being implemented for the child by that date, with the IEP specifying the special education and related services that are needed in order to ensure that the child receives FAPE, including any extended school year services, if appropriate. (Section 612(a)(9) of the Act). If a child with a disability is determined eligible to receive Part B services, the public agency must convene a meeting and develop an IEP by the child's third birthday, and must in developing the IEP determine when services will be initiated. For 2-year olds served under Part C, the public agency must meet with the Part C lead agency and the family to discuss the child's transition to Part B services at least 90 days (and, at the discretion of the parties, up to 6 months) before the child turns 3. (See section 637 (a)(8)) of the Act). In order to ensure a smooth transition for children served under Part C who turn 3 during the summer months, a lead agency under Part C may use Part C funds to provide FAPE to children from their third birthday to the beginning of the following school year. (See section 638 of the Act).

Children with disabilities who have their third birthday during the summer months are not automatically entitled to receive special education and related services during the summer, and the public agency must provide such services during the summer only if the IEP team determines that the child needs extended school year services at that time in order to receive FAPE. The substance of Note 1 should be incorporated into the text of the regulation, because it sets forth long-standing requirements that are based on the statute (see analysis of ''General Comments'' relating to the use of notes under this part).

Changes: The substance of Note 1 has been added to the text of the regulations, and the note has been deleted.

Comment: Some commenters expressed support for Note 2 (regarding the determination of eligibility for children advancing from grade to grade), and recommended that the substance of the note be incorporated into the text of the regulations. A few of the commenters suggested deleting the second sentence of Note 2 (relating to the IEP team) before making the note a regulation. Other commenters recommended that Note 2 be deleted, as it confuses the IEP team with the team that determines eligibility.

Discussion: The revised IEP requirements at § 300.347 require public agencies to provide special education and related services to enable students with disabilities to progress in the general curriculum, thus making clear that a child is not ineligible to receive special education and related services just because the child is, with the support of those individually designed services, progressing in the general curriculum from grade-to-grade. The group determining the eligibility of a child who has a disability and who is progressing from grade-to-grade must make an individualized determination as to whether, notwithstanding the child's progress from grade-to-grade, he or she needs special education and related services. The substance of Note 2, as revised, should be incorporated into the text of the regulation, because it sets forth long-standing requirements that are based on the statute (see analysis of ''General Comments'' relating to the use of notes under this part).

Changes: Section 300.121 has been revised to incorporate the substance of Note 2, and the note deleted.

Comment: None.

Discussion: To ensure that children with disabilities have available FAPE, consistent with the requirements of this part, it is important for the Department to be able to verify that each State's policies are consistent with their responsibilities regarding important aspects of their obligation to make FAPE available. Therefore, § 300.121(b) should be revised to provide that each State's policy regarding the right to FAPE of all children with disabilities must be consistent with the requirements of §§ 300.300–300.313.

Changes: Section 300.121(b) has been revised to provide that the States' policies concerning the provision of FAPE must be consistent with the requirements of §§ 300.300–300.313.

Exception to FAPE for Certain Ages (§ 300.122)

Comment: Some commenters expressed support for § 300.122(a)(2), which sets forth an exception to the FAPE requirement for certain youth who are incarcerated in adult correctional facilities, and Note 2 which includes clarifying language from the House Committee Report. A few commenters wanted the regulation to clarify the responsibility of a State where reasonable efforts to obtain prior records from the last reported educational placement have been made, but no records are available. The commenter also requested adding a note to clarify that, even if State law does not require the provision of FAPE to students with disabilities, ages 18 through 21, who, in the last educational placement prior to their incarceration in an adult correctional facility were not identified as a child with a disability and did not have an IEP under Part B of the Act, the State may choose to serve some individuals who fit within that exception and include those individuals within its Part B child count.

Discussion: Before determining that an individual is not eligible under this part to receive Part B services, the State must make reasonable efforts to obtain and review whatever information is needed to determine that the incarcerated individual had not been identified as a child with a disability and did not have an IEP in his or her last educational placement prior to incarceration in an adult correctional facility. The steps a State takes to obtain such information may include a review of records, and interviewing the incarcerated individual and his or her parents.

A State may include in its Part B child count an eligible incarcerated student with a disability to whom it provides FAPE, even if the State is permitted under § 300.122(a)(2) and State law to exclude that individual from eligibility. It is not necessary to provide additional clarification regarding these issues in the regulations.

Proposed Note 2 quoted from the House Committee Report on Pub. L. 105–17 which, with respect to paragraph (a)(2) of this section (relating to certain students with disabilities in adult prisons), stated that:

> The bill provides that a State may also opt not to serve individuals who, in the educational placement prior to their incarceration in adult correctional facilities, were not actually identified as a child with a disability under section 602(3) or did not have an IEP under Part B of the Act. The Committee means to* * *make clear that services need not be provided to all children who were at one time determined to be eligible under Part B of the Act. The Committee does not intend to permit the exclusion from services under part B of children who had been identified as children with disabilities and had received services under an IEP, but who had left school prior to their incarceration. In other words, if a child had an IEP in his or her last educational placement, the child has an IEP for purposes of this provision. The Committee added language to make clear that children with disabilities aged 18 through 21, who did not have an IEP in their last educational setting but who had actually been identified should not be excluded from services. (H. R. Rep. No. 105–95, p. 91 (1997))

The concepts in this note are important in the implementation of this program. Appropriate substantive portions of the note should be clarified and included in the regulations. Consistent with the decision to not include notes in these final regulations, the note should be removed.

Changes: Section 300.122(a)(2) has been revised by adding appropriate substantive portions of Note 2 to the text of the regulation, to specify situations in which the exception to FAPE for students with disabilities in adult prisons does not apply.

Comment: Some commenters expressed support for § 300.122(a)(3) (which provides that the obligation to make FAPE available does not apply to students with disabilities who have graduated from high school with a regular high school diploma), and Note 1 (which clarifies that graduation with a regular high school diploma is a change of placement requiring notice and reevaluation), and recommended that the substance of the note be included in the text of the regulation. Other commenters requested that § 300.122(a)(3) and Note 1 be deleted because there is no statutory basis for these regulatory interpretations. Several commenters stated that, in most States, graduation is dependent on a student's having met specific standards (State, local, or both).

A few commenters stated that some States have developed procedures for disabled students to graduate with a diploma based on the IEP, and recommended that the term ''regular'' be deleted from § 300.122(a)(3). Other commenters recommended deleting the language about graduating with a regular high school diploma, and added that many States have, with public input, established multiple graduation diplomas and certificates. Other commenters recommended deleting the provision, and added that some States are shifting from diplomas to certificates of mastery based on what students know. A few commenters stated that receipt of a diploma or age 21 is the only reason for termination of eligibility, and, therefore, the requirement is redundant and should be deleted.

Many commenters recommended deleting Note 1, stating that graduation is not a change of placement, and that reevaluation is not necessary and should not be required. These commenters stated the basis for their recommendation by adding that: (1) With the addition of the new IEP requirements such as benchmarks, reporting to parents, and examination of transition needs at age 14, the reevaluation requirement becomes redundant; (2) if the parents and student are provided notice of the impending graduation and the IEP team concurs, the additional step of reviewing current data and determining the nature and scope of a reevaluation is unnecessary and will consume staff time and resources; and (3) if parents believe their child should not graduate, they have procedural avenues available to contest the graduation.

A few commenters stated that § 300.122(a)(3) should not be interpreted as prohibiting a State from using Part B funds to serve students aged 18 through 21 who have attained a regular diploma but who are still in the State-mandated age range.

Discussion: Because the rights afforded children with disabilities under IDEA are important, the termination of a child's eligibility under Part B is equally important. When public agencies make the determination as to whether the Part B eligibility of a student with a disability should be terminated because the student has met the requirements for a regular high school diploma or that the student's eligibility should continue until he or she is no longer within the State-mandated age of eligibility, it is important to ensure that the student's rights under the Act are not denied.

As the comment notes, a number of the new IEP requirements focus increased attention on how children with disabilities can achieve to the same level as nondisabled children. In implementing these new requirements, it is important that the parents, participating in decisions made in developing their child's IEP—including decisions about their child's educational program (e.g., the types of courses the child will take) and the child's participation in State and district-wide high stakes assessments—understand the implications of those decisions for their child's future eligibility for graduation with a regular diploma.

The commenters persuasively point out that, there is a less burdensome way to protect the interests of students with disabilities under the Act whose eligibility for services is ending because of graduation with a regular diploma or because they are no longer age eligible. If an eligibility change is the result of the student's aging out or receipt of a regular high school diploma, the statutory requirement for reevaluation before a change in a student's eligibility under section 614(c)(5) should not be read to apply.

Graduation with a regular high school diploma ends a student's eligibility for Part B services, and is, therefore, a change in placement requiring notice under § 300.503 a reasonable time before the public agency proposes to graduate the student. The new requirements for transition planning and for reporting to parents regarding the progress of their child, together with the notice to them regarding proposed graduation, are sufficient to ensure that parents are appropriately informed to protect the rights of their child. The parents would have the option, as with any public agency proposal to change the educational program or placement of a child with a disability, to seek to resolve a disagreement with the proposal to graduate the student through all appropriate means, including mediation and due process hearing proceedings.

Exiting or graduating a student with a disability with a credential that is different from the diploma granted to students who do not have disabilities does not end an individual's eligibility for Part B services, and is not a change in placement requiring notice under § 300.503. The second paragraph of proposed Note 1 clarified that if a high school awards a student with a disability a certificate of attendance or other certificate of graduation instead of a regular high school diploma, the student would still be entitled to FAPE until the student reaches the age at which eligibility ceases under the age requirements within the State or has earned a regular high school diploma. This clarification is consistent with the statute and final regulations. However, consistent with the decision to not include notes in the final regulations, the note should be deleted.

An SEA or LEA may elect to use Part B funds for services for a student with a disability who has graduated with a regular high school diploma but who is still within the State-mandated age range for Part B eligibility, but may not include the student in its Part B child count. For children aged 19 through 21, eligibility for services is a matter of State discretion.

Changes: Section 300.122(a)(3) has been revised to make clear that graduation from high school with a regular diploma is a change in placement requiring notice in accordance with § 300.503. Section 300.534(c), also has been revised to clarify that a reevaluation is not required before the termination of a student's Part B eligibility due to graduation with a regular high school diploma, or ceasing to be age-eligible under State law. Note 1 has been removed.

Child Find (§ 300.125)

Comment: A few commenters expressed support for the statutory provision reflected in § 300.125(c), which states that nothing in the Act requires that children be classified by their disability. Some commenters believed that § 300.125(c) is inconsistent with § 300.125(b)(3), which requires a

description of the policies and procedures that the State will use to obtain the number of children by disability category, and § 300.751, which requires the reporting of data by disability category.

Some commenters recommended that Note 2 (which states that the services and placement needed by each child with a disability must be based upon the child's unique needs and may not be determined or limited based upon a category of disability) be incorporated into the regulations. Other commenters recommended deleting the phrase ''and may not be determined or limited based upon a category of disability,'' so as not to conflict with § 300.346(a)(2)(iii) (consideration of special factors relating to children who are blind or visually impaired). Other commenters stated that Note 2 should be deleted because it deals with services and placements, rather than child find.

A few commenters requested that the regulations clarify the child find requirements for children birth through age 3, because the requirements under Parts B and C are different, and it is not clear which must be followed. One commenter recommended that Note 3 (which describes the link between child find under Parts B and C) be incorporated into the regulations because it promotes interagency coordination. Other commenters stated that Note 3 is unnecessary and should be deleted because the text of § 300.125 sufficiently covers the statutory requirement.

Some commenters expressed support for Note 4 (relating to highly mobile children, such as the homeless and migrant children). A few commenters requested more guidance related to a State's obligation to migrant children. Other commenters stated that States are already doing their best to find these children, but added that it is (1) virtually impossible to meet fully an obligation to ensure that all of these children are found, and (2) extremely difficult to obtain accurate data on these populations.

Discussion: Section 300.125(c), which clarifies that the Act does not require public agencies to label children by disability, is not inconsistent with the data reporting requirements in §§ 300.125(b)(3) and 300.751. The statement in Note 2—that the services and placement needed by each child with a disability may not be determined or limited based upon a category of disability—is crucial in implementing both the child find and FAPE requirements. Thus, the substance of the note has been included in this discussion, and has been incorporated in the text of the regulations at § 300.300(a)(3)(ii). Specifying that services and placement not be determined or limited based on category of disability is not incompatible with the special considerations related to children who are blind and visually impaired.

It is clear, without the need for further clarification in the regulations, that the child find and evaluation procedures under Part C must be followed when the purpose is to locate, identify and evaluate infants and toddlers with disabilities who may be eligible for early intervention services under that Part, and that the child find and evaluation procedures under Part B must be followed when the purpose is to locate, identify and evaluate children with disabilities who may be eligible for special education and related services under that part.

Note 3 provided needed clarification of long-standing statutory requirements, under Parts B and C regarding the respective responsibilities of the SEA and Part C lead agency for child find activities. In States in which the SEA and Part C lead agency are different, each agency remains responsible for ensuring that the child find responsibilities under its program are met, even if the agencies, through an interagency agreement, delegate to one agency the primary role in child find for the birth through two population. When different, the SEA and Part C lead agency are encouraged to cooperate to avoid duplication and ensure comprehensive child find efforts for the birth through two population. The substance of the note should be incorporated into the text of the regulation.

Although it is difficult to locate, identify, and evaluate highly mobile children with disabilities, it is important to stress that the States' child find responsibilities under § 300.125 apply equally to such children and that the substance of Note 4 should be added to the text of § 300.125(a).

Changes: The substance of Notes 1, 3, and 4 has been added to the text of the § 300.125; the substance of Note 2 has been added to the text of § 300.300(a)(3)(ii); and the four notes have been deleted.

Procedures for Evaluation and Determination of Eligibility (§ 300.126)

Comment: A few commenters requested that the regulation specify best practices for evaluation and the determination of eligibility.

Discussion: The use of best practices in all educational programs and activities in order to help ensure that all children, including children with disabilities, are prepared to meet high standards is, of course, strongly encouraged, and the Department funds many programs to identify and disseminate best practices. Section 300.126, however, addresses the eligibility requirements relating to evaluation and the determination of eligibility that States must meet, rather than best practices.

Changes: None.

Confidentiality of Personally Identifiable Information (§ 300.127)

Comment: None.

Discussion: In the NPRM, § 300.127 included a note that contained a reference to the Family Education Rights and Privacy Act (FERPA) in 34 CFR Part 99. There is a clear relationship between the confidentiality requirements in IDEA and those in FERPA. The regulations in §§ 300.560—300.577 are drawn directly from the FERPA regulations.

Changes: Consistent with the decision to eliminate notes from the final regulations, the note following this section has been removed.

Least Restrictive Environment (§ 300.130)

Comment: A few commenters requested that ''State-approved private schools and facilities'' be added to the list of placement options included in the continuum, as set forth in the note following § 300.130.

A few commenters were concerned that the proposed regulations did not include the State eligibility requirement, set forth in the prior regulations at § 300.132(b), that each State include in its State plan the number of children within each disability category who are participating in regular education programs, and the number of children with disabilities who are in separate classes or separate school facilities or otherwise removed from the regular education environment.

A few commenters stated that the note and § 300.551 should be deleted; they assert that there is no requirement in the statute for a continuum, and that the note and the regulation are inconsistent with the statute's strengthened requirement that children with disabilities be integrated.

Discussion: As described in § 300.551(b)(1), the continuum includes the placement option of ''special schools.'' The requested revision regarding State-approved private schools and facilities is, therefore, not necessary. State-approved private schools and facilities are already covered by the continuum.

The requirement in the prior regulations at § 300.132(b), that each State include in its State plan the number of children within each disability category who are participating in regular education programs, and the number of children with disabilities who are in separate classes or separate school facilities or otherwise removed from the regular education environment, was based upon an express provision in the prior statute at section 612(5)(B) that was removed from the statute by the IDEA Amendments of 1997. Those amendments also eliminated the requirement that each State submit a State plan, instead requiring that each State demonstrate eligibility under Part B by having specified policies and procedures on file with the Secretary. The Department will, however, continue to collect data regarding placement in the LRE under section 618 of the Act.

The statute, at section 607(b), prohibits the Secretary from implementing or publishing regulations implementing IDEA that would procedurally or substantively lessen the protections provided to children with disabilities, as set forth in the Part B regulations as in effect on July 20, 1983, including those relating to placement in the least restrictive environment, except to the extent that the revised regulation reflects the clear and unequivocal intent of the Congress in legislation. The provisions of § 300.551 in the NPRM were included in the regulations as in effect on July 20, 1983. Therefore, those provisions must, consistent with section 607(b) of the Act, be retained in the regulations. In fact, the Senate and House Committee Reports on Pub. L. 105–17 support the continuing importance of the continuum provision:

> The committee supports the longstanding policy of a continuum of alternative placements designed to meet the unique needs of each child with a disability. Placement options available include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. For disabled children placed in regular classes, supplementary aids and services and resource room services or itinerant instruction must also be offered as needed. (S. Rep. No. 105–17, p. 11; H. R. Rep. No. 105–95, p. 91 (1997))

The substance of the note is helpful in implementing the LRE requirements, and should be included in the text of the regulations.

Changes: Consistent with the decision to delete notes from the final regulations, the note following § 300.130 in the NPRM has been removed. The substance of the note has been incorporated into paragraph (a) of this section.

Comment: A number of commenters expressed concerns about the provisions of § 300.130(b), regarding the steps that a State must take if it distributes State funds on the basis of the type of setting in which a child is served. Some commenters were concerned that this provision not be implemented in a way that would negatively impact State funding formulas for State schools for the deaf. Other commenters requested that the regulations provide clear guidance as to what a State must do to determine whether its funding mechanism is resulting in placements that violate the least restrictive environment requirements of the Act.

A few commenters asked that the regulations make clear that individual needs, rather than a State's finding mechanism must drive placement decisions, but that a State is not required to change the way in which it distributes State funds to public agencies unless the funding mechanism results in placement decisions that violate Part B's LRE requirements. Other commenters requested that the regulations be revised to require that a State's assurance under § 300.130(b)(2) must specify the steps the State will take by a date certain (no later than the end of the following fiscal year) to revise its funding mechanism.

Discussion: The provisions of § 300.130(b) are unchanged from section 612(a)(5)(B) of the Act. A State is not required to revise a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, unless it is determined that the State does not have policies and procedures to ensure that the funding mechanism does not result in placements that violate the LRE requirements of §§ 300.550–300.556. The Senate and House Committee Reports on Pub. L. 105–17 emphasize the importance of section 615(a)(5)(B), stating that:

> The bill amends the provisions on least restrictive environment * * * to ensure that the state's funding formula does not result in placements that violate the requirement.
>
> The committee supports the long standing policy that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled and that special separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (S. Rep. No. 105–17, p. 11; H. R. Rep. No. 105–95, p. 91 (1997)) Further clarification in the regulation is not needed.

Changes: None.

Transition of Children From Part C to Preschool Programs (§ 300.132)

Comment: A few commenters expressed concern regarding the cost of home visits, especially in large geographic areas, that would be needed to implement the transition requirements of § 300.132.

Discussion: The provisions of § 300.132 are drawn from the statutory requirements at section 612(a)(9), and do not set forth any additional requirements. While § 300.132(c) requires that each LEA participate in transition planning conferences arranged by the designated lead agency under section 637(a)(8) (which requires the lead agency to convene such a conference), § 300.132 does not require any home visits. Therefore, no revision is necessary.

Changes: None.

Comment: A few commenters requested that the regulation be revised to make clear that the pendency provisions of § 300.514 apply to children transitioning from early intervention services under Part C to preschool special education and related services under Part B.

Discussion: The pendency provision at § 300.514(a) does not apply when a child is transitioning from a program developed under Part C to provide appropriate early intervention services into a program developed under Part B to provide FAPE. Under § 300.514(b), if the complaint requesting due process involves the child's initial admission to public school, the public agency responsible for providing FAPE to the child must place that child, with the consent of the parent, into a public preschool program if the public agency offers preschool services directly or through contract or other arrangement to nondisabled preschool-aged children until the completion of authorized review proceedings.

Changes: None.

Comment: One commenter expressed concern that § 300.132(b) suggests that a program of special education and related services be in place for each child with a disability on his or her third birthday, even if the birthday occurs during the summer and the child does not need extended school year services.

Discussion: Section 612(a)(9) of the Act requires that, by the third birthday of a child with a disability participating in early intervention programs assisted under Part C who will participate in preschool programs assisted under Part B, an IEP or, if consistent with § 300.342(c) and section 636(d) of the

Act, an IFSP, has been developed and must be implemented for the child. This means that if a child with a disability is determined eligible to receive Part B services, the public agency must convene a meeting and develop an IEP by the child's third birthday, and must, in developing the IEP, determine when services will be initiated. Children with disabilities who have their third birthday during the summer months are not automatically entitled to receive special education and related services during the summer, and the public agency must provide such services during the summer only if the IEP team determines that the child needs extended school year services during the summer in order to receive FAPE.

Changes: The regulation has been revised to clarify that decisions about summer services for children who turn three in the summer are made by the IEP team.

Comment: A few commenters requested that the regulation be revised to clarify that representation of an LEA in the transition planning process would most appropriately include all members of the IEP team, in order to further ''smooth'' the transition process and ensure appropriate attention to the child's needs.

Discussion: Section 612(a)(9) of the Act leaves to each LEA the responsibility to determine who will most appropriately represent the agency in transition planning conferences. The requested revision goes beyond the requirements of the Act.

Changes: None.

Comment: A few commenters requested that a definition of the term ''effective'' be included in the regulations.

Discussion: It is not necessary to provide a definition of the term ''effective,'' and doing so would restrict the flexibility needed to implement the Act for a very heterogeneous group of children.

Changes: None.

Comment: A few commenters requested that the regulations be revised to require that: (1) the transition planning conference be incorporated into the required timelines under Part B of the Act for determining eligibility and developing an IEP; and (2) LEAs acknowledge and consider existing documentation related to eligibility and service planning prior to conducting an individual evaluation of a child referred from the Part C system.

Discussion: The Part C regulations require, at § 303.148(b)(2), that the lead agency convene, with family approval, a transition planning conference at least 90 days, and at the discretion of the parties, up to 6 months before the third birthday of a toddler receiving early intervention services. The Part B regulations require that an IEP be developed and implemented for children with disabilities by their third birthday. It is inappropriate to specify further timelines in § 300.132. Section 300.533 permits an LEA, if appropriate, to review existing data regarding a child with a disability (including a child who has been referred by the lead agency) as part of an initial evaluation.

Changes: None.

Comment: A few commenters requested that the regulation be revised to emphasize the responsibility of the lead agency to ensure that the LEA receive advance notice of any transition planning conference at which the participation of the LEA is required.

Discussion: The Part C regulations require at § 303.148(b) that the lead agency notify the local educational agency in which a child with a disability resides when the child is approaching the age of three, and convene, with family approval, a transition planning conference which includes the lead agency, the family and the LEA at least 90 days, and at the discretion of the parties, up to 6 months before the child's third birthday. Implicit in these requirements is the requirement that the lead agency inform the LEA early enough so that the LEA can arrange to participate in the conference. Additional clarification in the Part B regulations is not necessary.

Changes: None.

Private Schools (§ 300.133)

Comment: A few commenters requested that the regulations be revised to require each State to include, as part of the policies and procedures that it must have on file with the Secretary in order to establish eligibility under Part B of the Act, the policies and procedures that the State has established to comply with the provisions of § 300.454(b), which requires that each LEA consult with representatives of private school children with disabilities in making determinations regarding the provision of special education and related services to children with disabilities who have been placed by their parents in private schools.

Discussion: Section 300.133 specifically requires that each State ''have on file with the Secretary policies and procedures that ensure that the requirements of §§ 300.400–300.403 and §§ 300.450–300.462 are met.'' Thus, the regulation already requires that the procedures required by § 300.454(b) be included in the policies and procedures that each State must have on file to establish eligibility.

Changes: None.

Comprehensive System of Personnel Development (§ 300.135)

Comment: A few commenters requested that the regulation be revised to require that each State, in developing its comprehensive system of personnel development, consider the need for bilingual special education and assistive technology instructors. Other commenters requested that the regulations be revised to require that special education, regular education, and related services personnel be trained regarding the use of home instruction and the circumstances under which such instruction is appropriate. Other commenters requested that the regulation be revised to require that each State have on file with the Secretary policies and procedures on the equitable participation of private school personnel in staff development, inservice, etc.

Discussion: The CSPD provisions in §§ 300.380–300.382 require each State to develop and implement a CSPD to ensure ''an adequate supply of qualified special education, regular education, and related services personnel'' (§ 300.380(a)(2)), and that ''all personnel who work with children with disabilities * * * have the skills and knowledge necessary to meet the needs of children with disabilities'' (§ 300.382). This would include, for example, consideration of the needs of personnel serving limited English proficient students and students who need assistive technology services and devices. The Act and regulations leave to each State the flexibility to determine the specific personnel development needs in the State.

Matters related to the participation of private school staff in inservice training and other personnel development activities are decisions left to the discretion of each State and LEA, and, therefore, should not be addressed under this part.

Changes: None.

Comment: None.

Discussion: The Senate and House committee reports on Pub. L. 105–17, in reference to the CSPD requirements of this section state that:

> Section 612, as [in] current law, requires that a State have in effect a Comprehensive System of Personnel Development (CSPD) that is designed to ensure an adequate supply of qualified personnel, including the establishment of procedures for acquiring and disseminating significant knowledge derived from educational research and for adopting, where appropriate, promising

practices, materials, and technology. (S. Rep. No. 105–17, p. ; H. R. Rep. No. 105–95, p. 93 (1997))

The States will be able to use the information provided to meet the requirement in § 300.135(a)(2) as a part of their State Improvement Plan under section 653 of the Act, if they choose to do so.

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

Personnel Standards (§ 300.136)

Comment: Commenters made a number of suggestions regarding general modifications to this section. Some commenters expressed concern that in no case should children with disabilities receive services from individuals who do not meet the highest requirements applicable to their professions. Commenters recommended clarification requiring LEAs to ensure that all personnel are adequately trained to meet all the requirements of the IDEA, with emphasis on any requirement on which the LEA has been found by the SEA to be out of compliance, such as the failure to provide necessary assistive technology devices and services.

Some commenters recommended that the definition of ''appropriate professional requirements in the State'' in § 300.136(a)(1) be amended to include an explicit reference to ''professionally-recognized'' entry level requirements. Other commenters requested additional clarification regarding the term ''highest requirements in the State.'' Those commenters who interpreted the term as imposing the maximum standard recommended that the definition be amended to specify that every provider of special education and related services must have a doctorate. Some commenters recommended clarification that highest requirements in the State are the minimum requirements established by a State which must be met by personnel providing special education and related services to children with disabilities under Part B.

Numerous comments were received regarding Note 1 to this section of the NPRM, and regarding Note 3 as it relates to paragraphs (b) and (c) of this section. A number of commenters indicated that they had found Note 1 to be extremely useful in understanding the scope of this section; however, other commenters recommended that Note 1 either be deleted entirely, or that the substance of the note be incorporated into the text of § 300.136. While many commenters recommended that Note 3 either be retained as a note or incorporated into the regulations, other commenters recommended that Note 3 be deleted because it would ''nullify'' the requirements of this section.

Discussion: The substance of § 300.136 of the NPRM has been retained in these final regulations, but the notes have been removed. Section 300.136 incorporates the provisions on personnel standards contained in § 300.153 of the current regulations, with the addition of the new statutory amendments in section 612(a)(15)(B)(iii) and (C) of the Act.

The IDEA Amendments of 1997 do not alter States' responsibilities to (1) establish policies and procedures relating to the establishment and maintenance of standards for ensuring that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, (2) establish their own minimum standards for entry-level employment of personnel in a specific profession or discipline providing special education and related services to children with disabilities under these regulations based on the highest requirements in the State across all State agencies serving children and youth with disabilities, and (3) if State standards are not based on the highest requirements in the State applicable to a specific profession or discipline, take specific steps to upgrade all personnel in that profession to appropriate State qualification standards by a specified date in the future.

Contrary to the suggestion made by commenters, the Act's personnel standards provisions are not intended to be a mechanism for addressing problems that result from the denial of special educational services to children with disabilities under Part B. If an SEA finds that any of its public agencies are out of compliance with the requirements of Part B, the SEA, in accordance with the general supervision requirements of section 612(a)(11) of the Act and § 300.600 of these regulations, must take whatever steps it determines are necessary to ensure the provision of FAPE to children with disabilities who are eligible for services under Part B. In addition, through the comprehensive system of personnel development (CSPD), an SEA must conduct a needs assessment and identify areas of personnel shortages, as well as describe the strategies it will use to address its identified needs for preparation and training of additional personnel necessary to carry out the purposes of Part B.

There is no need to clarify the regulatory definitions of ''appropriate professional requirements in the State'' in § 300.136(a)(1) or ''highest requirements in the State applicable to a specific profession or discipline'' in § 300.136(a)(2). Section 300.136 incorporates verbatim the definitions of these terms contained in the current regulations implementing the Act's personnel standards provisions, which were added to Part B by the Education of the Handicapped Act Amendments of 1986, Pub. L. 99–457.

These definitions are consistent with the congressional intent that all personnel in a specific profession or discipline meet the same standards across all State agencies; nevertheless, they still afford States flexibility in determining the steps that must be taken to upgrade all personnel in a specific profession or discipline to meet applicable State qualification standards if the SEA's standard is not based on the highest requirements in the State applicable to the profession. The definition of ''highest requirements in the State'' is based on the highest entry-level academic degree required for employment in a specific profession or discipline across all State agencies.

As explained in Note 1 to this section of the NPRM, these regulations require a State to use its own existing requirements to determine the standards appropriate to personnel who provide special education and related services under Part B of the Act, and nothing in Part B requires that all providers of special education and related services attain a doctorate or any other specified academic degree, unless the State standard requires this academic degree for entry-level employment in that profession or discipline.

While States may consider professionally-recognized standards in deciding what are ''appropriate professional requirements in the State,'' there is nothing in the statute that requires States to do so. Rather, these matters appropriately are left to States. Therefore, to clarify the extent of flexibility afforded to States in meeting the Act's personnel standards requirements, a new paragraph (b)(3) should be added to these final regulations, and provides, in accordance with Note 1 to this section, that nothing in these regulations requires States to set any specified training standard, such as a master's degree, for entry-level employment of personnel who provide special education and related services under Part B of the Act.

States also have the flexibility to determine the specific occupational categories required to provide special education and related services and to revise or expand those categories as

needed. Therefore, the clarification regarding this issue contained in the note to the current regulation should be incorporated as part of paragraph (a)(3) in the definition of ''specific profession or discipline.''

Despite commenters' concerns that Note 3 would ''nullify'' the requirements of this section, experience in administering the Act's personnel standards provisions has demonstrated that there is a need to afford States that have only one entry-level academic degree for employment of personnel in a particular profession or discipline the ability to modify that standard if the State determines that modification of the standard is necessary to ensure the provision of FAPE to all children with disabilities in the State. Therefore, the substance of Note 3 should be incorporated into this section as paragraph (b)(4).

Changes: Note 1 has been removed as a note and incorporated, as appropriate, both into the above discussion and into § 300.136. Note 2 has been removed as a note, and, as discussed later in this attachment, the substantive portion of Note 2 has been incorporated into § 300.136(g) of these final regulations. Note 3 has been removed as a note and has been incorporated into § 300.136, as explained below.

Paragraph (a)(3) has been amended by adding a new paragraph (iv), which states that the definition is not limited to traditional occupational categories.

New paragraphs (b)(3) and (b)(4) have been added, which provide that (1) nothing in this part requires a State to establish a specified training standard (e.g., a masters degree) for personnel who provide special education and related services under Part B of the Act, and (2) a State with only one entry-level academic degree for employment of personnel in a specific profession or discipline, may modify that standard without violating the other requirements of this section.

