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34 CFR Parts 300, 301, and 303

Assistance to States for the Education of Children With Disabilities, Preschool Grants for Children With Disabilities, and Early Intervention Program for Infants and Toddlers With Disabilities; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 300, 301 and 303

RIN 1820–AB40

Assistance to States for the Education of Children With Disabilities, Preschool Grants for Children With Disabilities, and Early Intervention Program for Infants and Toddlers With Disabilities

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing the Assistance to States for Education of Children with Disabilities program, the Preschool Grants for Children with Disabilities program, and the Early Intervention Program for Infants and Toddlers with Disabilities. These amendments are needed to implement changes recently enacted by the Individuals with Disabilities Education Act Amendments of 1997.

DATES: Comments must be received by the Department on or before January 20, 1998.

The Department plans to hold public meetings in conjunction with this NPRM. The dates and times of the meetings are in the section titled *Public Meetings* under Invitation to Comment elsewhere in this preamble.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Thomas Irvin, Office of Special Education and Rehabilitative Services, U.S. Department of Education, Room 3090, Mary E. Switzer Building, 330 C Street., SW., Washington, DC 20202. Comments may also be sent through the Internet to: comment@ed.gov

You must include the term ''Assistance for Education'' in the subject line of your electronic message.

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of those comments may also be sent to the Department representative named in the **ADDRESSES** section.

The Department plans to hold public meetings in conjunction with this NPRM. The locations of the meetings are in the section titled *Public Meetings* under Invitation to Comment elsewhere in this preamble.

FOR FURTHER INFORMATION CONTACT: Thomas Irvin (202) 205–8969 or JoLeta Reynolds (202) 205–5507. Individuals who use a telecommunications device for the deaf (TDD) may call (202) 205–5465.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to Katie Mimcy, Director of the Alternate Formats Center. Telephone: (202) 205–8113.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. To ensure that public comments have maximum effect in developing the final regulations, the Department urges commenters to identify clearly the specific section or sections of the proposed regulations that each comment addresses and to arrange comments in the same order as the proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 3090, Mary E. Switzer Building, 300 C St., SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

On request the Department supplies an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking docket for these proposed regulations. An individual with a disability who wants to schedule an appointment for this type of aid may call (202) 205–8113 or (202) 260–9895. An individual who uses a TDD may call the Federal Information Relay Service at 1–800–877–8339, between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

To assist the Department in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

Public Meetings

In a notice published in the **Federal Register** on September 17, 1997 (62 FR 48923–48925), the Department announced public meetings to obtain public comment on the statutory requirements of the IDEA Amendments of 1997. The Department will use those public meeting dates and times for public comment on this NPRM.

Individuals who wish to make a statement at any of the meetings are encouraged to do so. Time allotted for each individual to testify will be limited and will depend on the number of speakers wishing to testify at each session. It is likely that each participant choosing to comment will be limited to four minutes. Persons interested in making oral public comment will be able to sign-up to make a statement on the day of the meeting at the Department's public meeting on-site registration desk on a first-come-first served basis. If no time slots remain, then the Department will reserve a limited amount of additional time at the end of each hearing to accommodate those individuals. (Every effort will be made to have ample time to hear all individuals who wish to make a statement.) For individuals who want to speak at the public meeting, registration will begin at 1:00 p.m., in all cities except Washington, DC where it will begin at 12:00 Noon, in each hotel or public building at the registration table outside the room where the public meeting will be held. The dates, times, and locations of the meetings are as follows:

October 23, 1997—2:00 p.m.–7:00 p.m.

Region I—Logan Ramada Hotel, 75 Service Road, Logan International Airport, Boston, MA 02128

October 27, 1997—2:00 p.m.–7:00 p.m.

Region IV—Radisson Hotel Atlanta, 165 Courtland and International Blvd., Atlanta, GA 30303

October 28, 1997—2:00 p.m.–7:00 p.m.

Region VI—Radisson Hotel Dallas, 1893 West Mockingbird Lane, Dallas, TX 75235

November 4, 1997—1:00 p.m.–5:00 p.m.

Department of Education, Government Service Administration (GSA), 7th and D Streets, S.W. (Auditorium), Washington, D.C. 20407

November 18, 1997—2:00 p.m.–7:00 p.m.

Region VIII—Four Points, 3535 Quebec Street, Denver, CO 80207

November 21, 1997—2:00 p.m.–7:00 p.m.

Region IX—Holiday Inn Select/ Chinatown, 750 Kearny Street, San Francisco, CA 94108

November 24, 1997—2:00 p.m.–7:00 p.m.

Region V—Sheraton North Shore, 933 Skokie Boulevard, Northbrook, IL 60062

The meeting sites are accessible to individuals with disabilities. An individual with a disability who will need an auxiliary aid or service to participate in the meeting (e.g., interpreting service, assistive listening device, or materials in an alternate format) should consult the notice mentioned in this document for the person to contact at least two weeks before the scheduled meeting date to ensure that accommodations requested will be available. Although the Department will attempt to meet a request received after that date, the requested accommodation may not be available because of insufficient time to arrange it.

Background

On June 4, 1997, the Individuals with Disabilities Education Act (IDEA) Amendments of 1997 were enacted into law as Pub. L. 105–17.

The statute passed by Congress and signed by the President reauthorizes and makes significant changes to IDEA to better accomplish the following purposes: (1) Ensure that all children with disabilities have available a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; (2) ensure that the rights of children with disabilities and parents of those children are protected; (3) assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; (4) assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; (5) ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and (6) assess, and ensure the effectiveness of, efforts to educate children with disabilities.

On June 27, 1997, the Secretary published a notice in the **Federal Register** requesting from the public advice and recommendations on regulatory issues under the IDEA Amendments of 1997. As of the end of August, 1997, 334 comments were received in response to the Notice, including letters from parents and public and private agency personnel, and from parent-advocate and professional organizations. The comments addressed each major provision of the IDEA Amendments of 1997 (such as the new funding provisions, discipline procedures, provisions relating to evaluation of children, individualized education programs, participation of private school children with disabilities, methods of ensuring services from noneducational agencies, and changes in the procedural safeguards). All of these comments were reviewed and considered in developing this Notice of Proposed Rulemaking. The Secretary appreciates the thoughtful attention of the commenters in responding to the June 27th notice.

Proposed Regulatory Changes

The IDEA Amendments of 1997 significantly updated the Assistance to States program under Part B of the Act, as in effect before June 4, 1997. The changes made by those Amendments call for corresponding updates to virtually all of the current regulations under this part, as well as new regulatory provisions to incorporate new statutory requirements such as those relating to performance goals and indicators, procedural safeguards notice, mediation, and discipline.

In addition to incorporating new requirements from the Act, some new provisions and notes are proposed to assist in clarifying the new statutory requirements, or providing guidance with respect to implementing those requirements. Finally, some changes are needed to incorporate longstanding interpretations of the Act that have been addressed in nonregulatory guidance in the past, or to ensure a more meaningful implementation of the Act and its regulations for children with disabilities, parents and public agencies.

To accommodate the reader in understanding these proposed changes, the Secretary has elected to publish the full text of the regulations, as they would be when amended, rather than simply publish an amendatory document that shows only the changes proposed to current regulations. Although this approach increases the length of this NPRM, it provides a more meaningful way for parents, agency officials, and the general public to review the changes within the context of the existing regulations.

The following summary of the proposed regulatory changes describes how the Secretary would incorporate the statutory changes of the IDEA Amendments of 1997 into the applicable subparts of the Department's regulations for the Assistance to States program (34 CFR part 300) and Preschool Grants program (34 CFR part 301) for children with disabilities, along with conforming changes to the Early Intervention program for Infants and Toddlers with Disabilities (34 part 303). The Department plans to publish additional technical amendments to Part 303 at a later date. Those amendments will revise the Part 303 regulations consistent with the changes made by the IDEA Amendments of 1997. This summary identifies changes that are statutory and describes any regulations that the Secretary is proposing in this NPRM to implement these statutory provisions.

Commenters are requested to direct their comments to issues that can be changed through regulation and not to statutory requirements. Commenters also are reminded that, under section 607(b) of the IDEA, the Secretary is not authorized to make regulatory changes to lessen the protections for children with disabilities in the IDEA regulations that were in effect on July 20, 1983, absent statutory changes indicating a Congressional intent to lessen those protections.

Throughout this preamble, issues that the Secretary is proposing to regulate on are introduced by phrases such as, ''The Secretary proposes * * *'' or ''In this proposed section, the Secretary proposes * * *''. Commenters are asked to focus their comments on these parts of the proposed regulation.

Appendix C to the current regulations (Interpretation of IEP program requirements) would be updated and revised consistent with the changes made by the IDEA Amendments of 1997 and these proposed regulations. Revised Appendix C is presented as Appendix C to this NPRM.

To aid readers in referring between this NPRM and current regulations, a distribution table for the part 300 regulations is presented in Appendix D to these proposed regulations. That table identifies each current regulatory section and the comparable proposed regulatory section, if any.

These proposed regulations would implement the new statutory changes relating to the three formula grant programs in the IDEA: (1) the Assistance to States for the Education of Children with Disabilities Program under Part B of the Act (34 CFR part 300); (2) the Preschool Grants Program under section 619 of the Act (34 CFR part 301); and (3) the Early Intervention Program for Infants and Toddlers with Disabilities under Part H of the Act (to be renamed part C on July 1, 1998) (34 CFR part 303).

1. Part 300—Assistance to States for the Education of Children With Disabilities

The new statutory amendments to the IDEA, while retaining (and strengthening) the basic rights and protections included in the Act since 1975, also have redirected the focus of the law as in effect before June 4, 1997, to heighten attention to improving results for children with disabilities. This shift in focus was necessary in order to make needed improvements in the Part B program, based on 20 years of experience and research in the education of children with disabilities. The amendments to the Part B program were the result of over three years of intensive work by stakeholders from all realms of life and at all governmental levels, who have a vested interest in the education of children with disabilities.

Background and Need for Improvements

Before enactment of the 1975 amendments to the IDEA (then known as the Education of the Handicapped Act (EHA)), approximately one million children with disabilities were excluded entirely from the public education system, and more than half of all children with disabilities in the United States did not receive appropriate educational services that would enable them to enjoy full equality of opportunity. The 1975 amendments to the EHA—the Education for All Handicapped Children Act (Pub. L. 94–142)—directly addressed the problems that existed at that time by establishing the right to education for all children with disabilities.

As a result of the Pub. L. 94–142 Amendments to the IDEA, significant progress has been made in addressing the problems that existed in 1975. Today, every State in the nation has laws in effect ensuring the provision of a free appropriate public education (FAPE) to all children with disabilities. The number of young adults with disabilities enrolled in post-secondary education has tripled, and the unemployment rate for individuals with disabilities in their twenties is almost half that of their older counterparts.

Despite the progress that has been made since 1975, the promise of the law has not been fulfilled for many children covered by the Act. Too many students with disabilities are failing courses and dropping out of school. Almost twice as many students with disabilities drop out as compared to students without disabilities. And, when students with disabilities drop out of school, they are less likely to ever return to school and are more likely to be unemployed or have problems with the law. Further, almost half of the students with disabilities do not participate in statewide assessments, and, therefore, schools are not held accountable for results. Students from minority backgrounds continue to be placed disproportionately in separate special education settings.

