified by requiring, for example, that for an extension the hearing officer consider whether the school district has created delays or otherwise not acted in good faith. A few commenters asked that any time an agency sought to extend an interim alternative education placement because of continued dangerousness, the agency first conduct a formal evaluation of the child.

Discussion: It is not necessary to change the regulation to specify that a parent's appeal of a hearing officer's decision must be heard by another hearing officer, as it would violate the basic impartiality requirement of § 300.508(a)(2) to permit a hearing officer to hear the appeal of his or her prior decision. Under paragraph (b) of this section, unless shortened as the result of a hearing officer's decision consistent with paragraph (a) of this section, a child would remain in the interim alternative educational setting pursuant to §§ 300.520(a)(2) or 300.521 for the period of the exclusion (which may be up to 45 days).

If the public agency proposes to change the child's placement at the end

of that interim alternative educational placement and the child's parents request a due process hearing on that proposed change of placement, the child returns to the child's placement prior to the interim alternative educational setting at the end of that interim placement, except as provided in paragraph (c) of this section. The expedited hearing procedure set forth in paragraph (c) of this section is drawn from the statute, which contemplates the same standards for these expedited hearings as for those under § 300.521.

There is no statutory limit on the number of times this procedure may be invoked in any individual case, and none is added to the regulation. If, after a 45-day extension of an interim placement under paragraph (c) of this section, an LEA maintains that the child is still dangerous and the issue has not been resolved through due process, the LEA may seek subsequent expedited due process hearings under paragraph (c)(1) of this section. However, in light of the decision to remove all notes from the regulations, the note would be removed.

Changes: A new paragraph (c)(4) has been added to make clear that the procedure in paragraph (c) may be repeated, if necessary. The note has been removed.

Protection for Children not yet Eligible for Special Education and Related Services (§ 300.527)

Comment: A number of commenters expressed concern that the statutory language that was reflected in paragraph (b) of this section was too broad and thought that reasonable restrictions should be added so that the issue of whether a ''basis of knowledge'' existed would not have to be litigated for almost any child who was subjected to disciplinary action.

With respect to paragraph (b)(1), some commenters requested that written parent concerns should be addressed to the director of special education, other special education personnel of the agency, or the child's teacher rather than to noninstructional personnel or personnel not normally charged with child find responsibilities. Other commenters asked that paragraph (b)(1) make clear that the parental expression of concern must be more than a casual observation or vague statement and must describe behavior indicative of a disability or reflect the need for a special education evaluation. Other commenters asked for specificity about how the determination about parents' English literacy would be determined and asked that parental illiteracy in English be rephrased as being unable to write.

Some commenters asked that paragraph (b)(2) clarify the type, severity, or degree of behavior or performance that would demonstrate the need for services under the Act. For example, some asked that the behavior or performance of the child would have to include characteristics consistent with a category of disability under § 300.7 of the regulations. Others asked that this provision be revised to require observation and documentation of the child's performance or behavior demonstrating the need for special education services by personnel who regularly work with the child.

Some commenters requested that various sections of paragraph (b) be time-limited to actions within the past year. Others asked that all of paragraph (b) be limited to actions that have occurred within the preceding two school years.

With respect to paragraph (b)(4) of this section, many commenters asked that the regulations make clear that casual communications between agency personnel would not meet this standard. Some thought that the agency personnel covered by this provision should be limited to those providing regular or special education to the child reporting concern to agency personnel who are normally responsible for initiating the special education evaluation process. Others asked that expressions of concern by appropriate agency personnel be a written expression of the child's need for a special education evaluation. Some noted that without the addition of reasonable limitations, this provision would undermine responsible efforts, such as pre-referral strategies, to limit identification of children for special education.

Some commenters asked that paragraph (b) make clear that an agency would not be considered to have a ''basis of knowledge'' merely because a child is receiving services under some other program such as Title 1 of the Elementary and Secondary Education Act, a State- or locally-developed compensatory education program, or consistent with Section 504 of the Rehabilitation Act of 1973. Others asked that the regulations specify that if an evaluation has been done and a child found ineligible for special education, that evaluation and determination would not constitute a ''basis of knowledge'' under paragraph (b). Others asked that agencies be able to demonstrate that they responsibly addressed an expression of concern and concluded that the available data were sufficient to determine that there was no reason to evaluate the child.

Discussion: In light of these comments, some changes would be made to paragraph (b) of this section. With respect to paragraph (b)(1) of this section, it is important to keep in mind that child find is an important activity of school districts under the Act and all of the staff of a school district should be at least aware enough of this important school function that, whatever their role in the school, if they receive a written expression of concern from a parent that a child is in need of special education and related services, a referral to appropriate school child find personnel should be made. Parents should not be held accountable for knowing who in a school is the proper person to contact if they are concerned that their child might need special education. On the other hand, the statute makes clear that the parental expression of concern must include enough information to indicate that their child is in need of special education and related services. The statutory provision expects that parents provide their expressions of concern in writing if they are able to and does not mention a particular language. Rather than refer to illiteracy; which may have a variety of interpretations, the regulations should refer to the parent not knowing how to write.

In paragraph (b)(2) of this section, the behavior or performance of the child sufficient to meet this standard should be tied to characteristics associated with one of the disability categories identified in the definition of child with a disability in order to remove unnecessary uncertainty about the type, severity, or degree of behavior or performance intended. Child find is an important function of schools and school districts.

School personnel should be held responsible for referring children for evaluation when their behavior or performance indicates that they may have a disability covered under the Act. Limiting paragraph (b)(2) to instances in which personnel who regularly work with the child have recorded their observation of a child's behavior or performance that demonstrates a need for special education would inappropriately omit those situations in which public agency personnel should have acted, but failed to do so.

Requested changes regarding time limitations on the standards in paragraph (b) are not adopted. However, if as a result of one of the forms of notice identified in this paragraph, a public agency has either determined that the child was not eligible after conducting an evaluation or determined that an

evaluation was not necessary, and has provided appropriate notice to parents of that determination consistent with § 300.503, the public agency would not have a basis of knowledge under this paragraph because of that notice. For example, if as the result of a parent request for an evaluation, a public agency conducted an evaluation, determined that the child was not a child with a disability, and provided proper notice of that determination to the parents, the agency would not have a basis of knowledge because of that parent request for an evaluation.

If the parents disagreed with the eligibility determination resulting from that evaluation, they would have the right to request a due process hearing under § 300.507. If the parents requested a hearing, the protections of this part would apply. If they did not request a hearing and the child subsequently engaged in behavior that violated any rule or code of conduct of the public agency, including behavior described in §§ 300.520 or 300.521, and there was no intervening event or action that would independently constitute a basis of knowledge under paragraph (b), the public agency would not be deemed to have knowledge (of a disability). In such a case, consistent with paragraph (c), the parents could request an expedited evaluation, but the public agency could subject the child to the same disciplinary measures applied to children without disabilities engaging in comparable behavior. An addition would be made to this section. In order to clarify that if an agency responsibly addresses the behavior or performance of a child or an expression of concern about that behavior or performance the agency's knowledge of that behavior, performance or expression of concern, does not preclude the agency from subjecting the child to the same disciplinary measures applied to children without disabilities who engage in comparable behaviors.

In order to provide clarity to the content of paragraph (b)(4), a change has been made to that provision. Public agencies should not be held to have a basis for knowledge that a child was a child with a disability merely because the child's teacher had expressed concern about the child's behavior or performance that was unrelated to whether the child had a disability. This provision would therefore be modified to refer to expressions of concern to other agency personnel who have responsibilities for child find or special education referrals in the agency.

The changes described in this discussion in regard to paragraph (b)(2) and (b)(4) would clarify that a public agency will not be considered to have a basis of knowledge under paragraph (b) of this section merely because a child receives services under some other program designed to provide compensatory or remedial services or because a child is limited-English proficient. If the child is eligible under section 504 and not the IDEA, discipline would have to be consistent with the requirements of section 504.

Changes: A technical change has been made to paragraph (a) to refer to paragraph (b) of this section rather than ''this paragraph.'' The parenthetical language in paragraph (b)(1) has been replaced with the following statement: ''(or orally if the parent does not know how to write or has a disability that prevents a written statement).'' Language is added to paragraph (b)(2) to clarify that the behavior or performance is in relation to the categories of disability identified in § 300.7; and paragraph (b)(4) has been revised to refer to other personnel who have responsibilities for child find or special education referrals in the agency. Paragraph (c) has been redesignated as paragraph (d) and a new paragraph (c) has been added to provide that if an agency acts on one of the bases identified in paragraph (b), determines that the child is not eligible, and provides proper notice to the parents, and there are no additional bases of knowledge under paragraph (b) that were not considered, the agency would not be held to have a basis of knowledge under § 300.527(b).

Comment: Some commenters thought that paragraph (c) of this section in the NPRM implied that a regular education child is entitled to some placement while eligibility is being determined, and thought that whether these students receive services while eligibility is being determined should be left to the States. Others asked that the regulations specify that the phrase ''educational placement'' in proposed paragraph (c)(2)(ii) includes a suspension or expulsion without services, while others thought that any disciplinary action should be put on hold until the evaluation was completed. Others asked that parents be involved in decisions about the child's educational placement under this provision.

Some commenters thought that more guidance should be provided about an appropriate timeline for an expedited evaluation. Others asked that an expedited evaluation when an agency had conducted an evaluation within the past year could be reviewing those results and determining whether other assessments would need to be conducted. Other commenters wanted the regulations to make clear that a parent would have the right to an independent educational evaluation if the parent disagrees with the evaluation results and to the standard appeal rights and that a court could enjoin improper exclusion during the pendency of the evaluation and appeal process.

Discussion: Redesignated paragraph (d) of this section does not require the provision of services to a child while an expedited evaluation is being conducted, if the public agency did not have a basis for knowledge that the child was a child with a disability. An educational placement under paragraph (d)(2)(ii) in those situations can include a suspension or expulsion without services, if those measures are comparable to measures applied to children without disabilities who engage in comparable behavior. Of course, States and school districts are free to choose to provide services to children under this paragraph.

There is no requirement that a disciplinary action be put on hold pending the outcome of an expedited evaluation, or that the child's parents be involved in placement decisions under paragraph (d)(2)(ii).

No specific timeline for an expedited evaluation is included in the regulations, as what may be required to conclude an evaluation will vary widely depending on the nature and extent of a child's suspected disability and the amount of additional information that would be necessary to make an eligibility determination. However, the statute and regulation specify that the evaluation in these instances be ''expedited'', which means that an evaluation should be conducted in a shorter period of time than a normal evaluation. As § 300.533 makes clear, in some cases, an evaluation may be conducted based on a review of existing data.

With regard to an expedited evaluation, a parent's right to an independent educational evaluation if they disagree with the results of that evaluation and to normal appeal rights of that expedited evaluation are not affected by this section. Courts have the ability to enjoin improper exclusion of children from educational services in appropriate circumstances.

Changes: Language has been added to paragraph (d)(2)(ii) to make clear that an educational placement under that provision may include suspension or expulsion without educational services.

Expedited due Process Hearings (§ 300.528)

Comment: Some commenters supported the time frames proposed for

expedited due process hearings in light of the need to get prompt resolution of the various issues that are subject to these hearings. A number of commenters expressed concern about being able to meet the timelines proposed in paragraph (a) and suggested that the expedited hearing timeline be set at some longer time such as 10 school days, 15 calendar days, 20 business days, or 20 school days, so that an orderly hearing could be conducted, the parties' rights protected, and a well-reasoned and legally sufficient decision could be rendered.

Some commenters thought that this section should refer to ''expedited hearings'' rather than ''expedited due process hearings.'' Others noted the obligation of a hearing officer to schedule the hearing quickly so that a decision could be reached within the time frame. Some commenters asked that a provision be added to specify that if a decision was not rendered within the time frame, the child would remain in the alternative placement until the decision was issued, while others asked that the child be returned to the regular placement if the decision were not issued within that time frame.

Some commenters were concerned that the provision proposed in paragraph (b) not be read to reduce rights available to children and parents under the law, and asked that a statement be added to the regulation to specify that in no instance should the protections afforded the student and parent under the Act be reduced.

Some commenters asked that paragraph (c) provide an expedited appeal process as well in light of the statutory emphasis on quick resolution of disputes about disciplinary actions. Some commenters asked that the regulations make clear that appeals of disputes under §§ 300.520–300.528 are to a State level review officer, if a State has a two-tier due process system, and not to another due process hearing officer.

Discussion: Because of concerns that in some States it will not be possible to conduct an orderly hearing and develop a well-reasoned, legally sufficient decision within a 10 business day timeline, the specific time limit would be removed and replaced with a requirement that States establish a timeline for expedited due process hearings that meet certain standards—it must result in written decisions being mailed to the parties in less than 45 days, with no extensions of time that result in a decision more that 45 days from the date of the request for a hearing, and it must be the same period of time, whether the hearing is requested by a public agency or parent. This will allow States to develop a rule that is fairly applied to both parents and school districts and is best suited to their particular needs and circumstances.

The regulations refer to expedited due process hearings rather than expedited hearings to make clear that the procedural protections in §§ 300.508 and 300.509 are to be met. With regard to the hearings provided for in section 615(k)(2) of the Act (§ 300.521 of the regulations), the Committee reports accompanying Pub. L. 105–17 refer to the hearings as ''expedited due process hearings.'' (S. Rep. No. 105–17, p. 31, H.R. Rep. No. 105–95 p. 111 (1997)) In addition, the evidentiary standard specified in the statute for hearings under §§ 300.521 and 300.526(c) requires consideration of evidence presented by both sides to a dispute, which rules out hearings which do not permit each side an equal opportunity to present evidence. Permitting a different standard to apply to expedited hearings on parent appeals under § 300.526(a) would be unfair to public agencies. If a decision is not reached within the time frame specified, the child's placement would be determined based on the other rules provided in these regulations. For example, if a school district had requested a hearing for the purpose of demonstrating that a child was substantially likely to injure themselves or others if the child remained in the current placement, the child could be removed from his or her current placement for not more than 10 school days pending the decision of the hearing officer, unless the child's parents and the public agency agreed otherwise. (§ 300.519).

If the child were in a 45-day interim alternative educational setting and the parents appealed that determination, the child would remain in that setting until the expiration of the 45 days or the hearing officer's decision, whichever occurs first. (§ 300.526(a)). If the child's parents oppose a proposed change of placement at the end of a 45-day interim alternative educational setting, under § 300.526(b), the child returns to the child's prior placement at the end of the interim placement, unless through another hearing and decision by the hearing officer under § 300.526(c), the interim alternative educational setting is extended for an additional period of time, not to exceed 45 days for each expedited hearing requested under § 300.526(c).

Paragraph (b) of this section is designed to make clear that while a State must insure that expedited due process hearings must meet the requirements of paragraph (a) of this section, the State may alter other State-imposed procedural rules from those it uses for hearings under § 300.507. This rule will ensure that the basic protections regarding hearings under the Act are met, while enabling States to adjust other procedural rules they may have superimposed on due process hearings in light of the expedited nature of these hearings.

No specific expedited appeal process is specified in the Act, and none is added by these regulations. However, States should be able to choose to adopt an expedited appeal procedure if they wish, including, in States that have a two-tier normal due process procedure, establishing a one-tier expedited hearing procedure (*i.e.*, expedited hearings conducted by the SEA) so that parties resort directly to a State or Federal court, rather than appeal through a State-level appeal procedure. Therefore, a change should be made to the regulation to clarify that an appeal of an expedited due process hearing must be consistent with § 300.510.

Changes: A technical change has been made to paragraph (a)(2) to refer to § 300.509 rather than § 300.508. Paragraph (a)(1) has been deleted and a new paragraph (b) has been added to provide that each State establish a timeline for expedited due process hearings that results in a written decision being mailed to the parties within 45 days, with no extensions permitted that result in decisions being issued more than 45 days after the hearing request; and to require that decisions be issued in the same period of time, whether the hearing is requested by a parent or an agency. Paragraphs (a)(2) and (a)(3) have been redesignated as paragraphs (a)(1) and (a)(2) and paragraphs (b) and (c) have been redesignated as paragraphs (c) and (d). Redesignated paragraph (d) has been revised to specify that expedited due process hearings are appealable consistent with the § 300.510. A modification has been made to § 300.526(a) regarding these appeals.

Referral to and Action by Law Enforcement and Judicial Authorities (§ 300.529)

Comment: Several commenters asked that paragraph (a) be modified to clarify that reporting crimes to law enforcement authorities not circumvent the school's responsibilities under IDEA to appropriately evaluate and address children's behavior problems that are related to their disabilities in a timely manner. Other commenters requested that procedural safeguards similar to those in §§ 300.520–300.528 be

incorporated into this section that would apply whenever an agency makes a report of a crime by a child with a disability, including conducting a manifestation determination on the relationship of the behavior to the disability, applying the 10- and 45-day timelines to any criminal or juvenile filing, notice to parents, and the right of parents to appeal decisions and request due process. Some commenters stated that any referral to juvenile or law enforcement authorities should trigger notice to parents of the referral.

Several commenters requested that the regulations specify that the Act also permits school officials to press charges against a child with a disability when they have reported a crime by that student.

One commenter asked that paragraph (a) be modified to require that a police report include a statement indicating that the student is in a special education program and identify a contact person who can provide additional information to appropriate authorities on request.