Comment: Numerous comments were received regarding the role of paraprofessionals and assistants under Part B. Some commenters strongly cautioned against additional regulation since determinations regarding the definitions of paraprofessionals and assistants and the scope of their responsibilities will vary widely from State to State and across disciplines. These commenters also pointed out that Congress chose to provide only minimal guidance in this area. Other commenters made a number of specific suggestions for regulatory changes. Some commenters recommended that the language in paragraph (f) be changed from ''may'' to ''shall'' to make it mandatory for States to use paraprofessionals and assistants. Other commenters, who did not support the use of paraprofessionals and assistants to assist in the provision of services under Part B, recommended regulations prohibiting their use.

Many commenters recommended that the regulations clarify that paraprofessionals and assistants who assist in the provision of speech pathology and audiology services under these regulations must be supervised by an individual who meets the highest entry-level academic degree requirement applicable to that profession. Similarly, commenters requested clarification that all paraprofessionals and assistants assisting in the provision of special education and related services under Part B must meet their profession's or discipline's highest entry-level academic degree requirement.

Some commenters recommended that the terms ''paraprofessionals'' and ''assistants'' be defined separately, and that the roles and responsibilities and training be set out in the regulations so that all States could have the same definitions, since differences in definitions and responsibilities among States could interfere with the rights of children with disabilities to receive appropriate services under Part B. These commenters also provided suggested definitions to address these concerns.

Commenters also suggested specific language that (1) only those paraprofessionals and assistants who are appropriately trained and supervised are allowed to assist in the provision of services under Part B in accordance with State law, regulations, written policy, and accepted standards of professional practice, and only assist in the provision of services with the consent of their supervisors; (2) para-professional and assistant services must be delivered under the direct, ongoing and regular supervision of a qualified professional with competency in the technique(s) employed by the paraprofessional or assistant; (3) paraprofessionals and assistants may not develop, modify, or provide services independent of or without such supervision, and may report findings but not make diagnostic or treatment recommendations to special education decision making teams; (4) the roles, supervision and training of paraprofessionals and assistants must be consistent with the professional standards of the different areas in which they work; (5) paraprofessionals and assistants, at a minimum, must receive organized in-service training under the direct, ongoing and regular supervision of a qualified professional with competency in the technique being employed by the paraprofessional or assistant; and (6) the State must have information on file with the Secretary that demonstrates that the State has laws, regulations, or written policies related to the training, use, and supervision of paraprofessionals and assistants.

Some commenters recommended that § 300.136 be amended to expand services that paraprofessionals and assistants could assist in providing under Part B. Other commenters maintained that the use of paraprofessionals and assistants to assist in the provision of some special education and related services should be prohibited. For example, some commenters recommended that the regulations be clarified to specify that paraprofessionals may not assist in the provision of mental health services, while other commenters recommended clarification indicating that paraprofessionals and assistants could assist in the provision of psychological services, including evaluation and treatment services, only under the supervision of a school psychologist.

Other commenters requested clarification regarding whether paraprofessionals could ever be used in lieu of special education teachers. A few commenters stated that in no case should medical procedures be provided by untrained individuals, and requested clarification to this effect.

A number of commenters recommended that parents must be notified whenever paraprofessionals or assistants are assigned to assist in the provision of services. Other commenters recommended that this type of notice is necessary whenever students with disabilities receive services from an individual who does not meet the highest requirement applicable to their professions, and that parents should have the right to challenge this issue through the IEP process.

Discussion: Section 300.136(f) tracks the statutory requirement in section 612(a)(15)(B)(iii), which permits, but does not require, the use of paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulations, or written policy, to assist in the provision of special education and related services under Part B. Since the statute affords a State the option of using paraprofessionals and assistants to assist in the provision of special education and related services to children with disabilities, it would be inappropriate to regulate in a manner

that would either require or prohibit the use of paraprofessionals and assistants under Part B.

The statute makes clear that the use of paraprofessionals and assistants who are appropriately trained and supervised must be contingent on State law, regulation, or written policy, giving States the option of determining whether paraprofessionals and assistants can be used to assist in the provision of special education and related services under Part B, and, if so, to what extent their use would be permissible. Therefore, there is no need to provide definitions of the terms ''paraprofessionals'' and ''assistants'' in these regulations, since States have the flexibility to determine the scope of their responsibilities.

Section 300.382 of these regulations requires States to include in their CSPD a plan for the inservice and preservice preparation of professionals and paraprofessionals. Appropriate training and supervision are prerequisites for use of paraprofessionals and assistants under Part B, and determinations of what constitutes ''appropriate'' training and supervision are matters for each State to decide, based on factors relevant to each profession or discipline. Because these regulations do not specify any particular standard for persons providing special education and related services, but instead leave such determinations to States, there also is no need to specify any particular standards for paraprofessionals and assistants or their supervisors in these regulations.

No regulatory changes are necessary regarding information that a State that uses paraprofessionals and assistants to assist in the provision of special education and related services must have on file with the Secretary, since this information already would be part of the personnel standards portion of the State's Part B State plan. If a State chose to adopt a policy regarding the use of paraprofessionals and assistants, the State would be required to submit its policy to the Department only if that policy constitutes a change from the information contained in the State's prior year Part B State submission, under section 612(c) of the Act.

In addition, there is no need to specify whether paraprofessionals and assistants can assist in the provision of psychological services, including mental health services, under these regulations, or to what extent they can participate in the testing process, since State laws, regulations, and written policies, not Part B requirements, would govern these determinations. With respect to ''medical services,'' however, it should be noted that only those medical services that are for diagnostic and evaluation purposes are eligible related services under Part B. Another category of ''related services,'' ''school health services,'' may be provided by a school nurse or other qualified person in accordance with applicable State qualification standards. It is critical that States that use paraprofessionals and assistants do so in a manner that is consistent with the rights of children with disabilities to FAPE under Part B. Since the Act provides that paraprofessionals and assistants may assist in the provision of special education and related services, their use as teachers would be inconsistent with a State's duty to ensure that personnel necessary to carry out the purposes of Part B are appropriately and adequately prepared and trained.

Part B does not require that public agencies give parents information on how paraprofessionals and assistants are assisting in the provision of services to their children. However, public agencies are encouraged to inform parents about whether paraprofessionals are assisting in the provision of special education and related services to their children, including the extent that these individuals are being supervised by appropriately trained and qualified staff.

No clarification has been provided regarding which services are being provided by individuals who do not meet the ''highest entry-level requirements'' applicable to their profession. The Act's personnel standards provisions and these regulations at § 300.136(c) make it permissible for States to use individuals who do not meet the highest entry-level academic degree requirement applicable to their profession, provided that the State is taking steps to upgrade all personnel in that profession to appropriate professional requirements in the State by a specified date in the future. IDEA allows State the discretion to determine the ''specified date'' and does not prevent a State from making changes to that date. Thus a State is not prohibited from extending its timeline for retraining or hiring of personnel to meet appropriate professional requirements in the State.

Changes: None.

Comment: A number of comments were received regarding § 300.136(g). These commenters requested definitions of ''most qualified individuals available,'' ''good faith efforts,'' ''geographic area,'' ''satisfactory progress,'' and ''shortages of personnel,'' or the clarification of these terms.

Numerous commenters objected to allowing States that have upgraded all personnel in a specific profession or discipline to appropriate professional requirements in the State to use personnel who did not meet those standards if they were experiencing personnel shortages. These commenters regarded this provision as permitting these States to waive applicable personnel standards. Some of these commenters advocated not allowing States to have a policy that would extend the three-year time frame for individual applicants who are hired under the ''waiver provision'' to become fully qualified. Other commenters requested clarification to ensure that paragraph (g) not be applied on a system-wide basis but instead be applied to individuals on a case-by-case basis.

Other commenters believed that paragraph (g) and Note 2 must be deleted because under no circumstances should States that have achieved the goal of upgrading all personnel in the State to meet appropriate professional requirements have the option of employing personnel, even temporarily, who do not meet applicable State personnel standards.

Commenters requested specific clarification that a State may exercise the option under paragraph (g) of this section even though the State has reached its established date, under paragraph (c) of this section, for training or hiring all personnel in a specific profession or discipline to meet appropriate professional requirements in the State.

While some commenters recommended that Note 2 either be retained or incorporated into the regulations, many commenters believed that Note 2 should be deleted because it encourages protracted delays in attaining the highest requirement in the State applicable to specific professions or disciplines.

Discussion: Section 300.136(g) of the NPRM incorporates essentially verbatim the new statutory provision at section 612(a)(15)(C) of the Act. Section 300.136(g) affords States the necessary flexibility to serve children with disabilities if instructional needs exceed available personnel who meet appropriate State personnel qualification standards, even though the State has satisfied the requirements of paragraph (c) of this section for personnel in a specific profession or discipline. However, a State's ability to permit its LEAs to utilize this option is conditioned on a number of factors.

Under § 300.136(g), States are given the option of adopting a policy of allowing LEAs in the State, that have made a good faith effort to recruit and hire appropriately and adequately

trained personnel, in a geographic area of the State where there is a shortage of personnel that meet applicable State qualification standards, of using the most qualified personnel available who are making satisfactory progress toward completion of applicable course work necessary to meet applicable State qualification standards within a three-year period.

Therefore, in order for § 300.136(g) to be invoked, the State must have made good faith efforts to recruit and hire appropriately and adequately trained personnel. However, before other personnel can be utilized, there must be a shortage of qualified personnel as determined by the State, in a geographic area as defined by the State, to meet instructional needs. The personnel who are utilized under these circumstances also must be making satisfactory progress toward completion of applicable course work within a three-year period.

While a State's decision to invoke the policy under § 300.136(g) depends on a variety of State-specific factors, the statute does not restrict the State's ability to invoke this policy if the conditions in § 300.136(g) are present. However, it is expected that the circumstances in which the policy under paragraph (g) of this section will be invoked will prove to be the exception rather than the rule.

The information provided by commenters does not provide a sufficient basis for restricting to only one three-year period a State's ability to invoke § 300.136(g). Therefore, to avoid confusion, and consistent with the determination explained in Note 2 to this section in the NPRM, the portion of Note 2 that explains that this section can be invoked even if a State has reached its established date for a specific profession or discipline under paragraph (c) of this section should be incorporated into the regulations. Also, the clarification from Note 2 that a State that continues to experience shortages of personnel meeting appropriate professional requirements in the State must address those shortages in its comprehensive system of personnel development should be incorporated into the regulations.

Changes: Paragraph (g) of this section of the NPRM has been designated as paragraph (g)(1) of these regulations. New paragraphs (g)(2) and (g)(3) have been added, and provide that (1) a State that has met its established goal for a specific profession or discipline under paragraph (c) of this section is not prohibited from invoking paragraph (g)(1); and (2) each State must have a mechanism for serving children with disabilities if instructional needs exceed available personnel, and if a State continues to experience shortages of qualified personnel, it must address those shortages in its comprehensive system of personnel development.

Comment: Some commenters requested that clarification be provided to ensure that personnel with disabilities were hired. One comment requested that a new paragraph (h) be added to the regulations to specify that States not utilize standards that ''may screen out or tend to screen out individuals with disabilities.'' Some commenters requested clarification regarding the applicability of the personnel standards provisions to private school staff serving children with disabilities parentally-placed in private schools, and recommended that this be a part of the consultation process.

Other commenters recommended that these regulations require that students who are deaf or hearing impaired receive appropriate instruction in their native language, including sign language, and that sign language interpreters meet particular qualification standards.

Discussion: For the most part, the issues raised by these commenters have been addressed elsewhere in these regulations or through other statutory requirements; therefore, no further clarification has been provided in this section. If State standards screen out individuals with disabilities from providing special education and related services under these regulations, they could violate Federal civil rights laws that prohibit discrimination on the basis of disability.

In addition, as required by Section 427 of the General Education Provisions Act (GEPA), each State must have on file with its Part B application to the Secretary a description of the steps the State is taking to ensure equitable access to, and participation in programs and activities assisted with Part B funds and must have identified the barriers to equitable participation and developed strategies to address those barrier.

The Part B CSPD provisions require each State to develop a plan for the in-service and preservice preparation of professionals and paraprofessionals who work with children with disabilities under these regulations. One of the strategies that must be included in this plan in accordance with § 300.382(h) is how a State will [r]ecruit, prepare, and retain qualified personnel, including personnel with disabilities and personnel from groups that are under-represented in the fields of regular education, special education, and related services.''

Therefore, in meeting their obligations under Part B and GEPA, States are required to take steps to ensure equitable access of individuals with disabilities to their programs and must take steps to remove barriers which prevent such access. It is expected that States that determine through their CSPD that they have employed an insufficient number of individuals with disabilities will identify and remove barriers to the employment of individuals with disabilities in the State. This will ensure that qualified individuals with disabilities are recruited and hired to provide special education and related services to children with disabilities under these regulations.

While sign language interpreters must be able to provide appropriate instruction and services to children who are deaf or hearing impaired, no clarification is necessary, since States must establish and maintain standards for all personnel who are providers of special education and related services, including sign language interpreters. See discussion of § 300.23 (qualified personnel) in Subpart A of this Attachment. In addition, section 614(d)(3)(B)(iv) of the Act requires the IEP team to consider the language and communication needs of children who are deaf or hard of hearing. To ensure that this occurs, § 300.136 would require each State to ensure that the necessary personnel are appropriately and adequately prepared and trained.

The personnel standards provisions of these regulations are applicable to persons providing services to children with disabilities who are publicly placed in private schools and to persons providing special education and related services to parentally-placed private school children the LEA, after consultation with representatives of private schools, has chosen to serve.

Changes: None.

Performance Goals and Indicators (§ 300.137)

Comment: Some commenters requested that the regulations be revised to clarify the responsibility of a State to establish performance goals and indicators for children with disabilities if the State has not established performance goals and indicators for general education students. They also requested clarification of States' responsibility to report to the Secretary and the public regarding progress toward achieving the performance goals.

Discussion: Further clarification is not required. As set forth in § 300.137(a),

each State is required to demonstrate that it has established performance goals that are ''consistent, to the maximum extent appropriate, with other goals standards for all children established by the State.'' However, regardless of whether a State has established goals for all children, it must establish goals for the performance of children with disabilities, and must establish indicators that the State will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, drop-out rates, and graduation rates (§ 300.137(a) and (b)).

The regulation also specifies that each State report every two years to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under § 300.137(a). The requested revisions are not necessary.

Changes: None.

Comment: Some commenters requested that the regulation be revised to require that, prior to each State's reporting to the Secretary and the public every two years, as required by § 300.137(c), the State conduct widely publicized forums at which students, parents, and concerned citizens can comment on a draft report, and that the State include the comments it receives as part of its final report to the Secretary and the public. Other commenters requested that the regulation be revised to require that each State establish its goals for the performance of children with disabilities with the cooperation and input of parents and children with disabilities, teachers, and members of the community.

Discussion: The Act requires that each State report every two years to the Secretary and the public on the progress of the State and of children with disabilities in the State toward meeting the State's performance goals, but neither requires nor prohibits States from implementing procedures to allow the public the opportunity to comment on draft reports. It is appropriate to leave the use of such procedures to the discretion of the States, and no additional procedures regarding the reports are needed.

In demonstrating eligibility under Part B, States are required to submit information to the Department demonstrating that they meet the requirements of this section of the regulations. Before submitting that information to the Department, the States' proposal will be subjected to public comment and involvement consistent with the public participation provisions of §§ 300.280–300.284. These provisions include public notice and public hearings, and an opportunity for the public to participate before that information is submitted to the Department. The process applies to the initial submission as well as any subsequent substantive provisions.

Changes: None.

Participation in assessments (§ 300.138)

Comment: A number of commenters raised concerns regarding the note following § 300.138, which states that it is assumed that only a small percentage of children with disabilities will need alternative assessments; some commenters requested that the language of the note be incorporated into the regulation itself, while others requested that the note be deleted, and further commenters requested clarification regarding the meaning of 'small percentage' in the note and who would enforce that requirement.

Other commenters asked that the regulation clarify that the IEP team must make the determination that a child will participate in an alternate assessment. Others asked that the regulation be revised to include criteria or guidelines in the regulation for determining if an alternate assessment can be used for a child, while others requested that the regulations require that each State provide such guidance for IEP teams. Some commenters said that the use of the term ''alternate assessment'' in the regulation and the use of the term ''alternative assessment'' in the note caused confusion, and asked that ''alternate assessment'' be defined. Other commenters stated that costs of alternate assessments would be prohibitive. Some commenters expressed concerns regarding the use of accommodations. Some commenters were concerned that the use of accommodations might affect test validity and standardization, while others requested further guidance as to who has the authority to determine whether a particular accommodation is necessary and how that determination must be made. Some of the commenters requested that the regulation specify that accommodations should address students' specific needs and afford maximum independence, while others said that a student's needs should be accommodated by tools or assistive technology that he or she uses on a daily basis or with which he or she is most familiar.

Other commenters asked that a note be added to reaffirm the State's responsibility to ensure that children are provided the accommodations they need so that they can participate in State and district-wide assessments. Some commenters requested clarification as to whether students should participate in assessments according to their performance level or the grade they are in based upon their chronological age. Some commenters requested clarification as to whether participation in alternate assessments was not required until July 1, 2000. A few commenters requested a note to state that assessment practices appropriate for children in grades 4 and older might not be appropriate for younger children.

Discussion: State and district-wide assessment programs are closely aligned with State and local accountability-based reform and restructuring initiatives. Therefore, it is important to allow the flexibility needed for State and local school districts to appropriately include disabled children in State and district-wide assessment programs. Only minimum requirements are included in these regulations for how public agencies provide for the participation of children with disabilities in State and district-wide assessments. The Department will be working with State and local education personnel, parents, experts in the field of assessment and others interested in the area of assessment to identify best practice that could serve as the basis for a technical assistance document. As provided in § 300.347(a)(5), the IEP team must determine whether a child with a disability will participate in a particular State or district-wide assessment of student achievement, and if the child will not, the IEP must include a statement of why that assessment is not appropriate for the child and how the child will be assessed. If IEP teams properly make individualized decisions about the participation of each child with a disability in general State or district-wide assessments, including the use of appropriate accommodations, and modifications in administration (including individual modifications, as appropriate), it should be necessary to use alternate assessments for a relatively small percentage of children with disabilities. Consistent with the decision to not include notes in these final regulations, the note is deleted.

Section 300.138 requires the State or LEAs, as appropriate, to develop alternate assessments and guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs. Alternate assessments need to be aligned with the general curriculum standards set for all students and should

not be assumed appropriate only for those student with significant cognitive impairments.

Section 300.347(a)(5) requires that the IEP team have the responsibility and the authority to determine what, if any, individual modifications in the administration of State or district-wide assessments are needed in order for a particular child with a disability to participate in the assessment. Section 300.138(a) should be revised to reflect the requirement that modifications in administration of State or district-wide assessments must be provided if necessary to ensure the participation of children with disabilities in those assessments. As part of each State's general supervision responsibility under § 300.600, it must ensure the appropriate use of modifications in the administration of State and district-wide assessments.

Test validity is an important variable and the Department has invested discretionary funds in providing assistance to States regarding appropriate modifications. The determination of what level of an assessment is appropriate for a particular child is to be made by the IEP team. It should be noted, however, that out of level testing will be considered a modified administration of a test rather than an alternative test and as such should be reported as performance at the grade level at which the child is placed unless such reporting would be statistically inappropriate.

Although SEAs and LEAs are not required by § 300.138 to conduct alternate assessments until July 1, 2000, each SEA and LEA is required to ensure, beginning July 1, 1998, that, if a child will not participate in the general assessment, his or her IEP documents how the child will be assessed.

Changes: Paragraph (a) has been revised to acknowledge that, for some children with disabilities, participation in State and district-wide assessments may require appropriate modifications in administration of the assessments as well as appropriate accommodations. The note has been removed.

Reports Relating to Assessments (§ 300.139)

Comment: Several commenters noted that the requirement in § 300.139(b)(1) that each State's reports to the public include ''aggregated data that include the performance of children with disabilities together with all other children'' exceeds the requirements of the Act at section 612(a)(17)(B), and should be deleted from the regulations. Other commenters requested clarification as to whether States are required to aggregate data regarding children who take alternate assessments with results for students who take the general assessment. Other commenters requested that the regulations require or suggest that States disaggregate assessment results by disability category in reporting results to the public. A few commenters requested that ''public agency'' be replaced with ''SEA'' in the note following § 300.139.

Discussion: In order to ensure that students with disabilities are fully included in the accountability benefits of State and district-wide assessments, it is important that the State include results for children with disabilities whenever the State reports results for other children. When a State reports data about State or district-wide assessments at the district or school level for nondisabled children, it also must do the same for children with disabilities. Section 300.139 requires that each State aggregate the results of children who participate in alternate assessments with results for children who participate in the general assessment, unless it would be inappropriate to aggregate such scores.

Section 300.139 and the Act neither require nor prohibit States from disaggregating assessment results by disability category in reporting results to the public; this is a matter that should be left to the discretion of each State. The text of § 300.139 tracks the statute, which addresses reporting requirements of the SEA.

The proposed note clarified that § 300.139(b) requires a public agency to report aggregated data that include children with disabilities, but that a public agency is not precluded from also analyzing and reporting data in other ways (such as, maintaining a trendline that was established prior to including children with disabilities in those assessments).

Changes: Consistent with the decision to not include notes in the final regulations, the note following § 300.139 of the NPRM has been removed.

Methods of ensuring services (§ 300.142)

Comment: Commenters emphasized that a child's right to FAPE should not be adversely affected because the child is eligible for services under Title XIX of the Social Security Act (Medicaid). For example, commenters recommended adding clarification prohibiting a State Medicaid agency or a Medicaid managed care organization from refusing to pay for or provide a service for which it would otherwise be responsible under Medicaid because the service is part of FAPE for a child.

Some commenters recommended that § 300.142(a)(4) be amended to incorporate Senate language about use of Medicaid funds to finance the cost of services provided in a school setting in accordance with a child's IEP to ensure that Medicaid-funded services are provided in the LRE and not in accordance with a medical model. However, some commenters were concerned that Medicaid funding would only be available for services for children with disabilities in school settings, and that reimbursement for services for children in other settings, such as the home, in accordance with their IEPs, would be denied.

Although many commenters acknowledged that Medicaid has been an effective funding source for services in children's IEPs, clarification was requested to ensure that there was not a delay in or denial of services or alteration in types of services provided to children with disabilities under these regulations, based on the rules of some other provider or contractor.

Many commenters noted that some LEAs will delay initiating a service until Medicaid payments are made, and requested that § 300.142(d) be amended to specify (1) a timeline to ensure that services are not delayed until payment is received from another agency; (2) a requirement that the LEA must provide the service and seek reimbursement from the entity that is ultimately found to be financially responsible; (3) a timeline for entering into interagency agreements; and (4) a timeline for the prompt provision of noneducational services specified in a child's IEP. Some commenters recommended that clarification be provided to specify that State interagency agreements are binding on contractors and managed care organizations.

Other commenters recommended a specific enforcement mechanism to make State IDEA grants contingent upon the existence and effective operation of an interagency agreement that complies with IDEA. Alternatively, the commenters' recommendation was that the regulations be amended to provide a mechanism for school districts to seek legal redress through the Department of Education or the judiciary against any State agency which fails to act in accordance with an existing legally-appropriate interagency agreement.

While many commenters found the explanation in Note 1 to this section of the NPRM useful in understanding the intent of these requirements and therefore recommended that the note either be retained or incorporated into the regulation, other commenters

recommended that Note 1 be removed because it exceeded the statute.

Discussion: While the concerns expressed by these commenters are very significant, most of them either already are addressed in this section or elsewhere in these regulations. However, in light of the general decision to remove notes from these final regulations, Note 1 should be removed as a note, but pertinent portions are incorporated in this discussion. Regarding the concern that a child's entitlement to FAPE not be construed as relieving a Medicaid provider or other public insurer of its responsibility to pay for required services under these regulations, § 300.601 implements the statutory provision at section 612(e) of the Act, which provides that Part B does not permit a State to reduce medical or other assistance or to alter eligibility under Titles V and XIX of the Social Security Act with respect to the provision of FAPE for children with disabilities in the State. Section 612(a)(12) of the Act, which is implemented by § 300.142, reinforces this important principle. This new statutory provision emphasizes the obligation for interagency coordination between educational and noneducational public agencies to ensure that all services necessary to ensure FAPE are provided to children with disabilities, and that the financial responsibility of the State Medicaid agency or other public insurer shall precede that of the LEA or State agency responsible for developing the child's IEP.

However, there is nothing in this provision that alters who is eligible for, or covered services under Medicaid or other public insurance programs. Therefore, the regulations should make clear that the coverage of or service requirements for Title XIX or Title XXI of the Social Security Act as defined in Federal statute, regulation or policy or the coverage of or service requirements for any other public insurance program are not affected by the IDEA regulation.

With regard to the concern that services paid for with Medicaid funds must be provided in the LRE, and, if appropriate, at home, payment for services cannot be conditioned solely on the setting in which necessary services are provided. Regardless of whether services are paid for with Part B or with Medicaid funds, all special educational services for children with disabilities under Part B must be individually-determined and provided in the least restrictive setting in which the disabled child's IEP can be implemented.

In response to the suggestions of commenters, the concept explained in the Senate and House Committee Reports on Pub. L. 105–17 which had been incorporated into Note 1 to this section of the NPRM, should be added to paragraph (b)(1) of these regulations to emphasize that health services provided to children with disabilities who are Medicaid-eligible and meet the standards applicable to Medicaid, may not be disqualified from Medicaid reimbursement because they are services provided in a school context in accordance with a child's IEP. However, if a public agency is billing a State Medicaid agency or other public insurance program for services provided under this part, the public agency must ensure that the services and the personnel providing those services meet applicable requirements under statute, regulation or policy applying to that other program.

Similarly, if the IEP team determines that a child needs to receive a particular service at home in order to receive FAPE, that service would not be disqualified from Medicaid reimbursement under the terms of these regulations, and States must address such concerns in the context of their interagency agreements under the terms of paragraph (a) of this section.

In response to numerous comments requesting clarification on the issue of timely delivery of services paid for by noneducational public agencies, it is particularly important to ensure that there are no undue delays in the provision of required services due to the failure of a noneducational public agency to reimburse the educational public agency for required services for which the noneducational public agency is responsible. Such delays could effectively nullify the requirements for interagency coordination in section 612(a)(12) of the Act.

Although paragraph (a)(4) of this section already includes a requirement that agencies have procedures that promote the coordination, timely, and appropriate delivery of services under these regulations, in response to concerns of commenters, the concept from the language in the Senate and House Committee Reports on Pub. L. 105–17, which is restated in Note 1 to this section of the NPRM, is important to clarify understanding of these final regulations. Paragraph (b)(2) of this section should be revised to clarify that the provision of services under this section must be provided in a timely manner.

No specific timelines have been included in these regulations. However, States are required to take the necessary steps to enter into appropriate interagency agreements between educational and noneducational public agencies, including ensuring the prompt resolution of interagency disputes. Effective interagency coordination should facilitate the timely delivery of special educational services as well as minimize any undue delays in the delivery of such services financed by noneducational public agencies.

Despite suggestions of commenters, no provision has been added regarding the responsibilities of contractors, since the noneducational public agency, not the contractor, is the party to the agreement.

No enforcement mechanism has been specified in these regulations. Under paragraph (a) of this section, the SEA must develop a mechanism for resolving disputes between respective agencies regarding financial responsibility for required services, and must ensure that all services needed to ensure the provision of FAPE are provided, including during the pendency of any interagency dispute.

Because a mechanism for interagency coordination is a condition of eligibility for assistance under Part B, a State that fails to develop an effective mechanism for resolving interagency disputes and ensuring the provision of required services during the pendency of such disputes could jeopardize its continued eligibility for IDEA funding.

Further, under section 613(a)(1) of the Act, in order for an LEA to be eligible for Part B funds from the State for any fiscal year, the LEA must have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 612 of the Act. This would include the requirement in section 612(a)(12) relating to methods of ensuring services.

Changes: Section 300.142 has been amended by adding language to paragraph (b)(1) to specify that a noneducational public agency may not disqualify an eligible service for Medicaid reimbursement because that service is provided in an educational context. Paragraph (b)(2) has been amended to indicate that services must be provided in a timely manner, by the LEA (or State agency responsible for developing the child's IEP). Note 1 to this section of the NPRM has been removed. A new paragraph (i) has been added to this section to clarify that nothing in this part should be construed to alter the requirements imposed on a State Medicaid agency, or any other agency administering a public insurance program under Federal statute, regulations or policy for Title XIX or

Title XXI of the Social Security Act, or any other public insurance program.

Comment: Commenters recommended that a statement be added to § 300.142(a)(4) to specify that services financed as a result of interagency coordination are to supplement, not supplant, services provided by the LEA. Other commenters asked that § 300.142(a)(4) be amended to specify that school-employed personnel must be the first resource for providing related services. In addition, commenters also recommended that clarification be added to specify that the use of contract personnel or other arrangements should not supersede or supplant the use of school based personnel, with very limited exceptions.

Discussion: The requirement in section 612(a)(12)(A) of the Act, also reflected in paragraph (a)(1) of this section (which specifies that the financial responsibility of the State Medicaid agency or other public insurer of children with disabilities must precede that of the LEA or State agency responsible for the provision of FAPE) should not be construed to mean that Medicaid-funded services are supplemental to the basic services provided under these regulations. Regardless of the source of payment, the public agency responsible for educating the disabled child still must ensure that the child receives all required services at no cost to the parents. Therefore, if Medicaid funds only a portion of required services based on service caps, the public agency responsible for the provision of FAPE must ensure that any remaining necessary services are provided at no cost to the parents. However, a public agency may not make decisions regarding the provision of required services to children with disabilities under these regulations based solely on availability of Medicaid funding. To the contrary, if a public agency determines that particular services are necessary to ensure the provision of FAPE to children with disabilities, those services must be provided at no cost to the parents, regardless of whether Medicaid funds the service.

No clarification has been provided regarding selection of personnel to provide required services under these regulations. In ensuring the provision of FAPE, public agencies may use any personnel that meet applicable State standards in accordance with §§ 300.136 and 300.23 of these regulations. However, as noted above, if a public insurance program is billed for services provided under this part, those services must meet the requirements of that program, including personnel standards that apply to that program, in addition to conforming with the requirements of this part. Once determinations about personnel qualifications have been made, Part B does not govern the manner in which necessary personnel are selected to meet instructional needs under these regulations.

Changes: None.

Comment: Commenters recommended clarification to specify that all services must be free from direct and indirect costs to parents. A principal concern of commenters was that even in circumstances where it is highly probable that future financial costs will result, parents feel constrained to permit public agencies to access their insurance because of the fear of losing necessary services for their disabled children.

Many commenters believe that there is always a cost associated with using private insurance, i.e., exhaustion of lifetime caps, decreased benefits, increased co-pays and costs, risk of future uninsurability with another insurance carrier, and possible termination of health insurance. These commenters recommended that a new paragraph be added to this section, which would require public agencies to inform parents that voluntary use of their private insurance could entail these risks, that parents have no obligation to permit access to their insurance payments, and have the right to say no. These commenters also recommended that Note 2 to this section of the NPRM be deleted.

Some commenters also objected that § 300.142(e) does not support the concept of obtaining parental permission for use of public insurance, and recommended that the regulation specify that parents must give informed consent to use of their public or private insurance which (1) must be voluntary on the part of parents, (2) renewed at least annually, (3) can be revoked at any time, and (4) must include a written description of ''potential financial costs'' associated with using their insurance. Other commenters agreed with proposed paragraph (e)(1) and Note 2 and urged that they be retained in the final regulations.