Over 20 years of experience and research in implementing Part B of the IDEA has demonstrated that the education of children with disabilities can be made more effective by—

(1) Having high expectations of these children and ensuring their access to the general curriculum to the maximum extent possible;

(2) Strengthening the role of parents and fostering partnerships between parents and schools;

(3) Aligning the Part B program with State and local improvement efforts so that students with disabilities can benefit from them;

(4) Providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs;

(5) Focusing resources on teaching and learning, while reducing paperwork and requirements that do not assist in improving educational results; and

(6) Supporting high-quality, intensive professional development for all personnel who work with disabled children to ensure that they have the skills and knowledge necessary to effectively assist these children to be prepared for employment and independent living.

The IDEA Amendments of 1997 are designed to make improvements in the Part B program that address many of the factors based on experience and research that are identified in the preceding paragraphs. A description of some of these improvements is included in the following paragraphs, together with an identification of where the statutory provisions have been incorporated into these proposed regulations:

Improving Results for Children With Disabilities

The focus of the changes in the new amendments is directed at improving results for children with disabilities—by promoting early identification and early provision of services, and ensuring the access of these children to the general curriculum and general educational reforms. The amendments include a number of provisions to address this goal.

A. Early Identification and Provision of Services

The Early Intervention Program for Infants and Toddlers with disabilities and the Preschool Grants program have demonstrated the importance of early intervention. Children who receive services at an early age are often better able to learn once they reach school age. In addition, research on school-aged children who are experiencing significant reading or behavior problems has shown that the common practice of waiting until the third or fourth grade to refer those children to special education only increases these problems. Appropriate interventions need to happen as early as possible in a child's life, when it is clear that the child needs help, and at a time, developmentally, when the child could profit most from receiving services.

The IDEA Amendments of 1997 include provisions that encourage States to reach out to young children who are experiencing learning problems, and allow States and local school districts to utilize ''developmental delay'' eligibility criteria as an alternative to specific disability categories through age 9. Implemented properly, this provision will allow children to receive earlier and more appropriate interventions.

The amendments also allow for more flexible use of IDEA-funded staff who work in general education classrooms or other education-related settings so that they can work with both children who have disabilities and others who may need their help. These provisions are included in §§ 300.7 and 300.235 of this NPRM.

B. IEPs That Focus on Improving Results Through the General Curriculum

The new amendments enhance the participation of disabled children in the general curriculum through improvements to the IEP by—(1) Relating a child's education to what nondisabled children are receiving; (2) providing for the participation of regular education teachers in developing, reviewing, and revising the IEP; and (3) requiring that the IEP team consider the specific needs of each child, as appropriate, such as the need for behavior interventions and assistive technology. These provisions are included in §§ 300.344, and 300.346–300.347 of these proposed regulations.

C. Education With Nondisabled Children

Research data show that for most students with disabilities integration into general education programs with nondisabled children is often associated

with improved results, higher levels of employment and independent living. The data also show that if disabled students are simply placed in general education classrooms without necessary supports and modifications they are more likely to drop out of school than their nondisabled peers. The new amendments address this issue by requiring that the IEP include: (1) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class; and (2) a statement of the specific special education and related services and supplementary aids and services to be provided to the child or on behalf of the child, and a statement of program modifications or supports for school personnel that will be provided for the child. These provisions are incorporated in § 300.347 of these proposed regulations.

D. Higher Expectations for Disabled Students and Agency Accountability

A critical element in improving educational results for disabled children is promoting high expectations for them commensurate with their particular needs, and ensuring meaningful and effective access to the general curriculum. Data and experience show that when schools have high expectations for these children, ensure their access to the general curriculum, whenever appropriate, and provide them the necessary supports and accommodations, many can achieve to higher standards, and all can achieve more than society has historically expected.

Despite the current knowledge base in this regard, the education system often fails to promote such high expectations or to establish meaningful education goals, and about half of all disabled children are excluded from State and district-wide assessments.

The new amendments specifically address these concerns by requiring (1) the development of State performance goals for children with disabilities that must address certain key indicators of the success of educational efforts for these children—including, at a minimum, performance on assessments, dropout rates, and graduation rates, and regular reports to the public on progress toward meeting the goals; (2) that children with disabilities be included in general State and district-wide assessments, with appropriate accommodations, if necessary, and (3) that schools report to parents on the progress of their disabled child as often as such reports are provided to parents of nondisabled children. These provisions are included in §§ 300.137–300.138 and 300.347 of the proposed regulations.

The IDEA Amendments of 1997 also contemplate that State performance goals and indicators will have a crucial role in determining personnel training and development needs, and offer additional funding, through the State Improvement Program authorized under Part D of the Act, to help States meet their goals for children with disabilities. These provisions are addressed in §§ 300.380–300.382. Additionally, States are encouraged to offer funding to school districts to foster capacity building and systemic improvement activities, as addressed in proposed §§ 300.622–300.624. School districts are also authorized to establish school-based improvement programs, as described in §§ 300.234 and 300.245–300.250.

E. Strengthening the Role of Parents and Fostering Partnerships Between Parents and Schools

In order to achieve better results for children with disabilities, it is critical to strengthen the role of parents, and to provide a means for parents and school staff to work together in a constructive manner. The IDEA Amendments of 1997 include several provisions aimed at promoting the involvement of parents, including providing that they: (1) Have an opportunity to participate in meetings with respect to the identification, evaluation, or educational placement of their child or the provision of FAPE to the child; (2) are included in any group that makes decisions on the educational placement of their child; and (3) receive regular reports on their child's progress (by such means as report cards) as often as reports are provided to parents of nondisabled children.

The amendments also require that, at a minimum, parents be offered mediation as a voluntary option whenever a hearing is requested to resolve a dispute between the parents and the agency about any matters specified in the preceding paragraph. These provisions are included in §§ 300.347, 300.501, and 300.506 of this NPRM.

F. Reducing Unnecessary Paperwork and Other Burdens

The IDEA Amendments of 1997 include several provisions that reduce unnecessary paperwork, and direct resources to teaching and learning. For example, the amendments permit initial evaluations and reevaluations to be based on existing evaluation data and reports, and do not require that eligibility be re-established when a triennial evaluation is conducted if the IEP team agrees that the child continues to have a disability. The amendments also eliminate unnecessary paperwork requirements that discourage the use of IDEA funds for teachers who work in regular classrooms, while ensuring that the needs of students with disabilities are met. These provisions are included under §§ 300.234 and 300.533 of this NPRM.

In addition, these amendments permit States and local educational agencies to establish eligibility only once by providing policies and procedures to demonstrate that the eligibility conditions under part B are met. Thereafter, only amendments to those policies and procedures necessitated by identified compliance problems or changes in the law would be required. These provisions are included under §§ 300.110–300.111 and 300.180–300.181.

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

Proposed § 300.1 would retain the statement of the purposes of this part in the existing regulations, except for conforming those purposes to the new statutory changes. Consistent with section 601(d)(1)(A) of the Act, the purpose in proposed § 300.1(a) (relating to ensuring that all children with disabilities have available to them a free appropriate public education designed to meet their unique needs) would be amended to add ''and to prepare them for employment and independent living.'' This change represents a significant shift in the emphasis of the Assistance to States program—to an outcome oriented approach that focuses on better results for children with disabilities rather than on simply ensuring their access to education.

Consistent with section 601(d)(1)(C) of the Act, the purpose in § 300.1(c) (relating to assisting States and localities to provide for the education of children with disabilities) would be amended by adding ''educational service agencies'' and ''Federal agencies'' to the list of entities that would be assisted under this part.

A note would be added following proposed § 300.1 that emphasizes the importance of independent living in promoting the integration and full inclusion of individuals with disabilities into the mainstream of American society, consistent with the new statutory purpose under § 300.1(a) (relating to employment and independent living). The note describes the philosophy of independent living

contained in Section 701 of the Rehabilitation Act of 1973.

Proposed § 300.2 (relating to the applicability of these regulations to State, local, and private agencies) would maintain the current regulatory provisions of this section, except for the following changes to conform the section to the new statutory provisions: First, paragraph (b) would be amended to eliminate the reference to State plans. The newly revised Act (Section 612(a)) no longer requires States to submit State plans. (See Subpart B, ''State Eligibility—General,'' for discussion of the statutory elimination of State plan requirements). Second, consistent with new statutory provisions relating to children with disabilities who are incarcerated, paragraph (b)(4) of § 300.2 would be amended to replace the term ''State correctional facilities'' with the term ''State and local juvenile and adult correctional facilities''.

Proposed § 300.3 would update the list of regulations that apply to this program. Under proposed paragraph (a) of this section, the regulations in 34 CFR part 76 (State Administered Programs) would continue to apply to the Part B program, except for the following sections:

Sections 76.125–76.137 (relating to ''Consolidated Grant Applications for Insular Areas'') no longer apply. A new statutory provision in section 611(b)(4) of the Act expressly prohibits the consolidation of Part B grants provided to the outlying areas (defined in § 300.718) or to the ''freely associated States'' (defined in section 611(b)(6) of the Act).

Sections 76.650–76.662 (relating to ''Participation of Children Enrolled in Private Schools'') would no longer apply because the applicable provisions of these regulations, that have applied to the Part B program for many years, would be incorporated into Subpart D of this part (''Children in Private Schools''), and specifically under the provisions relating to ''Children with Disabilities Enrolled by their Parents in Private Schools'' (§§ 300.450–300.462).

All other regulations identified in § 300.3 of the existing regulations for this part would be retained under proposed § 300.3, except for 34 CFR part 86 (''Drug-Free Schools and Campuses'') because those regulations are no longer applicable to State administered programs, and now apply only to institutions of higher education.

Definitions

The proposed regulations under this part would retain the scheme used in the current regulations relating to defining terms that are used in this part—that is, Subpart A would include definitions of all terms that are used in two or more subparts of the regulations, whereas any term that would be used in only a single section or subpart would only be listed in Subpart A, together with a reference to the specific section in which the term is defined. The list of these terms would be included in an introductory note (Note 1) immediately following the heading ''Definitions'', and would be updated, as follows:

Two terms would be deleted from the list in Note 1 (''first priority children'' (§ 300.320(a)), and ''second priority children'' (§ 300.320(b)). Statutory provisions regarding priorities in the use of funds were deleted by the IDEA Amendments of 1997.

The term ''individualized education program'' (or ''IEP'') that appears in the list in Note 1 of the existing regulations, would be moved to proposed § 300.14, and would be defined along with the other terms of general applicability that are included under Subpart A.