Discussion: Paragraph (a) of § 300.529 does not authorize school districts to circumvent any of their responsibilities under the Act. It merely clarifies that school districts do have the authority to report crimes by children with disabilities to appropriate authorities and that those State law enforcement and judicial authorities have the ability to exercise their responsibilities regarding the application of Federal and State law to crimes committed by children with disabilities. The procedural protections that apply to reports of a crime are established by criminal law, not the IDEA. Of course, it would be a violation of Section 504 of the Rehabilitation Act of 1973 if a school were discriminating against children with disabilities in how they were acting under this authority (*e.g.*, if they were only reporting crimes committed by children with disabilities and not committed by nondisabled students).

The Act does not address whether school officials may press charges against a child with a disability when they have reported a crime by that student. Again, school districts should take care not to exercise their responsibilities in a discriminatory manner.

With regard to indicating that a student is a special education student and identifying a contact person who can provide appropriate information to authorities to whom a crime is reported, as explained more fully in the discussion on § 300.529(b), under the confidentiality requirements of these regulations (see, *e.g.*, § 300.571) and those of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. 1232g), personally identifiable information (such as a student's status as a special education student) can only be released with parental consent except in certain very limited circumstances.

Changes: None.

Comment: A number of commenters asked that paragraph (b) of this section include a reference to the requirements of FERPA and note that public agencies must insure the confidentiality of records such as the special education and disciplinary records referred to in this section. Some asked that a provision be added making clear that a release to law enforcement authorities could only be made pursuant to the requirements of FERPA. Others asked whether this provision constituted an exception to disclosure of education records under FERPA, and if so, that the regulations make this clear. Some commenters noted that disclosure of education records would be a significant burden on schools and that it contradicts existing confidentiality and disclosure requirements. Some commenters were concerned that other agencies would not maintain these records in a way that would protect the often very sensitive information that they contain.

Discussion: Under sections 612(a)(8) and 617(c) of the Act, the Secretary is directed to take appropriate action, in accordance with FERPA to assure the confidentiality of personally identifiable information contained in records collected or maintained by the Secretary and by SEAs and LEAs (see §§ 300.127, and 300.560–300.577). The provisions of section 615(k)(9)(B) of the Act as reflected in paragraph (b) of this section must be interpreted in a manner that is consistent with the requirements of FERPA, and not as an exception to the requirements of that law. In other words, the transmission of special education and disciplinary records under paragraph (b) of this section is permissible only to the extent that such transmission is permitted under FERPA.

If section 615(k)(9)(B) of the Act were construed to require, or even permit, disclosures prohibited by FERPA, it arguably would violate the equal protection rights of children with disabilities to be protected against certain involuntary disclosures to authorities of their confidential educational records to the same extent as their nondisabled peers. To avoid this unconstitutional result, this statutory provision must be read consistent with the disclosures permitted under FERPA for the education records of all children.

FERPA would permit disclosure of the special education and disciplinary records mentioned in § 300.529(b) only with the prior written consent of the parent or a student aged 18 or older, or where one of the exceptions to FERPA's consent requirements apply. (See also, § 300.571). For example, disclosure of special education and disciplinary records would be permitted when the disclosure is made in compliance with a lawfully issued subpoena or court order if the school makes a reasonable attempt to notify the parent of the student of the order or subpoena in advance of compliance. (34 CFR 99.31(a)(9)). This prior notice requirement allows the parent to seek protective action from the court, such as limiting the scope of the subpoena or quashing it. Prior notice is not required when the disclosure is in compliance with certain Federal grand jury or other law enforcement subpoenas. In these cases, the waiver of the advance notification requirement applies only when the law enforcement subpoena or court order contains language that specifies that the existence or the contents of, or the information furnished in response to, such subpoena or court order should not be disclosed. (34 CFR 99.31(a)(9)(ii)). Additionally, under FERPA, if the disclosure is in connection with an emergency and knowledge of the information is necessary to protect the health or safety of the student or other individuals (34 CFR 99.31(a)(10) and 99.36), disclosure may be made without parental consent. In addition, schools may disclose education records without consent if a disclosure is made pursuant to a State statute concerning the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released. The State statute must create an information sharing system, consisting only of State and local officials, that protects against the redisclosure of a juvenile's education records. (34 CFR 99.31(a)(5) and 99.38). For additional information on the juvenile justice system provision and other provisions under FERPA, refer to the U.S. Department of Education/U.S. Department of Justice publication entitled *Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs.* The publication can be downloaded from the Family Policy Compliance Office's web site: www.ed.gov.office/OM/fpco

In some instances, however, the Part 300 regulations are more restrictive than FERPA. For example, the Part 300

regulations in the past prohibited disclosures without parent consent to outside entities that FERPA would permit. (See proposed § 300.571(a) limiting disclosures without consent to officials of participating agencies collecting or using the information under IDEA and requiring consent before information is used for any purpose other than meeting IDEA requirements.) Section 615(k)(9)(B) of the Act now eliminates, with regard to children with disabilities who are accused by schools of crimes, IDEA restrictions on the sharing of information that is permissible under FERPA.

Except in certain limited situations, information from special education and disciplinary records may be disclosed only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent. (34 CFR 99.33). This procedure should be sufficient to ensure that those other parties maintain the records in a manner that will protect the confidentiality of that information.

Changes: Paragraph (b) of this section has been amended to make clear that copies of a child's special education and disciplinary records may be transmitted only to the extent that such transmission is permitted under FERPA. Section 300.571 has been amended to note the exception of this section.

Comment: Some commenters asked that the regulations provide further clarification about the disclosure of information described in paragraph (b) by, for example, clarifying whether a request from a law enforcement official is needed before a transfer, whether the LEA would be permitted to determine the most appropriate official to receive the records, and if all or part of the record is transmitted. Others asked that the regulations specify that the records be transferred within a short period of time so that they would be available for consideration in decisions about the student's case or that some limitations be imposed on what is transferred, such as records covering the past year, or ''relevant'' records.

Some commenters asked that the regulations impose some limitations on this responsibility by defining ''appropriate authorities,'' ''special education record,'' and ''disciplinary record.'' Others asked that the regulations require SEAs to develop procedures regarding the disclosure of education records to the appropriate authorities when LEAs report a student's criminal activity because States' juvenile law and criminal law enforcement systems are different.

A few commenters asked that the agency reporting a crime be responsible for ensuring that the child continues to receive FAPE in accordance with the child's IEP with consultation with law enforcement, judicial authorities, or any other agency responsible for the education of incarcerated youth.

Discussion: As explained in the prior discussion, FERPA limits the extent to which disclosure of special education and disciplinary records would be permitted. The circumstances that determine whether records may be transmitted generally will determine whether a specific request from a law enforcement official would need to be made, to whom the records would be transmitted and the extent of the information provided. In light of the fact-specific nature of the analysis required, no specific definitions of terms used in paragraph (b) are provided. The requirements of FERPA and its implementing regulations at 34 CFR Part 99 provide more specific guidance. The agency that is responsible to ensure that a child receives FAPE when the child has been accused of a crime and is in the custody of law enforcement and judicial authorities will be determined by State law.

Changes: None.

Procedures for Evaluation and Determination of Eligibility

Initial Evaluation (§ 300.531)

Comment: A few commenters requested that this section be revised to clarify that parents may request an initial evaluation, and some requested that public agencies be required to conduct an initial evaluation upon parent request. A few commenters requested that the regulation be revised to require that, upon parent request, an initial evaluation include new testing in all areas of suspected disability, even if a determination is made, under § 300.533(a), that no additional data are needed. A few commenters requested that the regulation be revised to specify the types of indicators, such as a psychiatric hospitalization, that trigger the requirement that a child be evaluated for possible disability.

Other commenters requested that the regulation be revised to clarify that initial evaluations are distinct from reevaluations, and to require that initial evaluations be ''comprehensive,'' and include a complete full and individual evaluation of the child in all areas of suspected disability. A few commenters requested that § 300.531 be linked with § 300.532(g), to make clear that a ''full and individual initial evaluation'' under § 300.531 means a comprehensive evaluation in all areas of suspected disability.

Discussion: The child find provisions of § 300.125 require that a public agency ensure that any child that it suspects has a disability is evaluated. Under both prior law and these regulations, if a parent requests an initial evaluation, the public agency must either: (1) provide the parents with written notice of the agency's proposal to conduct an initial evaluation if the agency suspects that the child has a disability and needs special education and related services; or (2) provide the parents with written notice of the agency's refusal to conduct an initial evaluation if it does not suspect that the child has a disability. The parent may challenge such a proposal or refusal by requesting a due process hearing.

If a group decision is made under § 300.533(a) that no additional data are needed as part of an initial evaluation, the public agency is not required to conduct additional assessment as part of the initial evaluation; however, the parents may challenge that decision by initiating a due process hearing.

The child find provisions in section 612(a)(3) and in these regulations at § 300.125 require that all eligible children be identified, located and evaluated, and it is not necessary to establish additional requirements regarding specific circumstances that trigger an agency's responsibility to evaluate a child.

Any initial evaluation or reevaluation of a child with a disability must meet the requirements of § 300.532; therefore, a child with a disability must, as part of any initial evaluation or reevaluation, be assessed in all areas of suspected disability (§ 300.532(g)). However, as provided in § 300.533(a) and explained above, the public agency may not need to conduct assessment procedures to obtain additional data in one or more areas of suspected disability depending on what data are already available regarding the child.

Changes: None.

Comment: A few commenters requested that the regulations be revised to provide guidelines for State timelines for completing initial evaluations.

Discussion: This issue is addressed in the discussion regarding § 300.342.

Changes: None.

Evaluation Procedures (§ 300.532)

Comment: Some commenters requested that the regulation be revised to require that all tests and other evaluation materials and procedures that are used to assess a child, including nonstandardized tests, be validated for the specific purpose for which they are

used and administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests.

Other commenters asked that the regulation be revised to require that tests and other evaluation procedures be selected and administered so as not to be discriminatory on a disability basis, and to prohibit use of tests if there is controversy in the literature about a test's validity for use with children with a particular disability unless a local validation study has been conducted for the particular disability that the child is suspected to have. A few commenters requested that the regulation specify that evaluations that are conducted verbally should use the language normally used by the child and not the language used by the parents, if there is a difference between the two.

A few commenters requested that the regulation be revised to require that public agencies collect information regarding a child's learning style(s) and needed methodologies as part of an evaluation, because such information is critical in formulating appropriate instructional methods to promote the child's learning. A few commenters requested that the regulation be revised to require that three individuals from different disciplines evaluate each child. A few commenters requested that the regulation be revised to clarify that tests and other materials used in evaluating each child must include a full range of diagnostic techniques, including observations and interview. A few commenters requested that § 300.532(g) be revised to require a comprehensive evaluation for all students, regardless of their area of suspected disability, and a functional behavioral assessment for each child who exhibits behavior that impedes learning.

A few commenters requested that the regulation be revised to require that initial evaluations and reevaluations address all of the special factors that IEP teams must consider under § 300.346(a)(2). A few commenters asked that the regulation be revised to require that evaluations provide information to enable public agencies to comply with the requirements of § 300.534(b)(1), which requires that a child not be determined to be a child with a disability if the determinant factor is a lack of instruction in reading or math.

A few commenters requested that paragraphs (d), (e), and (f), and Notes 1, 2, and 3, be deleted because they exceed the requirements in the statute.

A few commenters were concerned that Note 2 does not address the broad array of unique circumstances in which it may be necessary, for communication or other disability-specific reasons, to seek out an appropriate evaluator who is not on the staff of the public agency.

A few commenters raised concerns about valid assessment of Native American children who are either Navajo-dominant speakers or bilingual. They expressed particular concern regarding the limitations of standardized written instruments in assessing children who speak Navajo, which is a predominantly oral language, and asked for guidance as to how Bureau of Indian Affairs schools will meet the requirements in § 300.532 regarding standardized assessment tools.

A few commenters were concerned that the reference in Note 3 to administration of assessment components by persons whose qualifications do not meet standard conditions would appear to ''give permission'' for the use of unqualified assessment personnel, and requested that this reference be deleted from the note. Other commenters asked that Note 3 be deleted because it inappropriately implies that IDEA permits public agencies to conduct assessments under ''substandard'' conditions.

Several commenters requested that the substance of all of the notes in the NPRM be incorporated into the text of the regulations, or that the notes be deleted in their entirety.

Discussion: The provisions of § 300.532(c) regarding requirements for standardized tests are consistent with section 614(b)(3)(B), which limits applicability of those requirements to standardized tests. The selection of appropriate assessment instruments and methodologies is appropriately left to State and local discretion.

A public agency must ensure that: (1) the IEP team for each child with a disability has all of the evaluation information it needs to make required decisions regarding the educational program of the child, including the consideration of special factors required by § 300.346(a)(2); and (2) the team determining a child's eligibility has all of the information it needs to ensure that the child is not determined to be a child with a disability if the determinant factor is a lack of instruction in reading or math, as required by § 300.534(b)(1). It is not, therefore, necessary to establish an additional requirement that evaluations address the requirements of § 300.346(a)(2) or § 300.534(b)(1).

Paragraphs (d), (e), and (f) were all among the provisions included in the regulations as in effect on July 20, 1983, and are unaffected by the IDEA Amendments of 1997.

In evaluating each child with a disability, it is important for public agencies to ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, including any needs the child has that are commonly linked to a disability category other than the disability in which the child has been classified. Further, public agencies must ensure that the services provided to each child under this part are designed to meet all of the child's identified special education and related services needs, and not those resulting only from the disability area in which the child has been initially classified.

As proposed Note 1 indicated, under Title VI of the Civil Rights Act of 1964: (1) in order to properly evaluate a child who may be limited English proficient, a public agency should assess the child's proficiency in English as well as the child's native language to distinguish language proficiency from disability needs; and (2) an accurate assessment of the child's language proficiency should include objective assessment of reading, writing, speaking, and understanding.

Both Title VI and Part B require that a public agency ensure that children with limited English proficiency are not evaluated on the basis of criteria that essentially measure English language skills. Sections 300.532 and 300.534(b) require that information about the child's language proficiency must be considered in determining how to conduct the evaluation of the child to prevent misclassification. In keeping with the decision to eliminate all notes from the final regulations, however, Note 1 has been removed. The text of § 300.532 has been revised to require that assessments of children with limited English proficiency must be selected and administered to ensure that they measure the extent to which a child has a disability and needs special education, and do not instead measure the child's English language skills.

Proposed Note 2 explained that paragraphs (a)(1)(i) and (2)(ii) when read together require that even in situations where it is clearly not feasible to provide and administer tests in the child's native language or mode of communication for a child with limited English proficiency, the public agency must still obtain and consider accurate and reliable information that will enable the agency to make an informed decision as to whether the child has a disability and the effects of the disability on the child's educational needs. In some situations, there may be

no one on the staff of a public agency who is able to administer a test or other evaluation in a child's native language, as required under paragraph (a)(2) of this section, but an appropriate individual is available in the surrounding area. In that case a public agency could identify an individual in the surrounding area who is able to administer a test or other evaluation in the child's native language include contacting neighboring school districts, local universities, and professional organizations. This information will be useful to school districts in meeting the requirements of the regulations, but consistent with the general decision to remove all notes, Note 2 would be removed.

An assessment conducted under non standard conditions is not in and of itself a ''substandard'' assessment. As proposed Note 3 clarified, if an assessment is not conducted under standard conditions, information about the extent to which the assessment varied from standard conditions, such as the qualifications of the person administering the test or the method of test administration, needs to be included in the evaluation report. A provision has been added to the regulation to make this point.

This information is needed so that the team of qualified professionals can evaluate the effects of these variances on the validity and reliability of the information reported and to determine whether additional assessments are needed. Again, while the proposed note provided clarifying information on the regulatory requirements, in keeping with the general decision to eliminate notes, Note 3 would be removed.

The provisions of the Act and § 300.532, as revised to include a provision regarding the use of nonstandard assessments, are sufficient to ensure that the provisions of the regulation are appropriately implemented for Navajo children, and no further changes are needed.

Changes: Section 300.532 has been revised to require that assessments of children with limited English proficiency must be selected and administered to ensure that they measure the extent to which a child has a disability and needs special education, and do not, instead, measure the child's English language skills.

A provision has been added to § 300.532 to require that if an assessment is not conducted under standard conditions, information about the extent to which the assessment varied from standard conditions, such as the qualifications of the person administering the test or the method of test administration, must be included in the evaluation report. Notes 1, 2, and 3 have been removed.

A provision has been added to § 300.532 to require that the assessment be sufficiently comprehensive to identify all of a child's special education and related services needs. A change also has been made to § 300.300 clarifying that services provided to each child must be designed to meet all the child's identified special education and related services needs.

Paragraph (b) has been revised consistent with section 614(b)(2) of the Act, to clarify that information about enabling the child to be involved in and progress in the general curriculum or for a preschool child to participate in appropriate activities may assist in determining both whether the child has a disability and the content of the child's IEP.

Determination of Needed Evaluation Data (§ 300.533)

Comment: A few commenters requested that the regulation or a note clarify that it is expected that typically some new tests or assessments will be required as part of reevaluations. A number of commenters were concerned that, absent more specific requirements mandating the use of additional assessments, public agencies would rely on outdated assessment information regarding the needs of children with disabilities, especially since the needs of children with disabilities may change significantly over time, and some requested that the regulations be revised to define a maximum ''age'' for data that a public agency may rely upon as part of an evaluation. A few other commenters were concerned that the required IEP team participants often would not have the appropriate qualifications and expertise to judge the validity of existing data and to determine what if any additional data are needed.