Discussion: Proposed paragraph (e)(1) of this section of the NPRM incorporated the interpretation of the requirements of Part B and Section 504 contained in the Notice of Interpretation (Notice) on use of parents' insurance proceeds, published on December 30, 1980 (45 FR 86390). Under the interpretation in the Notice, public agencies may not access private insurance if parents would incur a financial cost, and use of parent's insurance proceeds, if parents would incur a financial cost, must be voluntary on the part of the parent.

In light of the concerns of numerous commenters that the use of private insurance always involves a current or future financial cost to the parents, and the Department's experience in administering Part B, the regulations regarding use of private insurance should be revised. As numerous commenters have indicated, parents who permit use of their private insurance often experience unanticipated financial consequences. These parents often act without full knowledge of the future impact of their decision. Public agencies should be permitted to access a parent's private insurance proceeds only if the parent provides informed consent to use.

Consistent with the definition of ''consent'' in these regulations, such consent must fully inform parents that they could incur financial consequences from the use of their private insurance to pay for services that the school district is required to provide under the IDEA, such as surpassing a cap on benefits, which could leave them uninsured for subsequent services, and that the parents should check with their private insurance provider so that they understand the foreseeable future financial costs to themselves before they give consent. This consent should be obtained each time a public agency attempts to access private insurance, and be voluntary on the part of the parents.

In addition, parents need to be informed that their refusal to permit a public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. However, the suggestion of commenters that parents be informed that they have the right to refuse use of their private insurance because of future risks of financial consequences has not been adopted because it is unnecessary, in light of the new requirement that public agencies obtain parental consent to use a parent's private insurance.

Changes: A new paragraph (f) has been added to clarify the circumstances under which public agencies may access parent's private insurance to pay for required services under these regulations. Note 2 to this section of the NPRM has been removed.

Comment: The majority of commenters urged regulations on the use of public insurance that would parallel those governing use of private insurance. Commenters recommended that regulations clarify that the same protections available to parents when

public agencies access private insurance are available to parents when public agencies access public insurance. These commenters also disagreed with the statement on page 55036 of the preamble to the NPRM that suggested that regulation on this issue was not necessary because there is no financial loss to parents under current public assistance programs such as Medicaid.

Examples of financial costs cited by commenters resulting from Medicaid use were (1) limitation or decrease in public insurance benefits available to children with disabilities and their families for non-school needs; (2) a requirement that private insurance initially be used before Medicaid funds are made available; (3) limitations on amounts of services that can be reimbursed with Medicaid funds; and (4) premiums or co-pays resulting from use of Medicaid funding.

Commenters also requested that the definition of ''financial cost'' be expanded to include costs such as a risk of losing eligibility for home and community-based waivers based upon aggregate health-related expenditure, and costs associated with Medicaid buy-ins. These commenters also recommended that the regulations clarify that parental consent must be obtained before a public agency can access Medicaid or other public insurance benefits available to the parent.

Some commenters urged the elimination of definitions or terms not included in the statute, such as the definition of financial cost. Other commenters recommended that changes not be made and agreed with the statement in the preamble to the NPRM that there is no financial cost to parents who access Medicaid or other public insurance benefits. These commenters believed that the regulation should state that parental permission need not be obtained before accessing public insurance. Some of these commenters also recommended further observation and study of current State practices to ensure that the regulations do not have an adverse impact on currently existing and effective financial systems. These commenters also recommended additional guidance to allow States maximum flexibility to utilize all available resources.

Some commenters recommended that Note 3 be retained as a note or that pertinent portions be incorporated into the regulation, while others requested that Note 3 be deleted.

Discussion: As numerous commenters pointed out, the statutory basis of the 1980 Notice of Interpretation governing use of private insurance proceeds also applies to children with disabilities who have public insurance. In both instances services under Part B must be at no cost to parents. In view of the comments received, it appears that the statement contained on page 55036 of the preamble to the NPRM, which indicates that there is no risk of financial cost to parents if public agencies use Medicaid or other Federal, State or local public insurance programs, is not entirely accurate.

While it is essential that public agencies have the ability to access all available public sources of support to pay for required services under these regulations, services must be provided at no cost to parents. However, in the majority of cases, use of Federal, State or local public insurance programs by a public educational agency to provide or pay for a service to a child will not result in a current or foreseeable future cost to the family or child. For example, under the Early Periodic Screening, Diagnosis and Treatment (EPSDT) program of Medicaid, potentially available benefits are only limited based on what the Medicaid agency determines to be medically necessary for the child and are not otherwise limited or capped. Currently, approximately 90 percent of the school-aged children who are eligible for public insurance programs are eligible for services under the EPSDT program. Where there is no cost to the family or the child, public educational agencies are encouraged to use the public insurance benefits to the extent possible. It also should be noted that a public educational agency is required to provide a service that is needed by a child and has been included on his or her IEP but that is not considered medically necessary under EPSDT or other public insurance program. As is the case for any other service required by a child's IEP, if a service on a child's IEP is provided by a public insurance program at a site that is separate from the child's school, the public educational agency is responsible for ensuring that the transportation is at no cost to the child or family.

There are some situations, however, that should be addressed by the regulation to ensure that use of public insurance does not result to a cost to the child or family. In some public insurance programs, families are required to pay premiums or co-pay amounts in order to be covered by or use the public insurance. Parents of children with disabilities under Part B should not be required to assume those costs so that a school district can use the child's public insurance to cover services required under Part B. While these regulations do not affect the requirement under Medicaid that the State Medicaid agency pursue liable third party payers such as private insurance providers, for the reportedly relatively small number of children and families who are covered by both private and public insurance, under IDEA parents may not be required to assume costs incurred through use of private insurance so that the school can get reimbursement from the public insurer for services in the child's IEP. Under IDEA, if a Medicaid-enrolled child also is covered by private insurance, the public agency must choose one of two options—either obtain the parent's consent to use the private insurance, or not use Medicaid to provide the service. One way a public agency might be able to obtain that consent would be to offer to cover the costs that would normally, under Medicaid, be assessed against the private insurer. Similarly, if under Medicaid a parent or family normally would incur an out-of-pocket expense such as a co-pay or deductible, a public agency may not require parents to incur that cost in order for their child to receive services required under the IDEA. In such a case, again, the public agency must choose one of two options—either cover the out-of-pocket expense so that the parent does not incur a cost, or not use Medicaid to provide the service. The regulations should make clear that a public agency is able to use Part B funds to pay the cost that under Medicaid requirements would otherwise be covered by a third party payer.

Public insurance limits of the amounts of services that will be covered based on the public insurer's determination of what is medically necessary for the child are not prohibited by Part B. However, a public educational agency's use of a child's benefits under a public insurance program should not result in the family having to pay for services that are required for the child outside of the school day and that could be covered by the public insurance program. For example, if a public insurer were to determine that eight hours of nursing services were medically necessary for a child whose medical devices needed constant trained supervision, a school district's use of six of those hours during the school day would mean that family would have to assume the financial responsibility for those services throughout the night. In such a case, the family would be incurring a cost due to the school district's use of the public insurance benefit. Risk of loss

of eligibility for home and community-based waivers, based in aggregate health-related expenditures could also constitute a cost to a family for those few children with very extensive health related needs.

A public agency may not require a parent to sign up for Medicaid or other public insurance benefits as a condition for the child's receipt of FAPE under Part B. A child's entitlement to FAPE under Part B exists whether or not a parent refuses to consent to the use of their Medicaid or public insurance benefits or is unwilling to sign up for Medicaid or other public insurance benefits. Children with disabilities are entitled to services under Part B, regardless of parents' personal choices to access Medicaid or other public insurance benefits.

Although section 612(a)(12) of the Act makes clear States' obligations to ensure that available public sources of support precede responsibilities of public agencies under these regulations, Medicaid or other public insurance benefits cannot be considered available public sources of support when parents decline to access those public benefits. However, there is nothing in these regulations that would prohibit a public agency from requesting that a parent sign up for Medicaid or other public insurance benefits. Furthermore, a public agency would not be precluded from using a child's public insurance, even if parents incur a financial cost, so long as the public agency's use of a child's public insurance is voluntary on the part of the parent.

In order to ensure that children with disabilities are afforded a free appropriate public education at no cost to their parents, the regulation should be amended to address children with disabilities who are covered by public insurance by specifying that a public agency may use Medicaid or other public insurance benefits programs in which a child participates with certain exceptions. Those exceptions would be that a public agency may not require parents to sign up for public insurance in order for their child to receive FAPE under Part B of the Act; require parents to incur out-of-pocket expenses related to filing a public insurance claim for Part B services; and may not use the public insurance if the use would decrease coverage or benefits, increase premiums, lead to discontinuation of insurance, result in the family paying for services that otherwise would be covered by the public insurance and that are required by the child outside of the time the child is in school, or risk loss of eligibility for home and community-based waivers. However, unlike the rule related to private insurance, Part B would not require the public agency to obtain parent consent each time it uses the public insurance. Under the terms of the public insurance program, consent may be required before a public educational agency may use a child or family's public insurance benefits.

In light of the importance of the issues addressed in Note 3 to this section of the NPRM, Note 3 should be removed as a note, and a new paragraph (g), regarding use of Part B funds, should be added to this regulation. This paragraph would permit use of Part B funds for (1) the cost of those required services under these regulations, if parents refuse consent to use public or private insurance; and (2) the costs of accessing parent's insurance, such as paying deductible or co-pay amounts.

Changes: Paragraph (e) has been amended to address circumstances under which a public agency can access a parent's Medicaid or other public insurance benefits to pay for required services under these regulations. The definition of financial costs in the NPRM has been deleted. Note 3 to this section of the NPRM has been removed, and the substance of Note 3 has been incorporated into a new paragraph (g) of this section.

Comment: Several commenters were concerned that § 300.142(f) of the NPRM makes it permissible for public agencies not to use funds reimbursed from another agency to provide special education and related services to children with disabilities. Suggestions made by commenters were that this paragraph either be deleted or changed to require that these reimbursed funds must be used in this program.

Commenters recommended that Note 4 be deleted since it gives public agencies the option of dedicating these funds to the Part B program only if they choose to do so. These commenters believe that this change is necessary for this regulation to be consistent with the purpose of section 612(a)(12) of the Act, which places financial responsibility for the provision of special education and related services on agencies other than schools. Other commenters recommended that Note 4 be deleted because it is redundant of § 300.3, which provides that the regulations in 34 CFR part 80 apply to this program.

Discussion: In response to concerns of commenters, Note 4 should be removed, but pertinent portions of Note 4 should be incorporated into the text of the final regulations. This section should clarify that, if a public agency receives funds from public or private insurance for services under these regulations, the public agency is not required to return those funds to the Department or to dedicate those funds for use in the Part B program, which is how program income must be used, although a public agency retains the option of using those funds in this program if it chooses to do so. Reimbursements are similar to refunds, credits, and discounts which are specifically excluded from program income in 34 CFR 80.25(a).

In addition, the regulations should clarify that funds expended by a public agency from reimbursements of Federal funds will not be considered State or local funds for purposes of §§ 300.154 and 300.231. If Federal reimbursements were considered State and local funds for purposes of the maintenance of effort provisions in §§ 300.154 and 300.231 of these regulations, SEAs and LEAs would experience an artificial increase in their base year amounts and would then be required to maintain a higher, overstated level of fiscal effort in the succeeding fiscal year.

Changes: Section 300.142(f) has been redesignated as § 300.142(h) and revised to clarify that (1) A public agency that receives proceeds from public or private insurance for services under these regulations is not required to return those funds to the Department or to dedicate those funds to this program because they will not be treated as program income under 34 CFR 80.25; and (2) funds expended by a public agency from reimbursements of Federal funds will not be considered State or local funds for purposes of §§ 300.154 and 300.231 of these regulations. Note 4 to this section of the NPRM has been removed.

Recovery of Funds for Misclassified Children (§ 300.145)

Comment: Some commenters requested that the regulation be revised to provide a State the opportunity for a hearing before a student is declared ineligible for Part B funding.

Discussion: Section 300.145 requires that each State have on file with the Secretary policies and procedures that ensure that the State seeks to recover any funds it provided to a public agency under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act. There is no need to revise the regulation to provide for administrative review of a decision by this Department that Part B funds should be recovered from a State because of an erroneous child count. The Department uses the administrative appeal procedures set out at 34 CFR Part 81 in recovering funds because of an erroneous child

count for cases where the Department is attempting to recover grant funds, including Part B funds.

Changes: None.

Suspension and Expulsion Rates (§ 300.146)

Comment: Some commenters requested the regulation be revised to permit States to use sampling procedures to obtain the data that they will examine pursuant to § 300.146(a).

Discussion: Obtaining complete and accurate data on suspension and expulsion is too critical to be collected on a sampling basis.

Changes: None.

Comment: Some commenters requested that § 300.146(b) be revised to require that a State review and if appropriate revise its comprehensive system of personnel development, if the State finds that significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the State or compared to the rates for nondisabled children within LEAs.

Discussion: Section 300.146(b) requires that, if an SEA finds that significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the State or compared to the rates for nondisabled children within LEAs, the SEA must, if appropriate, revise (or require the affected State agency or LEA to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

Among the policies that a State would review and if necessary revise are its CSPD policies and procedures related to ensuring that personnel are adequately prepared to meet their responsibilities under the Act. Further, § 300.382 specifically requires each State to develop strategies to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the needs of children with disabilities; and these strategies must include how the State will ''* * * enhance the ability of teachers and others to use strategies, such as behavioral interventions, to address the conduct of children with disabilities that impedes the learning of children with disabilities and others'' (§ 300.382(f)). Further guidance is not needed.

Changes: None.

Public Participation (§ 300.148)

Comment: None.

Discussion: Section 300.148 requires each State to ensure that, prior to the adoption of any policies and procedures needed to comply with this part, there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities consistent with §§ 300.280–300.284.

In the past, a number of States have indicated that certain State special education policies that are also required under this part had previously been subjected to public review and comment under the State's own public participation process, and the States have expressed concern about having to repeat the process for those policies under §§ 300.280–300.284.

The need for an effective public participation process is critical to the adoption and implementation of policies and procedures that comply with the requirements under this part. However, if a State, in adopting State special education policies had previously submitted those policies through a public participation process that is comparable to and consistent with the requirements of §§ 300.280–300.284, it would be unnecessary and burdensome to require the State to repeat the process.

Therefore, a provision would be added to § 300.148 to clarify that a State will be considered to be in compliance with this provision if the State has subjected the policy or procedure to a public review and comment process that is required by the State for other purposes and that State public participation process with respect to factors such as the number of public hearings, content of the notice of hearings, and length of the comment period, is comparable to and consistent with the requirements of §§ 300.280–300.284.

Changes: Section 300.148 has been amended to include the provision described in the above discussion.

Prohibition Against Commingling (§ 300.152)

Comment: None.

Discussion: The proposed note clarified that the assurance required by § 300.152 is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of the Part B funds and that separate bank accounts are not required, and referred the reader to 34 CFR § 76.702 in EDGAR, regarding Fiscal control and fund accounting procedures. Because this information provides useful guidance to States, it should be incorporated into the regulations.

Changes: The substance of the note is incorporated into the text of the regulation.

Maintenance of State Financial Support (§ 300.154)

Comment: None.

Discussion: States should be able to demonstrate that they have not reduced the amount of State financial support for special education and related services for children with disabilities, whether made directly available for those services or otherwise made available in recognition of the excess costs of educating children with disabilities on either a total or per child basis. A number of States, for example, have State funding formulas that are based on enrollment which could result in a decrease in the total amount of State financial support if enrollment declines.

Changes: Paragraph (a) of this section has been revised to clarify that either a total or per child level of State financial support is acceptable.

Annual Description of Use of Part B Funds (§ 300.156)

Comment: Some commenters requested that the regulation be made consistent with the statutory provision at section 611(f)(5) of the Act by deleting § 300.156(b).

Discussion: It is reasonable and appropriate to permit a State, if the information which it would submit pursuant to § 300.156(a) for a given fiscal year is the same as the information that it submitted for the prior fiscal year, to submit a letter to that effect rather than resubmitting information that it has previously submitted.

Changes: None.

Excess Cost Requirement (§ 300.184)

Comment: Some commenters asked that the regulation be revised to require regular financial audits to ensure compliance with the excess cost requirements.

Discussion: Each SEA, as part of its general supervision responsibility under § 300.600, must ensure that LEAs comply with all requirements of Part B, including the requirements of § 300.184 regarding excess cost. Each SEA may meet this requirement through a variety of methods, including monitoring and financial audits.

Changes: None.

Meeting the Excess Cost Requirement (§ 300.185)

Comment: None.

Discussion: The proposed note clarified the Department's longstanding position that: (1) The excess cost requirement means that the LEA must spend a certain minimum amount for the education of its children with disabilities before Part B funds are used, ensuring that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district in elementary or secondary school as the case may be; (2) excess costs are those costs of special education and related services that exceed the minimum amount; (3) if an LEA can show that it has (on the average) spent the minimum amount for the education of each of its children with disabilities, it has met the excess cost requirement, and all additional costs are excess costs; and (4) Part B funds can then be used to pay for these additional costs. However, several commenters requested that the substance of all Notes be incorporated into the text of the regulations or the Notes deleted.

Changes: The note has been deleted.

Requirements for Establishing Eligibility (§ 300.192)

Comment: Section 300.192(c) requires that, ''Notwithstanding any other provision of §§ 300.190–300.192, an educational service agency shall provide for the education of children with disabilities in the least restrictive environment, as required by § 300.130.'' Some commenters requested that the regulation be revised to emphasize the appropriateness of children's educational programs as strongly as placement in the least restrictive environment.

Discussion: Section 300.192(c) clarifies that notwithstanding whether an LEA establishes Part B eligibility as a single LEA or jointly with other LEAs, it must ensure compliance with the LRE requirements of the Act. This provision does not in any way diminish an LEA's responsibility to ensure that FAPE is made available to all eligible children with disabilities.

Changes: None.

LEA and State Agency Compliance (§ 300.197)

Comment: Some commenters requested that the regulations be revised to require that each SEA conduct sufficient monitoring activities in each LEA and State agency, at least once every three years, to enable the SEA to make findings regarding the extent to which the agency is in compliance. Other commenters requested that § 300.197(a) be revised to reduce or cease to provide further payments under Part B to an LEA or State agency if SEA finds that the agency is engaging in a pattern of noncompliance or has failed promptly to remedy any individual instance of noncompliance.

Section 300.197(c) requires that an SEA consider any decision resulting from a hearing under §§ 300.507–300.528 that is adverse to the LEA or State agency involved in the decision in carrying out its functions under § 300.197. Some commenters requested that the regulation be revised to require that the SEA also consider adverse decisions on complaints filed under §§ 300.660–300.662.

Discussion: Each SEA, as part of its general supervision responsibility under § 300.600, must ensure that all public agencies meet the educational standards of the SEA, including the requirements of Part B; and the General Education Provisions Act requires that each SEA use effective monitoring methods to identify and correct noncompliance with Part B requirements. In implementing this requirement, each SEA must determine: (1) the frequency with which it must monitor each of the public agencies in the State in order to ensure compliance; and (2) whether a single act or pattern of noncompliance demonstrates substantial noncompliance necessitating the SEA to pursue financial sanctions.

Unlike hearings that are resolved by impartial due process hearing officers who are not SEA employees, all complaints under the State complaint procedures alleging a violation of Part B are resolved directly by the SEA, which must also ensure correction of any violations it identifies in response to such complaints. Therefore, the SEA will, as part of its general supervision responsibilities, consider any adverse complaint decisions in meeting its responsibilities under § 300.197, and the requested revision is not necessary.

Changes: None.

Maintenance of Effort (§ 300.231)

Comment: Some commenters expressed concern that the provision on local maintenance of effort (MOE) would mean that even in years when State legislatures increased State appropriations to offset financial expenditures of LEAs, those funds could not be included in making determinations as to whether the maintenance of effort provision had been met.

Discussion: The statutory LEA-level maintenance of effort provision requires that LEAs do not use the funds they are awarded under the IDEA to reduce the level of expenditures that they make from local funds below the level of those expenditures for the preceding year (except as provided in §§ 300.232 and 300.233). The statutory provision replaces a prior regulatory provision that had required LEAs to maintain the same total or per capita expenditures from State and local funds as in prior years, which was viewed as financially burdensome by LEAs when they were required, because of this prior regulatory provision, to replace out of local funds any amount by which a State reduced the amount of State funds going to an LEA.

Therefore, in recognition of this change, the regulation would allow a comparison of local funding in the grant year to local funding in a prior year. If a State assumes more responsibility for funding these services, such as when a State increases the State share of funding for special education to reduce the fiscal burden on local government, an LEA may not need to continue to put the same amount of local funds toward expenditures for special education and related services in order to demonstrate that it is not using IDEA funds to replace prior expenditures from local funds.

On the other hand, an LEA should not be able to replace local funds with State funds when the combination of local and State funding is not at least equal to a base amount from the same sources, as this would result in reductions in expenditures not contemplated by the statute. Since those Federal funds for which accountability is not required to a Federal or State agency are expended at the discretion of an LEA, they may be included in computations of local funds budgeted and expended for special education and related services for children with disabilities.

In determining whether an LEA could receive a subgrant in any year, an SEA should compare the amount of funds from appropriate sources budgeted for the grant year to the amount actually expended from those sources in the most recent fiscal year for which data are available. Reductions in the amount budgeted would be permissible for the conditions described in §§ 300.232 and 300.233, if applicable. An LEA that did not expend in a grant year from those sources at least as much as it had in the year on which the maintenance of effort comparison for that year is based, would be liable in an audit for repayment of the amount by which it failed to expend to equal the prior year's expenditures,

up to the total amount of the LEA's grant.

Changes: A new paragraph has been added to clarify the maintenance of effort provision.

Exception to Maintenance of effort (§ 300.232)

Comment: Some commenters requested that the regulation be revised to specifically require that lower-salaried staff who replace special education and related services personnel, who depart voluntarily or for just cause, meet entry-level academic degree requirements that are based on the highest requirements in the State for the relevant profession or discipline. Other commenters requested retention of the provision in § 300.233(a) that an LEA may reduce its expenditures from one year to the next if the reduction is attributable to the voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel, but that the language specifying that these personnel must be replaced by qualified, lower-salaried staff and the note following this regulation be deleted.

Discussion: The requirements of § 300.136 regarding personnel standards apply to personnel who replace special education and related services personnel, who depart voluntarily or for just cause. It is important to make clear in the regulation that all staff providing special education and related services must be qualified.

The Senate and House committee reports on Pub. L. 105–17, with respect to the voluntary departure of special education personnel described in § 300.232(a), clarify that the intended focus of this exception is on special education personnel who are paid at or near the top of the salary schedule, and sets out guidelines under which this exception may be invoked by an LEA. These guidelines (which provide that the agency must ensure that such voluntary retirement or resignation and replacement are in full conformity with existing school board policies in the agency, with the applicable collective bargaining agreement in effect at that time, and with applicable State statutes) are important in the implementation of this section and, therefore, should be added to the regulation. (S. Rep. No. 105–17, p. 16, H. R. Rep. No. 105–95, p. 96 (1997)).

Changes: Paragraph (a) has been amended to include the substance of the note, consistent with the above discussion, and the note has been removed.

Comment: Some commenters requested that § 300.232(c)(3) be revised to specify that an LEA may reduce its expenditures from one year to the next if the reduction is attributable to the termination of the LEA's obligation to provide a program of special education to a child with a disability that is an exceptionally costly program, as determined by the SEA, because the child no longer needs the program of special education, as determined in accordance with the IEP requirements at §§ 300.346 and 300.347.

Discussion: Because any change in the special education and related services provided to a child with a disability must be made in accordance with the IEP requirements, the requested revision is not necessary. The circumstances under which an LEA may reduce effort because it no longer needs to provide an exceptionally costly program are addressed by the regulations at § 300.232(c).

Changes: None.

Comment: Some commenters requested that the regulation be revised to require an LEA to submit to the SEA an assurance that all students with disabilities in the LEA are receiving a free appropriate public education, before the LEA would be permitted to reduce its expenditures.

Discussion: As part of its general supervision responsibility under § 300.600, each SEA is required to ensure that all public agencies in the State are complying with the requirement that they make FAPE available to all eligible children in their respective jurisdictions. Therefore, the requested revision is not necessary.

Changes: None.

Schoolwide Programs Under Title 1 of the ESEA (§ 300.234)

Comment: A commenter requested that, in § 300.234(b), the reference to § 300.230(a) be changed to also include § 300.230(b) or § 300.231(a). Another commenter asked if an LEA can use its State and local special education funds in a schoolwide program without accounting for expenditures of those funds for special education and related services, and added that if such use is allowable, could the State and local funds be considered in the LEA's maintenance of effort calculation.

Discussion: The reference in § 300.234 to § 300.230(a) in the NPRM should be changed to § 300.230(b). If Part B funds are used in accordance with § 300.234, the funds would not be limited to the provision of special education and related services. They could also be used for other school-wide program activities. However, children with disabilities in school-wide programs must still receive special education and related services in accordance with properly developed IEPs and must still be afforded all the rights and services guaranteed under the IDEA.

The use of IDEA funds in a school-wide program does not change the LEA's obligation to meet the maintenance of effort requirement in § 300.231.

Consistent with the general decision regarding the disposition of notes, the note following § 300.234 would be removed. However, the note includes important guidance related to ensuring that children with disabilities in schoolwide program schools still receive services in accordance with a properly developed IEP, and still be afforded all of the rights and services guaranteed to children with disabilities under the IDEA. Therefore, this guidance should be added to the text of the regulation as a specific provision.

It should be pointed out that the use of funds under Part B of the Act in accordance with § 300.234 is beneficial to children with disabilities, and, contrary to informal concerns that have been raised, the use of the Part B funds in schoolwide programs does not deplete resources for children with disabilities. Rather, it helps to ensure effective inclusion of those children into the regular education environment with nondisabled children.

Changes: Paragraphs (b), (c), and (d) have been reorganized as paragraph (b) and (c) and revised to include the substance of the note. The note has been deleted.

Permissive Use of Funds (§ 300.235)

Comment: Some commenters requested clarification as to whether LEAs are still required to maintain ''time and effort'' or other records to document that Part B funds have been expended only on allowable costs. Other commenters expressed their concern that, with no limitation on the number of children who do not have disabilities who may benefit from special education and related services, the needs of children with disabilities will not be met. Some commenters asked that the regulation be revised to require regular financial audits to ensure compliance with the excess cost requirements.

Discussion: Section § 300.235 sets forth circumstances under which an LEA may use Part B funds to pay for the costs of special education and related services and supplementary aids and services provided in a regular class or other education-related setting to a child with a disability and to develop and implement a fully integrated and coordinated services system; this

section does not impact the documentation requirements where an LEA uses a particular individual to provide special education or related services during one portion of the day or week and to perform other functions at other times for which the LEA cannot pay using Part B funds.

Although § 300.235 makes clear that Part B does not prohibit benefit to nondisabled children, it does not permit Part B funds to be expended in a regular class except for special education and related services and supplementary aids and services to a child with a disability in accordance with the child's IEP. If special education and related services are being provided to meet the requirements of the IEP for a child with a disability, this provision permits other children to benefit, and in such circumstances no time and effort records are required under Federal law, thus reducing unnecessary paperwork.

This provision does not in any way diminish an SEA or other public agency's responsibilities under Part B to ensure that FAPE is made available to each eligible child with a disability. Each SEA must, as part of its general supervision responsibility under § 300.600, ensure compliance with the requirements of § 300.235; the methods that the SEA uses to ensure compliance may include monitoring and financial audits of LEAs. Under the Single State Audit Act, SEAs are required to ensure that periodic audits are conducted, and the General Education Provisions Act requires periodic monitoring.

Changes: None.

Treatment of Charter Schools and Their Students (§ 300.241)

Comment: None.

Discussion: The proposed note clarified that the provisions of this part that apply to other public schools also apply to public charter schools, and, therefore, children with disabilities who attend public charter schools and their parents retain all rights under this part. The Senate and House Committee Reports on Pub. L. 105–17, which, in reference to this provision states:

> The Committee expects that charter schools will be in full compliance with Part B. (S. Rep. No. 105–17, p 17, H. R. Rep. No. 105–95, p. 97 (1997))

Thus, to ensure the protections of the rights of children with disabilities and their parents, this concept should be incorporated into the regulations.

Changes: The substance of the note has been incorporated into the discussion under § 300.18, and in the regulations under § 300.312. The note has been deleted.

Subpart C

Provision of FAPE (§ 300.300)

Comment: Some commenters expressed support for a seamless system of services for disabled children from birth through age 21, and recommended that Note 3 under § 300.300 be added to the regulation to highlight the need for States to plan their child find and other activities to meet the age range for FAPE. A few commenters stated their understanding that the exemption to the ''50% rule'' in § 300.300 (related to FAPE for disabled children aged 3 through 5 in States receiving a Preschool grant) was temporary, and asked if the exemption would continue in effect.

Discussion: In light of the previous discussion regarding the disposition of notes under this part (see ''General Comments''), Note 3, which provides only clarifying information to explain why the age range for child find (birth through age 21) is greater than the age range for providing FAPE, should be deleted and not moved into the regulation. Further, Note 1 (FAPE applies to children in school and those with less severe disabilities) is no longer relevant as the statute now is commonly understood to apply to all children with disabilities, not just those out of school or with severe disabilities, and should be deleted. The substance of Note 2 (importance of child find to the FAPE requirement) should be incorporated into the text of the regulation at § 300.300(a)(2) because of the crucial role that an effective child find system plays as part of a State's obligation of ensuring that FAPE is available all children with disabilities.

The provision in § 300.300(b)(4) clarifies that if a State receives a Preschool Grant under section 619 of the Act, the ''50% rule'' does not apply with respect to disabled children aged 3 through 5 years, because the State must ensure that FAPE is available to ''all'' disabled children in that age range within the State—as a condition of receiving such a grant. (See §§ 301.10 and 301.12) Therefore, this provision should be included, without change, in these final regulations.

Changes: The substance of Note 2 has been added as a new paragraph (a)(2). Notes 1—3 have been removed.

FAPE—Methods and Payment (§ 300.301)

Comment: One commenter stated that there is no authority in Federal law to permit a State to use unlimited local resources to meet the State's requirement for FAPE, and recommended that the statement in § 300.301(a) related to using whatever State, local, or private sources of support be replaced by providing that a State may use all of its State funds to ensure FAPE. Some commenters requested that a new paragraph (c) be added to clarify that there can be no delay in the provision of FAPE while the SEA determines the payment source for IEP services.

Discussion: Section 300.301 is a long-standing provision that was included, without change, in the NPRM. The section merely clarifies that each State may use other sources of support for meeting the requirements of this part, in addition to State education funds or Part B funds.

It would be appropriate to add a new paragraph to § 300.301 to clarify that there can be no delay in implementing a child's IEP in any case in which the payment source for providing or paying for special education and related services to the child is being determined. Section 300.142 also addresses the role of the public agency in ensuring that special education and related services are provided if a noneducational agency fails to meet its responsibility and specifies that services must be provided in a timely manner, while the payment source for services is being determined. Further, because §§ 300.342 and 300.343 also address the timely development and implementation of a child's IEP, it is appropriate to include a reference to those sections in § 300.301.

Changes: A new paragraph (c) has been added to ensure, consistent with the above discussion, that there is no delay in providing services while the payment source is being determined.

Residential Placement (§ 300.302)

Comment: A few commenters requested that the regulations clarify that costs for residential placements include the expenses incurred by parents' travel to and from the program and the cost of telephone calls to the placement. One commenter stated that the LEA should be responsible for the educational costs if the system cannot meet the needs of the student, and that other appropriate related service agencies should assume the cost of care and treatment.

Discussion: Section 300.302 is a long-standing provision that applies to placements that are made by public agencies in public and private institutions for educational purposes. The note following this section should be deleted in light of the general decision to remove all notes from these final regulations.