Several terms that were added by the IDEA Amendments of 1997, but are not terms of general applicability, would be added to the list in Note 1. Following is a list showing each new term and the statutory and regulatory citations for that term:

- Base year (Relates to the new funding formula) (Section 611(e)(2)(A); § 300.707).
- Controlled substance (Relates to the discipline provisions) (Section 615(k)(10)(A); § 300.520).
- Excess costs (The term was defined in prior law, but the statutory definition was not included in the current regulations. The definition of the term, as updated by the IDEA Amendments of 1997, would be incorporated into these regulations (Section 602(7); § 300.284).
- Freely associated States (Relates to the Pacific Basin entities that are eligible for assistance under this part) (Section 611(b)(6); § 300.722).
- Indian; Indian Tribe (Relates to the eligibility of the Secretary of the Interior to receive amounts under this part) (Sections 602(9) and 602(10); § 300.264).
- Outlying area (Relates to grant requirements under this part) (Section 602.18; § 300.718).
- Substantial evidence (Relates to discipline provisions) (Section 615(k)(10)(C); § 300.521).
- Weapon (Relates to discipline provisions) (Section 615(k)(10)(D); § 300.520).

The following terms are not defined in the Act, but the Secretary proposes to add them to the list in Note 1 in order to provide additional clarification to certain provisions that would be added:

- Comparable in quality (A definition of this term would be added to § 300.455 to clarify what services must be provided by an LEA to children with disabilities who are enrolled by their parents in religiously affiliated or other private schools).
- Extended school year services (A definition of this term would be added to a new provision under proposed § 300.309 that would require each public agency to consider extended school year services on a case by case basis in ensuring that a free appropriate public education (FAPE) is available to each child with a disability. The definition would clarify that the meaning of the term ''extended school year services'' applies to providing services during the summer months. (A description of this provision is included under Subpart C, § 300.309, in this preamble).
- Meetings (A definition of this term would be added to § 300.501, relating to participation of parents in meetings about their child on matters covered under this part).
- Financial Costs (A definition of this term is included in proposed § 300.142(e) on use of private insurance proceeds).

A second note (Note 2) following the heading ''Definitions'' would maintain the note from the current regulations that lists abbreviations of certain terms that would be used throughout the regulations, but would update that list, as follows: The terms ''Comprehensive system of personnel development'' (''CSPD'') and ''individualized family service plan'' (''IFSP'') would be added; and, consistent with a statutory change (section 602(4)), the term ''educational service agency'' (''ESA'') would replace the term ''intermediate educational unit'' (''IEU'').

Proposed § 300.4 (Definition of ''Act'') would delete the obsolete reference to the Education of the Handicapped Act from the current regulatory definition of this term.

Proposed §§ 300.5 and 300.6 (Definitions of ''assistive technology device'' and ''assistive technology service'') would retain the current regulatory definitions of those terms, with the exception of a minor technical change for consistency in using the singular ''child with a disability.'' The note following the definitions of those terms in the existing regulations (that states that the definitions are substantively identical to the definitions of those terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988) would be retained in abbreviated form.

Proposed § 300.7 would make the following changes to the current regulatory definition of ''children with disabilities'': The term would be restated in the singular (''Child with a disability''), and the definition itself would also be restated in singular rather than plural terms. This change is made because it more appropriately comports with the individualized focus of Part B of the Act. Paragraph (a)(1) of this section would be revised, consistent with section 602(3)(A)(i) of the Act, to clarify that the term ''serious emotional disturbance'' will hereinafter be referred to as ''emotional disturbance''. A corresponding change would be made in the definitions of the individual disability categories under proposed paragraph (b), by changing the term ''serious emotional disturbance'' to ''emotional disturbance'' and moving the definition of that term from paragraph (b)(9) to paragraph (b)(4).

Consistent with section 602(3)(B) of the Act, proposed § 300.7(a)(2) (relating to a State's discretion to use the term ''developmental delay'' for children aged 3 through 5) would be revised, as follows: The age range for using that term would be extended from ages 3 through 5 to ages 3 through 9; and the decision to use the term ''developmental delay'' would be at the discretion of both the State and the local educational agency (LEA). The State's definition of the category may be different under Parts B and H (to become Part C on July 1, 1998).

Note 1 following § 300.7 of the current regulations (relating to children with autism) would be added without change to proposed § 300.7, and four new notes would be added to that section, as follows:

Note 2 would address the statutory change under paragraph (a)(2) of this section relating to use of the term ''developmental delay''. The note would clarify that (1) if a State adopts the term for children aged 3 through 9, or a subset of that age range, LEAs that elect to use the term must conform to the State's definition; (2) LEAs could not otherwise use ''developmental delay'' as a basis for establishing a child's eligibility under this part; and (3) even if a State adopts the term, the State may not require an LEA to use it. This clarification is necessary to avoid confusion and potential compliance problems in implementing this new statutory provision, and to otherwise facilitate its implementation.

Note 3 would further address the use of the term ''developmental delay'' by including a statement from the House Committee Report that emphasizes the value of using ''developmental delay'' in establishing eligibility for young children in order to prevent locking the child into an eligibility category that may be inappropriate or incorrect during a period when it is often difficult to determine the precise nature of the disability.

Note 4 would describe congressional intent in changing the term ''serious emotional disturbance'' to ''emotional disturbance''. The note would include a statement from the House Committee Report that explains that the statutory change (1) is intended to have no substantive or legal significance, and (2) is intended strictly to eliminate the pejorative connotation of the term ''serious.'' The Report further makes clear that this statutory revision does not change the meaning of the definition of ''serious emotional disturbance'' that is included in the existing regulations for this part.

Note 5 would address the conditions under which a child with attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) is eligible under Part B of the Act. The note clarifies that some children with ADD or ADHD who are eligible under this part meet the criteria for ''other health impairments'' if (1) the ADD or ADHD is determined to be a chronic health problem that results in limited alertness that adversely affects educational performance, and (2) special education and related services are needed because of the ADD or ADHD. (The note clarifies that the term ''limited alertness'' includes a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.)

The note further clarifies that (1) some children with ADD or ADHD may be eligible for services under other disability categories in § 300.7(b) if they meet the applicable criteria for those disabilities, and (2) if those children are not eligible under this part, the requirements of section 504 of the Rehabilitation Act of 1973 and its implementing regulations may still be applicable.

Proposed § 300.8 would add a definition of ''day'' to clarify that unless otherwise indicated, the term ''day'' means calendar day. Although the Department has traditionally interpreted ''day'' to mean calendar day, the term has never been defined in the regulations. It is important to include such a definition in these proposed regulations because under the new statutory provisions added by the IDEA Amendments of 1997, the term is applied differently under certain provisions, including the use of ''school days''; ''business days''; and ''business days (including any holidays that fall on business days).''

Proposed § 300.9 would add the definition of ''educational service agency'' that appears in section 602(4) of the Act. That term was added by the IDEA Amendments of 1997 to replace the term ''intermediate educational unit'' that was used in prior law and in the current regulations.

Proposed § 300.10 would add the definition of ''equipment'' that appears in section 602(6) of the Act. That definition is substantively identical to the definition of ''equipment'' in prior law. However, that definition is not included in the current regulations. The Secretary believes that, for the regulations to be most useful to parents, school officials, and members of the general public, the regulations should contain all applicable statutory provisions in one document, rather than simply referencing definitions or other provisions that are contained in other regulations. With very few exceptions, these proposed regulations have been developed to include all applicable provisions of the Act.

Proposed § 300.11 would incorporate the existing regulatory definition of the term ''free appropriate public education,'' except that the reference to the IEP requirements in paragraph (d) of that section would change from §§ 300.340–300.350 to §§ 300.340–300.351, to conform to a proposed change made in those requirements.

The Secretary proposes to add in proposed § 300.12 a definition of ''general curriculum'' to clarify that, for purposes of this part, there is a single curriculum that applies to all children within the jurisdiction of the public agency, including nondisabled children and children with disabilities. The purpose of adding this definition is to eliminate (or significantly reduce) the possibility of misinterpreting the new requirements in the Act relating to the participation of children with disabilities in the general curriculum. Some commenters on the June 27, 1997 **Federal Register** notice have expressed concern that a public agency could assume that there is a ''general curriculum'' for nondisabled and another ''general curriculum'' for certain categories of children with disabilities. If the requirements of this part were implemented based on that assumption this would seriously limit the possibility of accomplishing the purposes of Part B of the Act that are set out in the IDEA Amendments of 1997.

A note would be added following this section to clarify that the term ''general curriculum'' relates to the content of the

curriculum and not to the setting in which it is used. The note further clarifies that the general curriculum could be used in any educational setting along a continuum of alternative placements, as long as the setting is consistent with the least restrictive environment provisions of § 300.550–300.553 and is applicable to an individual child with a disability. A number of comments were received requesting clarification relating to this matter.

Proposed § 300.13 would retain the current regulatory definition of the term ''include''.

Proposed § 300.14 would include a definition of the term ''individualized education program'' (IEP). Because the term ''IEP'' has traditionally been defined under § 300.340 (an introductory section to the IEP requirements of §§ 300.340–300.350) the definition in proposed § 300.14 would simply reference the definition in § 300.340.

Proposed § 300.15 would add a definition of ''individualized education program team'' (or ''IEP team''). The definition states that the term ''IEP team'' means a group of individuals described in § 300.344 that is responsible for developing, reviewing and revising an IEP for a child with a disability. Because the term ''IEP team'' is used throughout these regulations, it is important to include a definition of that term in Subpart A. However, to preserve the structural integrity of the current regulatory provisions on IEPs in §§ 300.340–300.350, the substantive definition of ''IEP team'', which conforms to the statutory definition under section 614(d)(1)(B), would be included in § 300.344.

Proposed § 300.16 would add a definition of ''individualized family service plan'' (or ''IFSP''), because that term is used in several subparts within these regulations. The definition of the term would be a reference to 34 CFR 303.340(b).

Proposed § 300.17 would incorporate the statutory definition of ''local education agency'' from section 602(15) of the Act. This definition, which updates the prior statutory definition of ''LEA'' to conform to the definition of that term in the Improving America's Schools Act, would replace the current regulatory definition of ''LEA.''

A note would be added following proposed § 300.17 to clarify that a public charter school is eligible to receive funds under Part B of the Act if it meets the definition of ''LEA.'' The note further clarifies that if a public charter school receives Part B funds it must comply with the requirements that apply to LEAs. Because of the widespread interest in establishing charter schools as a major part of educational reform, this clarification is necessary in order to ensure that, to the extent applicable, these schools are in full compliance with the requirements of this part.

Proposed § 300.18 would incorporate the statutory definition of ''native language'' from section 602(16) of the Act. The new definition is substantively similar to the current regulatory definition of ''native language.'' The note following the current regulatory definition of ''native language'' would be retained, unchanged, except for clarifying that the term ''native language'' is also used in the procedural safeguards notice under proposed § 300.504(c). (The procedural safeguards notice is a new statutory provision that was added by section 614(d) of the Act.)

Proposed § 300.19 would incorporate the current regulatory definition of ''parent'' (under a new paragraph (a)). A proposed new paragraph (b) would be added to address questions raised by public agencies and other agencies representing children with disabilities about whether foster parents, who have a long-term relationship with a disabled child, could serve as the child's parent, in lieu of requiring the appointment of a surrogate parent to represent the child.

Proposed paragraph (b) of this section would permit State law to provide that a foster parent qualifies as a parent under Part B of the Act if the natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law, and if the foster parent (1) has an ongoing, long-term parental relationship with the child; (2) is willing to participate in making educational decisions in the child's behalf; and (3) has no interest that would conflict with the interest of the child.