A few others requested that the regulation be revised to require that a public agency collect additional data to determine whether a child continues to be a child with a disability, unless the agency obtains signed, informed parent consent to not collect such additional data, and that States be required to report on the number of such parent ''waivers.'' Other commenters requested that the regulation or note clarify that the provisions of § 300.533(c) apply only to the portion of a reevaluation that addresses whether a child continues to be a child with a disability, and not the portion that addresses the child's needs for special education and related services.

A few commenters requested that parents be required to justify any request for additional assessment data. A few other commenters requested that public agencies be required to inform parents of their right to request additional assessments to determine whether their child has a disability.

A few commenters thought that is was important to clarify that a public agency may use data from prior assessments conducted by individuals or agencies other than the public agency in determining what additional data were needed.

Some commenters requested that the note be deleted.

Discussion: Whether additional data are needed as part of an initial evaluation or reevaluation must be determined on a case-by-case basis, depending upon the needs of the child and the information available regarding the child, by a group that includes the individuals described in § 300.344 and other qualified professionals, as appropriate.

It is intended that the group review all relevant existing evaluation data on a child, including that provided by the parents and, where appropriate, data from evaluations conducted by other agencies. A public agency must ensure that the group fulfilling these functions include individuals beyond those described in § 300.344 if necessary to ensure that appropriate, informed decisions are made (see § 300.533).

Requiring public agencies to obtain informed written consent permitting them not to collect, as part of a reevaluation, additional data to determine whether a child continues to be a child with a disability, would exceed the requirements of the statute, as would requiring States to report on the number of children for whom a reevaluation does not include collecting additional data to determine whether they continue to be children with disabilities.

The provisions of § 300.533(c) apply only to the collection of additional data needed to determine whether a child continues to be a child with a disability.

It would not be consistent with the statute and these regulations to require that parents ''justify'' any request for additional assessment data. Parents must be included in the group that reviews existing data and determines what additional data are needed, and, as part of that group, they have the right to identify additional assessment data that they believe are needed and to participate in the decision regarding the need for those data. Both the statute and these regulations require that the determination regarding the need for

additional data be based, in part, on input from the parents. Under both the statute and these regulations, parents also have the right to request an assessment, as part of a reevaluation, to determine whether their child continues to have a disability under IDEA. However, this right is limited to determinations of eligibility for services under Part B. If the group reviewing the existing data does not believe additional data are needed to determine a child's continued eligibility under IDEA, but the parents want additional testing for reasons other than continued eligibility under IDEA, such as admission to college, the denial of the parent's request would be subject to due process.

An additional requirement that parents be informed of their right to request additional assessment data is not needed, as it is already addressed by paragraph (c)(1)(iii).

The proposed note clarified that the requirement in § 300.533(a) and § 300.534(a)(1) that review of evaluation data and eligibility decisions be made by groups that include ''qualified professionals,'' is intended to ensure that the group making these determinations include individuals with the knowledge and skills necessary to interpret the evaluation data and make an informed determination as to whether the child is a child with a disability under § 300.7, and to determine whether the child needs special education and related services.

The composition of the group will vary depending upon the nature of the child's suspected disability and other relevant factors. For example, if a student is suspected of having a learning disability, a professional whose sole expertise is visual impairments would be an inappropriate choice. If a student is limited English proficient, it will be important to include a person in the group of qualified professionals who is knowledgeable about the identification, assessment, and education of limited English proficient students. While the proposed note provided clarifying information on the regulatory requirements, in keeping with the general decision to eliminate notes, the note would be removed.

Changes: The note has been removed. Paragraph (d) has been revised to clarify that the parent's right to request an evaluation regarding continued eligibility concerns services under Part B.

Comment: Some commenters requested that the regulation be revised to provide further guidance as to whether public agencies are required to convene a meeting to review existing evaluation data on a child and to determine what, if any, additional data are needed as part of the evaluation. A few commenters stated their opinion that the Congress did not intend to establish a new requirement for an additional meeting that public agencies must convene. Others asked for clarity as to whether a public agency could meet the requirements of § 300.533(a) by reviewing existing data and determining what additional data are needed as part of the child's IEP meeting during the second year of the three year evaluation cycle. A few commenters asked that the regulation be revised to require that parents are entitled to participate in any meeting held to review existing data.

A few other commenters requested that the regulation be revised to provide that only those members of the IEP team needed to review current goals and objectives must participate in the review of existing data, and that not all members involved in the initial placement need be involved unless there is to be a change in the placement or identification of the child.

Discussion: Section 300.533(a) requires that a group that includes the individuals described in § 300.344 (regarding the IEP team) and other qualified professionals, as appropriate, review the existing evaluation data and determine what additional data are needed. Although a public agency must ensure that the review of existing data and the determination of any needed additional data must be made by a group, including the parents, neither the statute nor these regulations require that the public agency conduct a meeting for this purpose. A State may, however, require such meetings.

Section 300.501(a)(2)(i) requires that parents have an opportunity to participate in meetings with respect to the evaluation of their child with a disability. Therefore, if a public agency conducts a meeting, as defined in § 300.501(b)(2), to meet its responsibilities under § 300.533, the parents must have an opportunity to participate in the meeting.

Neither the statute nor these regulations requires that all individuals who were involved in the initial placement of a child with a disability be part of the group that, as part of a reevaluation of the child reviews existing data and determines what additional data are needed. Both the statute and the regulations require, however, that a group that includes all of the individuals described in § 300.344 for an IEP meeting, and other qualified professionals, as appropriate, fulfill those functions.

Changes: Paragraph (a) has been revised to refer to the group that includes the individuals described in § 300.344 and other qualified individuals. A new paragraph (b) has been added to make clear that a meeting is not required to review existing evaluation data.

Determination of Eligibility (§ 300.534)

Comment: A few commenters requested that the regulation provide further guidance regarding the standards and process public agencies must use to ensure that lack of instruction in reading or math is not the determinant factor in determining that a child is a child with a disability. Other commenters requested that the regulation clarify that proposed § 300.534(b) does not mean that a child who has a disability and requires special education and related services because of that disability can be found ineligible simply because the child also has been denied instruction in reading or math or because the child has limited English proficiency.

Some commenters asked for clarification as to whether, if the group determines under § 300.533 that no further data are needed, a public agency may, without further evaluation, meet its obligation under proposed § 300.534(c) to evaluate a child with a disability before determining that the child is no longer a child with a disability.

A few commenters requested that the regulation be revised to clarify the meaning of ''evaluation report.'' A few commenters requested that the regulation be revised to require that a public agency provide information to parents regarding the results of an evaluation prior to conducting an IEP meeting, and other commenters requested that the regulations specify a timeline for how quickly the public agency must provide parents with a copy of the evaluation report.

A few commenters asked for clarification as to whether a public agency must conduct an evaluation of a child with a disability before the agency may graduate the child. (This issue is addressed in the discussion regarding § 300.121.)

Discussion: The specific standards and process that public agencies use to ensure that lack of instruction in reading or math is not the determinant factor in determining that a child is a child with a disability, and the content of an evaluation report, are appropriately left by the statute to State and local discretion. However, a public agency must ensure that a child who has a disability, as defined in § 300.7 (i.e., a child who has been evaluated in accordance with §§ 300.530–300.536 as

having one of the thirteen listed impairments, and who because of that impairment needs special education and related services) is not excluded from eligibility because that child also has limited English proficiency or has had a lack of instruction in reading or math. (See also § 300.532, which has been revised to require that assessments of children with limited English proficiency must be selected and administered to ensure that they measure the extent to which a child has a disability and needs special education, and do not instead measure the child's English language skills.)

The specific content of an evaluation report is appropriately left by the statute to State and local discretion. Both the statute and the regulations require that, upon completing the administration of tests and other evaluation materials, a public agency must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent, but neither establishes a timeline for providing these documents to the parents; rather, this timeline is appropriately left to State and local discretion. It is, however, important to ensure that parents and other IEP team participants have all the information they need to participate meaningfully in IEP meetings. Indeed, § 300.562(a) requires that a public agency comply with a parent request to inspect and review existing educational records, including an evaluation report, without unnecessary delay and before any meeting regarding an IEP.

A public agency must evaluate a child with a disability before determining that the child is no longer a child with a disability, but such a reevaluation is, like other reevaluations, subject to the requirements of § 300.533. Accordingly, if a group decision is made under § 300.533(a) that no additional data are needed to determine whether the child continues to be a child with a disability, the public agency must provide parents with the notice required by § 300.533(d)(1), and must provide such additional assessment(s) upon parent request consistent with § 300.533(d)(2).

Changes: Paragraph (b) is revised to clarify that children are not eligible if they need specialized instruction because of limited English proficiency or lack of instruction in reading or math, but do not need specialized instruction because of a disability, as defined in § 300.7. See discussion of comments received under § 300.122 regarding a change to § 300.534(c).

Procedures for Determining Eligibility and Placement (§ 300.535)

Comment: Some commenters requested that parents be added to the variety of sources from which the public agency will draw, under § 300.535(a)(1), in interpreting evaluation data for the purpose of determining if a child is a child with a disability.

Discussion: The proposed change is consistent with section 614(b)(4)(A), which requires that the parent be part of the team that determines eligibility, and other provisions of the Act that stress the importance of information provided by the parents.

Changes: Section 300.535(a)(1) is revised to add ''parent input'' to the variety of sources from which the public agency will, under § 300.535(a)(1), draw in interpreting evaluation data for the purpose of determining if a child is a child with a disability.

Comment: A few commenters were concerned that the note inappropriately implied that it is not necessary to use a team of professionals and more than one assessment procedure to plan and implement the evaluation for a child and to determine eligibility. A few other commenters stated that the note inappropriately states that all sources must be used for all children whose suspected disability is mental retardation. Other commenters requested that the note be revised to state that for some children information from additional sources, such as an assessment of independent living skills, might be needed.

Discussion: Section 300.532 requires that a variety of assessment tools be used, that no single procedure be used as the sole criterion for determining the eligibility or needs of a child with a disability, and that the child be assessed in all areas of suspected disability. Section 300.534 requires that a team of professionals and the parent determine a child's eligibility.

The proposed note did not in any way diminish these requirements. It clarified that, consistent with the statute and these final regulations, the point of § 300.535(a)(1) is to ensure that more than one source is used in interpreting evaluation data and in making these determinations, and that although that subsection includes a list of examples of sources that may be used by a public agency in determining whether a child is a child with a disability, as defined in § 300.7, the agency would not have to use all the sources in every instance. While the proposed note provided clarifying information on the regulatory requirements, in keeping with the general decision to eliminate notes, the note would be removed.

Changes: The note has been removed.

Reevaluation (§ 300.536)

Comment: Some commenters asked for clarification as to what constitutes a reevaluation. A few of these commenters asked whether a determination under § 300.533(a) that no additional data are needed as part of a reevaluation constitutes a reevaluation and whether parent consent under § 300.505(a)(iii) is required under such circumstances.

A few commenters requested clarification as to whether a public agency must provide a reevaluation each time that a parent requests a reevaluation. A few commenters asked that a Note clarify that a public agency must conduct a reevaluation upon parent request, whether or not the public agency agrees that a reevaluation is needed, while others requested clarification that a public agency may refuse a parent request for reevaluation and afford parents the opportunity for a due process hearing to challenge the refusal. A few other commenters asked for clarification as to whether a public agency must conduct an evaluation whenever requested by the parent, regardless of the frequency of such requests.

A few commenters asked that the regulation be revised to require that public agencies consider the need for a reevaluation of a child with a disability at least once every three years, rather than require, as in the NPRM, that a reevaluation be conducted at least once every three years.

Discussion: Under both prior law and the current regulations, if a parent requests a reevaluation, the public agency must either: (1) provide the parents with written notice of the agency's proposal to conduct the reevaluation; or (2) provide the parents with written notice of the agency's refusal to conduct a reevaluation. The parent may challenge such a proposal or refusal by requesting a due process hearing. If the agency conducts a reevaluation and the evaluation group concludes that under § 300.533(a) no additional data are needed to determine whether the child continues to be a child with a disability, the public agency must provide parents with the notice required by § 300.533(c)(1), and must provide such assessment upon parent request.

The statute specifically requires at section 614(a)(2) that ''a reevaluation of each child with a disability is conducted ... at least once every three years.'' However, in meeting this

requirement, a group will, pursuant to § 300.533, review existing data and determine what, if any, additional assessment data are needed. Parent consent is not required for a review of existing data; however, parent consent would be required before additional assessments are conducted.

Changes: None.

Comment: A few commenters noted that § 300.536(b) references § 300.530(b), a nonexistent subsection.

Discussion: The noted reference is a typographical error.

Changes: Section 300.536(b) has been revised to refer to § 300.530 rather than § 300.530(b).

Additional Procedures for Evaluating Children With Specific Learning Disability (§§ 300.540—300.543)

Comment: Commenters raised a variety of issues regarding the regulatory provisions concerning the additional procedures for evaluating children suspected of having specific learning disabilities. However, none of those comments raised significant concerns about the minor changes from prior regulations proposed in the NPRM, which were designed merely to accommodate new statutory provisions regarding the participation of parents in evaluation determinations and evaluation reports and documentation of eligibility determinations applicable to all eligibility determinations, including those regarding specific learning disabilities.

Discussion: As indicated in the preamble to the NPRM, the Department is planning to conduct a careful, comprehensive review of research, expert opinion and practical knowledge of evaluating and identifying children with a specific learning disability over the next several years to determine whether changes to the standards and process for identifying children with a specific learning disability should be proposed. Because that review has not been done, no further changes are made to the regulations.

Changes: None.

General LRE Requirements (§ 300.550)

Comment: A number of commenters asked that the regulation be revised to make clear that a child with a disability cannot be removed from the regular class environment based on the type or degree of modifications to the general curriculum that the child needs, or on the types of related services that the child needs. Some commenters asked that paragraph (b)(1) be revised to make clear that whatever the setting selected, the child is educated in the general curriculum. Others asked that paragraph (b)(2) be revised to require consideration of positive behavioral supports in educating children with disabilities in regular classes.

A few commenters asked that a cross-reference to the exceptions in § 300.311(b) and (c) be added for students with disabilities convicted as adults and incarcerated in adult prisons. Several commenters asked that a note be added to specify that ESY services must be provided in the LRE. Another asked that a note explain that the reference to ''special classes'' in paragraph (b)(2) refers to special classes based on special education needs rather than special classes that the LEA makes available to all children, whether nondisabled or disabled, such as remedial reading, art, or music classes.

Discussion: Placement in the LRE requires an individual decision, based on each child's IEP, and based on the strong presumption of the IDEA that children with disabilities be educated in regular classes with appropriate aids and supports, as reflected in paragraph (b) of this section. The regulations always have required that placement decisions be based on the individual needs of each child with a disability and prohibited categorical decision-making.

In addition, the new statutory provisions regarding IEPs, reflected in the regulations at § 300.347(a)(1) and (2) specify that IEPs must include a statement of how the child's present levels of educational performance affect the child's involvement and progress in the general curriculum and a statement of measurable annual goals, including benchmarks or short-term objectives for meeting the child's disability-related needs to enable the child to be involved in and progress in the general curriculum. These provisions apply regardless of the setting in which the services are provided.

Similarly, the IEP team, in developing the IEP under § 300.346(a)(2)(i), is required to consider positive behavioral intervention, strategies and supports to address the behavior of a child with a disability whose behavior impedes his or her learning or that of others. These provisions are designed to foster the increased participation of children with disabilities in regular education environments or other less restrictive environments, not to serve as a basis for placing children with disabilities in more restrictive settings.

The determination of appropriate placement for a child whose behavior is interfering with the education of others requires careful consideration of whether the child can appropriately function in the regular classroom if provided appropriate behavioral supports, strategies and interventions. If the child can appropriately function in the regular classroom with appropriate behavioral supports, strategies or interventions, placement in a more restrictive environment would be inconsistent with the least restrictive environment provisions of the IDEA. If the child's behavior in the regular classroom, even with the provision of appropriate behavioral supports, strategies or interventions, would significantly impair the learning of others, that placement would not meet his or her needs and would not be appropriate for that child.

The IDEA Amendments of 1997 place renewed emphasis on teaching children with disabilities to the general curriculum and ensuring that these children are included in State- and district-wide assessments of educational achievement. Because, as commenters noted, one consequence of heightened accountability expectations may be unwarranted decisions to remove children with disabilities from regular classrooms so as to avoid accountability for their educational performance, the regulations should make clear that the type or extent of the modifications that the child needs to the general curriculum not be used to inappropriately justify the child's removal from education in regular, age-appropriate classrooms. Therefore, a provision should be added to § 300.552 to provide that a child not be denied education in age-appropriate regular classrooms solely because the child's education required modification to the general curriculum. Under this provision, for example, a child with significant cognitive disabilities could not be removed from education in age-appropriate regular classrooms merely because of the modifications he or she needs to the general curriculum. This provision should not be read to require the placement of a child with a disability in a particular regular classroom or course if more than one regular age-appropriate classroom or course is available in a particular grade or subject.