A statement clarifying that costs for residential placements include the expenses incurred by parents' travel to and from the program and the cost of telephone calls to the placement is included in the analysis of comments on the definition of ''special education'' (see § 300.26). The regulations already address the respective responsibilities of the SEA, LEAs, and noneducational agencies under this part (see, for example, §§ 300.121, 300.142, and 300.220).

Changes: The note has been deleted.

Proper Functioning of Hearing Aids (§ 300.303)

Comment: Comments received on § 300.303 included requests to: (1) clarify that LEAs cannot ensure proper functioning of hearing aids unless students report non-working devices, especially students who are in private or out-of-school placements (because it is beyond the LEAs' capability to monitor whether devices are working); (2) provide that LEAs are not responsible for hearing aids damaged by misuse within non-school environments; (3) revise the section to address other AT devices; (4) ensure the provision is consistently met, using qualified persons who check aids on a regular basis, and (5) delete the note because it reflects 20 year-old appropriations committee report language, and, therefore, is no longer relevant. Other comments expressed concern that the section adds unnecessary paperwork and an unfair financial burden.

Discussion: Section 300.303 has been included in the Part B regulations since they were initially published in 1977. The note following § 300.303, which incorporated language from a House Committee Report on the 1978 appropriation bill, served as the basis for the requirement in § 300.303. That report referred to a study done at that time that showed that up to one-third of the hearing aids for public school children were malfunctioning; and the report stated that the [Department] must ensure that hearing impaired school children are receiving adequate professional assessment, follow-up, and services.

Section 300.303 was added to address that Congressional directive, and has been implemented since 1977. The Department has routinely monitored § 300.303; and when a violation has been identified, appropriate corrective action has been taken. Although it is important that § 300.303 be retained in the final regulations, the note is no longer relevant, and should be deleted.

Questions relating to damage of hearing aids are addressed in the analysis of comments on the definitions of assistive technology devices and services (see §§ 300.5 and 300.6).

Changes: The note following § 300.303 has been deleted.

Full Educational Opportunity Goal (§ 300.304)

Comment: Some commenters expressed support for § 300.304. One commenter stated that SEAs and LEAs should be required to improve the general quality of education in ways that will benefit the disabled, including submitting plans and timetables relating to such improvements. Another commenter recommended updating the note to use ''people first'' language consistent with the IDEA, as amended in 1990, and to make reference to quality education programs. Other commenters recommended that the note be deleted.

Discussion: The requirement that there be a goal of ensuring full educational opportunity to all children with disabilities predates the FAPE requirement in Pub L. 94–142. The IDEA Amendments of 1997 are sufficiently clear to not require an elaboration of the full educational opportunity goal. Further, in light of the general tenor of comments received on this section, and the comments and discussion relating to the disposition of notes (see analysis of general comments), it is clear that there would not be sufficient benefit gained to justify updating or retaining the note.

Changes: The note following § 300.304 has been deleted.

Program Options (§ 300.305)

Comment: Some commenters expressed support for this section, stating that disabled children must have the same opportunities as their nondisabled peers. One commenter stated that §§ 300.305 and 300.306 go beyond the new statute and are made moot by the provisions about including students in the regular curriculum as much as possible. Another commenter requested that the section be amended to make it clear that the list of items is not exhaustive.

Discussion: The provisions of §§ 300.305 and 300.306 do not go beyond the requirements of Part B of the Act. These are long-standing regulatory provisions that were included, unchanged, in the NPRM, and have been reinforced by the IDEA Amendments of 1997, through provisions requiring that children with disabilities be included in the general curriculum, and enabling them to meet State standards. The definition of the term ''include'' in § 300.13 makes it clear that the list of programs and services is not exhaustive. Therefore, the note following § 300.305 is unnecessary.

Changes: The note following § 300.305 has been deleted.

Nonacademic Services (§ 300.306)

Comment: One commenter stated that this section will require documenting an array of non-academic and extracurricular services and activities, and that it should be rephrased so that it will not lead to more unnecessary paperwork. Another commenter requested that the section be amended to clarify that participation in extracurricular activities is not a component of a disabled child's program.

Discussion: Section 300.306, as well as § 300.553 (''Nonacademic settings'') are long-standing provisions that were included, without change, in the NPRM. There is no basis for assuming that the provisions in these sections will result in any unnecessary or increased paperwork.

Changes: None.

Physical Education (§ 300.307)

Comment: Several commenters requested that the regulations clarify that each public agency is responsible for making sure that special physical education (PE) (including adapted PE) is provided by qualified personnel, and not by classroom teachers, aides, related services personnel, or other unqualified personnel. One commenter stated that § 300.307(b) should replace ''available to nondisabled children'' with the phrase ''to the extent available to all children.''

Discussion: Section 300.307(b), which provides that each child with a disability has the opportunity to participate in the regular PE program available to nondisabled children, is clear as written, and there is no basis for making the change recommended by the commenters. It is not necessary to amend § 300.307 to state that specially designed PE must be provided by qualified personnel because SEAs are already required under § 300.136 to determine what standards must be met for all special education and related services personnel within the State. The note following § 300.307, which provided important guidance in the original regulations under this part, is no longer necessary, in light of the comments relating to the disposition of notes.

Changes: The note following § 300.307 has been deleted.

Assistive Technology (300.308)

Comment: Some commenters expressed support for § 300.308, stating that disabled students must have the tools they need to succeed. A few commenters requested that a note be added to describe what assistive technology (AT) devices would be available for children with hearing impairments, including deafness. One of the commenters requested listing specific devices (e.g., captioning, computer software, FM systems, and hearing aids).

Discussion: The AT devices for children with hearing impairments identified by the commenters are appropriate AT devices under this part. However, it is not necessary to list such devices in these regulations. Moreover, it would be inappropriate to list AT devices for one disability category without listing such devices for other disability categories. This position is consistent with the previously stated position related to including examples of AT devices in these regulations (see analysis of comments under §§ 300.5 and 300.6). Some examples of AT devices include word prediction software, adapted keyboards, voice recognition and synthesis software, head pointers, and enlarged print.

Under Section 504 of the Rehabilitation Act of 1973, 34 CFR Part 104, and the Title II of the Americans with Disabilities Act of 1990, 28 CFR Part 35, local educational agencies are responsible for providing a free appropriate public education to qualified students with disabilities who are within their jurisdiction. To the extent that assistive technology devices are required to meet the obligation to provide FAPE for an individual student, the devices must be provided at no cost to the student or his or her parents or guardians.

Changes: No change has been made to this section in response to these comments. See discussion under § 300.6 regarding a change to § 300.308.

Extended School Year Services (§ 300.309)

Comment: A number of commenters expressed support for this regulation. Because Notes 1 and 2 following § 300.309 provide important clarification regarding criteria for providing extended school year (ESY) services, some commenters recommended that these notes be added to the regulations.

Other commenters requested that § 300.309 be deleted because it has no statutory base, and could be interpreted to require ESY services for all disabled children regardless of what the child's IEP indicates is appropriate for the child. One comment noted that responsibility for providing ESY services will be extremely costly and likely will require large expenditures of local dollars.

Several commenters requested that both notes be deleted because Note 1 is ambiguous and unnecessary since the regulation is sufficiently clear, and Note 2 is not appropriate because all children regress in the summer.

Numerous comments were received regarding the standards referenced in Note 2 that States can establish for use in determining a child's eligibility for ESY services. One comment urged the adoption of a Federal standard and formula for determining unacceptable rates of recoupment. One recommendation was that while Note 2 should be added to the regulation, it should be changed to clarify that the list of factors is not exhaustive.

Another comment stated that ''regression/recoupment'' is a minimum standard that should be used in determining a child's eligibility for ESY services. Other commenters indicated that regression/recoupment is too narrow a standard, and recommended adding to the regulations additional criteria that courts have used to determine eligibility (e.g., whether the child has emerging skills, the nature or severity of the disability, and special circumstances, such as prolonged absence or other serious blocks to learning progress, which in the view of the IEP team could be addressed by ESY services).

Another comment recommended that the list of factors be revised to specify ''evidence or likely indication of significant regression and recoupment.'' One comment recommended that the reference to ''predictive data'' be expanded to ''predictive data and other information based on the opinion of parents and professionals.''

Another comment stated that, although the regulation should incorporate Note 2 and permit States to establish standards for determining ESY eligibility, public agencies also should be required to make these standards available to parents either at IEP meetings or on request.

One comment recommended deleting Note 2 because it is too narrow and inconsistent with case law. According to the comment, the ESY standard should be flexible and permit consideration of a variety of factors (e.g., whether the child's current level of performance indicates that the child will not make ''meaningful progress'' during the regular school year in the general curriculum or in other areas pertinent to child's disability-related needs).

Several comments recommended other specific changes to § 300.309, such as the following: (1) Section 300.309(a)(2) should be revised to state that the determination of whether a child needs ESY services, including the type and amount of services, must be made by the IEP team and should be specified in the child's IEP; (2) the regulation should specify a timeline for determining eligibility for ESY services to enable the parents to take appropriate steps to challenge the denial of services; (3) the regulation should clarify whether ESY services are limited only to summer programming or to other breaks in the school calendar; and (4) no one factor can be the sole criterion for determining whether a child receives ESY services.

Another comment requested that clarification be added to specify that ESY services must be provided in the least restrictive environment, and that to ensure that this occurs, students with disabilities may have to receive ESY services in noneducational settings.

One comment requested that a note be added to clarify that the process for determining the length of a preschool child's school year must be individualized and described in the child's IEP/IFSP, and added that the decision is not necessarily based on school-aged ESY practices or formulas, which may be inappropriate for younger children, and that if a child turns three during the summer, the child should receive ESY services if specified in the IEP or IFSP.

Other comments requested that the regulations: add a new paragraph (c) to address the needs of disabled children enrolled in private facilities and include additional guidance relating to an LEA's obligation to conduct necessary evaluations during the summer when a child arrives in an LEA in the summer with an IEP from another LEA that requires ESY services.

Discussion: The regulation and notes related to ESY services were not intended to create new legal standards, but to codify well-established case law in this area (and, thus, ensure that the requirements are all in one place). Since the requirement to provide ESY services to children with disabilities under this part who require such services in order to receive FAPE is not a new requirement, but merely reflects the longstanding interpretation of the IDEA by the courts and the Department, including it in these regulations will not impose any additional financial burden on school districts.

On reflection and in view of the comments, it has been determined that

this regulation should be retained, and that Note 1 following § 300.309, with some modifications, should be incorporated into the text of the regulation. Section 300.309 and accompanying notes clarify the obligations of public agencies to ensure that students with disabilities who require ESY services in order to receive FAPE have necessary services available to them, and that individualized determinations about each disabled child's need for ESY services are made through the IEP process. The right of an individual disabled child to ESY services is based on that child's entitlement to FAPE. Some disabled children may not receive FAPE unless they receive necessary services during time periods when other children, both disabled and nondisabled, normally would not be served. Both parents and educators have raised issues for many years about how determinations about ESY services can be made consistent with the requirements of Part B.

The clarification provided in Note 1 in the NPRM is essential to ensuring that public agencies do not limit eligibility for ESY services to children in particular disability categories, or the duration of these necessary services. Since these issues are key to ensuring that each disabled child who requires ESY services receives necessary services in order to receive FAPE, this concept from Note 1 should be incorporated into this regulation.

In the past, the Department has declined to establish standards for States to use in determining whether disabled children should receive ESY services. Instead, the Department has said that States may establish State standards for use in making these determinations so long as the State's standards ensure that FAPE is provided consistent with the individually-oriented focus of the Act and the other requirements of Part B and do not limit eligibility for ESY services to children in particular disability categories. These regulations continue this approach.

Within the broad constraints of ensuring FAPE, States should have flexibility in determining eligibility for ESY services, and a Federal standard for determining eligibility for ESY services is not needed. As is true for other decisions regarding types and amounts of services to be provided to disabled children under Part B, individual determinations must be made in accordance with the IEP and placement requirements in Part B.

Regarding State standards for determining eligibility for ESY services, Note 2 was not intended to provide an exhaustive list of such standards. Rather, the examples of standards that were included in Note 2 (e.g., likelihood of regression, slow recoupment, and predictive data based on the opinion of professionals) are derived from well-established judicial precedents and have formed the basis for many standards that States have used in making these determinations. *See*, e.g., *Johnson* v. *Bixby ISD 4*, 921 F.2d 1022 (10th Cir. 1990); *Crawford* v. *Pittman*, 708 F.2d 1028 (5th Cir. 1983); *GARC* v. *McDaniel*, 716 F.2d 1565 (11th Cir. 1983). It also should be pointed out that nothing in this part is intended to limit the ability of States to use variations of any or all of the standards listed in Note 2. Whatever standard a State uses must be consistent with the individually-oriented focus of the Act and may not constitute a limitation on eligibility for ESY services to children in particular disability categories.

To ensure that children with disabilities who require ESY services receive the services that they need, a high priority is being placed on monitoring States' implementation of this regulation in the next several years to ensure that State standards are not being applied in a manner that denies children with disabilities who require ESY services in order to receive FAPE access to necessary services. However, to give States needed flexibility in this area, the regulations should clarify that States may establish their own standards for determining eligibility for ESY services consistent with the requirements of this part.

To respond to a concern expressed in the comments that this regulation could require the provision of ESY services to every disabled child, regardless of individual need, paragraph (a)(2) has been revised to make clear that ESY services must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§ 300.340–300.350, that the services are necessary for the provision of FAPE to the child.

Although it is important that States inform parents about standards for determining eligibility for ESY services, a regulatory change is not necessary. Since this matter is relevant to the provision of FAPE, it already would be included in the information contained in the written prior notice to parents provided under this part for children for whom ESY services are an issue.

There is no need to incorporate the IEP team's responsibility to specify the types and amount of ESY services. Section 300.309(a)(2) already specifies that the determination of whether a child with a disability needs ESY services must be made on an individual basis by the IEP team in accordance with §§ 300.340–300.350. These IEP requirements include specifying the types and amounts of services consistent with the individual disabled child's right to FAPE.

The determination of whether an individual disabled child needs ESY services must be made by the participants on the child's IEP team. In most cases, a multi-factored determination would be appropriate, but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor. In all instances, the child's IEP team must decide the appropriate manner for determining whether a child is eligible for ESY services in accordance with applicable State standards and Part B requirements. Therefore, no requirements have been added to the regulation regarding this issue.

There is no need to specify a timeline for determining whether a child should receive ESY services. Public agencies are expected to ensure that these determinations are made in a timely manner so that children with disabilities who require ESY services in order to receive FAPE can receive the necessary services.

No further clarification has been provided regarding the times when ESY services can be offered. Section 300.309(b)(1)(i) specifies that ESY services are provided to a child with a disability ''[b]eyond the normal school year of the public agency.'' For most public agencies, the normal school year is 180 school days. Typically, ESY services would be provided during the summer months. However, there is nothing in the definition of ESY services in § 300.309(b) that would limit the ability of a public agency to provide ESY services to a student with a disability during times other than the summer, when school is not in session, if the IEP team determines that the child requires ESY services during these time periods in order to receive FAPE.

There is no need to provide clarification regarding the comment that public agencies may wish to use different standards in determining eligibility of preschool-aged children with disabilities for ESY services from those used for school-aged children. Since Part B does not prescribe standards for determining eligibility for ESY services, regardless of the child's age, the issue of whether a State should establish a different standard for school-aged and preschool-aged children is a matter for State and local educational authorities to decide.

The IEP or IFSP will specify whether services must be initiated on the child's third birthday for children with disabilities who transition from the Part C to the Part B program, if the child turns three during the summer. This means that ESY services would be provided in the summer if the IEP or IFSP of a child with a disability specifies that the child must receive ESY services during the summer. In any case, the IEP or IFSP must be developed and implemented in accordance with the terms of those documents by the child's third birthday. These responsibilities are clarified elsewhere in these regulations.

No additional clarification is being provided in this portion of the regulations as to whether parentally-placed disabled students can receive ESY services. As is true for determinations regarding services for children with disabilities placed in private schools by their parents, determinations regarding the services to be provided, including the types and amounts of such services and which children will be served, are made through a process of consultation between representatives of public agencies and representatives of students enrolled by their parents in private schools. Through consultation, if a determination is made that ESY services are one of the services that a public agency will offer one or more of its parentally-placed disabled children, Part B funds could be used for this purpose.

No regulatory change has been made regarding the application of LRE requirements to ESY services. 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 services at that time for its nondisabled children. However, consistent with its obligation to ensure that each disabled child receives necessary ESY services in order to receive FAPE, nothing in this part would prohibit a public agency from providing ESY services to an individual disabled student in a noneducational setting if the student's IEP team determines that the student could receive necessary ESY services in that setting. No further clarification is needed regarding the comment about requirements for evaluating students who move into LEAs during the summer to determine eligibility for ESY services. Requirements for child find are addressed elsewhere in these regulations.

Changes: Consistent with the above discussion, paragraph (a)(2) of § 300.309 has been revised, and a new paragraph (a)(3) has been added to this section to specify that (1) ESY services must be provided only if a child's IEP team determines the services are necessary for the provision of FAPE to the child; and (2) Public agencies may not limit eligibility for ESY services based on category of disability, and may not unilaterally limit types and amounts of ESY services. Notes 1 and 2 have been removed.

FAPE Requirements for Students With Disabilities in Adult Prisons (§ 300.311)

Comment: Several commenters requested that the regulation include a definition of ''bona fide security or compelling penological interest that cannot otherwise be accommodated.'' Several commenters requested a definition that would clarify that this exception is to be used only in unique situations. These commenters requested that the definition specifically exclude routine issues of prison administration and convenience, cost-reduction measures, and policies to promote discipline or rehabilitation through systematic withholding of educational services which are otherwise required. Another commenter requested that the terms be defined to include prudent correctional administration, and physical or mental health determinations by prison health officials.

One commenter stated that the regulation should include guidance as to when an IEP or placement can be modified under the stated exception for modifications. Another commenter requested that the regulations clarify that modifications to IEP or placement may only be made by the IEP team and these changes are covered by the notice requirements of the Act.

Another commenter opposed services to students alleged to have committed heinous crimes and requested that a free appropriate public education be limited to those students who would otherwise be denied access to education services by virtue of their incarceration.

One commenter requested a definition of the term ''last educational placement'' to clarify that this means a public or private school placement.

Another commenter requested that a student's ''potential'' eligibility for early release be considered in determining eligibility for transition services.

Discussion: The requirement that the student's IEP team make an individualized determination regarding modifications to IEP or placement are clearly stated in the regulations. This requirement ensures that a team of professionals with knowledge about the student will be able to weigh the request of the State and make an individualized determination as to whether the State has demonstrated a bona fide security or compelling penological interest. In addition, the IEP team would need to consider possible accommodations of these interests and only decide to modify the IEP or placement in situations where accommodations are not possible. This provision also allows the State to address any issues specific to persons alleged of committing heinous crimes.

This provision does not impact an individual's eligibility for services, rather it allows the IEP team to make temporary modifications to the IEP or placement. These modifications are to be reviewed whenever there is a change in the State's bona fide security or compelling penological interest and at least on a yearly basis when the IEP is reviewed.

A definition of the terms ''bona fide security or compelling penological interest'' is not appropriate, given the individualized nature of the determination and the countless variables that may impact on the determination. Further, a State's interest in not spending any funds on the provision of special education and related services or in administrative convenience will not rise to the level of a compelling penological interest that cannot otherwise be accommodated, because States must accommodate the costs and administrative requirements of educating all eligible individuals with disabilities.

Further, since a modification to the IEP or placement is a change in the placement or in the provision of a free appropriate public education, the notice requirements under the Act would clearly be invoked.

There is no need to define the term ''last educational placement'' because the term is sufficiently clear.

Finally, there is no need to further clarify eligibility for transition services. Since consideration for transition services is also part of the IEP process, eligibility determinations should be addressed by the IEP team based upon the State's sentencing and parole policies, which may include potential eligibility for early release.

Changes: None.

Children With Disabilities in Public Charter Schools (§ 300.312)

See comments, discussion, and changes under § 300.18.

Children Experiencing Developmental Delays (§ 300.313)

See comments, discussion, and changes under § 300.7.

Initial Evaluations (§ 300.320)

Comment: A few commenters requested that the regulation be amended to require that initial evaluations be comprehensive so that each child is tested in all areas of possible disability, not just areas of suspected disability (e.g., a child who is having behavior problems may be acting out of frustration over unrecognized learning disabilities). Another commenter expressed concern that terms such as ''in all areas of suspected disability'' and the requirement to conduct evaluations in the native language do not appear in the NPRM, although they were in prior regulation and in Appendix A. Another commenter recommended that at least three diagnosticians from different disciplines actually evaluate a child, and added that this helps ensure that the evaluation is broad-based, nondiscriminatory, and relies on more than one method to determine eligibility.

One commenter recommended that § 300.320(a) repeat the language of the statute (i.e., that the LEA ''shall conduct'' initial evaluations, rather than ''shall ensure that initial evaluations are conducted''); that the reference to applicable sections under §§ 300.530–300.536 be revised; and that other technical and conforming changes be made. A few commenters recommended amending § 300.320(b)(2) to add a provision requiring the IEP team to provide copies of all evaluations to the parents and all team members sufficiently in advance of the meeting at which they will be reviewed so that all have time to review the results prior to the meeting.

Discussion: The general requirement to conduct evaluations and reevaluations was added to Subpart C (§§ 300.320–300.321) in the NPRM to sequentially place evaluations as a preliminary step in determining a child's eligibility before convening an IEP team to develop the child's IEP. However, the specific evaluation requirements are included in Subpart E (§§ 300.530–300.536). Those requirements, especially the ones in § 300.532, are long-standing provisions that require the evaluations to be multifactored and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so. Section 300.532(g) makes clear that the evaluation must include ''all areas related to the suspected disability.''

If public agencies are in full compliance with these evaluation requirements, the initial evaluations will be sufficiently comprehensive to identify any disability that an individual child may have, including any disability that was not initially suspected. Further, the failure to provide such an evaluation is an implementation issue and not a regulatory issue. Therefore, no change is needed in this provision.

Section 300.320(a) of the NPRM states that each public agency ''shall ensure that'' a full and individual evaluation is conducted for each child with a disability. It is not necessary to substitute ''shall conduct'' for the language in the NPRM. The term used in the NPRM and in these final regulations places the burden squarely on the public agency to implement the evaluation requirements either directly, by using public agency staff to conduct the evaluations, or by contracting with other agencies or individuals to do so.

Technical and conforming changes that have been recommended should be reflected in these final regulations to the extent that they are determined to be relevant. For example, contrary to the commenter's recommendation, § 300.533 (determination of needed evaluation data) may be germane to initial evaluations as well as reevaluations, and, therefore should be included in the listed sections under § 300.320(b)(ii).

To the extent feasible, the results of evaluations conducted under this part should be provided to parents and appropriate school personnel before any meeting to discuss the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. However, this is an implementation matter that should be left to the discretion of individual public agencies. In administering the Part B program over the past 22 years, concerns about evaluation teams not having timely access to evaluation results have seldom been raised with the Department.

Changes: The authority citation for the section has been revised to add a reference to section 614(c) of the Act.

Reevaluations (§ 300.321)

Comment: Some commenters expressed support for § 300.321, and stated that the importance of sharing the evaluation information with the IEP team is vital. One commenter recommended that a wording change be made in § 300.321(b); that the reference to applicable sections under §§ 300.530–300.536 be revised; and that other technical and conforming changes be made.

Discussion: Technical and conforming changes as recommended by the commenter should be reflected in these final regulations, if relevant.

Changes: Paragraph (a) of § 300.321 has been amended to delete ''§§ 300.530–300.536'' from the list of applicable sections and replace it with ''§ 300.536.'' Paragraph (b) has been revised to replace the term ''used'' with ''addressed.''

Definitions Related to IEPs (§ 300.340)

Comment: None.

Discussion: To clarify that IEPs are developed, reviewed, and revised at IEP meetings, a change would be made to paragraph (a) of this section. However, as the Committee reports to the Act noted:

Specific day to day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP team. However, if changes are contemplated in the child's measurable annual goals, benchmarks, or short-term objectives, or in any of the services or program modifications, or other components described in the child's IEP, the LEA must ensure that the child's IEP team is reconvened in a timely manner to address those changes. (S. Rep. No. 105–17, p. 5 (1997); H. Rep. No. 105–95, pp. 100–101 (1997))

SEA Responsibility for IEPs(§ 300.341)

Comment: A few commenters stated that the manner in which the term ''that agency'' is used in § 300.341 is confusing because it is not always clear whether the term is applying to the SEA or to other agencies described in the section and in Note 1, and requested that appropriate changes be made. One commenter stated that additional language is needed in the section to expand on the State's ultimate obligation to ensure district compliance with all IDEA requirements.

Several comments were received relating to § 300.341(b). One commenter stated that ''religiously-affiliated'' may be broader than parochial, but it inadvertently excludes private schools with a religious focus that are *not* affiliated but rather are freestanding, and recommended using ''religiously-oriented'' instead. Another commenter recommended using only ''private school,'' and deleting ''religiously affiliated,'' stating that there is no basis for using that term.

Some commenters stated that the term ''IEP'' has an explicit meaning in IDEA—as an inherent component of FAPE, and recommended that another term other than ''IEP'' be used with respect to children in private schools, who are not entitled to FAPE. Another commenter recommended that the statement requiring that an IEP is developed and implemented be revised to include a reference to the proportionate expenditure requirements in Subpart D.

One commenter recommended that the statement in § 300.341(b)(2)(ii) regarding ''special education or related services'' be amended to replace ''or'' with ''and'' in order to avoid any implication that a child may receive only related services. Another commenter suggested deleting the entire reference to related services.

One commenter recommended requiring that (1) any nonpublic school that is licensed by the SEA or receives any other tax or benefit from the State must develop an IEP for each disabled student, and (2) LEAs provide the student with a supplemental IEP showing the additional services that the LEA will provide.

Discussion: The language of this section, and especially the note, should be modified to ensure that the term ''SEA'' is used consistently, to avoid the confusion identified by the commenters. This can best be accomplished, and the section strengthened, by moving the substance of the note into the text of the regulation. The comment related to ensuring compliance with all provisions of IDEA is addressed by § 300.600, which provides that the SEA is responsible for ensuring such compliance.

In drafting the NPRM the term ''religiously-affiliated'' was adopted instead of the statutory term ''parochial,'' based on the assumption that Congress intended that all religious schools be included, not just those organized on a parish basis. The intent was for the broadest possible coverage. However, in light of the comment related to this matter, the term ''religiously-affiliated'' does not account for other religious schools that are not affiliated. The term should be replaced with the more comprehensive term ''religious schools.'' That term will be used throughout these regulations to replace ''religiously-affiliated.''

Another term other than ''IEP'' should be used with respect to disabled children who are enrolled by their parents in private schools. As noted by the commenters, (1) ''IEP'' is an inherent component of, and an explicit term used in, the statutory definition of ''FAPE'', and (2) the private school provisions in the IDEA Amendments of 1997 and § 300.454(a) make it clear that these children have no individual right to receive some or all special education and related services that they would be entitled to if enrolled in a public school.

Therefore, if it is determined, in accordance with § 300.454(b) (Consultation with representatives of private school children with disabilities), that a given child is to receive special education and related services under this part, the document used to denote those services should have a different name. The term ''services plan'' has been adopted as an appropriate term for use with these children.

Further, in light of the comments related to this section, and the discussion in the preceding paragraph, all provisions related to parentally-placed children in religious or other private schools (including the provisions in proposed §§ 300.341(b)(2) and 300.350) should be incorporated, in revised form, under Subpart D (Children in Private Schools).

The statute does not require a private school to unilaterally develop an IEP for each disabled child enrolled in the school, or to require a supplemental IEP for additional services that the LEA will provide.

Changes: The name of § 300.341 has been changed to ''Responsibility of SEA and other public agencies for IEPs.'' The paragraph headings have been deleted, and § 300.341 has been revised consistent with provisions in Subpart D regarding parentally-placed children with disabilities in religious or other private schools. A new paragraph (b) incorporates the substance of the note following § 300.341, to clarify that the provisions of the section (related to public agencies) also apply to the SEA, if the SEA provides direct services under § 300.370(a) and (b)(1). The note has been deleted. The section has been further revised by making other technical and conforming changes. A new paragraph has been added to § 300.452(b) related to the SEA's responsibility for eligible children enrolled in religious schools.

When IEPs Must Be in Effect (§ 300.342)

Comment: Some commenters stated that, as used in § 300.342(b)(2) and Note 1, the terms ''as soon as possible'' and ''undue delay'' are not meaningful and should be defined or clarified. The commenters recommended that an outside timeline (e.g., 15 days following the IEP meetings described in § 300.343) be established for implementing IEPs. Other commenters requested that Note 1 be deleted. A few commenters indicated that the statement in Note 1 (regarding services not being provided during the summer or a vacation period unless the child requires such services) does *not* adequately identify LEAs' obligations.

Discussion: It would not be appropriate to add an outside timeline under § 300.342(b) for implementing IEPs, especially when there is not a specific statutory basis to do so. However, with very limited exceptions, IEPs for most children with disabilities should be implemented without undue delay following the IEP meetings described in § 300.342(b)(2).

There may be exceptions in certain situations. It may be appropriate to have a short delay (e.g., (1) when the IEP meetings occur at the end of the school year or during the summer, and the IEP team determines that the child does not need special education and related services until the next school year begins); or (2) when there are circumstances that require a short delay in the provision of services (e.g., finding a qualified service provider, or making transportation arrangements for the child).

If it is determined, through the monitoring efforts of the Department, that there is a pattern of practice within a given State of not making services available within a reasonable period of time (e.g., within a week or two following the meetings described in § 300.343(b)), this could raise a question as to whether the State is in compliance with that provision, unless one of the exceptions noted above applies.

Changes: Paragraph (b) of this section is amended (consistent with the discussion under § 300.344(a)(2) and (3) of this Analysis) to require that each public agency must ensure that (1) a child's IEP is accessible to each regular education teacher, special education teacher, related services provider and other service provider who is responsible for its implementation; and (2) each of the child's teachers and providers is informed of his or her specific responsibilities related to implementing the child's IEP, and of the specific accommodations, modifications, and supported that must be provided for the child in accordance with the IEP. Note 1 has been deleted. Note 2 (related to a 1997 date certain for certain requirements regarding students with disabilities incarcerated in adult prisons) also has been deleted. Subject headings have been added to each paragraph in the section.

Comment: Several commenters expressed concern about § 300.342(c) and Note 3 (related to using an IFSP for a child aged 3 through 5), and some of

the commenters recommended deleting paragraph (c)(2) and the reference to it in Note 3. The commenters stated (for example) that (1) IFSPs should be used for children under age 3, and IEPs for older children, and parents should not have a choice; (2) an IFSP may not be appropriate in the educational setting; (3) the requirement is inconsistent with OSEP policy letters; (4) the use of an IFSP or IEP requires only the two factors in § 300.342(c)(1) (i.e., it is consistent with State policy, and agreed to by the parents and the agency); and (5) because Note 3 and the preamble to the NPRM indicate a clear preference for an IEP rather than IFSP, a specific rationale should be given.

One commenter requested that Note 3, or Appendix A, be amended to underscore that special care must be taken by LEAs in agreeing to continue children's IFSPs when they become eligible for an IEP—especially if the IFSP does not have an educational component, because research has shown a significant positive difference in school readiness for kindergarten when children whose (prekindergarten) program included an educational component, as compared to those who attend custodial day care without an educational component. Another commenter requested that § 300.342(c) be revised to allow use of IFSPs for children aged 3 and above without meeting the requirements in paragraph (b)(2).

Discussion: It is important to retain in these final regulations the general thrust of § 300.342(c) from the NPRM (related to requiring parental consent to using an IFSP in lieu of an IEP for a child who moves from the Early Intervention Program under Part C of the Act to preschool services under Part B of the Act). As a result of the IDEA Amendments of 1997, there have been significant changes in the statute, including an increased emphasis on the participation of children with disabilities in the general curriculum, and on ensuring better results for children with disabilities. Because of the importance of the IEP as the statutory vehicle for ensuring FAPE to a child with a disability, paragraph (c)(2) of this section provides that the parents' agreement to use an IFSP for the child instead of an IEP requires written informed consent by the parents that is based on an explanation of the differences between an IFSP and an IEP.