The note following the current regulatory definition of ''parent'' (relating to other persons, such as a grandparent, who may act as a parent) would also be incorporated into these proposed regulations. The note would be revised to add conforming language about a foster parent, as described in paragraph (b) of this section.

Proposed § 300.20 would retain the current regulatory definition of ''public agency,'' but would revise that definition to replace the term ''IEUs'' with the term ''ESAs.''

Proposed § 300.21 would incorporate without change the current regulatory definition of the term ''qualified.''

Proposed § 300.22 would retain the current regulatory definition of ''related services,'' except for making the following changes: In proposed paragraph (a), the term ''speech pathology and audiology'' would be replaced by the term ''speech-language pathology and audiology services,'' and the term ''orientation and mobility services'' would be added to the list of related services. These changes would be made to conform to a statutory change in section 602(22) of the Act.

Proposed § 300.22(b) would be amended to add a definition of the term ''orientation and mobility services'' identified in paragraph (a) of this section. The definition (included as a new paragraph (b)(6)) states that the term ''orientation and mobility services'' means services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home and community.

In proposed § 300.22(b)(9) (relating to psychological services) and (b)(13) (relating to social work services in schools) the definitions of those terms would be amended to add a reference to assisting in developing positive behavioral intervention strategies to the list of functions performed by these related services providers. These providers could be helpful in ensuring effective implementation of the new statutory provision in section 614(d)(3)(B) (proposed § 300.346) that requires that the IEP team, in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions.

In proposed § 300.22(b)(14), the current regulatory definition of the term ''speech-pathology'' would be retained, but the term would be changed to ''speech-language pathology services,'' to conform to the statutory change identified in paragraph (a) of this section.

The note following the current regulatory definition of ''related services'' would be retained as Note 1 following proposed § 300.22, except for the following changes: The list of other related services in the first paragraph of that note would be amended (1) by adding other important services, including travel training, nutrition services, and independent living services, and (2) to clarify that the services would be provided if necessary for the child to receive FAPE.

Several notes would also be added to proposed § 300.22, as follows:

Note 2 would acknowledge the critical importance of orientation and mobility services for children who are blind or have visual impairments, and

point out that there are children with other disabilities who may also need to be taught the skills they need to navigate their environments (e.g., travel-training). The note includes a statement from the House Committee report on Pub. L. 105–17 that emphasizes the importance of travel training for certain children with disabilities.

Note 3 would clarify that, with respect to various related services defined in this section, nothing would prohibit the use of paraprofessionals to assist in the provision of those services if doing so is consistent with the personnel standards requirements of proposed § 300.136(f).

Note 4 would explain that (1) most children with disabilities should receive the same transportation services as non-disabled children, and (2) for some disabled children, integrated transportation may be achieved by providing needed accommodations such as lifts and other adaptations on regular school transportation vehicles.

Proposed § 300.23 would incorporate the statutory definition of ''secondary school'' from section 602(23) of the Act. This definition updates the prior statutory definition of ''secondary school'' to conform to the definition of that term in the Improving America's Schools Act. The term ''secondary school'' is not defined in the current regulations.

Proposed § 300.24 would retain the current regulatory definition of ''special education,'' except for the following changes:

In § 300.24(a)(2), the term ''speech pathology'' would be changed to ''speech-language pathology services,'' to conform to the terms used in section 602(22) of the Act.

Under a new § 300.24(b)(3), a definition of ''specially designed instruction'' would be added to clarify that the term means adapting the content, methodology, or delivery of instruction to (1) address the unique needs of an eligible child under this part that result from the child's disability, and (2) ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. Although the term is a key component in the definition of ''special education'' in both prior law and the current Act, it has never been defined. With the shift in emphasis of the Part B program toward greater participation of children with disabilities in the general curriculum, this definition should facilitate implementation of the program.

Proposed § 300.24(b)(4) would replace the outdated definition of ''vocational education'' in the current regulations with a new definition that states that the term ''vocational education'' means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

The note following the definition of ''special education'' in the current regulations would be retained under proposed § 300.24, but would be revised to clarify that a related services provider may be a provider of specially designed instruction if, under State law, the person is qualified to provide that instruction.

Proposed § 300.25 would incorporate the statutory definition of ''State'' from section 602(27) of the Act to mean each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas. This definition updates the prior statutory definition of ''State.'' The term is not defined in the current regulations.

Proposed § 300.26 would incorporate the definition of ''supplementary aids and services'' from section 602(29) of the Act. Although the term was included in prior law, it was not defined until the enactment of the IDEA Amendments of 1997. The term is defined as aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with the LRE provisions in §§ 300.550–300.556.

Proposed § 300.27 would retain the current regulatory definition of ''transition services,'' except for the following changes: The organizational structure of the definition has been changed to conform to the definition of the term in section 602(30) of the Act. The new definition simply describes what the term means, but does not attempt to regulate under the definition. The current regulatory definition uses the regulatory term ''must'' in defining what services must be provided. Consistent with the new statutory definition, the term ''related services'' is added as one of the services or activities covered by the term.

Proposed § 300.28 would add a list of terms found in the part B regulations that are defined in the Education Department General Administrative Regulations (EDGAR).

Subpart B—State and Local Eligibility

State Eligibility—General

Under the prior statute, States were required both to meet certain eligibility requirements and to submit State plans to the Department, and were subject to periodic resubmission requirements. The newly revised Act replaces that scheme with an eligibility determination based on a demonstration satisfactory to the Secretary that the State has in effect policies and procedures to ensure that it meets each of a list of conditions. (Section 612(a)). A State that already has on file with the Secretary policies and procedures demonstrating that it meets any of these requirements will be considered to have met that requirement for the purpose of receiving a grant under Part B of the Act. (Section 612(c)(1)). A technical change will be made to Part 76 with the publication of the final regulations to reflect the substitution of this demonstration of State eligibility for State plans.

Under section 612(c) (2) and (3), the policies and procedures submitted by a State remain in effect until a State submits modifications that the State decides are necessary or until the Secretary requires modifications based on changes to the Act or its implementing regulations, new interpretations by a Federal court or the State's highest court, or an official finding of noncompliance with Federal law or regulations. The provisions regarding State eligibility apply to modifications in the same manner and to the same extent as they do to a State's original policies and procedures.

Section 612(d) specifies that if the Secretary determines that a State is eligible to receive a grant under Part B of the Act, the Secretary notifies the State of that determination, and that the Secretary shall not make a final determination that a State is not eligible until providing the State reasonable notice and an opportunity for a hearing. These provisions are incorporated in the proposed regulations in §§ 300.110–300.113.

State Eligibility—Specific Conditions

The statutory eligibility conditions that must be addressed by each State in order to receive a grant under Part B of the Act are contained in proposed §§ 300.121–300.156. The IDEA Amendments of 1997 made a number of changes to the eligibility conditions and State plan requirements previously contained in the Act. These proposed regulations incorporate these statutory changes, with appropriate modifications described below, into the regulations

regarding State plan contents. Some changes of a technical nature have been made to preexisting regulatory provisions in order to reflect the fact that States now demonstrate eligibility, rather than submit State plans, as was the case under the prior law. In addition, some reordering and reorganization of current regulatory provisions is done for the sake of coherence.

Proposed § 300.121 would add to the current § 300.121 the new statutory provision, under section 612(a)(1)(A), that the right to a free appropriate public education (FAPE) extends to children with disabilities who have been suspended or expelled from school. The issue of what the right to FAPE means for children who have been suspended or expelled from school has been the subject of numerous comments to the Department in response to the June 27, 1997 notice, many of which raise this issue in the context of lengthy discussions about all of the provisions in the Act concerning discipline for children with disabilities. Proposed § 300.121(c) reflects the Secretary's interpretation that the IDEA Amendments of 1997 take a balanced approach to the issue of discipline for students with disabilities that reflect both the need to protect the rights of children with disabilities to appropriate educational services and the need of schools to be able to ensure that all children, including children with disabilities, have safe schools and orderly learning environments. The positions taken in these proposed regulations on the issue of continued services for children with disabilities who have been properly suspended or expelled and on the other disciplinary provisions of the Act (see proposed §§ 300.520–300.529) reflect this need for a balanced, fair interpretation of these new statutory provisions.

With regard to the issue of the provision of FAPE for children with disabilities who have been suspended or expelled, the Secretary believes that the statute struck a balance between the longstanding interpretation of the Department that schools are not required by the Act to provide services to children with disabilities who are suspended for ten school days or less, and the desire to ensure that children with disabilities not be removed from education for prolonged amounts of time in any school year.

In proposed § 300.121(c)(1), the Secretary proposes to define children with disabilities who have been suspended or expelled from school for purposes of this section to mean children with disabilities who have been removed from their current educational placement for more than 10 school days in a given school year.

In proposed § 300.121(c)(2), the Secretary proposes to clarify that the right to FAPE under these circumstances begins on the eleventh school day from the date of the child's removal from the current educational placement. For example, if a child with a disability who has not previously been suspended in the school year receives a three week suspension, services must be provided by the eleventh school day of that suspension. If a child with a disability who has received two five school day suspensions in the fall term is suspended again in the spring of that school year, services must be provided from the first day of the third suspension.

A second issue regarding the statutory right to FAPE for children with disabilities who have been suspended or expelled is how to reconcile the right to FAPE with the statutory recognition, in sections 612(a)(1)(A) and 615(k)(5)(A), that children with disabilities properly could be subjected to the same disciplinary measures applied to nondisabled children if their behavior was not a manifestation of their disability. The Secretary proposes in § 300.121(c)(2) to address this question by requiring that in providing FAPE to children with disabilities who have been suspended or expelled, a public agency shall meet the requirements for interim alternative educational settings under section 615(k)(3) of the Act. The Secretary believes requiring that education for children who have been suspended or expelled meets the standards in section 615(k)(3) allows accommodation of both the statutory obligation to provide FAPE to these children and recognizes in section 615(k)(5) that, through an appropriate suspension or expulsion, school districts can legitimately remove children from their current educational placement. Under proposed § 300.622, States may elect to use funds available for capacity building and improvement activities to support public agency services to children who have been suspended or expelled.

Two notes would also be added to proposed § 300.121. The first would be added to reflect the Department's longstanding interpretative position that the obligation to make FAPE available to children 3 through 21 begins on each child's third birthday, and an IEP or IFSP must be in effect by that date that specifies the special education and related services that must be provided, consistent with proposed § 300.342, including extended school year services, if appropriate. For children receiving early intervention services under Part C of the Act and who will be participating in a preschool program under Part B of the Act, the transition requirements of proposed § 300.132 would apply.

The second note to follow proposed § 300.121 would recognize that, under the statute, school districts are not relieved of their obligations to provide appropriate special education and related services to individual disabled students who need them even though the students are advancing grade to grade, and that decisions about eligibility under Part B of the Act for these students must be determined on an individual basis.