A cross-reference to the exceptions in § 300.311(b) and (c), like that in § 300.347(d), will make the regulations clearer and more complete.

As the discussion of § 300.309 explains in more detail, while ESY services must be provided in the LRE, public agencies are not required to create new programs as a means of providing ESY services to students with disabilities in integrated settings if the public agency does not provide summer services for its nondisabled children.

While the commenters are correct that the reference to ''special classes'' in paragraph (b)(2) refers to special classes necessary to meet special education needs, and not classes that an LEA makes available to all children, such as remedial reading, or advanced placement, art or music classes, paragraph (b)(1) provides that the LRE provisions of the regulations are focused on educating children with disabilities with nondisabled children to the maximum extent appropriate. In that context, the reference to ''special classes'' is to classes organized on the basis of disability and not classes that are based on some other interest, need or ability of the students.

Changes: A cross-reference to the requirements of § 300.311(b) and (c) has been added to paragraph (a).

A new paragraph has been added to § 300.552 prohibiting removal of a child with a disability from an age-appropriate regular classroom solely because of needed modifications in the general curriculum.

Continuum of Alternative Placements (§ 300.551)

Comment: A number of commenters requested that the regulation include a statement that a child does not need to fail in each of the less restrictive options on the continuum before they are placed in a more restrictive continuum placement that is appropriate to their needs. These commenters felt that this was needed to insure that children get appropriate services in a timely manner. Some commenters requested that the regulations specify that the placement appropriate for children who are deaf must be in a setting where the child's unique communication, linguistic, social, academic, emotional, and cultural needs can be met, including opportunities for interaction with nondisabled peers.

Discussion: The regulations do not require that a child has to fail in the less restrictive options on the continuum before that child can be placed in a setting that is appropriate to his or her needs. Section 300.550(b)(2) of the regulations however, does require that the placement team consider whether the child can be educated in less restrictive settings with the use of appropriate supplementary aids and services and make a more restrictive placement only when they conclude that education in the less restrictive setting with appropriate supplementary aids and services cannot be achieved satisfactorily. New statutory changes to the IEP development process make clear that the IEP team considers the language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level and full range of needs, including opportunities for direct instruction in the child's language and communication mode in developing IEPs for children who are deaf or hard of hearing. These requirements, which are included in the regulations at § 300.346(a)(2)(iv), should address the concerns raised by the commenters. In light of this change, further regulation is not necessary.

Changes: None.

Comment: A number of commenters expressed concern about the note following this section regarding home instruction. Some stated that the note should be struck because it implied that home instruction was an appropriate placement for all medically fragile children and that this was contrary to the requirement that placement be determined based on the individual needs of each child. Some asked that the regulation limit home instruction to those medically fragile children whose treating physicians have certified are not able to participate in a school setting with other children.

Others disliked the note because they believed that home instruction should be available in other instances when the IEP team determines that such a placement is appropriate and should not be limited by type of disability. Some commenters wanted the note to be revised to make clear that home instruction could be available for children with behavior problems and those in interim alternative educational placements because they had been suspended or expelled from school for disciplinary reasons if the IEP team determined that it was the appropriate placement. Others asked that the note should be revised to caution about the inappropriate use of home instruction as a placement for children suspended and expelled, unless requested by the parent for medical, health protection, or diagnostic evaluation purposes. Some commenters asked that the note make clear that discipline issues should be handled through the provision of appropriate services in placements other than home.

Some commenters asked that the note be modified to state that home instruction services may be appropriate for young children if the IEP/IFSP team determines appropriate. Other commenters asked that the regulations make clear that home instruction services are an appropriate modification of the IEP or placement for incarcerated youth who are being kept in segregation, close custody or mental health units.

Discussion: Home instruction is, for school-aged children, the most restrictive type of placement because it does not permit education to take place with other children. For that reason, home instruction should be relied on as the means of providing FAPE to a school-aged child with a disability only in those limited circumstances when they cannot be educated with other children even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery. The implication in the note that placement decisions could be based on the type of disability of a child was unintended.

Instruction at home may be the most natural environment for a young child with a disability if the child's IEP/IFSP team so determines. 'Home instruction' may be an appropriate modification of an IEP or placement under § 300.311 for incarcerated youth who are being kept in close custody, or segregation or in a mental health unit. The issue of home instruction for children with disabilities who have been suspended or expelled for behavior that is not a manifestation of their disability is addressed under § 300.522.

Changes: The note has been deleted.

Placements (§ 300.552)

Comment: A number of commenters asked that paragraph (a)(1) be revised to require that parents be informed about the full range of placement options, especially for children who are deaf or hard of hearing. Often these commenters also asked that the regulations contain a statement that the appropriate placement of a child who is deaf or hard of hearing is the setting in which the child's unique communication, linguistic, academic, social, emotional and cultural needs can be met.

One commenter asked that the regulations include standards for numerical improvements in the percentages of children with disabilities who are educated in regular classes and dates by which those standards are to be met.

Discussion: The discussion concerning § 300.551 notes that the IEP provisions of the regulations already incorporate statutory language concerning the need to consider the particular needs of children who are deaf or hard of hearing in developing appropriate IEPs.

Since placements are determined based on the needs of individual children, and because the IDEA Amendments of 1997 provide that parents of children with disabilities are members of any group that makes

decisions on the education placement of their child (section 614(f) of the Act) it would seem to be unnecessary and unreasonably burdensome to require LEAs to inform parents about the full range of placement options.

Under § 300.501(c), parents must now be included in the group making decisions about the educational placement of their child. In view of the principle of regulating only if necessary, the regulations are not changed in the ways suggested by these commenters.

With respect to paragraph (a)(1) of this section, nothing in the regulations would prohibit a public agency from allowing the group of persons that makes the placement decision to also serve as the child's IEP team, so long as all individuals described in § 300.344 are included. However, in the interest of limiting the use of notes in these regulations, Note 1 would be removed.

Changes: Note 1 has been removed. See discussion of comments received under § 300.550 regarding the addition of a new § 300.552(e) prohibiting removal of a child with a disability from an age-appropriate regular classroom solely because of needed modifications in the general curriculum.

Comment: A number of commenters asked for revisions to the regulation designed to foster the inclusion of children with disabilities in the schools and classrooms they would attend if not disabled, such as explaining that children with disabilities could be placed at another school only with compelling educational justification and not for reasons of administrative convenience, or requiring that the child be educated at the school that they would attend if not disabled unless the child's educational needs require some other placement. Others wanted the regulation to recognize the administrative right to make geographic assignments so that not every facility in a school district would need to be made accessible, as provided under the Section 504 and Americans with Disabilities Act regulations.

Discussion: LEAs are strongly encouraged to place children with disabilities in the schools and classrooms they would attend if not disabled. However, the regulatory provision has always provided that each child with disabilities be educated in the school he or she would attend if not disabled unless their IEP required some other arrangement. (See, § 300.552(c)). Physical accessibility of school facilities is covered more fully by section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA).

Changes: None.

Comment: Some commenters felt that paragraph (d) of the regulation required burdensome, unnecessary paperwork. Others requested its deletion because they felt that too often a district is unwilling to prevent potential harmful effects and uses this provision to make segregated placements that are then presented as being ''in the child's best interest.'' One commenter asked that this paragraph be revised to emphasize how integration of children with disabilities and nondisabled children and successful learning are now necessary conditions of one another.

Discussion: Paragraph (d) of this section does not impose paperwork burdens. Paragraph (d) of this section provides important protections for children with disabilities and helps ensure that they and their teachers have the supports to prevent any harmful effect of a placement on the child or on the quality of services that he or she needs. If the placement team determines that even with the provision of supplementary aids and services, the child's IEP could not be implemented satisfactorily in the regular educational environment, that placement would not be the LRE placement for that child at that time.

Generally, as the commenter suggests, achievement test performance of students in inclusive classes is the equivalent or better than achievement test performance of others in segregated setting and self-concept, social skills and problem solving skills improve for all students in inclusive settings. Placement decisions, however, need to consider the individual needs of each child.

Changes: None.

Comment: A number of commenters were concerned with placement considerations for preschool-aged children with disabilities. Some expressed support for the language in Note 2 regarding preschool children with disabilities. Others thought that the language of the note that indicated that school districts that did not operate regular preschool programs might have to place preschool children with disabilities in private preschool programs as a means of providing services in the LRE should be struck as it was not required by the statute, or would be costly to implement.

Some thought the explanation about LRE for preschool children with disabilities should be in the regulation, as it is important that schools understand that they may meet the requirements of paragraph (c) for preschool children with disabilities by participating in other preschool programs such as Head Start, operated by other agencies, through private agencies serving preschool-aged children, and by locating preschool programs in elementary education schools that serve all children.

One commenter asked that the reference to 'private school programs for nondisabled children' be struck as suggestive that private schools are not bound to comply with the ADA. Some commenters thought that the note implied that a full continuum is not needed for preschool children with disabilities and should be revised. Another commenter stated that locating classes of preschool children with disabilities in regular elementary schools is not an appropriate solution to meeting the LRE for preschoolers and should be struck from the note.

Discussion: Language has been added to the regulation to clarify that the requirements of § 300.552, as well as the other requirements of §§ 300.550–300.556, apply to all preschool children with disabilities who are entitled to receive FAPE. Note 2 to this section in the NPRM was intended to provide suggestions on how a public agency may meet the LRE requirements if it does not generally provide education to nondisabled preschool children. However, in light of the general decision to remove all notes from these final regulations, the note would be removed.

Public agencies that do not operate programs for nondisabled preschool children are not required to initiate those programs solely to satisfy the requirements regarding placement in the LRE. For those public agencies, the note provided some alternative methods for meeting the LRE requirements. The examples in the note of placing preschool children with disabilities in private preschool programs and locating classes for preschool children with disabilities in regular elementary schools as a means of meeting the LRE requirements were not intended to limit the placements options on the continuum which may be used to meet the LRE needs of preschool children. The full continuum of alternative placements at 34 CFR 300.551, including integrated placement options, such as community-based settings with typically developing age peers, must be available to preschool children with disabilities.

The overriding rule in this section is that placement decisions for all children with disabilities, including preschool children, must be made on an individual basis. The reference in the note to ''private school programs for nondisabled children'' was not intended to suggest that private schools are not required to comply with the ADA.

The second part of Note 2 to proposed § 300.552 cited language from the 1976 published analysis of comments on the regulations implementing Section 504 of the Rehabilitation Act of 1973. The issues raised by that analysis (appropriate placement for a child with disabilities whose behavior in a regular classroom significantly impairs the education of other students, and placement of a child with disabilities as close to home as possible) are addressed elsewhere in this attachment.

Changes: A reference to preschool children with disabilities has been added to the introductory paragraph of § 300.552. Note 2 has been removed.

Comment: Several commenters requested adding language that would prohibit States from using a funding mechanism to provide financial incentives to place children with disabilities in a particular type of placement and to specify that State funding mechanisms must be ''placement neutral'.

A number of commenters asked that the regulations explicitly include a presumption that placement of children with disabilities is in the regular class, and that the placement team must consider the use of positive behavioral interventions, and supplementary aids and services before concluding that placement in a regular class is not appropriate for a child with a disability. Others asked that the substance of Note 3 (explaining that if behavioral interventions are incorporated into the IEP many otherwise disruptive children will be able to participate in regular classrooms) be incorporated into the regulations. Others felt that Note 3 added steps and services that exceeded the statute.

Discussion: Section 300.130(b) incorporates into the regulations the new statutory provision that specifies that if a State has a funding mechanism that distributes State funds on the basis of the type of setting in which a child is served, that mechanism may not result in placements that violate the LRE requirements, and if the State does not have policies and procedures to ensure compliance with that obligation, it provides the Secretary with an assurance that it will revise the funding mechanism as soon as feasible. Given that requirement, no further change is necessary here.

A presumption of placement in a regular class is already embodied in § 300.550. Note 3 to this section in the proposed regulations merely stated the reasonable conclusion that if behavioral interventions are incorporated into the IEPs of children with disabilities, many of these children, who without those services might be disruptive, can be successfully educated in regular classrooms. Note 3 added no requirements or services that exceed the statute, as the requirement to consider positive behavioral interventions, strategies, and supports to address the behavior of children with disabilities whose behavior impedes his or her learning or that of others, which is contained in § 300.346(a)(2)(i), is taken directly from section 614(d)(3)(B)(i) of the Act. Nevertheless, in the interest of eliminating the use of notes in these regulations, Note 3 should be removed, as it was merely an observation, based on the requirements of the regulations.

Changes: Note 3 has been removed.

Nonacademic Settings (§ 300.553)

Comment: None.

Discussion: The note following this section in the NPRM pointed out that this provision is related to the requirement in the regulations for section 504 of the Rehabilitation Act of 1973, and emphasized the importance of providing nonacademic services in as integrated a setting as possible, especially for children whose educational needs necessitate their being solely with other disabled children during most of the day. Even children with disabilities in residential programs are to be provided opportunities for participation with other children to the maximum extent appropriate to their needs. However, in light of the decision to remove all notes from these final regulations, the note following this section would be removed.

Changes: The note following this section has been removed.

Children in Public or Private Institutions (§ 300.554)

Comment: One commenter thought that the language of this section was ambiguous and left confusion as to whether special arrangements with public and private institutions were required whether they were needed or not. Another commenter proposed changes that would require arrangements such as a memorandum of understanding with all public and private institutions. One commenter thought that the note following this section conflicted with other regulations concerning incarcerated students and that those students should be excluded from the subject of the note. Another commenter asked that the substance of the note be incorporated into the regulation and that timelines for compliance be included.

Discussion: This section was not intended to require memoranda of agreement or other special procedures that are not necessary to effectively implement § 300.550. Requiring agreements to be developed that are not necessary for meeting the other LRE requirements would be overly prescriptive.

The requirement that disabled students be educated with nondisabled students does apply to students with disabilities who are in correctional facilities, to the extent that the requirement can be met consistent with the terms of their incarceration, except to the extent modified under the authority in § 300.311. One way the LRE requirements could be met for students with disabilities in prisons would be to include them in the educational activities of nondisabled prisoners and provide appropriate services in that environment. If a State has transferred authority for the education of students with disabilities who are convicted as adults under State law and incarcerated in adult prisons to another agency, the other agency, not the SEA, would have to ensure that LRE requirements are met as to that class of students.

The note following this section in the NPRM reflected the important fact that, except as provided in § 300.600(d) (regarding students with disabilities in adult correctional facilities), children with disabilities in public and private institutions are covered by the requirements of these regulations, and that the SEA has an obligation to ensure that each applicable agency and institution in the State meets these requirements. Whatever the reasons for the child's institutional placement, if he or she is capable of education in a regular class, the child may not be denied access to education in a regular class, consistent with § 300.550(b). Timelines for development of memoranda of agreement or other special implementation procedures would be overly prescriptive. In light of the decision to remove notes from these final regulations, the note would be removed.

Changes: Section 300.554 has been reworded to clarify that special arrangements with public and private institutions are only required if needed to ensure that § 300.550 is effectively implemented. A technical change has been made to the regulation to make clear that the SEA's responsibility does not include students with disabilities who are convicted as adults under State law and incarcerated in adult prisons. The note following this section has been removed and a new paragraph has been added to § 300.300(a) to more generally

make the point that services and placement decisions must be based on a child's individual needs and not category of disability.

Technical Assistance and Training Activities (§ 300.555)

Comment: Some commenters asked that parents and advocates be included in the training mentioned in paragraph (b) of this section. Another commenter asked that the regulation make clear that education support personnel as well as teachers and administrators are fully informed and provided technical assistance and training necessary to help them meet their LRE responsibilities. Another commenter wanted SEAs to provide specific training and information on LRE for children who are deaf and hard of hearing.

Discussion: As a matter of good practice, SEAs and LEAs are encouraged to develop opportunities for school personnel (including related service providers, bus drivers, cafeteria workers, etc.) and parents to learn together about all of the requirements under the Act because these experiences will improve cooperation among school personnel and between schools and parents and lead to improved services for children with disabilities. However, regulation on this point is not appropriate, as SEAs need the flexibility to respond to particular circumstances in their jurisdictions. For the same reason, additional specificity about the school personnel who need information and training or the subject matter of that training is not appropriate.

Changes: None.

Monitoring Activities (§ 300.556)

Comment: One commenter asked that States be required to establish criteria that would trigger monitoring reviews of LEA placement procedures to ensure compliance with LRE requirements because of the long history of violations of these provisions. Another asked that the regulations specify that SEAs must initiate enforcement actions, if appropriate.

Discussion: SEAs, under their general supervisory responsibility, are charged with ensuring that the requirements of the Act are met. That responsibility includes monitoring LEA performance, providing technical assistance and information on best practices, and requiring corrective action and instituting enforcement actions when necessary. The provisions of this section reinforce the active role SEAs need to play in implementing the entire Act and emphasize the importance of the LRE requirements in meeting the goals of the Act. The role of SEAs in implementing the requirements of the Act will be carefully reviewed by OSEP in its monitoring of States.

Changes: None.

Access Rights (§ 300.562)

Comment: A number of commenters were concerned about the types of records to which parents have access under this section. For example, some believed that the regulations should make clear that parents would not have access to copyrighted materials such as test protocols, or private notes of an evaluator or teacher. Others took the opposite view, urging that whenever raw data or notes are used to make a determination about a student, that information should be subject to parent access. Commenters also requested clarity on the question of the schools' liability for allowing parents access to records under these regulations when other laws or contractual agreements prohibit such disclosure.