As noted by at least one commenter, research has shown a significant positive difference in school readiness for kindergarten if children's ''prekindergarten'' programs included an educational component, compared to those who attend custodial day care without an educational component. In addition, the provisions related to the IFSP under Part C can generally be replicated under Part B. Because of the definition of ''FAPE,'' services that are determined necessary for a child to benefit from special education must be provided without fees and without cost to the parents.

Changes: Note 3 has been deleted.

Comment: Some commenters expressed support for § 300.342(d) in the NPRM (i.e., that all IEPs in effect on July 1, 1998 must meet the new requirements in §§ 300.340–300.351), stating that public agencies have had since June 4, 1997 to prepare for changes in the IEP requirements, many of which have already been in use in some agencies. A few of the commenters requested that all IEPs developed during the spring and summer of 1998 be in full compliance with the new requirements.

A large number of commenters expressed concern about § 300.342(d), stating (for example) that it (1) is inconsistent with section 201(a)(2)(A) of the Act; (2) will result in massive national noncompliance and public financial liability; and (3) force pro forma IEPs that will result in frustration and resentment on the part of parents and local providers. The commenters requested that the requirements be changed to provide that IEPs written on or after July 1, 1998 must meet the new requirements.

Discussion: It is appropriate to amend § 300.342(d) to provide that IEPs developed, reviewed, or revised on or after July 1, 1998 must comply with the requirements in section 614(d) of the Act and §§ 300.340–300.350 of these final regulations. While we commend the many public agencies that began as soon as the IDEA Amendments of 1997 was enacted to implement the new statutory requirements and already have in place IEPs that meet these requirements, other public agencies argued compellingly that they simply did not have the wherewithal to ensure that, on July 1, 1998, all IEPs would fully comply with the new IEP requirements, and that a phase-in period should be adopted in which the anniversary date for each child's IEP meeting would be the basis for revising the child's IEP to comply with the new requirements.

Requiring IEPs developed on or after July 1, 1998 to meet the new requirements should result in more meaningful IEPs that focus on effective implementation, consistent with the purposes of the IDEA Amendments of 1997. At the same time, public agencies are strongly encouraged to grant any reasonable requests from parents for an IEP meeting to address the new IEP provisions. Public agencies are also encouraged to inform parents of the important changes resulting from the new IEP requirements so that they may be effective partners in the education of their children.

Changes: Section 300.342(d) has been revised to state that all IEPs developed, reviewed, or revised on or after July 1, 1998 must meet the requirements of §§ 300.340–300.350.

IEP Meetings (§ 300.343)

Comment: One commenter stated that, as written, § 300.343(b)(1) implies that an LEA is required to make an offer of services in accordance with an IEP whether or not the child qualifies (i.e., before the child is evaluated), and requested clarification of the provision. Other commenters stated that the requirement should begin with referral, not consent, and ''services'' should be referenced as ''special education and related services.''

Some commenters expressed support for the 30 day timeline in § 300.343(b)(2) (i.e., that an IEP meeting is conducted within 30 days of determining that a child needs special education). A few commenters requested changing the provision to 30 ''school days.'' One commenter recommended amending the provision to recognize that regular education teachers are not available in the summer, because to the extent participation of a regular education teacher is required at the IEP meeting, the meeting would have to wait until teachers return.

A number of comments were received relating to § 300.343(c)(1) (Review and revision of IEPs). One commenter requested that paragraph (c)(1) be amended to clarify that a child's IEP is reviewed periodically if warranted, or requested by the child's parent or teacher, and to include additional language related to determining if the child is making meaningful progress toward attaining the goals and standards for all children as well as goals and short term objectives or benchmarks. Other commenters recommended requiring that a review meeting be held when requested by an IEP team member, and that LEAs honor ''reasonable'' requests from parents for timely IEP review meetings.

One commenter requested amending paragraph (c)(2)(i) (related to revising a child's IEP to address any lack of progress in the annual goals) by adding benchmarks or short term objectives to the statement related to annual goals. A

few commenters recommended deleting the reference to ''Other matters'' in § 300.343(c)(2)(v) as the language is redundant and confusing.

A few commenters requested that a new § 300.343(d) be added to incorporate the statutory requirement in section 614(c)(4) (i.e., procedures to follow when the IEP team determines that no additional data are needed to determine whether the child continues to be a child with a disability). One commenter felt that an additional note should be added to encourage combining the eligibility meeting with the initial IEP meeting.

Discussion: There is potential for confusion with the language in § 300.343(b)(1) of the NPRM regarding whether a child must be evaluated before the offer of services is made. It also would be more appropriate to refer to ''special education and related services'' rather than referring simply to ''services.''

While the basic position taken in the NPRM with respect to § 300.343(b)(1) has been retained (i.e., an offer of services will be made to parents within a reasonable period of time from the public agency's receipt of parent consent to initial evaluation), the concept of ''making services available'' to a child with a disability seems more relevant to these final regulations than ''offer of services'' in ensuring that FAPE is available to a child with a disability in a timely manner.

Therefore, the regulations should be amended to clarify that, within a reasonable period of time following consent to an initial evaluation, the evaluation is conducted; and if the child is determined eligible under this part, special education and related services are made available to the child, in accordance with an IEP.

It would not be appropriate to change the reference to § 300.343(b)(1) from ''parent consent'' to ''referral'' because informed consent of the parents is a necessary step in ensuring that the evaluation will be conducted.

It also would not be appropriate to change the 30 day timeline in § 300.343(b)(2) to 30 ''school days.'' That timeline is a long-standing provision that has been appropriately implemented since the inception of the regulations under this part, and there is no basis to make such a change.

A provision is not necessary to clarify that public agencies will honor ''reasonable'' requests by parents for a meeting to review their child's IEP. Public agencies are required under the statute and these final regulations to be responsive to parental requests for such reviews. If a public agency believes that the frequency or nature of the parents' requests for such reviews is unreasonable, the agency may (consistent with the prior notice requirements in § 300.503) refuse to conduct such a review, and inform the parents of their right to request a due process hearing under § 300.507. It should be noted, however, that as a general matter, when a child is not making meaningful progress toward attaining goals and standards applicable to all children, it would be appropriate to reconvene the IEP team to review the progress.

It is inappropriate and unnecessary to add ''benchmarks or short-term objectives'' to the statement on annual goals in § 300.343(c)(2)(i). The language in that paragraph, which incorporates the language from the statute, refers to ''the annual goals described in § 300.347(a).'' Section 300.347(a) states that each child's IEP must include ''A statement of measurable annual goals, including benchmarks or short-term objectives * * *''. Therefore, benchmarks or short-term objectives are inherent in § 300.343(c)(2)(i), and do not need to be repeated.

It is not necessary to include a note encouraging public agencies to combine the eligibility and initial IEP meetings. This is an individual State option that many States have unilaterally elected to follow in implementing Part B of the Act over the past 22 years, while other States have determined that the better course is to hold separate meetings.

Changes: The title of § 300.343(b) has been changed from ''Timelines'' to ''Initial IEPs; provision of services.'' Paragraph (b)(1) has been amended to (1) clarify that, within a reasonable period of time from the agency's receipt of consent to an initial evaluation, ''the evaluation is conducted'', and (2) clarify the timing issue by replacing ''offer of services * * * is made to parents'' with ''special education and related services are made available to the child * * *''. Paragraph (b)(2) has been changed by replacing the phrase ''In meeting the timeline in paragraph (b)(1)'' with ''In meeting the requirement in paragraph (b)(1).'' In the title to § 300.343(c), the term ''IEP'' has been changed to ''IEPs.'' Paragraph (c)(2)(ii) has been revised to correctly cite § 300.536. The authority cite has been changed from ''1414(d)(3)'' to ''1414(d)(4)(A).''

Comment: A number of comments were received on the note following proposed § 300.343 (regarding the offer of services within 60 days of parent consent to initial evaluation). Some commenters expressed support for the 60 day time frame, stating that (1) many LEAs experience significant delays in completing evaluations, especially during the summer, and delay providing FAPE for a very long time, and (2) if LEAs respond to requests for evaluation in a timely manner, 60 days is reasonable. Many of these commenters recommended that the note be added to the regulation.

Other commenters recommended deleting the 60 day timetable in the note, stating that (1) the timeline is not a reflection of the statute, and Federal guidance is not necessary because most States have set reasonable, child-friendly timetables for the initial provision of services; (2) it is unrealistic, unreasonable, and ambiguous (3) it would override time frames set by States, (4) the Department could continue to monitor the issue of reasonableness in each State without the timeline; and (5) while IEPs generally can be implemented within 60 days, this non-statutory requirement should not become the standard for all cases.

Some commenters recommended changing the length of the timelines (e.g., to 75 days, 80 days, 90 days, or 120 days), or using the designation of ''school days'' or ''operational days,'' or adding a caveat exempting school breaks and holidays from the 60 day timeline. One commenter requested a clarification of timelines when the initial evaluation occurs with less than sixty days remaining in the school year.

Discussion: While it is critical that each public agency make FAPE available in accordance with an IEP within a reasonable period of time after the agency's receipt of parent consent to an initial evaluation, imposing specific timelines could result in the timelines being implemented only in a compliance sense, without regard to meeting the spirit of the requirement, and this may not always serve the best interests of the children involved.

Moreover, as indicated by some of the commenters, most States are able to meet a timeline of 60 days. The Department considers this to be reasonable, and will not make a finding of noncompliance when monitoring a State that is meeting the 60 day timeline for most children.

It is recognized, however, that it may, for some children, take longer, and for some, it could be done in a shorter period of time. Therefore, the note following § 300.343 should be deleted, and no timelines should be added to the final regulations relating to the concept of ''within a reasonable period of time.'' Although no specific timeline is given, implementation should be done with all due haste.

Changes: The note following § 300.343 has been removed.

IEP Team (§ 300.344)

Comment: A wide variety of general comments was received regarding this section. Some commenters believe that anyone expected to implement the IEP should attend the IEP meeting. Numerous comments were received regarding the note to this section of the NPRM. Some commenters believed that the note should be deleted in its entirety because it went beyond the statute, while other commenters recommended that only portions be deleted, or that the note be included in the regulations instead. Other commenters requested a limitation on the number of people that could attend IEP meetings, with provision for an exception when necessary.

Other commenters suggested that there should be a requirement that an appropriate member of the IEP team meet with every teacher that works with a student to explain goals and objectives contained in the IEP and accommodations and modifications required by the teachers.

Discussion: In response to commenters' recommendations and in light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed as a note. However, substantive portions should be incorporated, as appropriate, into pertinent provisions of this section, reflected in questions and answers on IEP requirements that are contained in Appendix A to these regulations, or addressed in the discussion of comments regarding this section.

No limitation on the number of individuals who can attend IEP meetings should be imposed, as requested by commenters, since these determinations are left to parents and public agencies, based on the requirements of this section. These requirements are sufficient to ensure that membership on the IEP team is limited to individuals who have particular knowledge or expertise to bring to the meeting. No clarification is needed here with regard to accommodations and modifications for all personnel who implement a child's IEP, since that requirement is addressed under § 300.346(d)(2) of these regulations.

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

Comment: Some commenters recommended that this regulation be amended to specify that parents can bring ''advocates of their choice'' to their child's IEP meetings. Other commenters recommended that the regulation be clarified to state that parent support personnel can attend IEP meetings if requested by the parent, and that if the district disagrees with the attendance of a person invited by the parent, they may file a complaint but must not prohibit that person from attending the meeting.

Commenters also requested clarification regarding how the public agency would document that it has ensured that the parent actually has been given the opportunity to participate meaningfully at their child's IEP meeting.

Discussion: As numerous commenters emphasized, it is essential that parents are given the opportunity to participate meaningfully as members of their child's IEP team. In many situations, an IEP meeting can be a very intimidating experience for many parents, even if the LEA encourages their active participation. Frequently, as commenters have suggested, parents would be assisted greatly at their child's IEP meetings if another person could accompany them. It is important to point out that under IDEA and the original regulations for this program, parents always have been afforded the opportunity to bring a friend or neighbor to accompany them at their child's IEP meeting. Question 26 in the Notice of Interpretation on IEP requirements, published as Appendix A to 34 CFR part 300, in 1981, stated in a note that, in some instances, parents might elect to bring another participant to the meeting, e.g., a friend or neighbor, someone outside of the agency who is familiar with applicable laws and with the child's needs, or a specialist who conducted an independent evaluation of the child.

Many parents traditionally have brought other individuals to accompany them to their child's IEP meeting as a way of ensuring their meaningful participation. Therefore, in response to commenters' suggestions and to ensure that meaningful parent participation at their child's IEP meeting is preserved, a new paragraph (c) should be added to this section.

Changes: Section 300.344 has been amended by adding a new paragraph (c) to clarify that ''[T]he determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section shall be made by the party (the parents or the public agency) who invited the individual to be a member of the IEP team.''

Comment: Numerous commenters addressed the requirement in proposed § 300.344(a)(2) and the pertinent portions of the note regarding the role of the regular education teacher as a member of the child's IEP team if the child is, or may be, participating in the regular educational environment. Some commenters were supportive of the participation of the regular education teacher at an IEP meeting, agreeing that at least one regular education teacher of the child should be an IEP team member. Some commenters also pointed out that problems surrounding placement of a child with a disability in the regular classroom cannot be addressed without adequate preparation or participation of teachers of those classes in the IEP meeting.

Those commenters opposed to the requirement cited potential costs. Some commenters also pointed out that, for children with disabilities taking a number of subjects, it will be impossible to bring all teachers together, while a single teacher will not have the requisite expertise on a variety of subjects.

Other commenters who were supportive of the regular education teacher's participation in principle, and acknowledged the importance of obtaining input from a regular education teacher, recommended a more flexible approach. These commenters felt that a requirement that a regular education teacher be present at every IEP meeting would interfere with the ability of regular education teachers to provide the necessary instruction to all children in their classrooms, both with and without disabilities. Specific recommendations that commenters made for regulatory changes were (1) the reference to regular educational environment in § 300.344(a)(2) should be replaced with language such as, if the child is, or may be, participating in a non-special education classroom; (2) the reference to regular education teacher should be replaced with general education teacher or person knowledgeable about the general education curriculum at the child's grade level; (3) the participation of a regular education teacher is required only if issues arise regarding behavior or socialization, making the input necessary; and (4) a regular education teacher must attend if the child with a disability is, or may be, receiving instruction from a regular education teacher during the period of time covered by the proposed IEP.

Commenters made a number of other suggestions concerning which IEP meetings the regular education teacher needs to attend and how those determinations could be made, such as, (1) the regular education teacher must attend only the annual IEP review meeting, but that attendance at other meetings should be on an as-needed basis; (2) there should be no requirement that the regular education

teacher be physically present at the IEP meeting, but must be given the opportunity to provide oral or written input about the child and appropriate instructional strategies; (3) the regular education teacher must attend to the extent appropriate; (4) the IEP team must consult with the regular education teacher to the extent appropriate, and determine whether it is necessary for the regular education teacher to attend all or part of the meeting; and (5) attendance is at the option of the regular education teacher, who also can appoint an individual of his or her choice who has had experience with the child and/or has had adequate pre-planning time with special education personnel.

Other commenters asked whether other individuals could be substituted for the regular education teacher's participation at IEP meetings, such as, (1) a special education teacher who is knowledgeable about the general curriculum; (2) a school counselor, particularly for high school students; (3) an individual certified as a regular education teacher, regardless of whether that individual is currently working with the child; and (4) for children who are receiving only speech-language services, a regular education teacher need not participate.

Commenters also requested that the regulations be clarified to state that school officials will not be deemed to have predetermined placement solely because a regular education teacher is not present at an IEP meeting. In the event that a regular education teacher does not attend, commenters asked if that regular education teacher would be required to provide input regarding the regular curriculum, and, if so, how this would be accomplished and documented.

Numerous commenters expressed concerns regarding confidentiality of IEPs if regular education teachers who did not attend the meeting are provided copies. Some commenters suggested that there be a central location for all IEPs, and the regulation make explicit that there are limitations on redisclosure of information in IEPs to others.

Discussion: Based on careful consideration of comments as well as applicable statutory requirements, § 300.344(a)(2) should be retained in these final regulations, but additional clarification should be provided in Appendix A and in § 300.342(b) of these regulations.

Section 614(d)(1)(B)(ii) of the Act specifies that the IEP team must include ''at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment).'' This statutory provision therefore prescribes that for any child who is, or may be participating in the regular educational environment, that child's regular education teacher must be a member of the child's IEP team. The child's regular education teacher's membership on the IEP team is particularly important to meeting the statutory requirement in section 614(d)(1)(A)(ii)(I) of the Act that the IEP explain how the child's needs will be met so that the child can be involved in and progress in the general curriculum.

In implementing the requirement for membership of a regular education teacher on the IEP team, the public agency will determine which teacher or teachers of the child will fulfill that function to ensure participation of at least one regular education teacher in the development, review, and revision of the child's IEP, to the extent appropriate, in accordance with section 614(d)(3)(C) of the Act. (*See* discussion of § 300.346(d) of these regulations).

In addition, it would be highly beneficial to the education of children with disabilities to ensure that those regular education teachers and other service providers of the child who are not members of the child's IEP team are informed about the contents of a child's IEP to ensure that the IEP is appropriately implemented.

Whether the child's regular education teacher must be physically present at an IEP meeting, and to what extent that individual must participate in all phases of the IEP process, are matters that must (1) be determined on a case-by-case basis by the public agency, the parents, and other members of the IEP team, and (2) be based on a variety of factors. This issue is discussed in more detail in a question and answer contained in Appendix A to these final regulations. Since the statutory language is incorporated into this regulation verbatim, no changes should be made regarding the use of the term ''regular education teacher,'' or the statutory language regarding the regular educational environment.

It is important to point out that the statute specifies that at least one regular education teacher of the child is a member of the IEP team. Therefore, the suggestions of commenters that other individuals could participate in lieu of the child's regular education teacher as the regular education teacher member of the child's IEP team should not be adopted; however, as stated in the note to this section in the NPRM, the regular education teacher participating in a child's IEP meeting should be the teacher who is, or may be, responsible for implementing the IEP, so that the teacher can participate in discussions about how best to teach the child.

If the child has more than one regular education teacher, the LEA may designate which teacher or teachers of the child will participate on the IEP team. While all regular education teachers of the child need not attend the child's IEP meeting, their input should be sought, regardless of whether they attend. In addition, each public agency must ensure that (1) the child's IEP is accessible to each regular education teacher (and to each special education teacher, related services provider and other service provider) who is responsible for its implementation, and (2) each of the child's teachers and providers is informed of his or her specific responsibilities related to implementing the child's IEP, and of the specific accommodations, modifications, and supports that must be provided to the child in accordance with the IEP. This provision is necessary to ensure proper implementation of the child's IEP and the provision of FAPE to the child. However, the mechanism that the public agency uses to inform each teacher or provider of his or her responsibilities is left to the discretion of the agency.

It is expected that the circumstances will be rare in which a regular education teacher would not be required to be a member of the child's IEP team. However, there may be situations in which a child is placed in a separate school and participates only in meals, recess periods, transportation, and extracurricular activities with nondisabled children and is not otherwise participating in the regular educational environment, and no change in that degree of participation is anticipated during the next twelve months. In these instances, since there would be no current or anticipated regular education teacher for a child during the period of the IEP, it would not be necessary for a regular education teacher to be a member of the child's IEP team.

No further clarification should be provided in response to commenters' concerns about the potential for violation of requirements regarding confidentiality of information if copies of a child's IEP are distributed to regular education teachers or other school personnel who did not attend the IEP meeting. These regulations contain confidentiality requirements at §§ 300.560–300.577 that are modeled after those in the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232(g), which also applies to this program.

While FERPA does not protect the confidentiality of information in general, it prohibits the improper disclosure of information from education records and generally protects parents' and students' privacy interests in ''education records.'' Records regarding an individual student's disability maintained by an educational agency or institution or by a party acting for the agency or institution are education records under FERPA. Therefore, a child's IEP is an ''education record'' which is subject to FERPA.

Under FERPA and Part B, the prior written consent of the student's parent or of the eligible student must be obtained for disclosure of personally identifiable information in education records, unless one of the authorized exceptions to the prior written consent requirement is applicable. (34 CFR 99.30 and 300.571 (a)(2) and (b)).

Under 34 CFR 99.31(a)(1), educational agencies or institutions, under certain circumstances, may disclose personally identifiable information in education records without prior written consent to school officials with legitimate educational interests. Each educational agency or institution must provide annual notification regarding how it meets the requirements of FERPA. This annual notification under FERPA must include a statement indicating that the parent or eligible student has a right to consent to disclosure of personally identifiable information, and the exception permitting nonconsensual disclosures to school officials with legitimate educational interests must be described.

The criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest also must be specified in this annual notification. (34 CFR 99.7(a)(3)). Accordingly, an educational agency or institution may disclose information from education records to teachers and other school officials who meet the criteria set forth in the agency's or institution's notice and must restrict access by other school employees who do not fall within an exception, unless consent to the disclosures is obtained. Although regular education teachers who fall within this exception also may disclose education records to other school officials with legitimate educational interests, those officials are subject to the restrictions on redisclosure in 34 CFR 99.33.

Public agencies also may find it practical to store education records in one central location to limit access to those individuals to whom the agency or institution is permitted to disclose personally identifiable information without prior consent.

Changes: Section 300.342(b) has been amended, consistent with the above discussion.

Comment: Commenters requested that ''special education provider'' be defined and that clarification be provided to indicate when a special education provider could attend an IEP meeting in lieu of a special education teacher. Other commenters asked if a paraprofessional could attend an IEP meeting in lieu of a special education teacher or special education provider. Some commenters recommended that the regulations clarify that it would not be permissible for a paraprofessional to be substituted for a qualified special education teacher or provider as an IEP team member.

Commenters also recommended clarification that parents should be informed about the qualifications of the IEP team members and degree to which the IEP is being implemented by what commenters referred to as ''non-qualified personnel.''

Discussion: Section 300.344(a)(3) of these final regulations implements section 614(d)(1)(B)(iii) of the Act, which gives the public agency the flexibility to determine whether the child's special education teacher or special education provider should be a member of the child's IEP team. The special education teacher or provider who is a member of the child's IEP team should be the person who is, or will be, responsible for implementing the IEP. For example, if the child's disability is a speech impairment, the special education teacher or special education provider could be the speech-language pathologist.

While there is no statutory requirement that public agencies inform parents of the qualifications of members of the IEP team, there is nothing in these regulations that would preclude public agencies from providing parents with this type of information. Public agencies are encouraged to grant reasonable requests from parents for such information.

Changes: None.

Comment: Numerous commenters requested that language from Appendix A about the public agency's ability to commit agency resources be added to the regulation. Commenters emphasized that it was especially important that the individual attending an IEP meeting in the capacity of public agency representative must be an individual such as an LEA administrator who is qualified to develop specially designed instruction and have authority to make decisions regarding LEA resources.

To give LEAs flexibility in their representation, some commenters suggested that the public agency representative should be an individual who can interpret the instructional implications of evaluation results and may be a member previously described. Other commenters emphasized that the requirement for participation of a public agency representative could be burdensome for rural States, and recommended that the regulations be clarified to indicate that IEP team members could fulfill dual functions so that responsibility of the public agency representative could be delegated to another team member.

Some commenters requested that the regulation be amended to provide that if particular services are not available in the district, lack of availability does not relieve the school district of its obligation either to provide needed services to a disabled child, or to include those services on a child's IEP.

Discussion: The three criteria enumerated in the statute at section 614(d)(1)(B)(iv) describing the representative of the public agency who is a member of the IEP team are incorporated into § 300.344(a)(4) of these final regulations. The statute should not be read to prohibit the public agency from designating another member of the IEP team to act as the public agency representative, if that individual meets the specified criteria for each role. Therefore, a new paragraph (d) should be added to § 300.344 regarding a public agency's authority to designate another IEP team member as the public agency representative member of the IEP team, so long as the criteria in § 300.344(a)(4) are satisfied.

Changes: Section 300.344 has been amended by adding a new paragraph (d), which authorizes a public agency to designate another IEP team member as the public agency representative, provided the criteria in § 300.344(a)(4) are satisfied.

Comment: Many commenters emphasized the need to link the IEP and evaluation processes to ensure that participants on the IEP team were knowledgeable about the deliberations during the evaluation process and eligibility determination. Some commenters believed that the language about interpretation of evaluation results needs to be modified to specify that the individual in this capacity had contributed to the evaluation process. Many commenters requested that the regulation should specify that the initial IEP team must include a member of the eligibility team who is qualified to interpret the instructional implications

of the evaluation results. Some commenters favored having such an individual present at all IEP meetings.

Discussion: Section 300.344(a)(5) essentially reflects the statutory requirement at section 614(d)(1)(B)(v), which requires the participation of an individual who is knowledgeable about the instructional implications of evaluation results, who may be another member of the IEP team. No further clarification should be provided since the statute specifically affords public agencies the flexibility to select another member of the IEP team to fulfill the requirement of § 300.344(a)(5), provided that individual is knowledgeable about the instructional implications of evaluation results.

Although commenters requested that the regulation be amended to require the participation of a member of the eligibility team who is knowledgeable about evaluation results to fulfill the requirement of § 300.344(a)(5), there is no statutory authority to impose such a requirement, either for initial or subsequent IEP meetings. However, it is expected that public agencies will find it helpful to have members of the eligibility team as IEP team members for initial and subsequent meetings to develop a child's IEP.

Changes: None.

Comment: Numerous comments were received regarding the participation of related services personnel at IEP meetings. Some commenters believed that any time a child is receiving a related service, or whenever a related service is reflected in the child's goals and objectives, the relevant related services personnel must attend the IEP meeting. Other commenters requested that the clarification in Appendix A regarding related services personnel who have special knowledge and expertise regarding the child be included in the regulations as well.

Many commenters requested a regulatory change to specify that related services personnel must attend IEP meetings, if appropriate, and need not be invited by the LEA. Other commenters recommended that to assist parents, clarification should be provided that related services personnel and the parents always must be notified of the IEP meeting whenever the child's need for a related service is being discussed. Other commenters recommended that § 300.344(a)(6) be changed to other individuals with special knowledge and expertise regarding the child, the child's disability and unique needs, and that criteria for attending the IEP meeting should include persons who can contribute to the quality of the final document.

Many commenters recommended that the regulations specify which related services personnel must attend IEP meetings. Several commenters recommended that IEP teams always must include school psychologists who are knowledgeable about clinical testing administration, particularly when evaluation results are being used to determine IEP goals, behavior impedes learning, reevaluations are required or are being determined, and functional behavioral assessments and reviews of behavioral interventions are necessary.

A number of comments were received regarding making the school nurse or other qualified provider of school health services a required participant on the IEP team. Some commenters limited this recommendation to situations in which the child has medical concerns or specialized health needs, and urged the participation of these individuals to the greatest extent practical, and when appropriate on the IEP team.

Many commenters were concerned that paragraph (a)(6) of this section was too restrictive, because it (1) could prevent parents from bringing support personnel, representatives of PTIs and other parent organizations, and other advocates to their child's IEP meetings, and (2) could place an unreasonable burden on the parent to prove the individual's ''special knowledge or expertise'' regarding their child.

Several commenters requested that the regulations list the conditions under which speech-language pathologists and audiologists will or may serve on the IEP team. Some commenters recommended that the regulations be amended to make the participation of the speech-language pathologist at the IEP meeting mandatory, while other commenters suggested that the number of individuals required to be on IEP teams for students for whom speech is the only special education service was excessive.

Some commenters recommended that the regulations specify that a person knowledgeable about the language and communication needs of deaf children must be present for their IEP meetings. Numerous commenters favored including in the regulation the portion of the note regarding the attendance of persons knowledgeable about positive behavior interventions and strategies at IEP meetings, if the student's behavior impedes the learning of the student or others. Some of these commenters recommended that the reference be changed to a person trained in the design and use of effective positive behavior support strategies.

Several comments were received regarding an attorney's participation at IEP meetings, and a recommendation was made that the discussion regarding the attorney's role at IEP meetings in Appendix A should be incorporated into the regulations. Another commenter recommended that the regulation should state that attorneys should never be in attendance at IEP meetings unless such a meeting is convened as a result of an administrative proceeding or judicial review. Other commenters suggested that adults with disabilities should be required members of the IEP team.

Discussion: Section 300.344(a)(6) adopts verbatim the statutory language at section 614(d)(1)(B)(vi) of the Act. Under this section, parents and public agencies have the discretion to bring to IEP meetings as IEP team members other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate. Under this statutory provision, the parent's and public agency's right to bring other individuals to the IEP meeting at their discretion must be exercised in a manner that ensures that all members of the IEP team have the knowledge or special expertise regarding the child to contribute meaningfully to the IEP team.

Individuals with knowledge about the child could include neighbors or friends of the parents, or advocates, who, in the judgement of the parents, are able to advise or assist them at the meeting. Individuals with special expertise could include professionals in evaluation or special education and related services who have been directly involved with the child, as well as those who do not know the child personally, but who have expertise in (for example) an instructional method or procedure, or in the provision of a related service that the parents or agency believe can be of assistance in developing an appropriate IEP for the child.

There is no need to make the participation of school nurses on the IEP team mandatory, as requested by commenters. As providers of the related service ''school health services,'' their participation would be subject to the requirements of this section, and they could be members of the IEP team at the discretion of the parents or public agency, provided that they possess the requisite knowledge and special expertise regarding the child. The same is true of providers of speech-language and audiology services and individuals knowledgeable about the communication needs of students who are deaf or hard of hearing. In the case of a child whose behavior impedes the

learning of the child or that of others, the public agency is encouraged to have a person with special expertise in positive behavior interventions and strategies on the IEP team at the IEP meeting.

Individuals such as representatives of PTIs may, at the parent's discretion, serve as members of the IEP team, provided they possess the requisite knowledge or expertise regarding the child.

Regarding attorneys participation at IEP meetings, it is important to note that a new statutory provision at section 615(i)(3)(D)(ii) provides that attorneys' fees may not be awarded for an IEP team meeting unless the meeting is convened as the result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation conducted prior to initiating a due process hearing under the Act. Issues raised related to attorneys' fees regarding IEP meetings are also addressed under § 300.513 of this attachment and in Appendix A.

It is not necessary to require the participation of adults with disabilities on the IEP team. As is true of other related services personnel, as well as other individuals selected as IEP team members at the parent's or agency's discretion, an adult with a disability could be a member of an IEP team at the parent's or public agency's discretion if that individual possesses the requisite knowledge and expertise regarding the child.

Changes: A new § 300.344(c) has been added to clarify that ''The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section shall be made by the parents or public agency who invited the individual to be a member of the IEP team.''

Comment: Commenters recommended that the word ''appropriate'' be deleted from § 300.344(a)(7), since a student always should be permitted to be at his or her IEP meeting, and that students eighteen years of age and older always should be considered members of the IEP team.

Commenters also recommended that language be added to the regulation to clarify that students under age 14 be included on the IEP team on an as-appropriate basis, and that students 14 and older be included as members of the team. Other commenters recommended clarification that the decision as to when it is ''appropriate'' for a child to attend his or her IEP meeting rests with the child and his or her parents.

Other commenters expressed a concern that students could be coerced into accepting instructional plans and that the IEP provisions should be amended to require that an advocate employed by the LEA must be present at every consultation involving teachers and students regarding IEP or implementation.

Discussion: Section 300.344(a)(7) of these regulations adopts verbatim the statutory requirement at section 614(d)(1)(B)(vii) of the Act regarding the child's participation as a member of his or her IEP team, as appropriate. Consistent with this statutory requirement, public agencies must invite students to attend IEP meetings in appropriate situations.