Proposed § 300.122 revises the current § 300.122 to eliminate an obsolete provision about the provision of FAPE to children with disabilities before September 1, 1980, and incorporates the new statutory limitation to the obligation to make FAPE available to certain individuals in adult correctional facilities. Section 612(a)(1)(B)(ii) provides that the obligation to make FAPE available to all children with disabilities does not apply to individuals aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility, were not actually identified as being a child with a disability or did not have an IEP under Part B of the Act. This provision, with minor modifications for clarity, would be reflected in proposed § 300.122(a)(2). A note, Note 2, would be added following § 300.122 quoting the House Committee Report explaining the statutory change.

The Secretary also proposes to amend § 300.122 to make clear that the right to FAPE does not apply to children with disabilities who have graduated from high school with a regular high school diploma. This reflects the Secretary's understanding that the right to FAPE is ended either by a student successfully finishing a regular secondary education program or reaching an age between 18 and 21 at which, under State law, the right to FAPE has ended. In addition, the changes made by the IDEA Amendments of 1997, particularly as they relate to the content of children's IEPs in section 614(d) of the Act, reinforce the Secretary's belief that FAPE is closely related to enabling children with disabilities to progress in the same general curriculum that is provided nondisabled children. The Secretary also believes that it is

important to clarify that the right to FAPE is not ended if a student with disabilities is awarded some other certificate of completion or attendance instead of a regular high school diploma. This change should not be interpreted as prohibiting the use of Part B funds to provide services to a student with disabilities who has already achieved a regular high school diploma, but who still is in the State's mandated age range if an LEA or SEA wishes to do so.

Note 1 following proposed § 300.122 would explain that graduation is a change of placement under Part B and, as such, would require prior written notice to the parents, and student if appropriate. The note would also explain that under § 300.534(c) a reevaluation is required before graduation. The note would further explain that other documents, such as certificates of attendance or other certificates granted instead of a regular high school diploma, would not end a student's entitlement to FAPE.

Proposed §§ 300.123–300.124 include, with only minor changes reflecting the new State eligibility scheme of the statute, the current regulatory provisions concerning State policies and procedures relating to the full educational opportunity goal and the full educational opportunity timetable. Current regulatory provisions concerning the full educational opportunity goal regarding facilities, personnel, and services, and priorities would be eliminated as these provisions were removed from the statute by the IDEA Amendments Act of 1997. Section 612(a)(2) of the Act requires each State to have established a full educational opportunity goal and timetable.

Proposed § 300.125 incorporates the current regulatory provision, revised as discussed, concerning child find obligations (identification, location, and evaluation of children with disabilities) with the new statutory provision that this obligation includes children with disabilities attending private schools, in accordance with section 612(a)(3)(A) of the Act. The requirement in the current regulation to provide yearly information about child find activities would be eliminated in light of the fact that periodic State plans are no longer required by statute. The provisions requiring data on and the method for determining which children are not receiving special education and related services also would be removed from the regulation, reflecting statutory changes. A new § 300.125(c) would be added that includes the construction clause of section 612(a)(3)(B). That clause clarifies that nothing in the Act requires that children be classified by their disability so long as each child who has a disability and, by reason thereof, needs special education and related services, is regarded as a child with a disability under Part B of the Act. The notes following the current regulatory provision regarding child find would be retained, but shortened and updated as appropriate. Two additional notes would be added to reflect longstanding policy positions of the Department. A new Note 2 would recognize that the services and placement needed by each child with a disability must be based on the child's unique needs and may not be determined or limited based on the child's disability category.

Note 3, which is largely retained from the current regulations, explains the important relationship between child find activities under this part and child find activities under Part 303 for children with disabilities from birth through age 2. The Secretary believes that developing effective child find activities for this age population will provide significant benefits not just for very young children with disabilities but also for schools and other public agencies that may find their responsibilities easier because of early attention to these children's needs.

A Note 4 following this section would reflect that each State's child find obligation under the statute includes highly mobile children, such as migrant and homeless children.

Proposed § 300.126 incorporates the evaluation procedures from sections 612(a)(7) and 612(a)(6)(B), by cross-referencing the provisions of proposed §§ 300.530–300.536, which include all of the statutory evaluation provisions of sections 612(a)(6)(B) and 614(a)–(c) and related evaluation procedures from current regulations. This provision would replace the current regulatory section on State procedures on protection in evaluation procedures.

Proposed § 300.127 includes, with only minor changes reflecting the new statutory State eligibility scheme, the provisions of the current regulation concerning State policies and procedures on the confidentiality of personally identifiable information. This provision reflects section 612(a)(8) of the Act. The note following this section would be updated to reflect current information about the regulations implementing the Family Educational Rights and Privacy Act.

Proposed § 300.128 is the same as the current regulatory provision concerning individualized education programs (IEPs), except as revised to reflect the new statutory State eligibility scheme and the requirements of section 612(a)(4) of the Act.

Proposed § 300.129 incorporates the current regulatory provision concerning procedural safeguards, as revised as discussed, and the statutory provision, in section 612(a)(6)(A), that children and their parents are afforded the procedural safeguards required by section 615.

Proposed § 300.130 would remove from the existing regulatory provision regarding least restrictive environment (LRE) the data collection requirements, and make other conforming revisions, as discussed, in light of the new State eligibility structure of the Act, consistent with section 612(a)(5)(A). (Data on LRE would still be collected under section 618(a)(1)(A) (iii) and (iv) of the Act.) Additionally, the following new statutory requirements regarding a State's funding formula are added as proposed § 300.130(b): (1) If a State uses a funding mechanism to distribute State funds on the basis of the type of setting in which a child is served, the funding mechanism may not result in placements that violate the LRE requirements; and (2) if the State does not have policies and procedures to ensure compliance with this new requirement, the State must provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that the mechanism does not result in placements that violate LRE. A note would also be added to this provision quoting language from the House Committee Report recognizing that this statutory addition does not eliminate the need for a continuum of alternative placements that is designed to meet the unique needs of each child with a disability.

Proposed § 300.132 adds to the existing regulatory provision concerning the transition of individuals from Part H (to be renamed part C on July 1, 1998) to Part B the new statutory language (from section 612(a)(9)) concerning ''effective'' transitions, and the provision that LEAs will participate in transition planning conferences arranged by the designated lead agency under Part H (to be renamed Part C).

Proposed § 300.133 updates the existing regulatory provision concerning children in private schools to reflect the new statutory structure, and the changes made in subpart D of this proposed regulation, consistent with section 612(a)(10) of the Act.

Proposed § 300.135 reflects the new statutory requirements concerning a comprehensive system of personnel development (CSPD). Section 612(a)(14)

provides that a State's CSPD must meet the requirements for a State improvement plan relating to personnel development. A note following this section would quote the House Committee Report to the effect that the State's CSPD must include procedures for acquiring and disseminating significant knowledge and for adopting appropriate promising practices, materials, and technology. The note would also explain that a State could use the information provided to meet the State eligibility requirement under Part B of the Act as a part of a State improvement program plan under Part D of the Act.

Proposed § 300.136 reflects the existing regulatory provision on personnel standards, revised as discussed, and the requirements of section 612(a)(15) of the Act. A new paragraph (f) adds the new statutory provision from section 612(a)(15)(B)(iii) that allows paraprofessionals and assistants who are appropriately trained and supervised, under State law, regulations or policy to be used to assist in the provision of services under Part B of the Act. Also added is the new provision, from section 612(a)(15)(C), that a State may adopt a policy that includes a requirement that LEAs in the State make an ongoing good-faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services, including, in a geographic area where there is a shortage of those personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meeting State standards within three years. This provision would be incorporated in § 300.136(g). A note following this section would be added explaining that a State may exercise the option in paragraph (g) even though the State has reached its established date for retraining or hiring of personnel to meet appropriate professional requirements under paragraph (c) of this section so as to avoid any unwarranted confusion on this issue. Another note would be added to clarify that if a State has only one entry level degree requirement for a specific profession or discipline, it is not precluded by § 300.136(b)(1) from modifying that standard if necessary to ensure the provision of FAPE to all children with disabilities in the State.

Proposed § 300.137 would add to the regulation the new statutory provision of section 612(a)(16) concerning performance goals and indicators. Basically, this provision requires that States have goals for the performance of children with disabilities, and indicators of progress that at a minimum address the performance of children with disabilities on assessments, drop-out rates, and graduation rates. The provision also requires reporting every two years to the Secretary and the public on the progress of the State, and revisions to a State's improvement plan under Part D of the Act as needed to improve performance, if the State receives a grant under that authority. The current regulatory provision concerning procedures for evaluation of the effectiveness of programs would be removed, reflecting a statutory change.

Proposed § 300.138 would add the new requirement of section 612(a)(17)(A) concerning inclusion of children with disabilities in general State and district-wide assessments, including conducting alternative assessments not later than July 1, 2000 for children who cannot participate in State and district-wide assessment programs. A note following this section would explain that only a small number of children with disabilities should need alternative assessments. The provision of section 612(a)(17)(B) concerning reports related to these assessments are contained in proposed § 300.139.

The Secretary proposes to interpret the statutory requirements to make clear that whenever the SEA reports to the public on student performance on wide-scale assessments, the reports must include aggregated results of all children, including children with disabilities, as well as disaggregated data on the performance of children with disabilities. The Secretary believes that the IDEA Amendments of 1997 were designed to foster consideration of children with disabilities as a part of the student population as a whole. It would not be in keeping with that focus if, in reporting assessment data, results for children with disabilities were not included in reports on the student population as a whole. A note following this section would explain that States would not be precluded from also reporting data in a way that would, for example, allow them to continue trend analysis of student performance, if children with disabilities had not been included in those analyses in the past.

Proposed § 300.141 incorporates the current regulatory provision, revised as discussed, concerning SEA responsibility for all educational programs, consistent with the requirement in section 612(a)(11) of the Act.

Proposed § 300.142 would replace the current regulatory provision concerning interagency agreements with the requirements of section 612(a)(12) regarding methods of ensuring services. This provision requires that the Chief Executive Officer or designee in each State ensure that an interagency agreement or some other mechanism for interagency coordination is in effect between noneducational agencies that are obligated under other law to provide or pay for services that are considered special education or related services under Part B of the Act and the SEA to ensure that those services are provided. In addition to the statutory requirements, a paragraph (e) would reflect the Department's interpretation that it would violate the statutory obligation to provide free services if a public agency required a parent to use private insurance proceeds to pay for services required under the Act. The Department has long taken the position that Part B of the Act and section 504 of the Rehabilitation Act prohibit a public agency from requiring parents to use insurance proceeds to pay for the services that must be provided to an eligible child under the FAPE requirements of those statutes, if they would incur a financial cost to secure those services. (See Notice of Interpretation published on December 30, 1980 (45 FR 66390)). This paragraph also would include a definition of the term ''financial cost,'' so that both parents and school districts will have a common understanding of the term. This definition reflects the Department's longstanding interpretation of the statutory obligation to provide services at no cost as applied to parents' private insurance. A note following this section would explain how this paragraph applies if a family is covered by both private insurance and Medicaid.

The Secretary believes that the same basic principle, that services be available at no cost to parents, would be equally applicable to parents whose children are eligible for public insurance, but that there is no current need to regulate on the public insurance issue because there is no risk of financial loss to parents under current public insurance programs such as Medicaid. The Secretary invites comment on whether a policy on public insurance similar to the proposed section regarding private insurance should be added to the final regulation.