One commenter asked that the right be phrased as the right ''to inspect and review all records relating to their children'' rather than to ''all education records relating to their children.''

Discussion: Part B incorporates and cross-references the Family Educational Rights and Privacy Act (FERPA). Under Part B, the term ''education records'' means the type of records covered by FERPA as implemented by regulations in 34 CFR part 99. Under § 99.3 (of the FERPA regulations), the term ''education records'' is broadly defined to mean those records that are related to a student and are maintained by an educational agency or institution. (FERPA applies to all educational agencies and institutions to which funds have been made available under any program administered by the Secretary of Education.)

Records that are not directly related to a student and maintained by an agency or institution are not ''education records'' under FERPA and parents do not have a right to inspect and review such records. For example, a test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be a part of his or her ''education records.'' However, Part B and FERPA provide that an educational agency or institution shall respond to reasonable requests for explanations and interpretations of education records. (34 CFR 300.562(b)(1); 34 CFR 99.10(c)).

Accordingly, if a school were to maintain a copy of a student's test answer sheet (an ''education record''), the parent would have a right under Part B and FERPA to request an explanation and interpretation of the record. The explanation and interpretation by the school could entail showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the responses in some other adequate manner that would inform the parent.

With regard to parents having access to ''raw data or notes,'' FERPA exempts from the definition of education records under 34 CFR 99.3 those records considered to be ''sole possession records.'' FERPA's sole possession exception is strictly construed to mean ''memory-jogger'' type information. For example, a memory-jogger is information that a school official may use as a reference tool and, thus, is generally maintained by the school official unbeknownst to other individuals.

With respect to the issue of liability for disclosing information to parents when other laws or contractual obligations would prohibit it, public agencies are required to comply with the provisions of IDEA and FERPA, and must ensure that State law and other contractual obligations do not interfere with compliance with IDEA and FERPA. Federal copyright law protects against the distribution of copies of a copyrighted document, such as a test protocol. Since IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, Federal copyright law generally should not be implicated under these regulations.

There is nothing in the legislative history of section 615(b)(1) of the Act to suggest that it expanded the scope of information available to parent examination beyond those records that they would have access to under FERPA.

Changes: None.

Comment: There were a variety of comments regarding the timeline in paragraph (a) for agency compliance with a parent request to inspect and review records. Some commenters thought it should be ''45 school days'' rather than 45 calendar days. Others felt that 45 days was too long, and that access should be provided usually within 10 days and no longer than 30 days after the request. Others wanted a one business day timeline if the agency has initiated an expedited due process hearing. Another commenter asked that agencies have to respond to a request to inspect and review before any meeting that parents now have the right to attend, not just before IEP meetings and

due process hearings. Other commenters wanted access to be required at least five days before an IEP meeting and wanted it made clear that if State or local law provided for shorter timelines, that those timelines must be met.

Discussion: The 45 day timeline is taken from FERPA, to which these regulations are tied by statute. FERPA requires that each educational agency or institution establish appropriate procedures for the granting of a request by parents for access to the educational records of their children within a reasonable period of time but in no case more than 45 days after the request has been made. In order not to confuse and increase administrative burden, these regulations are intended to be consistent with FERPA where possible. In practice, schools often provide access within a period of time that is considerably shorter than the 45-day time limit, which is the maximum time allowed for compliance.

The commenters are correct that the new expedited due process hearing procedures will require prompt access by parents when requested, but the regulations already adequately addresses the obligation of the participating agencies to provide access before a hearing and so no more specific timeline is added to the regulations. However, the regulations should be changed to acknowledge the new expedited due process hearing procedures in §§ 300.521–300.528 concerning discipline. Changes are not made with respect to other meetings, in light of the confusion and increased administrative burden inherent in such a change. Public agencies, however, are encouraged to provide parents access, when requested, in advance of these meetings to the greatest extent possible.

Changes: Paragraph (a) of this section has been amended to acknowledge that access rights also apply to the new expedited due process hearing procedures under §§ 300.521–300.528.

Comment: Other commenters asked that parents receive at no cost copies of their child's records prior to meetings or hearings, rather than just have the right to inspect and review those records. Another commenter asked that the regulations specify that parents or their legal representatives have the right to copy any record they feel they need for an agency-specified reasonable charge per page. Another commenter stated that parents or their legal representatives should also have access to any manuals used in preparing or evaluating any student records.

Discussion: As explained previously, these regulations should be consistent with those implementing FERPA to the greatest extent possible to prevent confusion and limit administrative burden on participating agencies. Therefore, it would not be appropriate to give parents additional rights to copies of their child's records. FERPA generally provides for a right to inspect and review records (34 CFR § 99.10) and permits agencies to charge fees for copies of education records provided to parents. (34 CFR 99.11).

These rules would apply to education records of a student that concern services required under the IDEA as well as all other education records. Paragraph (b)(2) of § 300.562 provides that a participating agency is required to provide copies of education records to a parent if failure to do so would effectively prevent the parent from inspecting and reviewing the records. (See, also 34 CFR 99.10(d)(1)). One such instance would be if the parent lives outside commuting distance of the participating agency. The Secretary has decided that it would impose unnecessary burden to require participating agencies to provide copies except as described previously. However, participating agencies are free to adopt policies of providing copies in other cases, if they choose to do so.

Access should not be required to documents that are not covered by the definition of education records, such as teacher or evaluator manuals. The requirements of paragraph (b)(1) of this section and 34 CFR 99.10(c) which provide that parents may request an explanation and interpretation of their children's education records will permit parents sufficient information about the contents of their children's education records.

Changes: None.

Fees (§ 300.566)

Comment: Several commenters requested that this section make clear that fees that can be charged may not include the cost of the labor involved in copying the records. Others asked that participating agencies not be permitted to charge parents more than the actual costs they incur in copying the records, or charge more than the prevailing rate in the community. Commenters also asked that agencies not be permitted to require parents to provide private financial information before providing copies of records at no cost. Some commenters asked whether LEAs could use Part B funds to cover the costs of providing parents copies so that fees would not have to be charged.

Discussion: Under these regulations and those implementing FERPA, participating agencies are entitled to charge reasonable fees for the actual cost of reproduction and postage. Under FERPA, a school may charge a fee for a copy of an education record which is made for the parent, unless the imposition of a fee effectively prevents the parent from exercising the right to inspect and review the student's education records. A school may not charge a fee to search for or to retrieve the education records. (34 CFR 99.11). Agencies may of course adopt policies of making copies available free of charge and are encouraged to do so. Agencies may use Part B funds to cover the costs that otherwise would be charged to parents.

Changes: None.

Consent (§ 300.571)

Comment: One commenter noted an apparent contradiction between this section, which requires parental consent before records are disclosed, and proposed § 300.529(b), which requires that LEAs transmit copies of special education and disciplinary records of a child to appropriate authorities when reporting a crime to those authorities.

Discussion: As explained in the discussion of §§ 300.529 and 300.529(b) permit the transmission of copies of education records only to the extent that disclosure without parental consent is permitted by FERPA. Because the prior § 300.571 would have prohibited disclosures without parent consent to agencies, such as law enforcement or juvenile justice agencies, that are not ''participating agencies'' under §§ 300.560–300.577 even though disclosure without parent consent to these entities in certain circumstances would have been permitted under FERPA, a change should be made to this section so that these regulations permit disclosures to the extent they are permitted under FERPA.

Changes: Paragraph (a) has been amended to permit disclosures without parental consent to the agencies identified in § 300.529, to the extent permitted under FERPA.

Destruction of Information (§ 300.573)

Comment: One commenter suggested that destruction of student records could act to deny students future benefits such as private insurance coverage and assistance in college.

Discussion: The regulations provides that parents must be informed when personally-identifiable information is no longer needed to provide educational services to the child. This notice would normally be given after a child graduates or otherwise leaves the agency. As the note following this section in the NPRM pointed out, personally-identifiable information on a

child may be retained permanently unless a parent requests that it be destroyed.

The purpose of the destruction option is to allow parents to decide that records about a child's performance, abilities, and behavior, which may possibly be stigmatizing and are highly personal, are not maintained after they are no longer needed for educational purposes. On the one hand, parents may want to request destruction of records as it is the best protection against improper and unauthorized disclosure of what may be sensitive personal information. However, individuals with disabilities may find that they need information in their education records for other purposes, such as public and private insurance coverage.

In informing parents about their rights under this section, it would be helpful if the agency reminds them that the records may be needed by the child or the parents for social security benefits or other purposes. Even if the parents request that the information be destroyed, the agency may retain the information described in paragraph (b) of this section.

In instances in which an agency intends to destroy personally-identifiable information that is no longer needed to provide educational services to the child (such as after the child has graduated from, or otherwise leaves the agency's program), and informs parents of that determination, the parents may want to exercise their right to access to those records and request copies of the records they will need to acquire post-school benefits in the future. In the interest of limiting the use of notes in these regulations, the note following this section would be removed.

Changes: The note following this section has been removed.

Children's Rights (§ 300.574)

Comment: Several commenters asked that the substance of the notes following this section in the NPRM be incorporated in the regulations.

Discussion: Because of the importance of clarifying the relationship of parent and child rights under IDEA and FERPA, including the new provisions of the IDEA concerning transfer of rights at the age of majority, and the general decision to eliminate all notes in these regulations, the substance of the notes following this section in the NPRM would be incorporated into the regulations.

Changes: The substance of Notes 1 and 2 have been incorporated into the regulations.

Disciplinary Information (§ 300.576)

Comment: One commenter requested that the term ''disciplinary action'' be defined. A commenter asked that the regulations make clear that action taken in response to conduct that was a manifestation of the child's disability is not ''disciplinary action'' under this section. Another asked that the results of a manifestation review be included in the student records to protect the child as well as the educational agencies.

One commenter asked that this section be revised to clarify that before applying a policy and practice of transmitting disciplinary information in the student records of disabled children, an LEA must first have such a policy and practice for the student records of nondisabled students, and that transmissions of student records that include disciplinary information to a student's new school under paragraph (c) can only occur to the extent such information is transferred for nondisabled students.

Discussion: It is important that the regulations allow school districts to understand what information may be transmitted under this section. Under Section 504, schools may not take a disciplinary action that constitutes a change of placement for behavior that was a manifestation of a child's disability. Making this point in the context of these regulations will assist schools in understanding what information may not be considered a statement about a disciplinary action and protect the interests of children with disabilities in not being identified as disciplinary problems because of behavior that is a manifestation of their disability. Further regulations are not necessary about what information may be transmitted to another school to which the child transfers.

Further regulation is not needed to make clear that the LEA's policy on transmitting disciplinary information must apply to both nondisabled and disabled students, as that provision is already contained in paragraph (a) of this section as to an LEA's policy. An LEA that had a policy that applied equally to nondisabled and disabled students but applied that policy only to transfers of records of disabled students would be in violation of Section 504, as well as Part B.

Changes: None.

Department Procedures (§§ 300.580–300.589)

Comment: One commenter objected that the procedures in proposed §§ 300.580–300.589 are overly detailed and bureaucratic. This commenter also stated that these procedures incorporate language from the old regulations concerning disapproval of State plans, which is no longer relevant in light of changes in the statute. Another commenter noted that proposed § 300.583 mentioned disapproval of State plans and requested that it be revised to refer to denial of eligibility.

Discussion: The Department does not agree that the procedures in §§ 300.580–300.589 are overly detailed. When the Secretary proposes to deny a State's eligibility, withhold funds or take other enforcement action and when a State has requested a waiver of supplement not supplant or maintenance of effort requirements, it is important to all parties that the process through which those issues will be decided is clearly described, so that time, money and effort are not spent resolving procedural questions instead of the underlying issues. The commenter is correct that proposed §§ 300.580–300.586 are substantially the same as old regulations that addressed disapproval of a State plan, and that State plans are no longer required by the statute. When necessary, however, these same procedures were designated in the past by the Secretary as the procedures to follow on a proposed denial of State eligibility, a concept that remains in the law.

Changes: A technical change has been made to § 300.583(a)(1) to refer to denial of State eligibility rather than State plan disapproval.

Enforcement (§ 300.587)

Comment: Some commenters stated that the regulations should contain a trigger when the Department must initiate enforcement action for systematic noncompliance with the Act. These commenters wanted a similar trigger provision added to § 300.197 regarding SEA enforcement against noncompliant LEAs. One commenter asked that paragraph (c) be revised to specify that fund withholding first be limited to funding for administrative personnel of the noncompliant SEA or LEA, so as to prevent denial or interruption in services to children with disabilities. Another commenter requested that the enforcement mechanisms mentioned in the note be incorporated into the regulation.

Several commenters objected to language in paragraph (e) which indicated that the Secretary would have a variety of enforcement actions available if a State were not providing FAPE to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. The commenters expressed the belief that the statute and its legislative history

make clear that the only enforcement action for failure to provide services to individuals convicted as adults under State law and incarcerated in adult prisons when the State has assigned responsibility for ensuring compliance with the IDEA to an agency other than the SEA under section 612(a)(11)(C) of the Act would be to withhold that agency's pro-rata share of the Part B grant.

Discussion: It would not be advisable to limit, through regulation, the discretion afforded the Secretary by the statute regarding appropriate enforcement mechanisms and when they should be employed. Given the very wide variety in potential situations in which compliance issues arise, and the significant differences in the scope and nature of the issues presented in compliance situations, the Secretary needs the discretion to exercise reasoned judgment about how best to achieve compliance and the tools to be used to do so.

Under the statute, the Secretary, upon a finding of a State's noncompliance with the provisions of Part B or of an LEA's or State agency's noncompliance with any condition of their eligibility, shall withhold further payments, in whole or in part, or refer the matter for appropriate enforcement action, which may include referral to the Department of Justice. This statutory language provides clear authority for including in the regulations the three enforcement options of withholding, referral to the Department of Justice, and other enforcement actions authorized by law. The other enforcement actions authorized by law include those set out in the General Education Provisions Act (GEPA), which are generally applicable to recipients of funds from the Department and are consistent with the goal of ensuring compliance with the requirements of this program.

The enforcement mechanisms mentioned in the note to this section are authorized by GEPA. The purpose of the note is merely to inform the readers that these are some of the additional enforcement procedures that the Secretary could choose to apply to a given instance of noncompliance. In the interest of limiting the use of notes in the regulations, the note would be deleted.

In cases where the State has transferred to a public agency other than the SEA the responsibility for ensuring compliance with the Act as to children with disabilities who are convicted as adults under State law and are incarcerated in adult prisons, and the Secretary finds substantial noncompliance by that other public agency, the statutory language limits withholding a proportionate share of the State's total grant under section 611 of the Act. However, the statute does not impose restrictions on the Department's use of other enforcement mechanisms. The legislative history on this issue shows two primary concerns, one is the reasonable limitation of services to this population in order to allow States to balance bona fide security and compelling penological concerns against the special education needs of the individual, and the other is that a State not be threatened with a withholding of their entire grant amount for a failure to serve this population.

The regulations address these concerns by interpreting the statutory provisions in a way that limits withholding of funds as Congress intended, but allows the Secretary, should he or she believe that limited withholding of funds is not the appropriate means to ensure compliance, the additional enforcement options authorized by law.

Changes: The note following this section has been deleted.

Waiver of Requirement Regarding supplementing and not Supplanting With Part B Funds (§ 300.589)

Comment: One commenter said that because State requests for waivers of provisions of the Act are major policy proposals, the public participation requirements of §§ 300.280–300.284 should apply to the State's waiver request proposal. The commenter also asked that § 300.589 be revised to permit public comment to be considered on any impact the waiver request will have on the State's ability to successfully implement the Act, not just the FAPE provisions of the Act.

Discussion: The procedures proposed by the Secretary provide for public comment on the question of whether a waiver should be granted by the Secretary after the State has first made a prima facie showing that FAPE is and will continue to be available if the waiver is granted. (See § 300.589(d)). This process is adequate to ensure that the views of the public are considered in deciding waiver requests and §§ 300.280–300.284 should not be applied to the State's waiver request proposal.

Sections 612(a)(18)(C) and 612(a)(19)(C)(ii) of the Act give the Secretary the authority to grant a waiver in whole or in part if the State provides ''clear and convincing evidence that all children with disabilities have available to them a free appropriate public education.'' Under § 300.589(d), when the Secretary conducts a public hearing on a State's waiver request, interested parties are afforded the opportunity to present evidence on whether FAPE is currently available to all children with disabilities and whether the State will be able to ensure that FAPE remains available to all eligible children with disabilities if the Secretary provides a waiver. This would include a wide variety of topics, such as the State's ability to ensure an adequate supply of qualified personnel to provide FAPE, or to maintain an effective and efficient due process hearing system. Even if a waiver is granted, the State will still be required to comply with all the other requirements of Part B.

Changes: A technical change has been made to conform to the statutory provision that the Secretary provides a waiver in whole or in part.