No regulatory change deleting the reference to ''if appropriate'' should be made, as requested by commenters, since to do so would alter the explicit statutory provision limiting the student's participation in IEP meetings to appropriate situations. However, if a purpose of the meeting will be the consideration of a student's transition services needs or needed transition services or both, § 300.344(b)(1) of these regulations would provide that the student must be invited to attend, because it is important to afford students an opportunity to participate and have a voice in planning for their transition from school to post-school activities, including postsecondary education and employment.

The change requested by commenters regarding the participation of a student over eighteen years of age as a member of their IEP team should not be made. Even if, under section 615(m) of the Act, all rights accorded parents under Part B transfer to students who have reached the age of majority under State law, ages of majority differ among States, and not all States regard age eighteen as the age at which parental rights transfer to children. In addition, under section 615(m) of the Act, there are circumstances in which parental rights accorded under Part B may not be transferred, even in a State that transfers rights at the State age of majority.

No change should be made regarding the commenters' concerns that students would be coerced into accepting instructional plans. It would be more appropriate to address these implementation issues at the State and local levels.

Changes: None.

Comment: Commenters requested that this section be revised to require SEAs and LEAs to enter into interagency agreements with non-school agencies that include participation by non-school agencies in transition meetings. Other suggestions made by commenters were that a statement be added to the regulations to require the attendance of an advocate or staff member from an independent living center and a transition coordinator at an IEP meeting whenever transition services are discussed. Other commenters requested additional information about boundaries and parameters for enlisting the involvement of other agency personnel in transition meetings.

Some commenters suggested that not only the public agency should have the ability to invite representatives of other agencies, but so should the parents. If a student is unable to attend an IEP meeting, other commenters asked what steps will be taken to ensure that the student's preferences and interests are being considered, especially if transition services are being discussed.

Discussion: Section 300.344(b)(1) of these regulations would require that a student of any age be invited to an IEP meeting if a purpose of the meeting is to meet a requirement of § 300.347(b)(1) (transition services) of these regulations. If the student cannot attend, the public agency must take whatever steps are necessary to ensure that the student's preferences and interests are being considered. No further clarification should be provided since these steps necessarily will vary based on a variety of factors, including the needs of the student.

There is no need for clarification regarding interagency agreements, since § 300.142 of these regulations already contains a requirement that agreements be in place between educational and noneducational public agencies to govern the provision and financing of all required services under these regulations, including transition services. There is no need to require the participation of advocates and transition coordinators at IEP meetings at which transition services needs or the statement of needed transition services is being discussed.

Changes: None.

Parent participation (§ 300.345)

Comment: A number of comments were received on the notice requirement in § 300.345(a), including comments requesting that (1) the regulations require that the notice be in a format and in language that is usable by parents; (2) because of the prior written notice requirement in the statute, public agencies should not have the option to provide verbal notice (i.e, by telephone); (3) LEAs generally should not be allowed to reject a parent's proposal for a time and place of the meeting, and meetings should be held at times that accommodate parents' work schedules; (4) the term ''early enough'' in § 300.345(a)(1) be replaced with a

specific number of days; and (5) a draft IEP be given to parents not less than 10 days before the meeting.

Discussion: The ''notice'' requirement in § 300.345(a) of these final regulations implements provisions under prior regulations that were not changed by the IDEA Amendments of 1997, and, therefore, does not need to be revised with respect to the comments received. This requirement is a long-standing provision that is intended mainly to inform parents about the IEP meeting and provide them with relevant information about it (e.g., the purpose, time, and place of the meeting, and who will be in attendance). The requirement is not the same as the prior notice provision in § 300.503 (which requires written notice to parents whenever the public agency proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child).

In implementing § 300.345(a), some LEAs elect to contact parents by telephone or to send less formal notes about IEP meeting arrangements than would be required under § 300.503. These approaches are consistent with the long-standing regulatory requirement. With respect to § 300.345(a)(1) (i.e., notifying parents early enough of the meeting to ensure that they will have an opportunity to attend), there is no information to justify replacing the term ''early enough'' with a specified timeline. Because communicating with parents about IEP meeting arrangements is generally a less formal process than the procedures required by certain other provisions in this part, the use of timelines could have a negative effect.

The key factor in § 300.345(a) is that public agencies effectively communicate with parents about the up-coming IEP meeting, and attempt to arrange a mutually agreed upon time and place for the meeting. This process should accommodate the parents' work schedules to ensure that one or both parents are afforded the opportunity to participate.

The commenter's request that the public agency provide parents with a copy of the IEP 10 days before the meeting is inconsistent with the requirements of this part, which requires that the IEP be developed at the IEP meeting. However, to the extent that preliminary information is available in the agency that may affect discussions and decisions at the meeting related to their child's IEP, it is expected that the information would be provided to the parents sufficiently in advance of the meeting so that they can participate meaningfully in those discussions and decisions on an equal footing with other members of the IEP team. It is not necessary to set out a specific timeline for this information to be provided.

Changes: None.

Comment: A number of comments were received requesting that the first sentence of the note following § 300.345 (related to informing parents of their right to bring other people to the IEP meeting) be added to the regulation, and specifically to § 300.345(b) to ensure that this would be a specific requirement. Other commenters recommended deleting the note, stating that it is misleading, and will confuse parents and school staff and lead to unneeded difficulties.

Discussion: It is important for parents of children with disabilities to be aware that, under the provisions of § 300.344(a)(6) and (c), other individuals may be included on their child's IEP team, provided that the individuals have knowledge or special expertise regarding the child (see discussion under § 300.344 of this analysis). To ensure that parents know about those provisions, public agencies should be required to include information about the provisions in the notice of IEP meetings specified under § 300.345(a)(1) and (b)(1)(ii).

Changes: Section 300.345(b) has been amended to provide that the notice required under § 300.345(b) must ''Inform the parents of the provisions in § 300.344(a)(6) and (c) (relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child).''

Comment: A few comments were received on § 300.345(d) (related to holding an IEP meeting without the parents if the LEA is unable to convince them to participate). The commenters stated that the term ''convince'' should be replaced because it connotes an adversarial situation between the LEA and the parents, and suggested other terms. Some commenters requested that § 300.345(d)(3) (related to visits to a parent's home or place of employment) be deleted, stating (for example) that such a provision is overly intrusive, invasive, and could anger employers, and could cause some parents to be negatively impacted or insulted; and that the remaining methods in § 300.345(d)(3) are sufficient.

Another commenter suggested replacing the language in this paragraph with language that would require LEAs to demonstrate what they have done in attempting to involve parents.

Discussion: Section 300.345(d) is a longstanding provision that is intended to enable a public agency to proceed to conduct an IEP meeting if neither parent elects to attend, after repeated attempts by the public agency to ensure their participation. In administering and monitoring the provisions of this part over the past 22 years, few, if any, questions or concerns have been identified, or raised, with respect to the implementation of § 300.345(d), and there is no information to justify amending the paragraph at this time, either with respect to the word ''convince'' or the reference to maintaining records of efforts to involve the parents.

The regulation makes it clear that paragraphs (d)(1) through (d)(3) of this section are examples of what a public agency ''may do'' to maintain a record of its attempts to arrange a mutually agreed on time and place for conducting an IEP meeting. Public agencies are not required to go to the parent's place of employment to attempt to seek the parents' involvement in their child's IEP; and it is expected that a public agency would pursue that option very judiciously. However, there may be situations in which the agency believes that it is important to do so because it is otherwise unable to contact the parent. Implementation of this specific provision is left to the discretion of each public agency. In any case in which the agency is unable to contact the parents or otherwise ensure their participation, § 300.345(d) sets out options that the agency may elect to follow.

Changes: None.

Comment: Several commenters recommended that § 300.345(f) be amended to delete the term ''on request'' from the statement, so that parents are given a copy of the IEP without having to ask for it. One commenter requested that the copy be given within 5 days of the meeting.

Discussion: The new statute has given parents a more active voice in the education of their children with disabilities than existed under prior law. Because of the role parents play in the development, review, and revision of their child's IEP, it is appropriate to amend the regulation to require that each public agency must give the parents a copy of their child's IEP at no cost to the parents.

Changes: Section 300.345(f) has been amended consistent with the above discussion.

Development, Review, and Revision of IEP (§ 300.346)

Comment: A few comments were received on § 300.346(a)(1). Commenters recommended that (1) examples be added related to the strengths of the child and the concerns of the parents for

enhancing the child's education; (2) the IEP team also consider the child's performance results on any State or district-wide assessments, in addition to the results of the initial or most recent evaluation of the child; and (3) the term ''consider'' be replaced with ''examine and address;'' or with ''incorporate,'' to ensure that the IEP team incorporates the listed items into a child's IEP, rather than simply considering them.

While some commenters recommended that Note 1 be retained, other commenters recommended that the clarification in the note either be included in the text of the regulation or deleted in its entirety. One of the concerns expressed by commenters was that in considering special factors, the statement in Note 1 concerning review of valid information data, as appropriate, sets up a demand of separate or more expansive evaluation procedures for special consideration.

Discussion: Section 300.346(a)(1) adopts the statutory requirements related to considering the strengths of the child and the concerns of the parents. No examples regarding this provision have been incorporated into these final regulations, since these determinations would differ for each student, based on a variety of unique factors in light of the abilities and needs of the parents and children involved. Because the requirement to ''consider'' the strengths of the child and the concerns of the parent, as well as the special factors, is statutory, a word other than ''consider'' should not be substituted. The requirements in paragraph (a)(1) and (a)(2) of this section impose an affirmative obligation on the IEP team to ensure that the child's IEP reflects those considerations.

Paragraph (c) of this section also makes clear that if the IEP team determines, through consideration of special factors, that a child requires a particular service, intervention, or program modification, a statement to this effect must be included in the child's IEP. Therefore, no further clarification is necessary. Because the requirements in § 300.346(a) are evident from the text of this regulation, there is no need to retain Note 1 to this section of the NPRM in these final regulations.

Section 300.346(a)(1)(ii) also requires consideration of the results of the initial or most recent evaluation of the child, and this consideration must include, as appropriate, a review of valid evaluation data and the observed needs of the child resulting from the evaluation process. Because Pub. L. 105–17 strengthens collaboration between the IEP and evaluation processes, it is expected that this consideration will occur, as appropriate, through examination of existing evaluation data. Therefore, the commenters' concern that separate or expansive evaluation procedures would be required is not warranted.

The commenters' suggestion regarding the IEP team's consideration of the child's performance results on any State and district-wide assessment programs is consistent with the emphasis in the Act on the importance of ensuring that children with disabilities participate in the general curriculum and are expected to meet high achievement standards. Effective IEP development is central to helping these children meet these high standards. Section 612(a)(17) of the Act and § 300.138 of these regulations require, as conditions for receipt of IDEA funds, that States ensure that children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations where necessary, and must report the performance results of these children on such assessments. Therefore, § 300.346(a)(1) should be amended by adding paragraph (iii) to require that in considering the results of the initial or most recent evaluation of the child, the IEP team also consider, as appropriate, the results of the child's performance on any general State or district-wide assessment programs.

Changes: Section 300.346(a)(1) has been amended by adding paragraph (iii) to provide that, in considering the child's initial or most recent evaluation, the IEP team also consider, as appropriate, the results of the child's performance on any general State or district-wide assessment programs. Note 1 to this section of the NPRM has been removed.

Comment: Numerous comments were received on § 300.346(a)(2) (i.e., consideration of special factors). With respect to the factor under paragraph (a)(2)(i), in the case of a child whose behavior impedes his or her learning or that of others, commenters requested that (1) the term ''if appropriate'' be deleted because it will be used only for those children exhibiting dangerous behavior; (2) a note be added to state that consideration should be given to whether the behavior that impedes learning is due to frustration over a lack of services; (3) the IEP team also consider behavior exhibited both in and outside the school, and behavior that must be addressed to sustain in-school learning; (4) aversive behavior management strategies are banned under these regulations; (5) a child not be subjected to physical restraints or interventions unless agreed to by the child's parent and teacher; and (6) a plan between the parent and teacher be required to specify what disciplinary actions would occur if a child violated his or her behavioral intervention plan.

Discussion: Paragraph (a)(2) of this section (relating to consideration of special factors) implements the new statutory requirement in section 614(d)(3)(B) of the Act. It should be emphasized that, under prior law, IEP teams were required to consider these special factors in situations where such consideration was necessary to ensure the provision of FAPE to a particular child with a disability. Therefore, this new statutory provision makes explicit what was inherent in each child's entitlement to FAPE under prior law.

Paragraph (a)(2)(i) of this section adopts the statutory requirement at section 614(d)(3)(B)(i) of the Act, that, in the case of a child whose behavior impedes his or her learning or that of others, the IEP team consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. The commenters' concern that the retention of the words ''if appropriate'' would mean that the provision would be applied only in situations where a child exhibited dangerous behavior seems to ignore that school officials have powerful incentives to implement positive behavioral interventions, strategies and supports whenever behavior interferes with the important teaching and learning activities of school. Since the word ''strategies'' is used two times in the statutory provision, contrary to commenters' suggestion, the word strategies should not be deleted the second time it appears in this section.

Although the commenters' suggestions that behavior may be exhibited that impedes learning due to a frustration over lack of services and that the IEP team needs to examine in and out-of-school behavior to develop interventions to sustain learning are extremely important, no clarification should be provided in these regulations, to avoid overregulation in this area. It would be more appropriate to provide technical assistance on § 300.346(a)(2)(i) on an as needed basis, instead of developing general rules to which numerous exceptions would most likely apply. The Department funds a number of research efforts in this area, as well as technical assistance providers. Of course, in appropriate cases it might be helpful to all parties for the IEP to identify the circumstances or behaviors of others that may result in inappropriate behaviors by the child.

Regarding what behavioral interventions and strategies can be used, and whether the use of aversive

behavioral management strategies is prohibited under these regulations, the needs of the individual child are of paramount importance in determining the behavioral management strategies that are appropriate for inclusion in the child's IEP. In making these determinations, the primary focus must be on ensuring that the behavioral management strategies in the child's IEP reflect the Act's requirement for the use of positive behavioral interventions and strategies to address the behavior that impedes the learning of the child or that of other children.

It would not be appropriate for these regulations to require a specific plan between the teacher and parent, as described by commenters, that would specify consequences for a student's failure to comply with a behavioral intervention plan. A child's need for this type of plan, and the specific elements of that plan, would vary depending on the child and the behavior involved. Of course, in appropriate circumstances, the IEP team which includes the child's parents, might agree upon a behavioral intervention plan that included specific regular or alternative disciplinary measures that would result from particular infractions of school rules.

Parents who disagree with the behavioral interventions and strategies included in their child's IEP can utilize the Act's procedural safeguard requirements, which afford them the right to request an impartial due process hearing under § 300.507 and the option to use mediation under § 300.506 of these regulations.

Changes: None.

Comment: Numerous comments were received on § 300.346(a)(2)(ii) and Note 3 (factors related to a child with limited English proficiency (LEP). Commenters recommended changes in the regulation, such as: (1) replacing ''IEP'' with ''disability'' in § 300.346(a)(2)(ii); (2) clarifying that the consideration include how the child's level of English language proficiency affects the provision of special education and related services needed to receive FAPE, and how the child will be provided meaningful and full participation in the general curriculum, including through the use of alternative language services; (3) clarifying that special education and related services be provided in the language identified by the school district, with appropriate support services; (4) clarifying whether English language tutoring is a related service that must be included in a child's IEP or part of the general curriculum; and (5) recognizing that second language acquisition might take precedence over the general curriculum.

A few commenters expressed support for Note 3, stating (for example) that it is helpful in recognizing that special education services may need to be provided in a language other than English. Other commenters requested that Note 3 be moved to the text of the regulation, or deleted in its entirety since it expands responsibilities under these regulations to requirements of Federal laws other than Part B.

Discussion: Section 300.346(a)(2)(ii) of these regulations adopts verbatim the statutory requirement at section 614(d)(3)(B)(ii) of the Act, that in the case of a child with limited English proficiency, the IEP team consider the language needs of the child as such needs relate to the child's IEP. Modifications to this paragraph that would involve changes to statutory language should not be made.

Issues such as the extent to which a LEP child with a disability receives instruction in English or the child's native language, the extent to which a LEP child with a disability can participate in the general curriculum, or whether English language tutoring is a service that must be included in a child's IEP, are determinations that must be made on an individual basis by the members of a child's IEP team.

In light of the general decision to remove all notes, Note 3 has been removed. However, in developing an IEP for a LEP child with a disability, it is particularly important that the IEP team consider how the child's level of English language proficiency affects the special education and related services that the child needs in order to receive FAPE, consistent with § 300.346(a)(2)(ii) and (c). Under Title VI of the Civil Rights Act of 1964, school districts are required to provide LEP children with alternative language services to enable them to acquire proficiency in English and to provide them with meaningful access to the content of the educational curriculum that is available to all students, including special education and related services.

A LEP child with a disability may require special education and related services for those aspects of the educational program which address the development of English language skills and other aspects of the child's educational program. For a LEP child with a disability, under paragraph (c) of this section, the IEP must address whether the special education and related services that the child needs will be provided in a language other than English.

Changes: Note 3 has been removed.

Comment: With respect to the special factor considered for a child who is blind or visually impaired, commenters requested that the regulation clarify that (1) Braille materials must be provided to students who are blind or visually impaired at the same time that their sighted peers receive the materials; (2) a child may not be denied Braille services on the basis that modified reading and writing media, other than Braille, are being provided; (3) when there is a disagreement about the use of Braille, Braille instruction must be provided until lawful procedures have culminated in a final decision; and (4) any child who meets the legal definition of blindness should be taught Braille.

Commenters also stated that other options besides Braille may be needed for certain students, as described in the ''Policy Guidance on Educating Blind and Visually Impaired Students'' (OSEP 96–4, dated 11–3–95), and requested that a note be added that includes much of the content of that document, or that a reference be made to that policy guidance paralleling Note 2 relating to students who are deaf or hard of hearing.

Discussion: Section 300.346(a)(2)(iii) of these final regulations adopts verbatim the statutory language at section 614(d)(3)(B)(iii) of the Act. Under this requirement, in the case of a child who is blind or visually impaired, the IEP team must make provision for instruction in Braille and the use of Braille, unless the IEP team determines, after the evaluations described in the statutory provision, that instruction in Braille or the use of Braille is not appropriate for the child. Changes to statutory language requested by commenters should not be made.

Contrary to a suggestion of commenters, a regulatory provision making it mandatory for Braille to be taught to every child who is legally blind would contravene the individually-oriented focus of the Act, as well as the statutory requirement that the IEP team must make individual determinations for each child who is blind or visually impaired based on relevant evaluation data. As explained in OSEP Memorandum 96–4, Policy Guidance on Educating Blind and Visually Impaired Students, the IEP team's determination as to whether a child who is blind or visually impaired receives instruction in Braille or the use of Braille cannot be based on factors such as availability of alternative reading media, such as large print, recorded materials, or computers with speech output.

Additionally, although these regulations do not specify that a child

for whom Braille instruction is determined appropriate must receive Braille materials at the same time they are provided to their sighted peers, once the IEP team determines that a child requires instruction in Braille, such instruction, along with other aspects of the child's IEP, must be implemented as soon as possible following the child's IEP meeting, and in any case, without undue delay. If there is disagreement between the parents and school district over what constitutes an appropriate program for a child who is blind or visually impaired, when the IEP team has determined that instruction in Braille would not be appropriate for the child, the parents of the child would have the right to request a due process hearing and mediation. In addition, parents have available to them mediation and complaint resolution by which they can file a complaint with the SEA under the State complaint procedures in these regulations.

Although the LEA would not be required to provide instruction in Braille while the dispute is being resolved, the LEA would be required, both by Part B and Section 504, to ensure that the child receives instructional materials in an alternative medium to enable the child to participate in the LEA's program.

The OSEP Policy Guidance on Educating Blind and Visually Impaired students should not be included in these final regulations since many of the statutory and regulatory provisions cited in the policy guidance have been replaced by the requirements of Pub. L. 105–17. In some important respects, particularly with regard to consideration of instruction in Braille, Pub. L. 105–17 substantially revised the requirements of prior law. It also should be pointed out that Note 2 to this section of the NPRM, which contained a reference to corresponding policy guidance regarding educating deaf students, is being removed as a note, and pertinent references to that policy guidance are incorporated into the discussion of § 300.346(a)(2)(iv).

Changes: None.

Comment: With respect to considering the communication needs of the child and factors related to a child who is deaf or hard of hearing, commenters expressed support for Note 2 (related to policy guidance on Deaf Students Education Services that was published in the **Federal Register** in 1992), and requested that the entire statement be published as an attachment to these regulations. Some commenters favored deleting Note 2 because they objected to citation of policy guidance documents in the regulations without following applicable procedures in section 607(b) and (c) of the Act.

Commenters recommended adding to the regulations proposed definitions of the terms ''direct communication,'' ''the child's language,'' and ''full range of needs,'' or adding clarifying language relating to those terms (e.g., that the child's primary language could be American Sign Language, and that the full range of needs includes social, emotional, and cultural needs).

Commenters also recommended (1) requiring that counselors of the deaf assess each deaf child's language and speech communication in spontaneous conversation at age 5, to determine whether the child has the skill to stay in an oral program or should be transferred to a program that uses sign language; (2) that the regulations make it clear that the communication needs of a deaf child are fundamental to the LRE decision; (3) that many deaf children need to be in an environment where they can communicate directly through a visual mode with those around them; and (4) that the IEP team document that it considered the language and communication needs of a hard of hearing child and how such needs will be met in the proposed placement.

A few commenters requested that children with cochlear implants be included with other deaf children in the structure of educational placements and language and communication needs, and that the IEP state what will be done to assist the child to best utilize the hearing acquired.

Some commenters requested adding children with deafness and blindness because they also have communication needs and require this consideration.

Discussion: Section 300.346(a)(2)(iv) of these regulations adopts verbatim the statutory requirement in section 614(d)(3)(B)(iv) of the Act that the IEP team consider the communication needs of the child, and, in the case of a child who is deaf or hard of hearing, those additional special factors relating to the child's language and communication needs. Additional guidance in the form of changes to the regulations requested by commenters should not be provided.

In the interest of not using notes in these final regulations, Note 2 to this section of the NPRM should be removed. It is important to emphasize that this policy guidance on Deaf Students Educational Services merely interprets existing statutory and regulatory requirements, and does not impose new requirements on the public. Nevertheless, LEAs are not relieved of their responsibilities to ensure that paragraph (a)(2)(iv) of this section is implemented consistent with the published policy guidance on Deaf Students Education Services, and that the full range of communication and related needs of deaf and hard of hearing students are appropriately addressed in evaluation, IEP, and placement decisions under these regulations.

The Senate and House Committee Reports on Pub. L. 105–17 reinforce this principle in their statements that ''the IEP team should implement the [new statutory] provision in a manner consistent with the policy guidance entitled ''Deaf Students Education Services'' published in the **Federal Register** (57 FR 49274, October 30, 1992) by the Department.'' S. Rep. No. 105–17, p. 25., H.R. Rep. No. 105–95, p. 104 (1997). The Department fully expects LEAs to ensure that § 300.346(a)(2)(iv) of these regulations is implemented consistent with these statements.

Changes: Note 2 has been removed.

Comment: With respect to considering whether a child needs assistive technology (AT), some commenters stated that if AT devices or services are recommended and not provided, the IEP must include a statement to that effect and the basis on which the determination was made. Other commenters stated that having to document that such devices and services were considered is an unnecessary paperwork burden.

Commenters also recommended (1) requiring that decisions about the need for AT are made early enough so that they are in effect by the beginning of the school year; (2) clarifying that if an AT device is needed, the child has the right to take it home; (3) adding clarification of liability issues (e.g., where a child uses a family owned device at school and other waiver of liability issues); and (4) adding a note that AT can have a significantly positive effect on the attainment of annual goals and participation in the general curriculum.

Discussion: Section 300.346(a)(2)(v) of these regulations adopts verbatim the new statutory requirement at section 614(d)(b)(3)(v) of the Act, making it mandatory for the IEP team to consider each child's AT needs. This statutory provision reinforces the requirement in § 300.308 of these regulations that if an IEP team determines that a disabled child requires an AT device or service in order to receive FAPE, the required AT must be provided at no cost to the parents. In all instances, the IEP team must determine whether an individual disabled child should receive AT, and if so, the nature and extent of AT provided to the child.

Because in many situations, parents were reporting that LEAs were not properly considering their children's AT needs on an individual basis, this new provision should ensure that each child's IEP team considers the child's need for AT. Since IEP teams must consider each child's need for AT on an individual basis, determinations regarding the provision of AT must be made when the child's IEP for the upcoming school year is finalized so that the AT can be implemented with that IEP at the beginning of the next school year.

In the interest of not adding paperwork burdens to these regulations, there is no additional requirement that LEAs document that the IEP team considered a child's AT needs, or considered a child's AT needs and determined that AT not be provided to the child. It is not necessary to add the clarification regarding the importance of reflecting a child's AT needs in IEP goals and objectives or in issues relating to the child's participation in the general curriculum.

All of needs identified through consideration of the special factors contained in paragraph (a)(2) of this section must be reflected in the contents of the child's IEP, including, as appropriate, the instructional program and services provided to the child, the annual goals, and the child's involvement in and progress in the general curriculum. In addition, individual consideration of a child's AT needs is essential to ensuring that the child's unique needs arising from his or her disability are appropriately addressed so that the child can be involved in and progress in the general curriculum.

Issues regarding whether AT devices or services can be used at home, and issues regarding liability for family-owned AT devices used at school are addressed either in discussions of §§ 300.5–300.6 or 300.308 of the attachment, and, as appropriate, are reflected in changes to those regulations.

Changes: None.

Comment: Commenters stated that, in light of the fact that IEP teams must consider special factors in five specific instances, and are responsible for significant decisions as a result of changes made by Pub. L. 105–17, a new paragraph (a)(3) should be added to § 300.346 to provide specific guidance to IEP teams (e.g., requiring that the teams draw upon information from a variety of sources, including teacher observation, input from parents, and other specified information). Other commenters requested that a new paragraph be added to § 300.346 to ensure that all children with disabilities receive the services in their IEPs and retain the rights and privileges included under the Act.

Discussion: While the concerns expressed by these commenters are extremely important, no regulatory changes should be made. Consideration of the five specific factors outlined in the statute and these regulations, of necessity, will require consideration of information from a variety of sources, and § 300.346(c) of these regulations also requires that such consideration be reflected in the contents of a child's IEP. In addition, it is not necessary to add a provision to clarify that all children with disabilities must receive services listed in their IEPs. This requirement is already reflected in § 300.350 of these regulations, which provides that each child with a disability must receive special education and related services in accordance with an IEP.

Changes: None.

Comment: A few comments were received on § 300.346(d)(2) (relating to the determination of supplementary aids and services, program modifications, and supports for school personnel, consistent with § 300.347(a)(3)). The commenters stated that (1) the term ''supports for school personnel'' focuses the need from the student to the staff, and recommended adding a note to narrow this provision, because it could be interpreted broadly by staff and have a negative effect on resources that are needed to directly meet student needs; (2) the provision may be used by teachers to block admission of children with disabilities to their class by demanding unreasonable supports; (3) additional guidance be provided, since this is the first time that the IEP has addressed needs not specific to the child; and (4) language be added indicating that the LEA and not the teacher should be the focus of responsibility in the provision of such supports.

Discussion: With respect to § 300.346(d)(2), including the statement relating to supports for school personnel, it is critical that those determinations are ''consistent with § 300.347(a)(3).'' Section 300.347(a)(3) makes clear that the focus of the supports is to assist the child to advance appropriately toward (for example) attaining the annual goals, and to be involved in and progress in the general education curriculum. Therefore, while certain supports for school staff may be provided (such as specific training in the effective integration of children with disabilities in regular classes), the ultimate focus of those supports to school personnel is to ensure the provision of FAPE to children with disabilities under Part B, their integration with nondisabled peers and their participation and involvement in the general curriculum, as appropriate. Consistent with the Act's emphasis on ensuring the provision of FAPE to children with disabilities, and, to the maximum extent appropriate, educating those children in regular classes with nondisabled children with appropriate supplementary aids and services, it is critical that at least one regular education teacher of the child be a member of the IEP team and provide input on appropriate supplementary aids and services, including program modifications and supports for school personnel. It also is essential that the child's teachers and other service providers who are not members of the IEP team are informed about the contents of the child's IEP, in whatever manner deemed appropriate by the public agency, so that the IEP is properly implemented by all school personnel.

Changes: None.

Content of IEP (§ 300.347)

Comment: A number of general comments were received relating to § 300.347. Some commenters expressed concerns that the IEP requirements were burdensome. A commenter requested that a sample IEP be provided in order to cut down on paperwork and keep the IEP to the essentials of Federal and State law. Commenters also (1) requested that a provision addressing assistive technology be added, as it is often not provided, and (2) stated that § 300.347 should contain a requirement that the IEP document be in a user-friendly format and written in language that can be understood by parents, and that the mandatory contents of IEPs include ESY services, if a child is eligible for such services, and necessary services that will be provided by another agency and the name of the provider.

Other commenters requested (1) documenting how special factors were considered; (2) clarifying the role of the regular education teacher in IEPs of children who are in self-contained, restrictive placement settings, or private placements; (3) providing the necessary flexibility to change how and where services are delivered to meet the child's changing needs; and (4) forbidding the practice of LEAs providing interim plans which promise that a full IEP will be developed at a later date—a device used by LEAs to avoid specifying what they will do for a child, so that the IEP can be discussed

and litigated (if necessary) well before the start of a school year.

Discussion: In developing these final regulations, efforts have been made to ensure that the regulatory requirements related to the content of IEPs are consistent with the IDEA Amendments of 1997, and that no additional burden is added. The Department will explore the extent to which a sample IEP addressing the Federal requirements as part of a technical assistance effort, would be useful to parents and State and local administrators in developing IEPs that meet Federal, State, and local rules.

With respect to concerns about added burden, the provisions of § 300.347 are drawn directly from the statute. While the statute did add some new requirements regarding content, it also gave the flexibility to use benchmarks of progress as opposed to short term objectives, and to determine how to regularly report on a child's progress instead of the more burdensome objective criteria, evaluation procedures and schedules required under prior law.

Except for including, essentially verbatim, the statutory content requirements in the regulations, the format and specific language used in developing IEPs are matters left to the discretion of individual States, and, to the extent consistent with State requirements, individual LEAs within the States. In providing such discretion, the assumption is that each State and LEA would attempt to make the format and language of the IEP as understandable and meaningful for parents as possible. Within this general framework, IEP teams develop the specific detail that is necessary to address each child's individual needs.

The importance of assistive technology devices and services in meeting the special educational needs of children with disabilities is addressed in several sections of these regulations (e.g., §§ 300.5, 300.6, 300.308, and 300.346). The importance of ESY services and the requirements related to addressing the need for those services is included under § 300.309. Therefore, no additional provisions are warranted in this section.

With respect to the comment regarding the role of the regular education teacher, the IDEA Amendments of 1997 require that at least one regular education teacher of the child be a member of the child's IEP team if the child is or may be participating in the regular education environment.

The development of an interim IEP (or the use of a diagnostic placement, on a case-by-case basis) may be appropriate for an individual child with a disability if there is some question about the child's special education or related services needs. However, it would not be consistent with the requirements of this part for an LEA to adopt an across-the-board policy of developing interim IEPs for all children with disabilities. Clearly, in any case in which the IEP for a child with a disability does not seem to effectively address the needs of the child, the IEP team should be reconvened (at the request of the child's parent or teacher(s)) to reconsider the nature and scope of the IEP.

Changes: None.