The Secretary also proposes to add a new paragraph (f) to specify that proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR 80.25. That section imposes limitations on how program income can be treated by grantees that would lead to States returning reimbursements from public and private insurance to the Federal

government or requiring that the funds be used under this part, which could discourage States and school districts from using all the resources available in paying for these services. Given the current small percentage that Federal funds under this part are to total funding for services under this part, and the fact that children with disabilities are guaranteed services under this part, the Secretary believes that States and school districts should be given some flexibility in how they use and account for funds received as reimbursements from other sources. A note would be added after this section explaining the consequences, under the Maintenance of Effort (MOE) requirements, of various State and local choices in accounting for these funds.

Two other notes would also be added following proposed § 300.142. One would quote the House Committee Report relating to the methods of insuring services provision. The other would explain that if a public agency cannot get parent consent to use public or private insurance for a service, the agency may use funds under Part B of the Act for that service. In addition, the note would explain that to avoid financial cost to parents who otherwise would consent to the use of private insurance, the public agency may use funds under this part to pay the costs of accessing the insurance, such as deductible or co-pay amounts.

Proposed § 300.143 incorporates, with revisions as described, the existing regulatory provision concerning State procedures for informing each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

Proposed § 300.144 would retain, with revisions as described, the existing regulatory provisions concerning State procedures that the SEA does not make a final determination regarding an LEA's eligibility for assistance under Part B without first giving reasonable notice and an opportunity for a hearing (consistent with section 612(a)(13)). The Secretary also proposes to retain as proposed § 300.145 the existing regulatory provision regarding recovery of funds for misclassified children. The statutory provision regarding recovery of funds for misclassified children was removed by the IDEA Amendments of 1997. In light of the fact that funds under section 611 of the Act will continue to be distributed based on a child count until some time in the future, however, the Secretary believes that prudent administration of Federal funds dictates that States continue to recover funds allocated among districts on the basis of incorrect child counts. The Secretary does not believe that this requirement will impose additional burden on States as all States already have these procedures. When the funding formula changes to the permanent formula under proposed § 300.706, this provision will be removed.

Proposed § 300.146 would add the new requirement of section 612(a)(22) regarding SEA examination of data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among State agencies and LEAs in the State and as compared to the rates for nondisabled children. As provided in the statute, if discrepancies are occurring, the SEA reviews and, if appropriate, revises its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards.

Proposed § 300.147 adds the new statutory requirements of section 612(b) concerning information that is required if an SEA is providing direct services. The Secretary interprets the statutory provision regarding requirements that must be met by an SEA as not including requirements relating to certain use of funds provisions, reflecting the different rules for SEA and LEA use of Part B funds. This regulation would replace the current regulatory provision on SEA provision of direct services.

Proposed § 300.148 adds the new statutory requirement of section 612(a)(20) concerning public participation in the adoption of any policies and procedures needed to comply with Part B of the Act. The proposed regulation would apply the procedures for public participation regarding State plans in the current regulations, with appropriate revisions as described, to the adoption of State policies and procedures in the future. Those procedures are in this NPRM in proposed §§ 300.280–300.284. The Secretary believes that these procedures are necessary to ensure that there is an adequate opportunity for public participation in the development of State policies and procedures related to the provision of special education and related services to children with disabilities. In addition, the Secretary does not see any indication in the IDEA Amendments of 1997 of an intention by Congress to lessen requirements concerning public participation in the development of State policies and procedures. The existing regulatory provision concerning consultation would be deleted, reflecting a statutory change. The existing regulatory provision concerning other Federal programs also would be deleted, in accordance with statutory changes.

Proposed § 300.150 incorporates the statutory requirement of section 612(a)(21)(A) that the State establish and maintain an advisory panel to provide guidance with respect to special education and related services for children with disabilities in the State.

Proposed § 300.152 incorporates the existing regulatory provision, and a note concerning commingling of Part B funds with State funds, with appropriate revisions, reflecting the requirements of section 612(a)(18)(B).

Proposed § 300.153 maintains the existing regulatory provision, regarding State-level nonsupplanting, appropriately revised, consistent with section 612(a)(18)(C). The note in the existing regulatory provision on nonsupplanting would be removed as it would be confusing in light of the new statutory State-level maintenance of effort requirement addressed in proposed § 300.154.

Proposed § 300.154 reflects the new statutory requirement of section 612(a)(19) which prohibits the State from reducing the amount of State financial support for special education and related services below the level of that support for the preceding fiscal year. If the State does reduce State support, the Secretary is directed to reduce funds to the State in the subsequent year by an amount equal to the amount by which the State failed to meet the requirement. The statute also provides that waivers are possible under certain described circumstances, and, if granted, in the year following the waiver the State must meet the level of support it had provided in the year before the waiver.

Proposed §§ 300.155 and 300.156 would simplify, in light of statutory changes, the provision in current regulations regarding policies and procedures for use of Part B funds, and annual descriptions of the use of Part B funds. Proposed § 30.156(b) would incorporate the longstanding Department practice of permitting a State to submit a letter instead of filing a new report when the State's use of funds that are retained by the State has not changed from the prior report submitted.

LEA and State Agency Eligibility—General

Similar to the State eligibility scheme as described, under section 613(a) LEAs and State agencies now also must demonstrate eligibility. Section 613(b)

specifies that if an LEA or State agency has policies and procedures on file with the State that meet a requirement of the new Act, the SEA shall consider the LEA or State agency to have met that requirement. Policies and procedures remain in effect until modified as the LEA or State agency decides necessary, or until required by the SEA because of changes to the Act or its implementing regulations, a new interpretation of the Act by Federal or State courts, or an official finding of noncompliance with Federal or State law or regulations. A provision would be added to clarify that the same rules apply to modifications to LEA or State agency policies and procedures as apply to the original ones consistent with the statutory provision regarding State eligibility. These provisions are in proposed §§ 300.180—300.182.

The excess costs provisions in the current regulations would be condensed and streamlined in these proposed regulations in §§ 300.184–300.185.

Proposed §§ 300.190 and 300.192 reflect the new statutory requirements of section 613(e) concerning joint establishment of eligibility and requirements for education service agencies (formerly intermediate educational units). These provisions eliminate the $7,500 minimum grant requirement of prior law and add an explicit prohibition on an SEA from requiring a charter school that is an LEA to jointly establish eligibility unless the SEA is explicitly permitted to do so under State law.

Proposed § 300.194 reflects the new statutory provision in section 613(i) concerning State agency eligibility. The Secretary proposes, in these regulations, to require that these agencies meet all the conditions of Subpart B of these proposed regulations that apply to LEAs, in keeping with the authorization in section 613(i)(2).

Proposed § 300.196 reflects the statutory provision of section 613(c) that if the SEA determines that an LEA or State agency is not eligible, the SEA notifies the LEA or State agency of that determination, and provides the LEA or State agency with reasonable notice and an opportunity for a hearing.

Proposed § 300.197 adds the statutory requirements concerning SEA actions if an LEA is failing to comply with the requirements of Part B.

LEA Eligibility—Specific Conditions

In accordance with the statutory changes in section 613(a), proposed § 300.220 simplifies the basic eligibility conditions for LEAs. This provision would replace most of the current regulations concerning the content of LEA applications. Under these proposed regulations LEAs must have in effect policies, procedures, and programs that are consistent with State policies and procedures required to demonstrate State eligibility.

With regard to implementation of the State's comprehensive system of personnel development, proposed § 300.221 reflects the requirement in section 613(a)(3) that the LEA demonstrate that all personnel necessary to carry out this part are appropriately and adequately prepared, consistent with State requirements, and that to the extent the LEA determines appropriate, it contributes to and uses the CSPD established by the State.

Proposed § 300.230 reflects the statutory provision of section 613(a)(2)(A) that funds under Part B of the Act must be used in accord with the requirements of Part B, may only be used for the excess costs of providing special education and related services to children with disabilities, and must supplement and not supplant other State, local and Federal funds.

Proposed § 300.231 reflects the new statutory provision that LEAs not reduce the level of expenditure of LEA funds.

Proposed § 300.232 incorporates new statutory exceptions to the local maintenance of effort (MOE) requirement. With regard to the exception relating to the voluntary departure or departure for just cause of special education personnel, the Secretary in these proposed regulations proposes to clarify that the exception only applies if personnel departing are replaced by qualified, lower-salaried personnel. This limitation would not permit a public agency to meet the MOE requirement by removing personnel and failing to replace them. The Secretary does not believe that the statutory provision was intended to permit a reduction in expenditures through attrition unless one of the other exceptions also applied. Other statutory exceptions added include exceptions covering a decrease in enrollment of children with disabilities; the termination of an obligation of the agency to pay for an exceptionally costly program, as determined by the SEA, because the child has left the agency, has reached the age at which the agency no longer has an obligation, or the child no longer needs special education; and the termination of costly expenditures for long-term purchases. A note following this section would quote from the House Committee Report on the issue of exceptions to maintenance of effort for voluntary departure of special education personnel, which provides the basis for the clarification of this exception.

Proposed § 300.233 reflects the new statutory provision in section 613(a)(2)(C) that in years when the Federal appropriation under section 611 is more than $4,100,000,000 an LEA may treat as local funds up to 20 percent of the amount of funds it receives under Part B that exceed the amount it received under Part B in the prior year. Under certain circumstances, an SEA may be authorized under State law to prevent an LEA from exercising this authority.

Proposed § 300.234 incorporates a new statutory provision concerning use of Part B funds in schoolwide project schools under section 1114 of the Elementary and Secondary Education Act of 1965. The amount of Part B funds that may be used in a schoolwide project is limited, by statute, to the amount arrived at by multiplying the per child amount the LEA receives under Part B by the number of children with disabilities participating in the schoolwide project school. The Secretary interprets the statutory provision regarding use of funds to require that these funds may be used without regard to the excess costs requirement, and that in calculating supplement, not supplant and maintenance of effort under Part B, these funds be considered as Federal Part B funds. An explicit statement that except as to the flexibility granted concerning how the Part B funds are used, all other requirements of Part B must be met by an LEA using Part B funds in a schoolwide project school would also be added. This reflects the Secretary's interpretation that this provision cannot be used as a basis for not providing services to children with disabilities in accordance with the other requirements of the Act. A note following this section would caution that children in schoolwide project schools must still receive services in accordance with a properly developed IEP and must still be afforded all of the rights and services guaranteed to children with disabilities under the Act.

Proposed § 300.235 incorporates the provisions of section 613(a)(4) regarding permissive use of Part B funds for special education and related services and supplementary aids and services provided to a child with disabilities that also benefit other children and to develop and implement a coordinated services system. The provision would make clear that an LEA will not be found to violate the commingling, excess costs, supplement not supplant, or maintenance of effort requirements

based on its use of funds in accordance with this provision.

Proposed §§ 300.240–300.250 reflect the new statutory provisions of section 613(a) (5), (6) and (7), (f) and (g) related to treatment of charter schools and their students, information for the SEA to carry out its duties under Part B, public availability of documents related to LEA eligibility, coordinated services systems, and school-based improvement plans. A note following proposed § 300.241 would explain that the provisions of the Part 300 regulations that apply to public schools also apply to children in public charter schools and that children with disabilities in charter schools retain all their rights under these regulations.