Subpart F

Responsibility for all Educational Programs (§ 300.600)

Comment: Several commenters requested that this section be revised to emphasize the SEA's obligation to monitor implementation of the Act. One commenter requested that States be required to verify that all corrective actions have been taken within a certain period of time. Another commenter asked that paragraph (d) be revised to specify that the SEA retains supervisory authority over any public agency to which the Governor or his or her designee has assigned responsibility for children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

Discussion: A strong SEA monitoring process to ensure effective implementation of the Act is crucial to improving educational results for children with disabilities. A basic component of eligibility has long been that the SEA exercises general supervisory responsibility over all educational programs for children with disabilities in the State, including ensuring that those programs meet the requirements of Part B. This responsibility includes not just monitoring, and enforcement when noncompliance is not corrected, but also effective technical assistance that focuses on best practice designed to improve the substantive content and results of special education. We know, from long experience in administering this Act, that if SEA monitoring is lax, noncompliant practices emerge at the local level and indicators of performance for children with disabilities decline.

A priority of the Department's monitoring will be the State's

compliance regarding the State's supervisory role in the implementation of Part B. However, further regulation is not necessary. There is a great variety of circumstances that may give rise to compliance problems, and States should have some flexibility in fashioning remedies and timelines for correction. Verifying that corrective action has been completed has always been an integral part of the State's supervisory role.

The statute permits the Governor or appropriate State designee to assign to another agency supervisory responsibility for children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. The statute does not contemplate that the SEA would retain supervisory authority over the education of children with disabilities who are convicted as adults under State law and incarcerated in adult prisons if the Governor or designee has assigned that responsibility to another agency.

Changes: Consistent with the decision to not include notes in these regulations, the note following this section has been removed.

Amount Required for Subgrants to LEAs (§ 300.623)

Comment: None.

Discussion: The amount that will be required to be distributed as subgrants to LEAs for capacity-building and improvement activities as specified in § 300.622 will vary from year to year and is determined by the size of the increase in the State's allocation. Funds used for the required subgrants to LEAs in one year become part of the required amount that must be flow-through to LEAs consistent with the formula in § 300.712 in the next year.

In those years in which the State's allocation does not increase over the prior year by at least the rate of inflation, the required set-aside for capacity-building and improvement grants will be zero. However, States may always use, at their discretion, funds reserved for State-level activities under § 300.602 for these subgrants.

Changes: Consistent with the decision to not include notes in these regulations, the note following this section has been removed.

State Discretion in Awarding Subgrants (§ 300.624)

Comment: None.

Discussion: This section specifies that States may establish priorities for subgrants under § 300.622 to LEAs and may award those subgrants competitively or on a targeted basis. This is because the purpose of subgrants under § 300.622, as distinguished from the formula subgrants to LEAs under § 300.712, is to provide funding that the SEA can direct to address particular needs not readily addressed through formula assistance to school districts such as funding for services to children who have been suspended or expelled. The SEA can also direct these funds to promote innovation, capacity building, and systemic changes that are needed to improve educational results.

Changes: Consistent with the decision to not include notes in these regulations, the note following this section has been removed.

Establishment of Advisory Panels (§ 300.650)

Comment: One commenter wanted the regulation revised to specify that the panel must be independent and operate under the direction of officers elected by members of the panel.

Discussion: Additional specificity is not needed. Within the limits of the minimum requirements of the regulations, the operation of these panels should be left to the States.

The concept from the note, that the State advisory panel would advise on the education of children with disabilities who have been convicted as adults and incarcerated in adult prisons, even if a State has assigned general supervision responsibility for those students to an agency other than the SEA should be incorporated into § 300.652, which addresses the functions of the State advisory panel. This is consistent with the purpose of the advisory panel under section 612(a)(21)(A) of the Act—to provide policy guidance with respect to special education and related services for children with disabilities in the State.

Changes: The second sentence of the note has been integrated into § 300.652. The note has been removed.

Membership (§ 300.651)

Comment: The Department received a variety of comments concerning the membership of the State advisory panels. Many commenters wanted representatives of specific additional groups, such as a representative of a Parent Training and Information Center in the State, added to the list of mandatory membership. Several commenters wanted paragraph (b) to be modified to permit parents of adults who had been children with disabilities, or persons who had relatively recent experience (e.g., within the last three years) as a parent of a child receiving services under the Act, to be counted as a part of the mandatory majority.

Some commenters wanted a provision added to paragraph (b) to prohibit individuals with a past or present affiliation, such as employment, with an agency receiving funding under the Act from being considered a part of the individuals with disabilities, or parents of children with disabilities, majority. Others asked that the regulations encourage States to seek the participation of nonacademic professionals on the panels or to recruit parent representatives through nominations from parent and advocacy groups.

Discussion: An advisory panel will be most effective if it fairly represents the various interests of the groups concerned with the education of children with disabilities and is perceived as such by the community at large. In selecting members for the State advisory panel, States are encouraged to solicit individuals to serve as members who do not have, and will not be perceived as having, a conflict of interest in representing the views of the group they were selected to represent. That said, additional regulation is not necessary or appropriate. The requirements of § 300.651 are statutory. States should have the discretion to appoint members to these panels, within these statutory requirements, in a manner that best meets their needs. There is nothing in the Act that prohibits an individual with a disability, or the parent of a child with a disability, from employment with the SEA or an LEA, and there will be many instances when the perspective that an individual with a disability or the parent of a child with a disability may bring to decisions as an employee of a public education agency will greatly improve education for children with disabilities in that jurisdiction. The term ''children with disabilities'' is a defined term under the Act and in the context of Part B, refers to those children with disabilities from birth through age 21 who are eligible for services under Part B.

Changes: None.

Advisory Panel Functions (§ 300.652)

Comment: Several commenters sought expansion of the duties of the advisory panel to encompass various operational tasks, such as overseeing the development and implementation of a reliable and timely data system on due process hearings.

Discussion: Section 612(a)(21)(A) of the Act specifies that the purpose of the State advisory panels is to provide policy guidance with respect to special education and related services for children with disabilities in the State. The functions of the advisory panel specified in § 300.652 are drawn from

the statutory charge of the advisory panels. The regulations do not mandate operational duties for an advisory panel. However, if the SEA wants to assign other responsibilities to the advisory panel, it may do so, as long as those other duties do not prevent it from carrying out its responsibilities under IDEA.

Changes: No change has been made in response to these comments. See discussion of comments received under § 300.650, regarding a change to § 300.652.

Advisory Panel Procedures (§ 300.653)

Comment: Some commenters asked that paragraph (d) be revised to require that public notice of advisory panel meetings and agendas be made far enough in advance so that interested parties, such as parents and others, may plan to attend. At least one commenter requested that the term ''reasonable and necessary expenses'' in paragraph (f) be revised to indicate that child care expenses are reimbursable.

Discussion: Since the purpose of announcing meetings and agendas for those meetings is to allow the interested public to attend, the meetings and agendas of the meetings of the advisory panels should be announced early enough so that interested parties can plan to attend those meetings, but an absolute time line is not necessary. A similar standard is used in these regulations at § 300.281(c)(2) regarding notice of public hearings about State policies and procedures related to the Part B program. Furthermore, States should have the discretion to decide what are reasonable and necessary expenses related to participation in meetings and performing other duties of the advisory panel. These may include child care expenses or personal assistant services.

Changes: Paragraph (d) is revised to require that advisory panel meetings and agenda items are announced enough in advance to afford interested parties a reasonable opportunity to attend and that the meetings be open to the public.

Adoption of State Complaint Procedures (§ 300.660)

Comment: Several commenters requested that the note following this section be deleted, while others thought it was important to make the point that compensatory services can be awarded by an SEA.

Discussion: The note merely reflected what has always been the case—that SEAs have the authority to order compensatory services in appropriate circumstances as a remedy for violations of Part B in resolving complaints under the procedures in §§ 300.660–300.662. However, in light of the decision to remove all notes from these regulations, and to emphasize the importance of SEA action to resolve complaints in a way that provides individual relief when appropriate and addresses systemically the provision of appropriate services, a provision would be added to this section to clarify that if it has found a failure to provide appropriate services to a child with a disability through a complaint, the resolution addresses both how to remediate the denial of services, which can include an award of compensatory services, monetary reimbursement, or other corrective action appropriate to the needs of the child, and how to provide appropriate services for children with disabilities.

Changes: A new paragraph (b) has been added on how an SEA remedies a denial of appropriate services. The prior paragraph (b) has been integrated into paragraph (a) and the reference to parent training and information centers is corrected. The note has been deleted.

Minimum State Complaint Procedures (§ 300.661)

Comment: A number of commenters requested that the possibility of Secretarial review be reinstated in the final regulations while others supported the change. Some State commenters objected to having to resolve complaints on matters on which parents could have elected to file a due process hearing request.

Discussion: The possibility of Secretarial review has not been an efficient use of the Department's resources, which can be better directed to improving State system-wide implementation of the Act for the benefit of students with disabilities. Because of the unsuitability of the Department evaluating factual disputes in individual cases, most requests for Secretarial review are denied. The existence of the Secretarial review process may falsely encourage parents to delay taking an issue to mediation or due process so that their case is not timely filed. The Department has other more efficient mechanisms such as on-site monitoring reviews, policy reviews and complaint referrals, to ensure correction of violations that are brought to its attention. In addition, the Department intends to carefully assess States' efforts to improve their complaint resolution processes where the need is identified.

State responsibility for ensuring compliance with the Act includes resolving complaints even if they raise issues that could have been the subject of a due process hearing request. A State's general supervisory responsibility is not satisfied by relying on private enforcement efforts through due process actions for all issues that could be the subject of a due process hearing. In addition, the State complaint process and mediation provide parents and school districts with mechanisms that allow them to resolve differences without resort to more costly and litigious resolution through due process.

In the interests of building cooperative, collaborative relationships with all parties involved in the education of children with disabilities, States are encouraged to offer mediation, as appropriate, when a State complaint has been filed, as well as when a due process hearing has been requested. The existence of ongoing mediation in and of itself should not be viewed as an exceptional circumstance under § 300.661(b); however, if the parties agree that the complaint resolution timeline should be extended because of the mediation the SEA may extent the timeline for resolution of the complaint.

In light of the general decision to remove all notes from these regulations, the notes following this section would be removed. Because these notes provided an important explanation of how the State complaint process interacts with the due process hearing process, they would be incorporated into the regulation. This will reduce unnecessary disputes between SEAs and complainants in cases in which a complaint raises an issue that also is raised in a due process hearing.

Changes: Paragraphs (b) and (c) have been combined into a new paragraph (b). A new paragraph (c) has been added to clarify that if an issue in a complaint is the subject of a due process hearing, that issue (but not those outside of the due process proceeding) would be set aside until the conclusion of the due process hearing; that the decision of an issue in a due process hearing would be binding in a State complaint resolution; and that a public agency's failure to implement a due process decision would have to be resolved by an SEA. The notes following this section have been deleted.

Filing a Complaint (§ 300.662)

Comment: Commenters generally supported the concept, reflected in paragraph (c) of this section, that there should be a reasonable time limit on issues subject to the complaint process. One commenter wanted a delayed effective date for this limitation until the individual notice of these complaint

procedures had been in effect for a year. Another wanted States to be able to waive that limitation for compelling reasons. Another commenter wanted States to have more flexibility to disregard complaints that are weak or insubstantial, are a continuation of a pattern of complaints that have repeatedly been found factually or legally unfounded, or that are about the same issue as addressed in a recently closed complaint or compliance review. Another commenter objected to the note, stating that a State should not have to deal with complaints filed by persons outside the State.

Discussion: The time limits in § 300.662(c) were added in recognition that at some point the issues in a complaint become so stale that they are not reasonably susceptible to subsequent resolution. However, such a time limit should include an exception for continuing violations. States are free to accept and resolve complaints regarding alleged violations that occurred outside those timelines, just as they are free to add additional protections in other areas that are not inconsistent with the requirements of the Act and its implementing regulations.

States must evaluate and resolve each complaint on its own merits. It is reasonable for a State to resolve a complaint on an issue that is the same as an issue in an earlier resolved complaint by reference to that earlier complaint resolution if it has first concluded, through review and evaluation, that the facts and circumstances pertinent to the complaints are unchanged. If a State were to refuse to accept a complaint because it appeared to be similar to an issue in an earlier-resolved complaint without reviewing whether the facts and circumstances pertinent to the complaints remain the same, the State could be ignoring potential violations of the Act.

With regard to the statement in the note that States must resolve complaints which allege violations of the Act within their respective State even if received from an individual or organization outside of the State, States are responsible for ensuring compliance with Part B.

A complaint about implementation of the Act filed by someone outside of the State may be as effective in bringing compliance issues to the State's attention as complaints from State residents. In light of the general decision to remove all notes from these regulations, and to make clear the point that complaints from organizations or individuals from out of State must also be resolved, that concept would be integrated into § 300.660(a).

Changes: Section § 300.660(a) has been revised to clarify that any complaint includes complaints filed by organizations or individuals from another State. The note following this section has been deleted.

Subpart G—Allocation of Funds; Reports

Allocations to States (§ 300.703)

Comment: None.

Discussion: A reference to allocating funds to the freely associated States was omitted from paragraph (a).

Paragraph (a) incorrectly refers to the method of distribution in §§ 300.704–300.705. These sections are reserved.

Changes: A reference to freely associated States has been added and the references to §§ 300.704–300.705 have been deleted.

Permanent Formula (§ 300.706)

Comment: None.

Discussion: Paragraph (b)(2) refers to the amount received by a State under ''this section'' in the base year. Funds would not be provided under this section of the regulations in the base year. They would be provided under section 611 of the Act, as indicated in § 300.703(b).

Changes: The reference has been corrected to cite section 611 of the Act.

Increases in Funds (§ 300.707)

Comment: None.

Discussion: Section 300.707 indicates how allocations are to be made if the amount available for allocations to States under § 300.706 is equal to or greater than the amount allocated to the States under ''this section'' for the preceding fiscal year. The reference to ''this section'' should be to section 611 of the Act.

Changes: The reference has been revised by replacing the words ''this section'' the first time they appear with ''under section 611 of the Act''.

Limitation (§ 300.708)

Comment: None.

Discussion: The language in § 300.708 describing conditions that are ''Notwithstanding § 300.707'' are actually consistent with § 300.707 since § 300.708 is mentioned in § 300.707 as establishing conditions.

Changes: The reference has been clarified by rewording the first sentence of § 300.707.

Allocations to LEAs (§ 300.712)

Comment: Commenters were concerned about the distribution of funds when the permanent formula takes effect. In particular, with regard to the base payments provision in § 300.712(b), commenters expressed concern that it could result in a reduction of funds for LEAs in the case of an SEA that distributes more than 75 percent of its allocation to LEAs, and the LEA has a high child count. Because of the apparent absence of a ''hold harmless'' provision, commenters recommended clarification that this provision does not require an SEA to reduce its allocation to an LEA. Other commenters asked whether proposed § 300.712(b)(2)(i) means that States should be allocating extra funds to LEAs based on the total number of students, both regular and special education students, or whether States should allocate based on numbers of special education students only. These commenters requested that the phrase ''relative numbers'' be clarified.

With respect to the note following this section of the NPRM, a concern of one commenter was that proposed § 300.712(b)(2) could be construed as limiting States' ability to direct how their LEAs expend Part B funds that have been reallocated to LEAs that had not adequately provided FAPE to children with disabilities, and recommended clarification that a State may direct how any allocation to an LEA is to be spent.

A commenter recommended that, in calculating the distribution of the 15 percent allocation under the permanent formula, consideration be given for LEAs with a high incidence of children who live in institutional and other congregate care facilities, who have special needs and attend public schools.

Discussion: Section 611(g)(2)(B)(i) of the Act requires that when the permanent formula becomes effective, LEAs be allocated base payments based on 75 percent of the amounts that each State received in the year prior to that in which the permanent formula became effective. Funds that States are required to allocate to LEAs above this level must be allocated based on children enrolled in elementary and secondary schools and children in poverty. This will result in some redistribution of funds among LEAs that have received funds above the 75 percent level on a basis of counts of children with disabilities. However, because these provisions are based on the Act, they cannot be changed through regulations. States may address this redistribution of resources through funds that they set aside for State level activities.

The IDEA Amendments of 1997 maintain, in section 611(f) of the Act, as reflected in § 300.370(a), the flexibility of States to provide additional support

to LEAs using these funds. However, it is appropriate to amend § 300.370 to clarify that SEAs may use these funds directly, or distribute them on a competitive, targeted, or formula basis to LEAs.

Section 300.712(b)(2)(i) is based on section 611(g)(2)(B)(ii)(I) of the Act, which requires that required flow through funds to LEAs be distributed based on the relative numbers of ''children enrolled'' in public and private elementary and secondary schools. Children enrolled include both regular and special education students.

The term ''relative numbers'', which is used in section 611(g)(2)(B)(ii) of the Act and in proposed § 300.712(b)(2), adequately conveys the meaning that the allocations of the 85 percent and the 15 percent will be the same proportion of the total available as the respective numbers of children in the LEA to the State totals.

Section 300.712(b)(3) deals with the allocation of funds, not the use of funds.

Section 611(g)(2)(B)(ii) of the Act, as reflected in proposed § 300.712(b)(2), requires that 15 percent of the funds remaining after base payments be distributed based on the relative numbers of children living in poverty as determined by the SEA in each LEA. The incidence of children living in institutional or other congregate care facilities is not a factor in this distribution, and cannot be added. However, SEAs may use funds available for State level activities to provide additional support for children in institutional or other congregate care facilities.

Changes: Section 300.370 has been amended to add a new paragraph (c) to clarify that an SEA may directly use funds that it retains but does not use for administration, or may distribute them to LEAs on a competitive, targeted, or formula basis.