Comment: A few comments were received related to the statement of the present levels of educational performance in the IEP (§ 300.347(a)(1)), including requesting that (1) the statement include the results of any independent assessment that has been done, and any reasons the LEA has for not accepting the assessment; and (2) the provision requiring a description of how the child's disability affects the child's involvement in the general curriculum be deleted. One commenter recommended that this requirement and the provision on goals and objectives in § 300.347(a)(2) be revised to address the concept of ''meaningful'' participation in the general curriculum. Commenters also requested that, in the requirements for a description of how a preschool child's disability affects the child's participation in appropriate activities, the term ''appropriate activities'' be clarified or examples given.

A number of comments were received regarding the ''statement of measurable annual goals, including benchmarks or short-term objectives'' (§ 300.347(a)(2)). Several commenters requested that the term ''benchmarks'' be defined or clarified or that a note be added to include examples, and that the term be distinguished from ''short-term objectives.'' Other commenters requested that (1) the term ''measurable'' apply to short-term objectives and not to annual goals, (2) the regulation clarify if ''measurable'' means statements of the amount of progress expected; (3) a child's report card be used to report annual goals; and (4) a provision be added requiring the IEP team to be reconvened if the benchmarks indicate that the child is not making satisfactory progress.

Comments were received on § 300.347(a)(2)(i) (regarding enabling a child to be involved in and progress in the general curriculum), as follows: (1) make the provision clearer, including requiring that the LEA list, for each goal and objective, each obstacle to full, effective participation in the general curriculum, and justify use of the resource room instead of supports in the regular classroom, and (2) clarify what the expectations are for children with significant cognitive disorders.

Discussion: It is important that the statement of a child's present levels of educational performance be based on current, relevant information about the child, that is obtained from a variety of sources, including (1) the most recent reevaluation of the child under § 300.536, (2) assessment results from State and district-wide assessments, (3) inputs from the child's special and regular education teachers, and (4) information from the child's parents. (§ 300.346(a)(1)). If an independent educational evaluation has been conducted, the results of that evaluation also must be considered if it meets agency criteria for such evaluations. (§ 300.502(c)(1)).

Consideration of all of the information described above is inherent in the requirement that the IEP include ''a statement of the present levels of educational performance.'' Therefore, it is not necessary to amend the regulation to address this requirement.

The provision in § 300.347(a)(1)(i) that requires a description of how a child's disability affects the child's involvement in the general curriculum (i.e., the same curriculum as for nondisabled children) is a statutory requirement and cannot be deleted. The requirement is important because it provides the basis for determining what accommodations the child needs in order to participate in the general curriculum to the maximum extent appropriate.

A basic assumption made in both the statute and these final regulations is that the programming and services for each ''individual'' child would be tailored to address the child's unique needs that impede the child's ability to make meaningful progress in the general curriculum. (As explained elsewhere in this attachment, the reference to the general curriculum in § 300.347(a)(2) has been modified to clarify that the general curriculum is the same curriculum for nondisabled children.)

With respect to preschool-aged children, the term ''appropriate activities,'' as used in § 300.347(a)(1)(ii), includes activities that children of that chronological age engage in as part of a formal preschool program or in informal activities (e.g., coloring, pre-reading activities, sharing-time, play time, and listening to stories told or read by the parent or pre-school teacher). In order to recognize that for some preschool-aged children appropriate goals will be related to participation in appropriate

activities, as these children are not of an age for which there is not a general curriculum for nondisabled children, a change should be made to § 300.347(a)(2).

A delineation and description of the difference between ''benchmarks'' and ''short term objectives'' is included in Appendix A.

Regarding the commenter's request that the LEA (1) list obstacles to the child's full, effective participation in the general curriculum, and (2) justify the use of a resource room instead of supports in the regular classroom, no further regulation will be provided. Parents are equal members of their child's IEP team, and can participate in the discussion about whether there are any obstacles to ensuring the child's full and effective participation in the general curriculum. In any case in which the parents are not satisfied with the outcome of the IEP meeting, they have avenues available to them under both the Act and regulations for redressing their concerns.

See comments and discussion in § 300.550 related to children with significant cognitive disorders.

Changes: Section 300.347(a)(2)(i) has been revised to clarify that ''general curriculum'' is the same curriculum as for nondisabled children and to recognize that a general curriculum is not available for all preschool-aged children.

Comment: With respect to the provision in § 300.347(a)(3) (related to describing services to be provided to a child, or on behalf of the child * * *), a few commenters requested clarification of the term ''on behalf of the child.'' Commenters also recommended that, in the ''statement of program modifications or supports for school personnel,'' the regulation clarify that ''staff training'' is one form of program support, and added that a necessary support service for staff can often be obtained more easily if it is identified as an IEP service.

A few commenters recommended that, in order to ensure full access to the general curriculum, § 300.347(a)(3)(ii) be amended to state that a child's involvement and progress in the general curriculum be ''to the maximum extent appropriate to the needs of the child.'' Other commenters requested that the provision in § 300.347(a)(3)(ii) (related to a child's participation in extracurricular activities) be deleted because it is inconsistent with Part B. Commenters also requested that the regulations clarify that participation in extracurricular activities is not a part of the child's educational program, and that such participation is subject to the same rules as other children.

With respect to § 300.347(a)(4) (an explanation of the extent to which the child will not participate with nondisabled children), a few commenters recommended that the provision be deleted, or that it be stated in positive terms (extent to which the child ''will'' participate with nondisabled children). Commenters also stated that documenting what will not happen is burdensome paperwork.

Discussion: As used in § 300.347(a)(3), the term ''on behalf of the child'' includes, among other things, services that are provided to the parents or teachers of a child with a disability to help them to more effectively work with the child. For example, as used in the definition of ''related services'' under § 300.24, the term '' 'parent counseling and training' means (i) Assisting parents in understanding the special needs of their child * * * and (iii) Helping [them] to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.''

Supports for school personnel could also include special training for a child's teacher. However, in order for the training to meet the requirements of § 300.347(a)(3), it would normally be targeted directly on assisting the teacher to meet a unique and specific need of the child, and not simply to participate in an inservice training program that is generally available within a public agency.

In order to ensure full access to the general curriculum, it is not necessary to amend § 300.347(a)(3)(ii) to clarify that a child's involvement and progress in the general curriculum must be ''to the maximum extent appropriate to needs of the child.'' The individualization of the IEP process, together with the new requirements related to the general curriculum, should ensure that such involvement and progress is ''to the maximum extent appropriate to the needs of the child.''

The provision in § 300.347(a)(3)(ii) related to participation in ''extracurricular and other nonacademic activities'' is statutory.

The provision in § 300.347(a)(4) (that requires a statement of the extent to which a child with disabilities will *not* participate with nondisabled children) is also a statutory requirement and cannot be deleted. The basic principle underlying this requirement is that children with disabilities will be educated in the regular education environment along with their nondisabled peers, and that these children are only removed from that environment if it is determined that they cannot be appropriately served in the regular education environment, even with the use of supplementary aids and services.

This new provision is designed to ensure that each IEP team carefully considers the extent to which a child can be educated with his or her nondisabled peers; and if the team determines that the child cannot participate full time with nondisabled children in the regular classroom and in the other activities described in § 300.347(a)(3)(ii), the IEP must include a statement that explains why full participation is not possible.

If (for example) a child needs speech-language pathology services in a separate setting two to three times a week, but will otherwise spend full time with nondisabled children in the activities described in § 300.347(a)(4), the ''explanation'' would require only the statement described in the preceding sentence. A similar explanation would be required for any other child with a disability who, in the judgement of the IEP team, will not participate on a full time basis with nondisabled children in the regular class. Thus, while the IEP needs to clearly address this situation, the required explanation does not have to be burdensome.

Changes: None.

Comment: A few comments were received on § 300.347(a)(5) (related to State or district-wide assessments), including requesting that: (1) the regulations clarify that if the individual modifications necessary for a child to participate in the assessment are not known at the time of the IEP meeting, a subsequent meeting be required to make this determination, as long as the decision is made before the assessment is conducted; and (2) an alternate assessment not be construed as an exemption and a separate assessment system, but, rather, that the provision in § 300.347(a)(5)(ii)(B) be amended to require a statement of how the child will be included in the State or district-wide assessment program with an alternative assessment.

Discussion: If the individual modifications necessary for a child to participate in the assessment are not known at the time of the IEP meeting, it would be necessary for a subsequent meeting to be conducted early enough to ensure that any necessary modifications are in place at the time the assessment is administered. It is not necessary, however, to add a regulation to address this matter.

The IDEA Amendments of 1997 require that all children with disabilities be included in general State and

district-wide assessment programs, with appropriate accommodations, where necessary. (§ 300.138). In some cases, alternate assessments may be necessary, depending on the needs of the child, and not the category or severity of the child's disability.

Changes: None.

Comment: Several comments were received on § 300.347(a)(6) (related to the projected date for beginning services and modifications and their anticipated frequency, location, and duration). A few commenters requested that the term ''anticipated'' be defined so that it does not diminish an LEA's obligation to provide services. Some commenters requested that the term ''location'' be defined as the placement on the continuum and not the exact building where the IEP service is to be provided, especially if the service is not available in the LEA and must be provided via contract. Other commenters similarly stated that a note be added clarifying that ''location'' means the general setting in which the services will be provided and not a particular school or facility.

Discussion: Use of the term ''anticipated'' to diminish the agency's obligation to provide services would be inconsistent with the requirements of this part. Moreover, a public agency could not alter the basic nature and scope of the child's IEP without reconvening the child's IEP team.

The ''location'' of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?

Changes: None.

Comment: With respect to § 300.347(a)(7) (related to a statement of how a child's progress toward annual goals will be measured and reported), commenters requested that a definition of ''progress report'' be added; and stated that the provision is burdensome, and should be changed to require that report cards for children with disabilities contain information about the child's progress in meeting annual goals.

Commenters also requested that the regulations (1) clarify the manner and frequency in which parents are kept informed of their child's progress; (2) clarify the extent to which this requirement can be met in writing as opposed to conducting an IEP meeting; (3) require a detailed written narrative report of how a child is progressing toward meeting IEP objectives instead of using a grade, because a grade is related to the system and not the child, and gives no indication of what is right or wrong; and (4) include a provision requiring action to be taken if satisfactory progress in not being made.

Discussion: It is not appropriate or necessary to include a definition of ''progress report'' because that term is not used in either the statute or these final regulations. The provision in § 300.347(a)(7)(ii) is incorporated verbatim from the statute. No additional burden was added by the NPRM or these final regulations.

Under the statute and regulations, the manner in which that requirement is implemented is left to the discretion of each State. Therefore, a State could elect to ensure that report cards used for children with disabilities contain information about each child's progress toward meeting the child's IEP goals, as suggested by commenters, but would not be required to do so.

With respect to the frequency of reporting, the statute and regulations are both clear that the parents of a child with a disability must be regularly informed of their child's progress at least as often as parents are informed of their nondisabled children's progress.

Requiring a ''detailed written narrative'' of how a child is progressing toward meeting the IEP objectives, as suggested by a commenter, could add an unnecessary burden. However, the commenter's concern about using a grade to designate a child's progress in meeting the IEP objectives in some cases may be valid because a grade does not always lend itself to sufficiently describing progress toward the annual goals. The statute and regulations make clear that a written report is sufficient, although in some instances, an agency may decide that a meeting with the parents (which does not have to be an IEP meeting) would be a more effective means of communication.

The agency must ensure that whatever method, or combination of methods, is adopted provides sufficient information to enable parents to be informed of (1) their child's progress toward the annual goals, and (2) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

Generally, reports to parents are not expected to be lengthy or burdensome. The statement of the annual goals and short term objectives or benchmarks in the child's current IEP could serve as the base document for briefly describing the child's progress.

Changes: None.

Comment: A number of comments were received on Notes 2 through 5 (which focus on matters related to the child's participation in the general curriculum, the expected impact on the length and scope of the IEP from such participation and from discussing teaching methodologies, and reporting to parents) are addressed in the following sections of this analysis. Some commenters requested that all notes be deleted. Other commenters requested that Notes 2, 3, and 4 be incorporated into the regulations. A few commenters recommended that for Notes 2 and 3, the regulations define the terms ''adaptations,'' ''modifications,'' ''accommodations,'' and ''adjustments.''

Regarding Note 3, some of the commenters recommended deleting the idea that the general curriculum is not intended to significantly increase the size of the IEP. One commenter recommended replacing the word ''accessing'' with ''fully participating in'' the general curriculum. The commenter stated that the language in the note (from the House Committee Report) could be used by LEAs as a basis for limiting the use of the IEP as a tool for enabling children with disabilities to participate fully in the general curriculum. Other commenters recommended that Note 3 be deleted.

Discussion: The IDEA Amendments of 1997 emphasize providing greater access by children with disabilities to the general curriculum and to educational reforms, as an effective means of ensuring better results for these children. Both the Senate and House Committee Reports on Pub. L. 105–17 state that:

> The Committee wishes to emphasize that, once a child has been identified as being eligible for special education, the connection between special education and related services and the child's opportunity to experience and benefit from the general education curriculum should be strengthened. The majority of children identified as eligible for special education and related services are capable of participating in the general education curriculum to varying degrees with some adaptations and modifications. This provision is intended to ensure that children's special education and related services are in addition to and are affected by the general education curriculum, not separate from it. (S. Rep. No. 105–17, p. 20; H.R. Rep. No. 105–95, p. 99 (1997))

These are important principles to keep in mind when implementing the new IEP requirements. However, in light of the general decision to remove notes from the final regulation, Note 2 would be removed.

The concepts in the committee reports cited in Note 3 also are valid. The new focus of the IEP is intended to address the accommodations and adjustments necessary to enable children with disabilities to be able to participate in

the general curriculum to the maximum extent appropriate. Although the annual goals and short term objectives (and the service accommodations described above) would be basic components of the IEP, it would not be appropriate for the IEP to include specific details related to the general curriculum itself (and to daily lesson plans).

Generally, the overall length of the IEP should not be greatly affected by including relevant information about the accommodations and adjustments needed by the child, along with the other required information. But the IEP should provide sufficient information necessary to enable parents, regular education teachers, and all service providers to understand what is required to effectively implement its provisions. However, consistent with the general decision made with respect to notes, Notes 2 and 3 would be deleted.

Because Note 3 has been deleted, it is not necessary to replace the word ''accessing'' with ''fully participating in'' the general curriculum. Clearly, the intent of the IDEA is full participation of each child with a disability in the general curriculum to the maximum extent appropriate to the needs of child; and the IDEA Amendments of 1997, as reflected in these final regulations, have given greater emphasis to that intent.

It is not necessary to include a regulatory definition of the terms ''adaptations,'' ''modifications,'' ''accommodations,'' and ''adjustments.'' The terms are essentially self-explanatory, and may overlap to some extent.

Certain changes may need to be made in a regular education classroom to make it possible for a child with a disability to participate more fully and effectively in general curricular activities that take place in that room. These changes could involve (for example) providing a special seating arrangement for a child; using professional or student ''tutors'' to help the child; raising the level of a child's desk; allowing the child more time to complete a given assignment; working with the parents to help the child at home; and providing extra help to the child before or after the beginning of the school day.

''Modifications'' or ''accommodations'' could involve providing a particular assistive technology device for the child, or modifying the child's desk in some manner that facilitates the child's ability to write or hold books, etc.

Changes: Notes 2 and 3 have been removed.

Comment: Several comments were received on Note 4 (related to teaching and related services methodologies). A few commenters expressed support for Note 4, and stated that the note should be added to the regulations. Other commenters requested that the note be deleted. Some of these commenters stated that, in some instances, it may be appropriate to include teaching methods and approaches in the IEP, and added that when methodologies differ significantly, one approach may be appropriate while others are inappropriate, based on the unique needs of each individual child. Other commenters pointed out that methodologies are an inherent part of the definition of special education, and it would be inconsistent with the definition to not include them in the IEP.

With respect to Note 5 (i.e., that the reporting provision in § 300.347(a)(7)(ii), related to the child's progress on the annual goals, is intended to be in addition to regular reporting for all children), a few commenters expressed appreciation for the provision. Some commenters stated that the note be deleted. Other commenters recommended that the note either be deleted, or changed to state that the provision in § 300.347(a)(7)(ii) may be incorporated as part of the regular reporting to all parents.

Discussion: In some cases, it may be appropriate to include teaching methods and approaches in a child's IEP. As used in the definition of ''special education'' under § 300.26, the term ''specially-designed instruction'' means ''adapting, as appropriate to each eligible child under this part, the content, methodology, or delivery of services * * * (i) to meet the unique needs of an eligible child under this part that result from the child's disability * * *''

In general, however, specific day-to-day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP team.

With respect to Note 5 (that the reporting provision in § 300.347(a)(7)(ii) is intended to be in addition to regular reporting for all children), as addressed earlier in this attachment, the report described in § 300.347(a)(7)(ii) may be incorporated in the regular reporting to all parents. Therefore, Note 5 is not needed.

Changes: Notes 4 and 5 have been deleted.

Comment: Several comments were received on the transition services provision in § 300.347(b)(1), including requests that the regulations: (1) clarify what is meant by transition services for 14 year-old students; (2) add ''daily living'' and independent living'' to the example in paragraph (b)(1)(i) because transition is much broader than employment; and (3) require that transition plans analyze and report the prospect of a student benefiting from higher education and if so what kind; and if vocational education is recommended and not general higher education, the transition plans specify the reason why general higher education is not a meaningful alternative.

A few commenters recommended that language be added to more clearly distinguish between ''a statement of the transition service needs'' of a student at age 14, and ''a statement of needed transition services'' at age 16. The commenters included a proposed definition that requires the identification of targeted post-school activities.

Discussion: The terms ''a statement of the transition service needs'' and ''a statement of needed transition services'' are incorporated verbatim from the statute. The purpose of ''a statement of the transition service needs'' is to focus on the planning of a student's courses of study during the student's secondary school experience (e.g., whether the student will participate in advanced placement or vocational education courses).

With respect to a statement of needed transition services, the focus is on the student's need for such services as he or she moves from school to postschool experiences, and any linkages that may be needed. These statements, as with the other components of the IEP, must be individualized in accordance with the needs of the student.

The Department has invested considerable resources in providing technical assistance in the area of transition services, and has a number of technical assistance resources available to public agencies in implementing these statutory provisions.

Changes: None.

Comment: A number of comments were received related to the provision in § 300.347(b)(2), that requires that if the IEP team determines that services are not needed in one or more of the areas specified in the definition of transition services, the IEP must include a statement to that effect and the basis upon which the determination was made. These commenters recommended that the provision be deleted because it is not statutory, not needed, and adds unnecessary and excessive paperwork.

Discussion: It is appropriate to remove the provision in § 300.347(b)(2) because, as stated by the commenters, the provision is not statutory and adds unnecessary paperwork.

That provision was based on the definition of ''transition services'' that was in effect prior to June 4, 1997, and did not account for the change in the definition of ''transition services'' that was made by the IDEA Amendments of 1997.

The ''prior law'' definition mandated the inclusion of specific components under the coordinated set of activities described in the definition. In recognition that all students with disabilities may not require services in all of the mandated areas, the final regulations implementing that provision (published in 1992) included a statement that ''If the IEP team determines that services are not needed in one or more of the areas specified in [the definition of transition services], the IEP must include a statement to that effect, and the basis upon which the determination was made.'' However, while the new definition of ''transition services'' added by Pub L. 105–17 includes the same components as in prior law, the provision requiring the inclusion of all components in a student's IEP was removed.

Changes: § 300.347(b)(2) has been deleted.

Comment: Comments were received related to Notes 1, 6, and 7 following § 300.347 of the NPRM, all of which focus on the transition services requirements. Some commenters recommended that all three notes be deleted. Other commenters recommended that Note 7 be modified to encourage public agencies to begin transition services before age 14. A few commenters stated that Note 7 is not needed because the regulations are already clear.

Discussion: Consistent with the Department's decision to not include notes in the final regulations, the notes should be deleted.

Changes: Notes 1, 6, and 7 have been deleted.

Comment: With respect to the transfer of rights at the age of majority (§ 300.347(c)), one commenter stated that the provision should be deleted. Another commenter stated that there is general confusion about this provision, especially when parents are unable financially or unwilling to seek legal guardianship for their child, and added that schools need guidance. A commenter asked, how do LEAs determine which students get transfer rights at age 18; and once transferred, does the LEA still have to notify the parents.

Another commenter requested that the regulations allow a student to authorize the continued participation of the student's parent or guardian after the age of majority to develop, review, or revise an IEP, and added that if the student authorizes parent participation, the parent should be considered a member of the IEP team.

Discussion: The provision at § 300.347(c) is statutory. Whether or not rights transfer at the age of majority depends on State law, and, consistent with § 300.517, whether or not the student has been determined incompetent under State law. State law also determines what constitutes the age of majority in that jurisdiction. The discussion concerning § 300.517 in this attachment provides a fuller explanation of the provision concerning the transfer of rights at the age of majority. Generally, a public agency will satisfy § 300.347(c) if, at least one year before the student reaches the age of majority under State law, the agency informs the student of the rights that transfer at the age of majority (and includes a statement to that effect in the IEP). If the public agency receives notice of the student's legal incompetency, so that no rights transfer to the student at the age of majority, the IEP need not include this statement.

The composition of the IEP team is discussed in § 300.344. There is nothing in the regulation that would prevent a student to whom rights have been transferred at the age of majority from exercising his or her discretion under § 300.344(a)(6) to include in the IEP team a parent as an individual with knowledge regarding the child.

Changes: None.

Private School Placements by Public Agencies (§ 300.349)

Comment: Some commenters suggested that § 300.349(a) be amended to require a public agency to conduct a subsequent IEP meeting before or shortly after actual enrollment with the participation of a representative of the private school.

A few commenters objected to the requirement in § 300.349(a)(2) that the public agency ensure that a representative of a private school or facility at which a disabled student is publicly-placed or referred must attend the initial IEP meeting initiated by the public agency. These commenters recommended that a private school representative be invited but not be forced to attend, since distance could prevent that individual from attending.

Another recommendation made by commenters was that private school staff should not be required to attend the IEP meeting required under § 300.349(a)(2), but that the IEP team should be allowed to confer with private school staff after the meeting. One commenter asked whether if the private school initiates an IEP meeting, all of the individuals identified in § 300.344 must participate.

Another commenter was concerned that this section implies that the team has predetermined placement, and recommended requiring that a second meeting should be held with private school staff to determine if they could provide the services.

One commenter also indicated that § 300.349(b)(2)(ii) is confusing, because it suggests that if either the parent or public agency disagrees with the changes proposed by the private school, those changes will not be implemented. This commenter also questioned why either party should have veto authority, and requested clarification regarding the responsibility to request a hearing. However, another commenter objected that this section gives a private school veto authority over a decision of the IEP team.

One commenter also objected to the use of ''must ensure'' in § 300.349(a) and (b), and recommended that more qualified language be substituted. Another commenter requested clarification that parents have the right to be reimbursed for costs incurred as a result of their participation at IEP meetings associated with their children's public placements at private schools or facilities.

Discussion: Section 612(a)(10)(B) of the Act makes clear that, as a condition of eligibility for receipt of Part B funds, States must ensure that children with disabilities placed in or referred to private schools or facilities by public agencies receive special education and related services, in accordance with an IEP, at no cost to their parents. This statutory requirement substantially reflects prior law in this area. Section 300.401 also provides that IEPs for children with disabilities who are publicly placed at or referred to private schools must meet the requirements of §§ 300.340–300.350.

Because these disabled children are publicly-placed or referred to private schools or facilities as a means of ensuring that they are provided FAPE, it would not be appropriate to change the regulatory language in the manner suggested by these commenters. The regulation gives public agencies and private schools and facilities some flexibility in the manner in which IEP

meetings are conducted; however, there is no need to require additional meetings, since these meetings can be initiated by the public agency or requested by the private school or facility at any time.

Regarding concerns about participation of representatives of private schools at meetings to develop the child's IEP, § 300.349(a)(2) provides that before a child with a disability is placed or referred to a private school or facility, a representative of that private school must be invited to the meeting to develop the student's IEP. However, if the private school representative is unable to attend in person, the public agency must use other methods to ensure that individual's participation at the meeting, including individual or conference telephone calls. Therefore, this regulation does not require participation of a private school representative if that individual is unable to attend the IEP meeting initiated by the public agency.

If a public agency initiates an IEP meeting in connection with a disabled child's placement at or referral to a private school or facility, the requirements of § 300.344 regarding participants at meetings apply. However, after the disabled child enters the private school or facility, § 300.349(b)(1) provides that the private school or facility, at the public agency's discretion, may initiate and conduct meetings for purposes of reviewing or revising the child's IEP. Section 300.344 applies to all IEP meetings for which a public agency is responsible, including those conducted by a private school or facility for a publicly-placed child with a disability.

If a public agency exercises its discretion under § 300.349(b)(1) to permit the private school or facility to initiate and conduct certain IEP meetings, § 300.349(b)(2) specifies that the public agency is still responsible for ensuring that the parents and a public agency representative are involved in those IEP decisions and agree to any changes in the child's program before they are implemented.

Section 300.349(b) does not afford veto authority either to the parents and the public agency, or to the private school, if there is a disagreement about the IEP for the child to be implemented at the private school. This is equally true for IEPs developed for public placements of children with disabilities at private schools.

Further, § 300.349(c) makes clear that the public agency is ultimately responsible for ensuring that the publicly-placed disabled student receives FAPE. Therefore, regardless of whether the public agency initiates meetings for the purpose of reviewing and revising IEPs of children with disabilities publicly-placed at private schools or facilities, the public agency must ensure that the child's IEP is reviewed at least once every twelve months, and that the child's placement at the private school or facility is in accordance with that child's IEP.

If the public agency disagrees with changes proposed by the private school, the public agency nevertheless remains responsible for ensuring that the student receives an appropriate program. If the private school or facility is unwilling to provide such a program, the public agency either must ensure that the student's IEP can be implemented at that or another private school or facility, or must develop an appropriate public placement for the child to address that child's needs. In all instances, the child's placement at the private school or facility must be based on the child's IEP, and that placement must be the LRE placement for the child.

The commenter's assumption that normal due process rights would apply is correct. The due process rights of Part B are available to parents and public educational agencies to resolve issues such as the appropriateness of the child's program at the private school, but representatives of private schools or facilities at which children with disabilities are publicly placed or referred do not have due process rights.

Regarding a parent's right to reimbursement for costs associated with their child's private school placement, § 300.401 reflects the statutory requirements of section 612(a)(10)(B) and requires that a disabled student's placement at a private school by a public agency must be at no cost to the child's parents, and public agencies must ensure that all of the rights guaranteed by Part B are afforded to publicly-placed children with disabilities and their parents. The ''at no cost'' requirements of the Act also would require public agencies to reimburse parents for transportation and other costs associated with their participation at IEP meetings conducted in a geographic area outside of the jurisdiction of the LEA, and such expenditures traditionally have been considered the responsibility of the public agency. *See* discussion under § 300.24 of this attachment.

Changes: None.

Children With Disabilities in Religiously-Affiliated or Other Private Schools

Comment: One commenter suggested that this section be amended to require IEPs for all children with disabilities in the LEA's jurisdiction who are placed by their parents at private schools, regardless of whether these children receive services from the public agency. Another commenter requested that the requirement for IEPs for children with disabilities who are publicly-placed at private schools be removed, and that requirements regarding service plans for children with disabilities placed by their parents at private schools be substituted and moved to Subpart D.

Discussion: There is no statutory authority to require public agencies to develop IEPs for every child with a disability in their jurisdiction placed by their parents at a private school, regardless of whether that child receives services from the LEA. Section 612(a)(10)(A) of the Act requires States to make provision for the participation of private school children with disabilities in programs assisted or carried out under this part, through the provision of special education and related services, to the extent consistent with their number and location in the State.

Because private school children with disabilities do not have an individual entitlement to services under Part B, it would be inconsistent with the statute to require public agencies to develop service plans for those private school children with disabilities who do not receive services from the public agency. However, the commenter's suggestion that proposed § 300.350 should be deleted and that a requirement for service plans for children with disabilities parentally-placed at private schools should be substituted and moved to Subpart D is reasonable.

Since private school children with disabilities are not entitled to receive FAPE in connection with their private school placements (*See* § 300.403(a)), it is misleading to use the term IEP to refer to the plans that are developed to serve them. IEPs must contain, among other elements, the full range of special education and related services provided to children with disabilities under these regulations.

By contrast, § 300.455(b) makes clear that a private school child with a disability receives only those services that an LEA determines it will provide that child, in light of the services that the LEA has determined, through the requirements of §§ 300.453–300.454, it will make available to private school children with disabilities.

Therefore, proposed § 300.350 should be deleted and its content incorporated in § 300.454 with appropriate revisions, and § 300.455(b) should be revised to reflect a new requirement for service

plans for those private school children with disabilities in the LEA's jurisdiction that the LEA has elected to serve in light of the services it makes available to its private school children with disabilities in accordance with the requirements of §§ 300.453–300.454.

Changes: Proposed § 300.350 has been deleted, and a new § 300.454(c) has been added to specify LEA responsibilities regarding development of service plans for private school children. Section 300.455(b) has been changed to reflect the new provision regarding service plans for private school children with disabilities.

IEP—Accountability (§ 300.350)

Comment: Some commenters agreed with this regulation, while other commenters recommended that the note either be revised or deleted. Some commenters believe that both the section and note are inconsistent with Congressional findings on low achievement and new performance standards.

Commenters also recommended that the regulation be strengthened to clarify (1) the district's obligation to monitor, review and revise the IEP if it is not having the desired impact on the student's progress; (2) the parent's responsibility to request an IEP meeting when progress reports indicate that the child's IEP is not effective; (3) the extent of the teacher's responsibility compared with that of the parent and child; and (4) that public agencies and personnel will not be held accountable if a child does not achieve the growth projected in annual goals and benchmarks or objectives if they were implementing an IEP that provided the child appropriate instruction, services and modifications.

Other commenters were concerned about the potential negative effect of this section on the effective implementation of transition services.

Discussion: Section 300.351 has been included in the IEP provisions of the Part B regulations since those regulations first were issued in 1977. It continues to be necessary to make clear that the IEP is not a performance contract and does not constitute a guarantee by the public agency and the teacher that a child will progress at a specified rate. Despite this, public agencies and teachers have continuing obligations to make good faith efforts to assist the child in achieving the goals and objectives or benchmarks listed in the IEP, including those related to transition services.

In addition, it should be noted that teachers and other personnel who must carry out portions of a child's IEP must be informed about the content of the IEP and their responsibility regarding its implementation. Because the clarification of this issue that was previously included in the note to this section is essential to the proper implementation of the Act's IEP requirements, a statement regarding the responsibilities of public agencies and teachers to make good faith efforts to ensure that a child achieves the growth projected in his or her IEP has been included at the conclusion of this section.

In order to meet the new emphasis in the Act that children with disabilities be involved in and progress in the general curriculum and be held to high achievement standards, the IEP provisions must be effectively utilized to ensure that appropriate adjustments can be made to address performance issues as early as possible in the process.

This section does not limit a parent's right to complain and ask for revisions of the child's IEP or to invoke due process procedures if the parent feels that these efforts are not being made. Further, this section does not prohibit a state or public agency from establishing its own accountability systems regarding teacher, school or agency performance if children do not achieve the growth projected in their IEPs.

Changes: The note to this section has been removed. Section 300.351 is redesignated as § 300.350 of these final regulations, and the substance of the note has been added to this section.

Use of LEA Allocation for Direct Services (§ 300.360)

Comment: Very few comments were received regarding this section. One comment recommended that the words ''or unwilling'' be added to § 300.360(a)(2) to correspond to the language of § 300.360(a)(3) of the current regulations. Another comment asked that the language in the second paragraph in the note following § 300.360 be updated to substitute the word ''disabled'' for the word ''handicapped.'' This comment also requested that a similar change be made to the note following § 300.552.