Secretary of the Interior—Eligibility

Proposed §§ 300.260—300.267 incorporate the revised statutory provisions concerning the payment to the Secretary of the Interior into the existing regulations on this topic. In proposed § 300.260 references to State eligibility requirements would be updated to reflect the new State eligibility requirements of the Act. In proposed § 300.262 the amount the Secretary of the Interior may use of the payment for administrative costs would be changed to 5 percent of its payment or $500,000 whichever is greater, reflecting the increase in the minimum for State administration in section 611. Provisions in the statute regarding a plan for coordination of services for all Indian children residing on reservations covered by Part B (section 611(i)(4)), definitions of the terms ''Indian'' and ''Indian tribe'' (section 602 (9) and (10)), and provisions regarding the establishment of an advisory board and reports by that board (sections 611(i) (5) and (6)(A)) would also be added.

Public Participation

Proposed §§ 300.280–300.284 incorporate the existing regulatory provisions concerning public participation, revised to reflect the statutory changes from State plans to State eligibility demonstrations. The Secretary believes that these provisions remain necessary to ensure adequate public participation in the development of State policies and procedures regarding the provision of special education and related services to children with disabilities under Part B of the Act, and sees nothing in the changes in the IDEA Amendments of 1997 that indicates a Congressional intent to reduce these requirements.

Subpart C—Services

Free Appropriate Public Education

Proposed § 300.300 is essentially the same as in the current regulation, with minor changes to update and accommodate new statutory provisions. Proposed §§ 300.301–300.308 also are restatements of the current regulatory provisions at these sections.

Reflecting the Secretary's long standing interpretation of the obligation to make FAPE available based on individual needs, a new § 300.309 would be added to address extended school year services. This provision would require that each public agency ensure that extended school year services are available to each child with a disability to the extent necessary to ensure that a free appropriate public education is available to the child, based on an individual determination of the child's needs by the child's IEP team. The term ''extended school year services'' is defined to be special education and related services that are provided to a child with a disability beyond the normal school year, in accordance with the child's IEP, at no cost to the child's parents, and that meet the standards of the SEA. A note following this section would explain that agencies may not limit extended school year services only to children with particular categories of disability or unilaterally limit the duration of services. The note would also explain that nothing in Part B requires that every child with a disability is entitled to, or must receive, extended school year services. A second note would explain that States may establish standards for decisions regarding which children should receive extended school year services and provides examples of acceptable factors that may be considered. These changes reflect the Secretary's policy guidance over the years on this topic, which itself has been informed by a number of Federal court decisions over the last twenty years under Part B of the Act. The Secretary believes that the changes are necessary to ensure that children with disabilities who need extended school year services have appropriate access to those services, and that those services are a part of FAPE.

Proposed § 300.311 reflects new statutory provisions in sections 612(a)(1)(B) and 614(d)(6) concerning students with disabilities who are in adult correctional facilities. Paragraph (a) would specify that the obligation to make FAPE available to all children with disabilities does not apply to students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility, were not actually identified as being a child with a disability and did not have an IEP under Part B. This language is taken from the statute, with minor changes for the sake of clarity. Paragraph (b) would provide that certain requirements of Part B do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons: the provisions relating to participation of children with disabilities in general assessments, and the provisions relating to transition planning and transition services for students whose eligibility under Part B will end, because of their age, before they will be released from prison. The Secretary interprets the provision concerning transition services to require consideration of the student's sentence and eligibility for early release because the required determination must happen before the student actually is released from prison. Reflecting statutory requirements, paragraph (c) would specify that the IEP team of a student with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

Evaluations and Reevaluations

Proposed §§ 300.320 and 300.321 would be added to reflect the basic statutory requirements concerning evaluations and reevaluations contained in section 614 (a) and (b) of the Act. Evaluations and reevaluations would be addressed in greater detail in the discussion of proposed §§ 300.530–300.536.

Individualized Education Programs

Proposed § 300.340 would restate the current regulatory definitions of ''IEP'' and ''participating agency.''

Proposed § 300.341 would restate the current regulatory provision concerning the SEA responsibility for development and implementation of IEPs, with one minor wording change. Throughout these proposed regulations, the Secretary proposes to use the term ''religiously-affiliated'' rather than the term ''parochial'' as the former is more inclusive and accurately reflects the type of schools described. These proposed regulations distinguish between children placed in private schools by public agencies and those

placed in private schools by their parents. Proposed §§ 300.401 and 300.402 address children placed by public agencies in private schools. Proposed § 300.403 concerns placement in private schools when the provision of FAPE is at issue. Proposed §§ 300.450–300.462 concern children placed by their parents in private schools.

Proposed § 300.342 (a) and (b) would restate, with minor nonsubstantive changes, the current regulatory provisions regarding when IEPs must be in effect. A new paragraph (c) would be added regarding the use of IFSPs for children aged 3 through 5 as provided for in the statute at section 614(d)(2)(B), and reflecting the Secretary's interpretation that this provision permits, if State policy provides and the public agency and parent agree, the use of an IFSP that meets the content requirements of section 636(d) of the Act in place of a document meeting the IEP content requirements of section 614(d) of the Act, for children aged 3 through 5. With regard to the requirement for agreement by the parents to using an IFSP instead of an IEP, the Secretary proposes to require written informed consent that is based on an explanation of the differences between an IFSP and an IEP in light of the importance of the IEP as the statutory vehicle for ensuring the provision of FAPE to children with disabilities. For most children who are five-years old, and for many 3- and 4-year olds as well, the use of an IEP that must be tied to the general curriculum provided to nondisabled age peers, is encouraged.

The Secretary proposes to add a new paragraph (d) to this section representing the Secretary's understanding of section 201(a)(2)(C) of Pub. L. 105–17 that IEPs that meet the requirements of section 614(d) (1)–(5) must be in effect as of July 1, 1998. Delaying implementation of these provisions beyond that date would be inconsistent with the right of children with disabilities to an IEP that meets the new requirements as of July 1, 1998. The note following this section from current regulations would be retained with minor changes, and a new note added to clarify that the provisions of section 614(d)(6) of the Act, relating to services to children with disabilities in adult prisons, took effect on June 4, 1997.

Proposed § 300.343(a) restates the current regulatory provision concerning the general standard for conducting IEP meetings. In paragraph (b) of this section, the Secretary would add a new provision on timelines for IEPs that would require that an offer of services based on an IEP must be made within a reasonable period of time from a public agency's receipt of parent consent to an initial evaluation reflecting the Department's longstanding interpretation of the requirements of the statute. A note following this section would be added to explain that for most children it would be reasonable to expect that a public agency would offer services based on an IEP within 60 days of receipt of parent consent for initial evaluation. The Secretary proposes this reasonable time standard in light of the importance of appropriate educational services for children with disabilities to enable them to receive FAPE and the frequent long delays observed between referral for special education evaluation and actual provision of services. Paragraph (b) would retain the current regulatory timeline of 30 days from the determination that the child is a child with a disability to an IEP meeting. A new paragraph (c) would also be added to this section that revises the current regulatory provision concerning review of IEPs to reflect new statutory requirements in section 614(d)(4). The note following this section in current regulations would be deleted as unnecessary and confusing in light of changes proposed to the regulation.

Proposed § 300.344 would revise the current regulatory provision concerning IEP team membership to reflect the requirements of section 614(d)(1)(B). Under this provision the IEP team includes the parents of the child with a disability; at least one regular education teacher (if the child is, or may be, participating in regular education); at least one special education teacher or, if appropriate, at least one special education provider of the child; a representative of the LEA who meets certain specified requirements; an individual who can interpret the instructional implications of evaluation results; at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel; and, if appropriate, the child.

The Secretary proposes to expand the current regulatory provision requiring the agency to invite students to participate in IEP meetings if the meeting will include consideration of the statement of needed transition services to also include meetings that will include consideration of transition service needs, in accordance with § 300.347(b)(1) and note 5 following that section. This reflects the Department's longstanding regulatory position that a student with a disability be involved in the development of an IEP if transition services are being considered. The current regulatory provision regarding taking other steps to ensure consideration of the student's preferences and interest if the student does not attend the IEP meeting would be maintained. This section also would maintain the current regulatory provisions concerning inviting representatives of any other agency that is likely to be responsible for providing or paying for transition services, including taking other steps to obtain participation if a representative invited to a meeting does not attend.

Note 1 following this section would be revised in light of the statutory changes. It would also explain that an LEA may designate one or more regular education teachers of the child to attend the IEP meeting, if the child has more than one. It would further state that if all of the child's teachers are not participating in the IEP meeting, LEAs are encouraged to seek input from teachers who will not be attending, and should ensure that teachers who do not attend the IEP meeting are informed about the results of the meeting, including receiving a copy of the IEP. Finally, the note would explain that LEAs are encouraged, in the case of a child whose behavior impedes the learning of the child or others, to have a person knowledgeable about positive behavior strategies at the meeting. Note 2 following this section in the current regulations would be removed.

Proposed § 300.345 largely would maintain the current regulatory provision concerning parent participation in IEP meetings based on the statutory requirements at section 614(d)(1)(B). It would be revised only by adding to the parent notification provisions that for students of any age, if a purpose of the IEP meeting is either the development of a statement of transition service needs or consideration of needed transition services, the agency's notice to the parent must indicate that purpose, and that the agency must invite the student to attend. This change merely modifies the current regulation to accommodate the new statutory provision requiring a statement of transition service needs for students beginning no later than age 14 contained in proposed § 300.347.

Proposed § 300.346 would add a new provision to the regulations based on the requirements of section 614(d)(3) concerning development of the IEP. That section requires that in developing each child's IEP the IEP team consider the strengths of the child and the concerns of the parents for enhancing the education of their child and the results of the initial or most recent

evaluation of the child. That section requires that the IEP team also consider a number of special factors that may apply to individual children. For example, if a child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. These statutory requirements are included in proposed § 300.346(a). Proposed § 300.346(b) would clarify that IEP teams consider these factors in review and revision of IEPs as well as in their initial development. A paragraph (c) also would be added to clarify that if in considering a factor, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP. It would be an anomalous result if an IEP team determined that a service or device was needed to address one of the statutory special factors, and that service or device were not included in the child's IEP.

Paragraph (d) of this proposed section would add the statutory requirements of section 614(d) (3)(C) and (4)(B) which specify that the regular education teacher, to the extent appropriate, must participate in the development, review, and revision of the IEP of the child, including assisting in the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel. Paragraph (e) of this section would incorporate the new statutory provision of section 614(e) which specifies that IEP teams are not required to include information under one component of a child's IEP that is already included under another. Three notes would also be added following this section. The first would recognize the importance of the consideration of the special factors in development of a child's IEP. As appropriate, consideration of these factors must include a review of valid evaluation data and the observed needs of the child resulting from the evaluation process. The second note would acknowledge the statement in the House Committee Report regarding Pub. L. No. 105–17 that states that for children who are deaf or hard of hearing the IEP team should implement the special consideration provision in a manner consistent with the ''Deaf Students Education Services'' policy guidance from the Department. The third note would explain how the considerations addressed in this section affect the development of an IEP for a child who is limited-English proficient. This is one of several notes addressing the responsibility of public agencies to effectively meet the needs of children with limited English proficiency who have a disability or are suspected of having a disability. The Secretary requests public comment on whether additional clarification would be useful.