Comment: None.

Discussion: Although no comments were received for this Part regarding base payments for new LEAs, a number of commenters on the Preschool Grants for Children with Disabilities program regulations (34 CFR Part 301) raised the issue of whether charter schools or LEAs not in existence during fiscal year 1997 would be eligible for a base payment under § 301.31(a) of the regulations for the Preschool Grants for Children with Disabilities program, and, if so, how such payments should be calculated.

A similar issue exists with regard to base payments under the Assistance to States for the Education of Children with Disabilities program after the appropriation under section 611(j) of the Act exceeds $4,924,672,200. The regulations should be revised to ensure that charter schools established under State law as LEAs and LEAs not in existence in the year prior to the year in which the appropriation for the Assistance to States for the Education of Children with Disabilities program exceeds $4,924,672,200 are eligible to receive base payments.

In addition, if the boundaries of LEAs that were in existence or administrative responsibility for providing services to children with disabilities ages 3 through 21 are changed, adjustments to the base payments of the affected LEAs also should be made. For example, a change in administrative responsibility might encompass a change in the age range for which an LEA is responsible for providing services such as where responsibility for serving high school students is transferred from one LEA to another.

These adjustments will ensure that affected LEAs equitably share in their base payments. The base amounts for new and previously existing LEAs, once recalculated, should become the new base payments for the LEAs. These base payments would not change unless the payments subsequently need to be recalculated pursuant to § 300.712.

Adjustments to base payments would be based on the current numbers of children with disabilities served as determined by the SEA. In making a determination, the SEA may exercise substantial flexibility. For example the SEA may choose to revise base payments based on the current location of children with disabilities included in a previous child count or a new count of children served by affected LEAs.

Changes: Section 300.712 has been revised to clarify that, if LEAs are created, combined, or otherwise reconfigured subsequent to the base year (i.e. the year prior to the year in which the appropriation under section 611(j) of the Act exceeds $4,924,672,200), the State is required to provide the LEAs involved with revised base allocations calculated on the basis of the relative numbers of children with disabilities ages 3 through 21, or 6 through 21 depending on whether the State serves all children with disabilities ages 3 through 5, currently provided special education by each of the affected LEAs.

Comment: A number of commenters requested that notes be deleted from the regulations implementing Part B of IDEA.

Discussion: The note following this section in the NPRM indicates that States should use the best data available to them in making allocations based on school enrollment and children living in poverty. The note also encourages LEAs to include data on children who are enrolled in private schools and suggests alternative sources such as aggregate data on children participating in the free or reduced-price meals program under the National School Lunch Act and allocations under title I of the Elementary and Secondary Education Act as bases for determining poverty. These suggestions still reflect options for allocating funds, but need not be specified in the regulations. The requirement for States to use the best data available to them should be included in the regulations.

Changes: The note has been removed and § 300.712 has been expanded to state that for the purpose of making grants under this section, States must apply, on a uniform basis across all LEAs, the best data that are available to them on the numbers of children enrolled in public and private elementary and secondary schools and the numbers of children living in poverty.

Former Chapter 1 State Agencies (§ 300.713)

Comment: Commenters indicated that § 300.713, which mirrors the statutory language regarding payments to former Chapter 1 State agencies, should be clarified to indicate that these agencies must receive the current amount of their Part B allocation, rather than an amount that would not exceed the fiscal year 1994 per child amount. Otherwise, the result would be a reduction of allocations to these agencies. The commenters recommended adding a new paragraph (c) to § 300.713 to provide that, in years where the per child amount under Part B exceeds the per child amount for fiscal year 1994, each State agency shall receive the per child amount under Part B for each child to whom the agency is providing special education and related services in accordance with an IEP.

Other commenters indicated the need to clarify that payments to former Chapter 1 State agencies are targeted for direct service costs as in the past. Several commenters believe that payments to former Chapter 1 State agencies must follow the child, and recommended inserting the phrase ''including State-operated and State-supported school programs'' after 1994 at the conclusion of § 300.713(a) to ensure that the children who are counted actually receive the funds for which they are eligible.

Some commenters stated that the merger of the former Chapter 1 Handicapped program with Part B had a negative effect at the State level on

private special education schools, because funds intended for children are now being used by many States for both State and municipal administrative costs. Other commenters recommended, consistent with the intent of the merger of the former Chapter 1 Handicapped program with Part B, that these schools should be treated as LEAs for funding purposes, regardless of whether they meet the Part B definition of LEA.

One commenter took issue with the fact that the Act specifies a reporting date of December 1 of the fiscal year, while the proposed regulation allows a State, at its discretion, to report on December 1 or on the last Friday of October. Since the Act sets a specific date, this commenter requests that only the statutory date be used in the regulation.

Discussion: Funds provided to former Chapter 1 State agencies that exceed fiscal year 1994 levels are provided either because the amounts to which former Chapter 1 State agencies are entitled as LEAs, without regard to their status as former Chapter 1 agencies, exceed the minimum allocations for former Chapter 1 agencies, or at the discretion of the States from funds available to be set aside for State level activities.

The IDEA Amendments of 1997 maintain, in section 611(f), as reflected in § 300.370(a), the flexibility of States to provide additional support to State agencies beyond the formula entitlement of LEAs under § 300.712. It would be inappropriate, as well as inconsistent with the Act, to compel States that have voluntarily passed through higher levels of funding to State agencies in the past to maintain those levels of funding as a requirement.

There has been confusion in some States regarding the entitlement of former Chapter 1 Handicapped State agencies to funds distributed by formula to LEAs that would be above the amounts these State agencies received per child for 1994 under the Chapter 1 Handicapped program. Under the IDEA, both before and after enactment of the IDEA Amendments of 1997, the amounts to which these State agencies are entitled are minimum amounts. Former Chapter 1 Handicapped State agencies are entitled to formula allocations in the same amounts as other LEAs. They may also be eligible for additional payments to bring their funding levels per child up to the levels they received under the Chapter 1 Handicapped program for fiscal year 1994.

Under the initial allocation of fiscal year 1998 funds, which became available on July 1, 1998, the minimum per child allocations that former Chapter 1 Handicapped State agencies are entitled to as LEAs exceeds the amount per child that these agencies received for fiscal year 1994 under the Chapter 1 Handicapped program in 40 States. SEAs in these States must provide former Chapter 1 Handicapped State agencies at least the minimum amount per child that they are entitled to as LEAs, not the lesser amounts that they received per child under the Chapter 1 Handicapped program for 1994.

For 10 States and the District of Columbia, the minimum per child amounts to which former Chapter 1 Handicapped State agencies are entitled as LEAs are still slightly smaller than the amounts that these agencies received per child for 1994 under the Chapter 1 Handicapped program. In these States, SEAs must provide the former Chapter 1 Handicapped State agencies with the amounts per child that these agencies are entitled to as LEAs. SEAs must then provide additional funds to the former Chapter 1 Handicapped State agencies from the amounts that the SEAs set aside for State level activities. The amount of these additional funds is equal to the difference between the amount per child that the former Chapter 1 State agencies received under the Chapter 1 Handicapped program for 1994 and the amount per child they receive as LEAs, multiplied by the lesser of the number of children ages 6 through 21 currently served by the former Chapter 1 Handicapped State agencies or the number of children ages 3 through 21 served by these agencies for 1994 under the Chapter 1 Handicapped program.

It is expected that for the Federal fiscal year 1999 appropriation, which will become available on July 1, 1999, the minimum per child amounts that will be provided to all LEAs, including former Chapter 1 Handicapped State agencies, will exceed the per child allocations under the Chapter 1 Handicapped program in all States.

Former Chapter 1 agencies are subject to the same requirements as other LEAs, and are not limited to using Part B funds only for direct service costs.

Adding the phrase ''including State-operated and State-supported school programs'' after ''1994'' at the conclusion of § 300.713(a) would not ensure that the children who are counted actually receive funds. Moreover, the last paragraph in § 300.713(a) deals with the optional use of funds available for State level activities to increase funding for LEAs that formerly served children who had at one time been in State-operated or State-supported programs, not to increase funding for State-operated and State-supported programs themselves. However, States, at their discretion, may use funds available for State level activities to provide support for State-operated or State-supported programs under § 300.370.

It should also be noted that, under the Act, States are required to ensure that all children with disabilities have access to a free appropriate public education regardless of the sources of funds that are used to provide that education. Ensuring that specific amounts of Federal funds are used for each of the 6 million children with disabilities who receive special education services would be administratively unwieldy and would not necessarily help to ensure that States meet this requirement.

The Chapter 1 Handicapped program was merged with the IDEA Part B Assistance to States for the Education of Children with Disabilities program in 1995. The merger was not affected by the IDEA Amendments of 1997, and its impact cannot be addressed by these regulations.

Section 602(15) of the Act defines LEA as including educational service agencies. Educational service agencies are defined in section 602(4) of the Act and § 300.10 as including public institutions or agencies having administrative control and direction over a public elementary or secondary school. State agencies formerly provided funding under the Chapter 1 Handicapped program and which continue to provide special education and related services to children with disabilities fall within this definition. Individual schools that received funding through State agencies under the Chapter 1 Handicapped program are not LEAs under the Part B Assistance to States for the Education of Children with Disabilities program.

Section 611(d)(2) of the Act specifies that, for the purpose of allocating funds among States, States may report children either as of December 1 or the last Friday in October of the fiscal year for which funds are appropriated. Using the same dates for establishing minimum funding levels for former Chapter 1 Handicapped State agencies will reduce burden on States that count children in October by eliminating the need for a separate count of children served by State agencies in December.

Changes: Language has been revised in paragraph (a)(1) to clarify that the amount that each former Chapter 1 State agency must receive is a minimum amount.

Reallocation of LEA Funds (§ 300.714)

Comment: One commenter recommended that this section be eliminated because it causes a disincentive for LEAs to provide ''adequate'' or even more than ''adequate'' FAPE.

Another commenter stated that the regulation must provide the State agency with a basis for determining that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency with State and local funds, and indicated that there is a need for guidance on criteria for determining when any portion of the funds allocated under this part may be removed. Criteria suggested by the commenter for this purpose include: (1) IEP related measures such as appropriateness of measurable IEP goals and a high percentage of annual goals successfully completed; (2) educational inputs such as student staff ratios including related services staff; and (3) a relatively large amount of unexpended IDEA funds.

Discussion: The authority of SEAs to reallocate funds among LEAs if they determine that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by the LEA and that the LEA does not need those funds to provide FAPE, is included in section 611(g)(4) of the Act. This authority cannot be removed through regulations. However, it is expected that SEAs would use this authority only in unusual circumstances (e.g., when there is a radical reduction in the number of children served by a LEA).

Moreover, the instances in which an SEA would reallocate the funds of an LEA because the LEA is providing adequate services and does not need the funds should be relatively rare, and the circumstances causing such a determination also should be unusual.

It would be very difficult to establish criteria that could be appropriately and fairly applied in all cases. For this reason, the criteria for determining these instances should be left at the discretion of the States.

Changes: None.

Payments to the Secretary of the Interior for the Education of Indian Children (§ 300.715)

Comment: None.

Discussion: The reference to ''this section'' in paragraph (a) should also include a reference to § 300.716 because the earmarked funds include Indian children covered under both sections.

Changes: The term ''this section'' in § 300.715(a) has been revised to read ''this section and § 300.716.''

Limitation for Freely Associated States (§ 300.719)

Comment: None.

Discussion: The references to ''this part'' in paragraph (c) of this section should be changed to ''Part B of the Act.''

Changes: Section 300.719 (c)has been amended, consistent with the above discussion.

Annual Report of Children Served—Report Requirement (§ 300.750)

Comment: Several commenters objected to the note following § 300.750 of the NPRM, stating that it reflects only the requirements of prior law, and not all requirements in the current section 611 of the Act. The commenters recommended that, if the note is retained, it needs to be revised to conform more closely to the current language used in the Act. For example, the references in the note to section 611(a)(5) of the Act should be deleted, since that section no longer exists. Also, the population that a State may count for allocation purposes no longer differs from the population of children to whom the State must make FAPE available, and this needs to be explained in the note.

Another commenter recommended that the regulations on annual SEA reports to the Department be amended to include the requirements of section 618(a)(1)(A) of the Act.

Discussion: The note following this section in the NPRM indicates that the number of children who are counted for the purpose of distributing funds may be different from the children for whom the States must make FAPE available. In order to receive full funding under Part B of the IDEA, States must provide services to all children with disabilities ages 3 through 17, and to children 18 through 21 when not inconsistent with State law or practice, or the order of any court. These statements in the note reflect the requirements of IDEA. However, consistent with the decision to not include notes in the final regulations, the note should be deleted.

It should be noted that until the appropriation for the Assistance to States for the Education of Children with Disabilities program exceeds $4,924,672,200, the interim formula requires that funds be distributed based on the number of children served, and the limitations in section 611(a)(5) of IDEA prior to the IDEA Amendments of 1997, which prohibit the Secretary from counting more than 12 percent of children with disabilities in certain cases, will be in effect until that time.

The content of the report is addressed in § 300.751. The reporting requirements in section 618 of the Act are complex. The Secretary believes that it would be better to address the data reporting requirements of the new section 618 as part of the clearance process for data collection rather than through these regulations.

Changes: The note has been removed.

Annual Report (§ 300.751)

Comment: Commenters stated that while § 300.751(a) specifies the information that must be included in the report for any year before the total appropriation for section 611 of the Act first exceeds $4,924,672,200, it is unclear what information should be included in the report after that date. The commenters indicated a need for this clarification in the regulation.

Other commenters recommended that the regulation clarify that if a child is deaf-blind, that child must be reported under that category, and if the child has more than one disability (other than deaf-blindness), that child must be reported under multiple disabilities. These commenters also requested that the regulations explain that the responsibility for the annual census count of deaf-blind children should be with the single and multi-State deaf-blind projects.

Discussion: Before the total appropriation for section 611 of the Act first exceeds $4,924,672,200, a count of children ages 3 through 21 will be used for distributing funds. After this level is reached, data on the number of children served will continue to be necessary due to the requirement in section 611(a)(2) of the Act that no State be allocated an amount per disabled child served greater than 40 percent of the average per-pupil expenditure in public elementary and secondary schools in the United States. The language in § 300.751 should reflect this requirement. In addition, data included in the report does not necessarily reflect the flexibility potentially available to the States to use sampling to collect data or new data reporting requirements for children ages 3 through 9.

The NPRM provided that a child with deaf-blindness must be reported under the category ''deaf-blindness'' and that a child who has more than one disability, other than deaf-blindness, must be reported under the category ''multiple disabilities''.

The single and multi-State deaf-blind projects, which are funded under discretionary awards under Part D of the Act, are not responsible for conducting a census count of deaf-blind children. Those projects were required to report on the number of children with deaf-blindness that they serve. These Part

300 regulations set out the requirements for participation of States under Part B of the Act.

Changes: This section has been reworded to reflect in paragraph (a) data required for the distribution of funds, including data on the numbers of children with disabilities that are provided special education and related services in the age groupings 3 through 5, 6 through 17, and 18 through 21. The remainder of the section has been revised to reflect the Secretary's ability to permit sampling to collect data, new data collection requirements in the Act, and to clarify that children who are not classified as developmentally delayed and who have two disabilities consisting of deafness and blindness should be reported under the category of ''deaf-blind''.

Annual Report of Children Served—Certification (§ 300.752)

Comment: None.

Discussion: The certification of an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question is critical only with regard to obtaining information needed for the allocation of funds.

Changes: The certification of an accurate and unduplicated count has been limited to the data required under § 300.751(a), which, as revised, is limited to information required to make funding allocations to States.

Annual Report of Children Served—Criteria for Counting Children (§ 300.753)

Comment: None.

Discussion: Children with disabilities who are enrolled by their parents in private schools should be able to be counted by LEAs if those children receive special education or related services, or both, that are provided in accordance with a services plan and meet the requirements of §§ 300.452–300.462. The language in the NPRM could have been read to require that children with disabilities enrolled by their parents in private schools be provided all of the related services they need to assist them in benefitting from special education in order for the LEAs to count these children.

Changes: Section 300.753 has been revised to permit LEAs to count private school children with disabilities who are receiving special education or related services, or both, that meet standards and are provided in accordance with §§ 300.452–300.462.

Comment: A number of commenters requested that notes be deleted from the regulations implementing Part B of IDEA.

Discussion: Note 1 following this section in the NPRM indicated that States may count children with disabilities in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards. All children who are counted must be enrolled in a school or program providing special education or related services that is operated or supported by a public agency. However, a child with a disability may also be enrolled in a private school. All children who are counted must be provided with services that meet State standards regardless of whether they are also enrolled in a private school.

Note 2 to this section in the NPRM indicated that where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education, the child may be counted. The revised § 300.753 more clearly reflects the fact that children with disabilities enrolled by their parents in private schools are eligible to be counted. This is true whether the curriculum of the school consists of basic or regular education, or special education.

Note 2 also indicated that the Department expects that there would only be limited situations in which special education would be clearly separated from regular education—generally, if speech services are the only special education required by the child. This expectation is not consistent with the flexibility that LEAs have in providing services to children in private schools.

As Note 2 indicated, a State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If an SEA or LEA is responsible for serving these children, and does provide them special education and related services, they may be counted.