Discussion: Section 300.360(a) essentially incorporates the text of the current regulatory provision verbatim, except with the minor modifications contained in section 613(h)(1) of Pub. L. 105–17. The legislative history makes clear that § 613(h)(1) has been ''retained without substantive alteration'' from prior law. (S. Rep. No. 105–17 at 15). It is true that under § 300.360(a)(3) of the regulations, an SEA may use funds that would have gone to an LEA for direct services if the SEA finds that the LEA either is unable or unwilling to establish and maintain programs of FAPE for children with disabilities. This regulatory provision implemented section 614(d)(1) of prior law which contained the reference to LEAs that were unwilling to establish and maintain programs of FAPE. However, since these words have not been retained in section 613(h)(1) with regard to an LEA's or State agency's failure to establish and maintain programs of FAPE, yet remain in the statute with regard to an LEA's failure to consolidate with other LEA's in applying for Part B funds, it is not appropriate to make the change requested by this comment.

Consistent with the general decision to not include notes in these final regulations, the note following § 300.360 should be deleted. However, the substance of the note related to the SEA's responsibility to ensure the provision of FAPE if an LEA elects not to apply for its Part B funds, or the amount of Part B funds is not sufficient to provide FAPE should be added to the text of the regulations because of its importance in ensuring that the purposes of this part are appropriately implemented.

A new paragraph also should be added to clarify, by referencing § 300.301, that the SEA may use whatever funding sources are available in the State to carry out its responsibilities under § 300.360.

Regarding the note following § 300.360, it is important to point out that the language that uses ''handicapped'' instead of disabled was taken verbatim from the original regulations for this program issued in 1977. Included in this note were direct quotations from the Department's regulation implementing Section 504 of the Rehabilitation Act of 1973 at 34 CFR Part 104, which has not yet been updated to substitute the term ''disabled'' or ''disability'' for the term ''handicapped'' or ''handicap.'' While the term ''handicapped'' is not consistent with current statutory language, it is not appropriate to modify the quoted language in the notes until the terminology in the Section 504 regulation is updated.

Changes: The substance of the note relating to SEA's responsibilities to ensure FAPE when the LEA elects not to receive its Part B funds, or there are not sufficient funds to ensure the provision of FAPE has been added to the text of the regulation. The note has been deleted. A reference is made to other funding sources under § 300.301.

Use of SEA Allocations (§ 300.370)

Comment: Several favorable comments were received regarding this section. One comment supported paragraph (a)(4), which permits the use of State agency allocations to assist LEAs with personnel shortages. One comment requested that a new paragraph (c) be added to reflect the statutory requirement ''that LEAs participate in the priority setting for the allocation of these funds.'' One comment requested that a note be added following this section to clarify that direct services ''can include using the State allocation of Part B funds to help LEAs cover unexpected and extraordinary costs of providing FAPE to a child with a disability in any setting along the continuum.''

Discussion: There is no statutory requirement that would require a State to obtain input from LEAs in setting priorities for how the State agency allocation should be spent. So long as the expenditures are consistent with the requirements of this part, States have discretion to determine the manner in which the funds are allocated.

Regarding the suggestion that a note be added following § 300.370, consistent with the decision to not include notes in these regulations, a note will not be added. However, the State agency allocation may be used for direct and support services, including the expenditure described in this comment. Nothing in this part would preclude an SEA from using its State allocation to assist an LEA in defraying the expenses of a costly placement for a student with a disability if it is determined that such a placement is necessary to ensure the provision of FAPE to that disabled student.

Changes: No change has been made in response to these comments. See discussion of comments received under § 300.712 regarding a change to § 300.370.

General CSPD Requirements (§ 300.380)

Comment: A number of comments were received regarding the recruitment and training of hearing officers included as part of CSPD. One comment recommended that § 300.380(a)(2) regarding an adequate supply of qualified special education, regular education, and related services personnel be expanded to include hearing officers and mediators.

Some commenters recommended that § 300.381 include a provision requiring each state ''to establish a council of parents, educators, attorneys, hearing officers, and mediators to develop and oversee the recruitment, training, evaluation, and continuing education of hearing officers and mediators'' and to ensure that they receive pre-service training and at least annual in-service training on special education law and promising practices, materials and technology.

A number of commenters indicated that, in order for personnel to be ''qualified'' under this part or a State's CSPD, ''the personnel must meet the State's legal licensing or certification requirements'' and ''must have the skills and knowledge necessary to ensure that personnel are qualified to work with children with disabilities.'' Another comment sought clarification regarding use of Part B funds for the training of regular education personnel.

Consistent with the emphasis on implementation, one comment recommended that § 300.380(a)(4) be amended to require that a State's CSPD be updated at least every two years, instead of at least every five years, as stated in the NPRM, ''and as often as the quality of education for children with disabilities within the State may require.'' The comment also objected that the regulation provides that States that have a State Improvement Plan under section 653 of the Act have met their CSPD requirements. Therefore, the comment recommended that § 300.380(b) be deleted, and instead be replaced with the last paragraph of the note following § 300.135, which gives a State that has a State Improvement Plan the option of using it to meet its CSPD, if it chooses to do so.

Discussion: States must ensure that mediators and hearing officers are appropriately trained and have the requisite knowledge and expertise regarding the requirements of this part. Otherwise, the due process rights of children with disabilities and their parents may not be adequately safeguarded under this part.

With respect to mediators, section 615(e)(2)(A)(iii) requires that SEA or LEA procedures for mediation ensure that the mediation is conducted by a qualified and impartial mediator who is trained in effective mediation techniques. Section 615(e)(2)(C) requires the State to maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services to children with disabilities.

Under current regulations, public agencies must maintain a list of impartial hearing officers and their qualifications. Further, the SEA's responsibility under section 615 of the Act to ensure that the procedural safeguard requirements of the Act are established and implemented includes the responsibility to ensure that impartial due process hearing officers are appropriately trained. In addition, § 300.370 makes clear that one of the support services for which the Part B funds reserved for State level activities may be expended is the training of hearing officers and mediators.

The comments regarding ensuring that personnel meet State licensing or certification requirements or are otherwise qualified under this part are addressed elsewhere in this attachment in the discussions of qualified personnel and personnel standards. With regard to the training of regular education personnel, consistent with a State's CSPD responsibilities, the State must ensure an adequate supply of special education, regular education, and related services personnel. Further, the training of regular education personnel is necessary to the proper administration of the Act and regulations, including carrying out the Act's LRE provisions, and personnel development is an appropriate expenditure of funds under this part and is one of the support services for which the State level allocation under § 300.370 may be expended.

Finally, there is nothing in this part that would prevent a State from updating its CSPD more frequently than at least every five years if the State chooses to do so. Therefore, there is no reason to incorporate the language from the second paragraph of the note following § 300.135 in place of § 300.380(b), since § 300.380(b) gives a State that has a State Improvement plan under section 653 the option of using it to satisfy its CSPD obligations, if the State chooses to do so.

Changes: The section has been retitled ''General CSPD requirements.''

Adequate Supply of Qualified Personnel (§ 300.381)

Comment: Only a few comments were received regarding this section. Some commenters requested that a provision be added to § 300.381(b) ''requiring the State to describe the strategies it will use to address personnel vacancies and shortages'' identified under that section. Another comment recommended that this section highlight shortages of personnel to do behavioral assessments and programming. Another comment recommended that additional language be included in § 300.381 requiring additional recruitment strategies and fiscal arrangements to ensure an adequate supply of qualified personnel.

Discussion: It is acknowledged that it is very important to ensure that appropriately-trained and

knowledgeable individuals conduct behavioral assessments of children with disabilities under this part. However, the obligation under § 300.381 is a general obligation to analyze State and local needs for professional development, including areas in which there are shortages, to ensure an adequate supply of qualified special education, regular education, and related services personnel under this part. Therefore, the regulation does not identify specific categories of personnel. In addition, States already have the ability to develop additional recruitment strategies and fiscal arrangements if they determine that they are needed to address their particular personnel needs.

Changes: None.

Improvement Strategies (§ 300.382)

Comment: One comment recommended that the name of this section be changed to ''Comprehensive system strategies'' to avoid confusion with Part D. Another comment recommended that the words ''content knowledge and collaborative skills'' to meet the needs of infants and toddlers and children with disabilities be expanded to specify which skills are involved, and suggested that skills such as instruction, behavioral management, communication, and collaboration be included.

One comment expressed concern that the section in the NPRM was not sufficiently strong to ensure that States design their CSPD to ensure that core instructional and related needs of children with disabilities are appropriately addressed. One comment requested clarification regarding which entity in the State is responsible for ensuring that the requirements of § 300.382 are met. One comment suggested that the reference to behavioral interventions in § 300.382(f) should be changed to positive behavioral supports to be more consistent with other provisions of these regulations.

Several comments were receive regarding § 300.382(g), particularly regarding the use of the phrase, ''if appropriate.'' One comment requested clarification on how ''appropriate'' would be defined, as well as guiding principles ''for directing the adoption of promising practices.'' Another comment recommended that the phrase, ''if appropriate'' be eliminated when referring to the State's adoption of promising practices and materials and technology.

One comment was particularly favorable about the requirement for joint training of parents, special education and related services providers, and general education personnel. Another comment recommended that this section be expanded to include joint training of hearing officers and mediators with parents and education personnel.

One comment recommended that this section be amended ''to require reports to the Department by the SEA bi-annually, including a survey of parents of students with IEPs regarding the effectiveness of the strategies and other tools being taught to teachers,'' and that parents ''should also be given the chance to state what tools they think ought to be taught'' to teachers. One comment recommended that a note be added following this section to clarify that the assurance that regular education and special education personnel be prepared means that ''they must be required to be prepared rather than simply 'offered the opportunity.'''

Discussion: There is no need to change the name of this section since it is unlikely that, even if it were changed, it would reduce the potential for confusion between CSPD responsibilities under Part B and those under Part D. While the delineation of content and skills for personnel serving infants and toddlers and children with disabilities is important, inherent in CSPD is the obligation of each State to identify its particular personnel development needs in light of factors that are specific to each individual State. The same is true with respect to strategies and needs. The CSPD is one of several mechanisms that States have to ensure that children with disabilities receive appropriate instruction and services consistent with the purposes of this part; therefore, the regulations do not specify which needs must be addressed through CSPD.

References throughout this part to State mean the SEA, unless the State has designated an entity other than the SEA to carry out the functions of this part. Regarding § 300.380(f), that section is directed at the State's enhancement of the ability of teachers and others to use strategies, including behavioral interventions. The regulatory language about behavioral interventions parallels the language in section 614(d)(3)(B)(i) of the Act.

It also should be pointed out that the term behavioral interventions is a broad term that includes positive behavioral supports. Regarding the use of ''appropriate'' in § 300.382(g), a State's obligation to adopt promising educational practices, materials, and technology is dependent on the State's needs. Hence, the use of the words ''if appropriate'' in this regulation ensures States have flexibility in this area.

The discussion of the role of hearing officers and mediators in response to comments on § 300.380 also applies to the suggestion on joint training of parents and special education and related services and general education personnel required by § 300.382(j) of these regulations. It is important to point out that there is nothing in this part that would preclude a State from including hearing officers and mediators in the joint training activities if it chooses to do so.

The comment's suggestion for additional reporting requirements has not been accepted. While input from parents regarding the effectiveness of personnel development strategies would be useful, the Department is committed to reducing paperwork burdens rather than increasing them.

Finally, with regard to training of general education personnel, § 300.382(j) already requires the participation of these individuals in joint training activities.

Changes: None.

Subpart D

Responsibility of SEA (§ 300.401)

Comment: Several commenters asked that § 300.401(a)(3) specify whether the standards that apply to private schools are limited to those necessary for the comparable provision of special education and related services to those provided in public agencies (for example, do private schools have to comply with SEA personnel standards beyond the qualifications needed to provide special education and related services).

Discussion: Children with disabilities who are placed by public agencies in private schools are entitled to receive FAPE to the same extent as they would if they were placed in a public school. FAPE includes not just the special education and related services that a child with a disability receives, but also includes an appropriate preschool, elementary and secondary school education in the State involved and must be provided in conformity with the child's IEP.

The IDEA Amendments of 1997 made a number of changes to reinforce the importance of the participation of children with disabilities in the regular education curricula and the need for children with disabilities to have the opportunity to receive the same substantive content as nondisabled students. These include provisions that tie IEP goals and objectives to the regular education curriculum (section

614(d)(1)(A)), establish performance goals and indicators for children with disabilities consistent with those that a State establishes for nondisabled children (section 612(a)(16)), and require the participation of children with disabilities in the same general State and district-wide assessments as nondisabled students (section 612(a)(17)).

Because of these changes in the statute and the confusion that has existed over whether all aspects of the education provided by private schools to publicly-placed children with disabilities had to meet the standards that apply to public agencies, a change should be made in the regulations to ensure that children who are publicly-placed in private schools receive services consistent with the SEAs' statutory obligation to ensure that FAPE is provided. SEAs must ensure that public agencies that place children with disabilities in private schools as a means of providing FAPE make sure that the education provided to those publicly-placed children with disabilities meets all standards that apply to educational services provided by the SEA and LEA that are necessary to provide FAPE.

With respect to personnel standards, for example, this would mean that all personnel who provide educational services (including special education and related services and non-special education services) meet the personnel standards that apply to SEA and LEA personnel providing similar services. The responsibility for determining what constitutes the appropriate personnel standard for any given profession or discipline is a State and local matter and State and local officials have great flexibility in exercising this responsibility. With regard to special education and related services personnel, however, the regulations provide some parameters for how personnel standards are developed. (See, §§ 300.21, 300.135, and 300.136).

Changes: A change has been made to specify that a child with a disability placed by a public agency as the means of providing FAPE to the child must receive an education that meets the standards that apply to the SEA and LEA.

Implementation by SEA (§ 300.402)

Comment: Another issue raised by comment was whether the term ''public agency'' in § 300.402(b) referred to just public schools or included other agencies. Some commenters requested that the term ''applicable standards'' in that paragraph be clarified to include application, compliance, on-site visits, monitoring, curriculum and evaluation standards. Several commenters requested various expansions of § 300.402(c) such as adding a 120-day consultation period prior to adoption of standards that apply to private schools, and requiring consultation in all phases of the development and design of SEA standards and compliance and monitoring procedures that apply to these private schools.

At least one commenter requested a new provision be added establishing a mechanism for appeals to the Secretary on standards that an SEA wants to apply to private schools.

Discussion: The term ''public agency'' as used in these regulations is defined in § 300.22. The term ''applicable standards'' is sufficient to encompass the variety of standards that SEAs may have that apply to private schools accepting public agency referrals of children with disabilities for the provision of FAPE. Further regulation about how States provide opportunities for private schools and facilities to participate in the development and design of State standards that apply to them is inappropriate. States should have flexibility in developing standards that meet the requirements of the IDEA.

The standards that SEAs apply to private schools accepting public agency referrals of children with disabilities for the provision of FAPE are, so long as they meet the requirements of Part B and its regulations, a State matter, so no appeal to the Secretary is appropriate.

Changes: None.

Placement of Children by Parent if FAPE is at Issue (§ 300.403)

Comment: Some commenters stated that some school districts may be using this provision as the basis for denying special education services to children with disabilities voluntarily enrolled in a private school and requested that the regulations make clear that these children are covered by the provisions of the regulations regarding participation of private school children in the Part B program.

Discussion: The statute in section 612(a)(10)(C)(i) is clear that an LEA must provide for the participation of parentally-placed private school children with disabilities in the Part B program with expenditures proportionate to their number and location in the State, even though the LEA is not otherwise required to pay the costs of education, including special education and related services, for any individual child with a disability who is voluntarily placed in a private school under the terms of § 300.403.

Changes: A change has been made to § 300.403(a) to clarify that the provisions of §§ 300.450–300.462 apply to children with disabilities placed voluntarily by their parents in private schools, even though the LEA made FAPE available to those children.

Comment: One commenter requested that the regulations clearly state whether a public agency must evaluate and develop an IEP for each private school child with a disability each year in order to avoid potential reimbursement claims.

Discussion: The new statutory provisions, incorporated in the regulations in § 300.403 (c), (d), and (e), provide that, as a general matter for children with disabilities who previously received special education and related services under the authority of a public agency, the claim for reimbursement of a private placement must be made before a child is removed from a public agency placement. It would not be necessary for a public agency to develop an IEP that assumes a public agency placement for each private school child each year. LEAs do have ongoing, independent responsibilities under the child find provisions of §§ 300.125 and 300.451 to locate, identify and evaluate all children with disabilities in their jurisdiction, including children whose parents place them in private schools. This would include scheduling and holding a meeting to discuss with parents who have consented to an evaluation, the results of the evaluation, the child's needs, and whether the child is eligible under Part B. (See §§ 300.320, and 300.530–300.535.)

In addition, the LEA must offer to make FAPE available if the child is enrolled in public school. A new evaluation need not be performed for each private school child each year, but evaluations for each private school child must meet the same evaluation requirements as for children in public agency placements, including the requirement for reevaluation in § 300.536. In addition, since LEAs must make FAPE available to all children with disabilities in their jurisdiction (§§ 300.121, 300.300), public agencies must be prepared to develop an IEP and to provide FAPE to a private school child if the child's parents re-enroll the child in public school.

Changes: None.

Comment: Several commenters requested that paragraph (c) be revised to prohibit reimbursement if the private placement is inappropriate, which was a part of the Supreme Court's standard on reimbursement announced in *School Comm. of Burlington* v. *Department of*

Ed. of Mass., 471 U.S. 359 (1985) (*Burlington*). Another commenter requested that the term ''timely manner'' be defined.

Another commenter requested that the Department clarify that the provisions of § 300.403 (c), (d), and (e) apply only in situations in which the child previously has received special education and related services under the authority of a public agency. In other situations, where the child has not yet been provided special education and related services, the Department should recognize that hearing officers and courts still retain broad equitable powers to award relief, and will continue to apply the reimbursement standard in *Burlington*.

Discussion: It is not in the public interest to require that public funds be spent to support inappropriate private placements. For these reasons, paragraph (c) should be revised consistent with the basic standard for reimbursement articulated by the Supreme Court in the *Burlington* and *Carter* cases. Since, as the Supreme Court made clear in *Carter,* in instances where the school district has not offered FAPE, the standard for what constitutes an appropriate placement by parents is not the same as the standards States impose for public agency placements under the Act, this new provision makes clear that parental placements do not need to meet State standards in order to be ''appropriate'' under this requirement.

As a commenter noted, hearing officers and courts retain their authority, recognized in *Burlington and Florence County School District Four* v. *Carter,* 510 U.S. 7 (1993) (*Carter*) to award ''appropriate'' relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section 615(l)(2)(B)(iii) in instances in which the child has not yet received special education and related services. This authority is independent of their authority under section 612(a)(10)(C)(ii) to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

The term ''timely manner'' should not be defined, since what constitutes timely provision of FAPE is best evaluated within the specific facts of individual cases. (See, *e.g.*, §§ 300.342(b) and 300.343(b)).

Changes: Paragraph (c) has been revised to include the requirement that the private placement by the parents must be appropriate (as determined by a court or hearing officer) in order to be eligible for reimbursement, and to make clear that a parental placement does not need to meet the State standards that apply to education provided by the SEA and LEAs in order to be found to be appropriate.

Comment: A number of commenters suggested definitions of various terms used in § 300.403(d) and (e) and other changes to the provisions of these paragraphs, some of which would have made recovering reimbursement more difficult for parents and others which would have limited school districts' use of these provisions in defense of a reimbursement claim.

Discussion: With the exception of making clear that the regulation also applies when parents choose to enroll their child in a private preschool program, no change is necessary. The regulation in § 300.403(d) and (e) reflects the statutory language, which balances the interests of parents and public agencies. (See the explanation of the definition of ''business day,'' under the discussion of comments to § 300.8, a term which is used in several places in these regulations.)

Changes: Paragraph (c) has been revised to specify that the reimbursement provisions of § 300.403 also apply if parents of a child with a disability who previously received special education and related services under the authority of a public agency enroll the child in a private preschool program.

Definition of ''Private School Children With Disabilities'' (§ 300.450)

Comment: Several commenters asked that the Department clarify whether children with disabilities who are home-schooled are included in the definition of ''private school children with disabilities''.

Discussion: State law determines whether home schools are ''private schools.'' If the State recognizes home schools as private schools, children with disabilities in those home schools must be treated in the same way as other private school children with disabilities. If the State does not recognize home schools as private schools, children with disabilities who are home-schooled are still covered by the child find obligations of SEAs and LEAs, and these agencies must insure that home-schooled children with disabilities are located, identified and evaluated, and that FAPE is available if their parents choose to enroll them in public schools.

Changes: None.

Child Find for Private School Children With Disabilities (§ 300.451)

Comment: Some commenters stated that there have been major difficulties in many areas of the country in ensuring that private school children with disabilities are identified and evaluated. Some commenters also noted the new statutory provision limiting the amount of funds that must be spent on parentally-placed private school children with disabilities based on the number of identified parentally-placed private school children with disabilities creates an additional need for timely and effective child find for this population. These commenters requested that the regulation be revised to require that consultation with appropriate representatives of private school children occur before the public agency conducts child find activities and to provide that child find activities for parentally-placed private school children be done on the same or comparable timetable as for public school children. Another commenter requested that child find activities include children placed by their parents in private residential facilities.

Discussion: The role of child find for parentally-placed private school children is very important for services for this population. Section 612(a)(10)(A)(i) and the regulations in § 300.452 tie the amount of money that will be used for parentally-placed private school children with disabilities to the number of parentally-placed private school children with disabilities in each LEA. Clearly, the adequacy of the LEA's child find activities for parentally-placed private school children with disabilities will be crucial to determining how many children with disabilities are parentally-placed in private schools, and consequently, the amount of funds that must be spent by an LEA on special education and related services to parentally-placed private school children with disabilities. For these reasons, LEAs should consult with representatives of private school children with disabilities on how to conduct child find activities for parentally-placed private school children with disabilities in a manner that is comparable, which would include timing, to child find for public school children with disabilities.

LEAs are required to conduct child find activities for children residing in their jurisdiction. Generally, as a matter of State law, children are considered to reside in the home of their parents even if they physically do not live there. Whether children who are in private residential facilities are residing in the jurisdiction of an LEA when that facility is within the boundaries of the LEA will be dependent on State law.

Changes: The term ''religiously-affiliated'' has been replaced with

''religious,'' to more accurately reflect the types of schools. The term ''public agency'' has been replaced with ''LEA,'' a technical change. Paragraph (a) has been revised (see description of comments received under § 300.453 regarding that revision). A new paragraph (b) has been added requiring public agencies to consult with representatives of parentally-placed private school students with disabilities on how to conduct child find activities for that population in a manner that is comparable to that for public school children.

Provision of Services—Basic Requirement (§ 300.452)

Comment: None.

Discussion: None.

Changes: Consistent with the comments, discussion, and changes under § 300.341, a new paragraph (b) has been added to § 300.452 regarding the SEA's responsibility for ensuring that a services plan is developed and implemented for each private school child with a disability who has been designated to receive special education and related services under this part.

Expenditures (§ 300.453)

Comment: One commenter asked for clarification that there is no obligation to spend more than the total per capita Federal allocation to the LEA, and use of State or local funds are not required, for private school children. Another commenter requested that the note following this section be integrated into the regulation, as it provided valuable guidance to States. Several commenters were concerned that LEAs were suggesting that no services needed to be provided to private school students as a proportional share of the Federal funds was being used to conduct evaluations of these children. Another commenter asked whether a longstanding State program that allocates funding to be used for private school children for certain special education and related services and evaluations can be used to satisfy the requirements of this section.

Several commenters noted the importance of determinations of the number of parentally-placed private school children with disabilities in calculating required expenditures and asked for specificity in how this number is determined. Another commenter requested that the Department require that each LEA separately account for funds used for private school children with disabilities and clarify that these funds are only to provide special education and related services and cannot be used to carry out activities such as child find.

Discussion: It is important to clarify that there is a distinction under the statute between the obligation to conduct child find activities, including individual evaluations, for parentally-placed private school children with disabilities, and the obligation to use an amount of funds equal to a proportional amount of the Federal grant to provide special education and related services to parentally-placed private school children with disabilities. The obligation to conduct child find, including individual evaluations, exists independently from the services provision described in §§ 300.452–300.456, and the costs of child find activities, such as evaluations, may not be considered in determining whether the LEA has spent the amount described in § 300.453 on providing special education and related services to parentally-placed private school children with disabilities.

The statute describes the minimum amount that must be spent on these services and does not specify that only Federal funds can be used to satisfy this obligation. Thus, if a State or LEA uses other funds to provide special education and related services to private school children, those funds can be considered in satisfying the provisions of § 300.453, so long as the services are provided in accordance with the other provisions of §§ 300.452–300.462.

The statute does not prohibit a State or LEA from spending additional State or local funds to provide special education and related services to private school children. To make this important point, in light of the general decision to remove all notes from these regulations, the note that followed this section in the NPRM should be incorporated into this section as paragraph (d).

Determining the number of parentally-placed private school children with disabilities is particularly important. Child find, which includes locating, identifying and evaluating children, is an ongoing activity that SEAs and LEAs should be engaged in throughout the year for all children in order to meet the statutory obligations to ensure that all children in the State are located, identified and evaluated and that all children have the right to FAPE. The statute does not distinguish between child find activities for children enrolled in public schools and those conducted for children enrolled in private schools.

In addition, the importance of child find for determining the amount to be spent on services for parentally-placed private school children with disabilities also argues for clarity in the regulations that child find activities for private school children with disabilities must be comparable to child find activities conducted for children in public schools. Further regulation also is necessary on determining the number of parentally-placed private school children with disabilities so as to eliminate the potential for disputes about how to determine the number of private school children with disabilities that will be used as the basis for the calculation and to provide a clear standard for LEAs to meet. Possible alternative standards for who to count, such as private school children referred for evaluation, or private school children with disabilities who are receiving services pursuant to §§ 300.450–300.462 are not consistent with the statutory language.

Since LEAs and SEAs are already counting children with disabilities who are receiving special education and related services on December 1 or the last Friday in October of each year (the State decides which date to use on a State-wide basis) for funding and data reporting purposes, conducting the count of eligible parentally-placed private school children with disabilities on that date as well is reasonable, reduces the amount of double counting of private school children with disabilities who move from one location to another, and gives States the same flexibility they have with regard to counting children with disabilities who are receiving services. Furthermore, this count will provide the public agencies the basis on which they will be able, consistent with § 300.454, to plan for the services that will be provided during the subsequent school year.

Changes: A new paragraph (c) has been added to § 300.453 to specify that the costs of child find activities for private school children with disabilities may not be considered in determining whether the LEA met the expenditures requirements of this section. A paragraph (d) has been added to clarify that States and LEAs are not prohibited from spending additional funds on providing special education and related services to private school children with disabilities. The note has been removed.

Section 300.451 has been revised to specify that child find activities for parentally-placed private school children with disabilities be comparable to child find activities for children with disabilities in public schools.

Section 300.453 has been revised to add a new paragraph (b) that specifies that each LEA consult with representatives of private school children with disabilities to decide how to conduct the count of the number of parentally-placed children with

disabilities in private schools on December 1 or the last Friday of October for determining the amount that must be spent on providing special education and related services for private school children for the subsequent school year, and that the LEA ensure that count is conducted.

Services Determined (§ 300.454)

Comment: Several commenters requested clarification of ''timely and meaningful'' so that parents, private school representatives and LEAs would have a better understanding of how this process works. Various other suggestions included public notice of the consultation meetings, public transcripts of those meetings, and requiring explanations of refusals to provide service, and decisions on allocations of funds for services for private school children.

Discussion: The needs of private school children with disabilities, their number and their location will vary over time and, depending on the circumstances in a particular LEA, will differ from year to year. However, an annual consultation with representatives of private school children is not required, since States and LEAs are best able to determine the appropriate period between consultations based on circumstances in their jurisdictions.

Paragraph (b)(3) specifies that consultation must take place before decisions are made affecting the opportunities of private school children with disabilities to participate in the State's special education program which is assisted or carried out with Part B funds. The regulations on this consultation process have not been amended, in the expectation that all parties will treat others in the process with reason and respect.

Changes: No change was made in response to these comments. See discussion of comments received under § 300.350 regarding a change to § 300.454.

Services Provided (§ 300.455)

Comments: Several commenters expressed concern that using the term ''IEP'' in this section added to confusion over whether private school children served under these provisions were to receive all the services they need, or just those services that had been decided through the consultation process would be provided. Several suggested that a different term, ''statement of special education and related services to be provided'' be substituted. Other commenters objected to the definition of a term ''comparable in quality'' not used in the statute.

Discussion: The use of the term ''IEP'' could result in confusion about whether these children receive all the services they would have received if enrolled in a public school. A different term, services plan, will be used. However, to the extent appropriate given the services that the LEA has selected through the consultation process described in § 300.454, that services plan must meet the requirements for an IEP in order to ensure that the services are meaningfully related to a child's individual needs. For example, in almost all instances, the services plan developed for an individual private school child with a disability would have to meet the requirements of § 300.347(a)(1)–(4), (6) and (7).

Whether those statements would also have to meet the requirements of § 300.347(a)(5), (b) and (c) would depend on the services that are to be provided to the parentally-placed private school student with a disability. Paragraph (c) provides useful guidance to LEAs and parents that will prevent disputes. That content will be retained, but the definition should be eliminated.

Changes: Paragraph (a) has been retitled ''General.'' Paragraph (b) has been revised by referring to a services plan instead of an IEP and by specifying that, for the services that are provided, the services plan, to the extent appropriate, must meet the content requirements for an IEP (§ 300.347) and be developed consistent with §§ 300.342–300.346. The useful content from paragraph (c) of the NPRM has been incorporated into paragraph (a).

Location of Services; Transportation (§ 300.456)

Comment: Some commenters requested that the Department require services to children in private schools be provided on-site, stating that providing services at a neutral site is disruptive and time consuming. Another asked for more specificity as to the phrase ''consistent with law.'' Several commenters objected to the treatment of transportation in § 300.456(b), some stating that there is no individual right to transportation under the Act, while others noted that providing transportation services could use all the funds available for special education and related services. Others asked why a certain related service (transportation) had been singled out for special treatment.

Discussion: Decisions about whether services will be provided on-site or at some other location should be left to LEAs, in consultation with representatives of private school children. Although in many instances on-site services are most effective, local considerations should allow flexibility in this regard. A change should be made to § 300.454(b)(1) to make clear that where services are provided is subject to consultation with representatives of private school children.

The phrase ''consistent with law'' is statutory. As Note 1 following this section indicated, the Department's position, based on the decisions of the Supreme Court in *Zobrest* v. *Catalina Foothills School Dist.* (1993) and *Agostini* v. *Felton* (1997) is that there is no Federal constitutional prohibition on providing publicly-funded special education and related service on-site at private, including religious schools. These decisions make clear that LEAs may provide special education and related services on-site at religious private schools in a manner that does not violate the Establishment Clause of the First Amendment to the U.S. Constitution.

While the statute and regulation do not require the provision of services on-site to private school children, to the extent it is possible to do so, LEAs are encouraged to provide those services at private school sites so as to minimize the amount spent on necessary transportation and to cause the least disruption in the children's education. However, State constitutions and laws must also be consulted when making determinations about whether it is consistent with law to provide services on-site at a religious school.

If services are offered at a site separate from the child's private school, transportation may be necessary in order to get the child from one site to the other, or the child may be effectively denied an opportunity to benefit. In this sense then, transportation is not a related service but is a means of making the services that are offered accessible. LEAs should work in consultation with representatives of private school children to ensure that services are provided at sites that will not require significant transportation costs. In light of the decision to remove notes from the final regulations, paragraph (b) of this section should be revised to incorporate the concept from the note that transportation does not need to be provided between the child's home and the private school.

Changes: Section 300.456 has been retitled ''Location of services; transportation.'' A technical change has been made to paragraph (a) to refer to religious schools rather than religiously-affiliated schools. Paragraph (b) has been revised to explain when