If a public agency places or refers a child with disabilities to a public or private school for educational purposes, parents may not be charged for any part of the child's education.

Changes: The notes have been removed, and language has been added to § 300.753 to clarify that, in order for a State to count children, the children must be enrolled in a school or program that is operated or supported by a public agency, and that they may not count children who are served solely through Federal programs, including programs of the Departments of Interior, Defense, and Education except as covered under § 300.184(c)(2).

Annual Report of Children Served—Other Responsibilities of the State Education Agency (§ 300.754)

Comment: One commenter recommended that the SEA should be required to sanction LEAs for providing intentionally misleading or false information about the number of children with disabilities receiving special education and related services within the LEA's jurisdiction.

Discussion: The IDEA Part B Assistance to States for the Education of Children with Disabilities program is administered primarily through SEAs. It is in the individual State's interest as well as the national interest to ensure that counts of children are accurate; requiring sanctions for LEAs that provide intentionally misleading or false information would be unnecessary and overly prescriptive. The IDEA allows States to impose sanctions subject to the requirements of the Act.

Changes: None.

Comment: None.

Discussion: Section 300.754(d) refers to ''reports'' under §§ 300.750–300.753. These sections refer to only one report.

Changes: The word ''reports'' has been changed to ''report''.

Comment: A number of commenters requested that notes be deleted from the regulations implementing Part B of IDEA.

Discussion: The note following this section in the NPRM indicates that data required in the annual report of children served are not to be transmitted to the Secretary in personally identifiable form, and that States are encouraged to collect these data in non-personally identifiable form. The formats used by the Secretary for collecting data do not provide for individual identification of children. The formats for data collection by States are a matter of State discretion.

Changes: The note has been removed.

Disproportionality (§ 300.755)

Comment: Commenters recommended that the regulation define what constitutes a significant disproportionality based on race in the identification, labeling, and placement of children with disabilities, thus triggering the obligation to review and revise, as appropriate, identification and placement policies, practices and procedures. Another commenter recommended additional language requiring consultation with parent training and information centers, parent and civil rights advocacy groups, and others, during this process. Other commenters suggested that data be

collected annually when the child count is submitted, and that a requirement should be added that data be analyzed. If disproportionality is found, a corrective action plan must be developed by the SEA, and such a plan should be reported to the Secretary and to the public annually.

Another commenter was supportive of the requirement in § 300.755 but noted that, because many BIA schools are serving American Indian children from wide catchment areas, an increasing number of children with disabilities are enrolling in these schools for what may be valid reasons. The commenter recommended a requirement for review and revision of policies by representatives of the Department of the Interior who have experience in the unique political, cultural, and geographical issues affecting the identification of these children as disabled and in need of special education and related services.

Discussion: The Act provides that the States and the Secretary of the Interior must collect data, determine if disproportionality exists, and take corrective action. In order for States and the Department of the Interior to determine if disproportionality exist they must establish criteria for determining what constitutes significant disproportionality. It is expected that the determination of disproportionality will involve consideration of a wide range of variables peculiar to each State including income, education, health, cultural, and other demographic characteristics in addition to race. Prescribing how the States should determine disproportionality and take corrective action would not reflect the varied circumstances existing in each State and is not consistent with discretion afforded to States under the statute.

It should also be noted that the Department's Office for Civil Rights also looks at disproportionality in its review of State and local activities, and that the Office of Special Education Programs will monitor to ensure compliance with this requirement.

The determination of disproportionality is separate from a determination as to whether any corrective action is appropriate. The Secretary of the Interior is expected to utilize knowledgeable individuals to determine if corrective action is called for in a particular instance.

Changes: None.

Part C

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) for the Early Intervention Program for Infants and Toddlers with Disabilities. The Department solicited comments on proposed changes to six regulatory provisions in the Early Intervention Program for Infants and Toddlers with Disabilities, formerly known as Part H of the Individuals with Disabilities Education Act (IDEA). Effective July 1, 1998, Part H of IDEA (Part H) was relocated to Part C of IDEA (Part C). The proposed changes were made to conform Part C to proposed changes in Part B of IDEA. On April 14, 1998, the Department published technical changes to the Part C regulations to incorporate statutory changes to Part C made by the IDEA Amendments of 1997 (63 FR 18290). A notice requesting advice and recommendations on Part C regulatory issues was also published on April 14, 1998 (63 FR 18297). Although the deadline for comments on Part C regulatory issues was July 31, 1998, the Department reopened the comment period by publishing another notice on August 14, 1998 (63 FR 43865–43866).

In response to the Department's invitation in the NPRM published on October 22, 1997, several parties submitted comments on the proposed regulations. An analysis of the comments and of the resulting changes in the regulations follow. Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes—'' and suggested changes the Department is not legally authorized to make under the applicable statutory authority ''—are not addressed. All Part C provisions amended by these regulations that were not the subject of the NPRM are amended only to conform provisions to statutory changes to Part C made by the IDEA Amendments of 1997, or to conform technical provisions to changes made to the Part B regulations.

Goals 2000: Educate America Act

Comment: One commenter asked how the Goals 2000: Educate America Act (Goals 2000) would be implemented for infants and toddlers with disabilities, in particular how the first goal of all children in America starting school ready to learn would be realized for infants and toddlers with disabilities. The commenter asked if there would be definitions or criteria promulgated pursuant to Goals 2000 regarding an infant's or toddler's readiness to learn.

Discussion: The National Education Goals are goals, not requirements; no definitions or criteria are necessary to specify how States should make progress towards goal one, ''All children in America will start school ready to learn.'' Children with developmental delays are likely to experience poor educational results because of a disability without appropriate early intervention. By addressing the effects of a disability or complications that could arise if services are not provided, these children will have a greater likelihood of better results, and require less intensive or possibly no special services, when they are ready to enter school. The Part C Early Intervention Program helps States to address the needs of infants and toddlers with disabilities and their families by promoting child find activities, implementing family-focused service systems, coordinating early intervention services on a statewide basis, and providing critical services that otherwise would not be available. As such, the program plays a major role in improving the school readiness of these young children and meeting the National Education Goal of ensuring that every child enters school ready to learn.

Changes: None.

General Comments

Comment: Several of the commenters requested that the Department issue a full notice of proposed rulemaking (NPRM) for the Part C program. Commenters questioned why the particular regulatory provisions in the October 22, 1997 NPRM were singled out for revision. Many requested generally that the Department clarify the statutory amendments to Part C, such as the provisions regarding natural environments.

Discussion: The six provisions related to Part C in these regulations have been revised in order to achieve consistency with parallel Part B regulations. Regarding the remainder of the Part C regulations, the Department solicited comments regarding all of the Part C regulations on April 14, 1998, and extended the comment period on August 14, 1988. Comments received in response to the October 22, 1997 NPRM regarding Part C regulations that were not the subject of that NPRM will be retained and considered with the comments received pursuant to the April 14 and August 14, 1998, solicitations. However, additional submissions from those same commenters are welcome.

These final regulations contain several technical changes that were not included in the April 14, 1998 regulatory changes. All of these changes will be included in the next version of Part C regulations published in the Code

of Federal Regulations (CFR), which is revised each year.

As with the final Part B regulations published in this issue of the **Federal Register**, these final Part C regulations will not contain notes. The critical substantive portions of the notes will be incorporated into the corresponding regulatory provision or the applicable discussion section in this preamble. Other information from the notes will be deleted.

Changes: None.

Definition of Parent (§ 303.18)

Comment: There were a few comments regarding the revisions to the definition of parent at § 303.18. Some commenters liked the changes and some objected to the changes. Commenters who objected did so primarily because the proposed changes were perceived to conflict with prior OSEP opinions and ultimately result in fewer children having ''parent'' representation at meetings. Commenters also asked what constitutes a ''long-term parent relationship'' for an infant or toddler.

Discussion: The changes to the definition of parent under Part C are to clarify that the definition is an inclusive one and to conform Part C to Part B for consistency and continuity purposes. The changes should result in more, rather than fewer, children having parental representation, as the regulation clarifies that foster parents may, in appropriate circumstances, unless prohibited by State law, serve as parents. 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.

With respect to the meaning of ''long-term parental relationship,'' this term was included to ensure that when a child is in foster care, decisions regarding services are made by the foster parents only if they have had, or will have, a parental relationship that is on-going rather than temporary. The goal is that decisions regarding services will be made only by those who have or will have a substantive understanding of the child's needs. Thus, for example, a parental relationship would be considered ''long-term'' if (1) at the time the relationship is created, it is intended to be a long-term arrangement, or (2) the relationship has existed for a relatively long period of time. For older children, States could require a more lengthy time period than would be appropriate for infants and toddlers.

Several changes to this provision are in response to comments regarding the corresponding provision in the Part B regulations (§ 300.20). The general definition of ''parent'' is amended to make clear that adoptive parents have the same status as natural parents. In addition, to avoid conflict with State statutes, a provision is added permitting the use of foster parents under these regulations unless State law prohibits foster parents from acting as parents for these purposes. For further explanation of the changes, see the discussion regarding 34 CFR 300.20 in the preamble to the final Part B regulations.

Changes: Section 303.18 has been amended to specifically include adoptive parents, and to permit States in certain circumstances to use foster parents as parents under the Act without amending relevant State statutes on the definition of ''parent''. The substance of the note has been incorporated into the regulations, and the note has been deleted.

Prior Notice (§ 303.403)

Discussion: No comments were received regarding proposed § 303.403(b)(4), and it is included in these final regulations. However, given the comments regarding the parallel section under Part B, and the fact that Part C does not have a separate procedural safeguards notice, § 303.403(b)(3) is changed to make clear that the notice given under this section must contain all procedural safeguards under Part C, including the new mediation procedures in § 303.419.

Changes: Section 303.403(b)(3) is amended to clarify that the notice must inform parents about all procedural safeguards available under §§ 303.401–303.460.

Adopting Complaint Procedures (§ 303.510)

Comment: One commenter requested that the Department clarify how frequently States are required to disseminate their State complaint procedures in proposed § 303.510(b); the commenter also asked that the requirement include provisions for limited-English speakers and non-readers.

Discussion: It is unnecessary to specify a frequency for dissemination of State complaint procedures; States have the responsibility to ensure that their publicly-disseminated State complaint materials are distributed to parents, as well as to the other required entities, and to ensure that the materials are kept up to date. In addition, the lead agency is now required to provide an explanation of the State complaint procedures to parents at the various times specified in § 303.403(b)(4), as part of the ''prior notice'' requirement. The requirements of § 303.403 regarding prior notice include communicating the notice in the parents' native language or other mode of communication; therefore, it is unnecessary to add those provisions to § 303.510.

Because a new paragraph (b) is added to this section (see discussion below), the language in proposed (b) from the NPRM is moved to paragraph (a)(2) of this section.

Changes: A portion of the existing note is incorporated into § 303.510(a) and the note is removed. Proposed Note 2 is incorporated into the regulation as new § 303.510(b); the language in proposed § 303.510(b) is moved to new § 303.510(a)(2). In addition, the language in the proposed note following § 303.511 regarding complaints from out of State is incorporated into § 303.510(a)(1).

Comment: Several commenters requested clarification of the provision regarding compensatory services in Note 2 to proposed § 303.510. Compensatory services are also referenced in proposed § 303.511(c). One commenter stated that compensatory services are not appropriate for infants and toddlers receiving services under Part C; services are already year-round, and because the frequency and intensity of services are individually tailored to the child's needs in the IFSP, supplementing those services would not be appropriate. This commenter noted, however, that families who procure services at their own expense because an IFSP was not implemented in a timely manner should be able to receive reimbursement. Another commenter stated that additional public discussion is needed before finalizing this provision regarding compensatory services. The commenter raised questions concerning how compensatory services would be funded and provided by a lead agency before a child turns three years old, how such services would be funded and provided after the child turns three, and how such post-Part C services would be integrated with the child's special education services. Another commenter requested the Department's ''vision'' for the proposed application of this regulation.

Discussion: The note reflected what has always been the case ''—that lead agencies have the authority to order remedies in appropriate circumstances for a violation of Part C in resolving complaints under the procedures in §§ 303.510–303.512. However,

consistent with the decision to remove notes from the Part B regulations, and to emphasize the importance of lead agency action to resolve complaints in a way that provides individual relief when appropriate and addresses systemically the provision of appropriate services, a provision is added to this section. The provision clarifies that if the lead agency has found a failure to provide appropriate services to an infant or toddler with a disability through a complaint, the resolution must address both how to remediate the denial of services, and how to provide appropriate services for all infants and toddlers with disabilities in the State and in the future. While recognizing that compensatory services, in the sense used under Part B, may be inappropriate for an infant or toddler in many instances, it should not be precluded where it is an appropriate corrective action as determined by the lead agency based on the individual circumstances. Lead agencies retain the authority, responsibility, and flexibility to construct appropriate remedies in individual cases in order to obtain the results needed for the child and family. Possible remedies may include reimbursement of sums spent by a parent, services—compensatory or otherwise, or other appropriate corrective action.

Regarding the issue of a complaint filed after a child turns three and is no longer eligible for Part C services, if parents have a complaint about the services received or not received by their child while an infant or toddler, those parents would properly file the complaint with the lead agency that had responsibility for the child during that time period, even if the child has ''aged out'' of the Part C program at age three. That lead agency has the responsibility to resolve and, as appropriate, investigate the complaint, and award appropriate corrective action, which may need to be designed by working with the SEA if the child is Part B-eligible, or by working with other appropriate service providers if the child is not Part B-eligible. These regulations do not prevent parents from filing a complaint with the lead agency after the child leaves the Part C program. In addition, if the alleged violation is systemic, corrective action would be required in order to ensure that a violation does not continue for other infants and toddlers. However, to prevent undue burden on lead agencies from very old cases, § 303.511(b) contains time limitations on complaints.

Changes: A new paragraph (b) has been added to § 303.510 to address how a lead agency remedies a denial of appropriate services, in place of proposed Note 2. Proposed paragraph (b) has been moved to new § 303.510(a)(2).

Filing a Complaint (§ 303.511)

Comment: Two commenters objected to the one-year time limit for filing a complaint in proposed § 303.511(c). They stated that parents are often not knowledgeable about their rights at their first entrance into a complex system, and that violations may not be apparent until after the child exits the system. The commenters stated that the one-year limit may also conflict with existing State laws governing administrative proceedings. These commenters also questioned when it would be appropriate for an organization to file a complaint, and asked why the proposed note states that lead agencies must resolve complaints filed by entities from another State.

Discussion: The time limits in proposed § 303.511(c) were added in recognition that at some point the issues in a complaint are no longer reasonably susceptible to resolution. However, such a time limit should include an exception for continuing violations; this would include a violation for a specific child, e.g., one that began when an infant was 4 months old and still continues at age two, as well as violations that continue on a systemic basis and affect other children. The regulation also includes a three-year time limit for cases in which a parent requests reimbursement or corrective action. As evidenced by the comments on the issue of compensatory services under Part C (see discussion regarding § 303.510 above), compensatory services may not be an appropriate remedy in some cases. Therefore, the language regarding the three-year limit in these regulations should be changed to describe more accurately the remedies that may be requested, such as a parent's request for reimbursement for amounts spent to provide services in the IFSP that were not provided by the lead agency.

As noted above in the response to comments on § 303.510, these regulations do not prohibit individuals from filing a complaint with the lead agency after the child has left the Part C system, and require, within the timeframes noted, that the State resolve the complaint. In addition, States are free to accept and resolve complaints regarding alleged violations that occurred outside these timelines, just as they are free to add additional protections in other areas that are not inconsistent with the requirements of the Act and its implementing regulations. If a State law provided a more generous timeline for filing complaints, the State could certainly use that timeline; it could, in the alternative, amend its State law to be as restrictive, but not more restrictive, than these Federal regulations.

Regarding the issue of when it is appropriate for an organization, rather than an individual, to file a complaint, the State complaint procedures broadly permit any organization to file a complaint alleging that the State is violating IDEA, in order to permit entities, as well as individuals, that become aware of violations to raise them. With regard to the statement in the note that the lead agency must resolve complaints even if received from an individual or organization outside of the State, the lead agency is responsible for ensuring compliance with Part C. A complaint about implementation of the Act filed by an organization or individual outside of the State is an additional means of bringing compliance issues to the State's attention. To be consistent with the decision to remove all notes from the Part B regulations, and to make clear that complaints from out-of-State organizations or individuals must also be resolved, that concept is integrated into § 303.510(a)(1).

Changes: The language in proposed § 303.511(c) has been moved to paragraph (b) and changed to describe more accurately the remedies that could be requested under the three-year limitation for State complaints. The note following § 303.511 regarding complaints filed by organizations or individuals from another State has been deleted, and the substance of the note has been moved to § 303.510(a)(1).

Minimum State Complaint Procedures; Timelines (§ 303.512)

Comment: One commenter asked whether eliminating the right to request Secretarial review would eliminate all potential appeals of a State's decision. The commenter requested that a note be added to reference other procedures still available if the complainant is not satisfied with a State's decision.

Discussion: If a complainant who wishes to contest a lead agency's decision on a State complaint is a parent, he or she may request a due process hearing under § 303.420 concerning a child's identification, evaluation, or placement, or the provision of appropriate early intervention services to the child and the child's family. In addition, States must make mediation under § 303.419 available, at a minimum, when a parent requests a due process hearing. States