Proposed § 300.347 would replace the current regulatory provision on the contents of IEPs with the new statutory requirements from section 614(d)(1)(A) regarding the contents of an IEP. In addition, proposed § 300.347 would maintain the current regulatory provision regarding transition services on a student's IEP which states that if the IEP team determines that services are not needed in one or more of certain of the areas specified in the definition of transition services, the IEP team must include a statement to that effect and the basis upon which the determination was made. In addition, the Secretary would add, as paragraph (d), a statement that special rules concerning the content of IEPs apply for children with disabilities who are in adult prisons, consistent with section 614(d)(6) of the Act. The notes following the current regulatory provision on IEP contents would be shortened and condensed into one note regarding transition services. Notes would be added following this section explaining several issues raised by the new provisions on IEP contents—the emphasis on the general curriculum, the focus of the IEP on enabling children with disabilities to access the general curriculum, the relationship of teaching and related service methodologies or approaches and the content of the IEP, the new reporting to parents requirement and the new statement of transition service needs. A final note would explain that it would not be a violation of Part B of the Act for a public agency to begin planning for transition service needs for students younger than age 14 and transition services for students younger than age 16.

Proposed § 300.348 would maintain the current regulatory provision concerning agency responsibility for transition services, consistent with section 614 (d)(5) and (d)(1)(A)(vii). Current regulatory provisions concerning private school placements by public agencies and children with disabilities in private schools would be retained as proposed §§ 300.349 and 300.350, with minor wording changes. These sections reflect the Secretary's interpretation of how public agencies meet their responsibilities regarding conducting IEP meetings under section 614(d)(1)(B) in light of the requirements of section 612(a)(10) (A) and (B) regarding providing services to children with disabilities in private schools. The current regulatory provision concerning IEP accountability would also be maintained as proposed § 300.351. The Secretary believes that this provision continues to represent the appropriate interpretation of the statutory provisions concerning IEPs. However, the note following this section has been revised in light of the heightened focus in the IDEA Amendments of 1997 on providing children with disabilities the instruction, services and modifications that will enable them to achieve a high standards.

Direct Services by the SEA

Proposed § 300.360(a) would replace the current regulatory provision describing the SEA's use of funds, that otherwise would have gone to an LEA, to provide direct services, with the new statutory requirements on this issue. Paragraphs (b) and (c) would be maintained from the current regulations, reflecting the Secretary's continuing interpretation of how SEAs implement direct services. The note following this section would be retained, with material deleted that has been rendered obsolete by the new statute. Proposed § 300.361 would be retained from the current regulations, consistent with the requirements of section 613(h)(2) of the Act.

Section 611(f)(3) authorizes several new uses of money that the State may retain at the State level, including to establish and implement the mediation process; to assist LEAs in meeting personnel shortages; to develop a State Improvement Plan under subpart 1 of Part D of the Act; to carry out activities at the State and local levels to meet performance goals and to support implementation of the State Improvement Plan; to supplement other amounts used to develop and implement a Statewide coordinated services system (but not more than one percent of the grant under section 611 of the Act); and for capacity building and system improvement subgrants to LEAs. The current regulatory provision would be expanded by adding these new statutory provisions as § 300.370(a) (3)–(8). Proposed § 300.370(a) (1) and (2) reflect statutory provisions that were in the prior law and are retained in section 611(f)(3). The provision in the current regulations concerning State matching would be deleted, reflecting the deletion of this requirement from the statute.

Proposed § 300.372 would replace the current regulatory provision regarding the applicability of the nonsupplanting provision to funds that the State uses with the new requirements from section 611(f)(1)(C) that the SEA may use funds retained without regard to the prohibition on commingling and the prohibition on supplanting other funds.

Comprehensive System of Personnel Development

The regulatory provisions in proposed §§ 300.380–300.382 would be revised to reflect new statutory requirements concerning a State's comprehensive system of personnel development (CSPD). Proposed § 300.380 would require that each State's CSPD be consistent with Part B of the Act and the CSPD provision of Part H (to be renamed Part C); be designed to ensure an adequate supply of qualified special education, regular education and related services personnel; be updated at least every five years; and meet the requirements of §§ 300.381–300.382, which contain the provisions of section 653 (b)(2)(D) and (c)(3)(D), as required by section 612(a)(14). Because the statute makes the CSPD the same as the personnel sections of a State Improvement Plan, the Secretary proposes to add a provision to make clear that a State with a State Improvement grant would be considered to have met the requirements of this section.

Proposed § 300.381 would require a State to include an analysis of State and local needs for professional development of personnel to serve children with disabilities that must include at least certain minimum specified information. Proposed § 300.382 would require States to describe the strategies in a number of specified areas that they will use to address the needs identified under proposed § 300.381, including identified needs for in-service and pre-service preparation 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.

Subpart D—Children in Private Schools

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

Sections 300.400–300.402 of these proposed rules would incorporate the existing rules regarding children with disabilities placed in private schools by public agencies and children with disabilities placed in private schools by their parents. These proposed rules reflect the unchanged statutory provision in section 612(a)(10)(B) that children with disabilities placed in or referred to private schools or facilities by an SEA or LEA must be provided special education and related services (1) in accordance with an IEP, and (2) at no cost to their parents. Section 612(a)(10)(B) further requires that the SEA must ensure that the private facilities meet State standards and that children placed in those facilities have the same rights they would have if served by a public educational agency. The IDEA Amendments of 1997 added new requirements concerning children placed by their parents in private schools. Section 612(a)(10)(C)(i) provides that an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the LEA made FAPE available to the child and the parents elected to place the child in the private school. Parent reimbursement is subject to certain requirements described in the next paragraph of this preamble. This provision would be reflected in proposed § 300.403(a). Proposed § 300.403(b) would be retained from the current regulations to clarify that due process procedures can be used to resolve disagreements about the provision of FAPE and financial responsibility of the public agency.

Section 612(a)(10)(C)(ii) describes the circumstances under which a parent may seek reimbursement from a public agency for a private school placement. This provision states that a court or a hearing officer may require the public agency to reimburse parents for the cost of a private school placement if the court or hearing officer finds that the public agency had not made FAPE available to the child in a timely manner. It also states that reimbursement may be reduced or denied if (1) at the child's most recent IEP meeting the parents did not inform the IEP team that they were rejecting the public agency's proposed placement, including stating their concerns and their intent to enroll their child in a private school at public expense; (2) ten (10) business days (including holidays that occur on a business day) prior to the removal of the child from public school, the parents did not give written notice that they were rejecting the public agency proposal and their intent to enroll their child in a private school at public expense; (3) prior to the parents' removal of the child from a public school, the public agency notified the parents, through the prior written notice required under section 615(b)(7) of the Act, of its intention to evaluate the child, but the parents did not make the child available for evaluation; or (4) upon a judicial finding of unreasonableness regarding the actions of the parents. Reimbursement may not be reduced or denied for failure to provide that notice if: (1) The parent is illiterate and cannot write in English; (2) compliance with an evaluation would likely result in physical or serious emotional harm to the child; (3) the school prevented the parent from providing the notice; or (4) the parents had not received notice, pursuant to section 615 of the Act, of the notice requirement. These provisions would be incorporated in the proposed regulations at § 300.403(c)–(e).

Children With Disabilities Enrolled by their Parents in Private Schools

Proposed § 300.450 would retain the current regulatory definition of ''private school children with disabilities.''

Section 612(a)(10)(A) of the Act provides that to the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for these children special education and related services, by spending a proportionate amount of the Federal funds available under Part B of the Act on services for these children. Those services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law. The statute also requires that the SEA's and LEA's child find activities apply to children with disabilities who are placed by their parents in private, including parochial, schools.

Proposed §§ 300.451–300.462 would incorporate these statutory requirements, and appropriate provisions from existing regulatory requirements (from 34 CFR 76.650–76.662) regarding the participation of private school students with disabilities. The term ''religiously-affiliated'' would be used instead of the statutory term ''parochial'' as the Secretary assumes that all religious schools were intended by Congress to be included, not just those organized on a parish basis. The child find obligation from the statute is reflected in proposed § 300.451. Proposed § 300.452 describes the basic statutory obligation to provide special

education and related services to private school children with disabilities and says that obligation is met by meeting the requirements of §§ 300.453–300.462. In § 300.453, the Secretary interprets the statutory limitation on the amount of funds that LEAs must spend on providing special education and related services to private school children with disabilities as the same proportion of the LEA's total subgrant under sections 611 and 619 of the Act as the number of private school children with disabilities aged 3 through 21 and 3 through 5, respectively, is to the total numbers of children with disabilities in its jurisdiction in each of those age ranges. A note would be added after this section to clarify that SEAs and LEAs are not prohibited from providing more services to private school children with disabilities than is required under the Act.

Proposed § 300.454(a) specifies that no individual private school child with a disability has a right to receive some or all of the special education and related services the child would receive if enrolled in a public school. This provision reflects the Secretary's longstanding regulatory interpretation of the statutory limitations on the obligation to provide services to private school children with disabilities, which now specifically reference the limited amount of funds that LEAs must spend on these services. LEAs should have the authority to decide, after consultation with representatives of private school children with disabilities, how best to provide services to this population. Proposed § 300.454 (b)–(e) specifies that LEAs make decisions about which children to serve and what services to be provided to private school children with disabilities, and how those services will be provided and evaluated after timely and meaningful consultation with appropriate representatives of private school children with disabilities that gives those representatives a genuine opportunity to express their views on these subjects. These rules are similar to requirements governing how decisions are made about services provided to private school children under Title I of the Elementary and Secondary Education Act, and are based on the consultation provisions in 34 CFR 76.652 that have applied to services to private school children with disabilities under the Act for many years.

Proposed § 300.455 specifies that services provided to private school children with disabilities must be comparable in quality to services provided to children with disabilities enrolled in public schools and provides a definition of ''comparable in quality.'' This proposed section also specifies that the IEPs developed for these children must address the services that the LEA has determined that it will provide to the child, in light of the services that the LEA has determined, through the consultation process, that it will make available to private school children with disabilities. (The proposed regulations will maintain the current regulatory provision at § 300.341(b)(2) requiring that IEPs be developed for children enrolled in private schools and receiving special education and related services from a public agency.)

Proposed § 300.456(a) would incorporate the statutory provision that services may be provided on-site at the child's private school, to the extent consistent with law. The term ''religiously-affiliated'' is used instead of the statutory term, ''parochial.'' A note would be included after this section that recognizes that under recent decisions of the U.S. Supreme Court, LEAs may provide special education and related services on-site at religiously-affiliated private schools in a manner that does not violate the Establishment Clause of the First Amendment to the U.S. Constitution.

Proposed § 300.456(b) would specify that transportation to a site other than the child's private school must be provided if necessary for the child to benefit from or participate in the other services offered, based on the Secretary's longstanding position that all children with disabilities must be provided transportation to and from other services provided under the Act, if that transportation is necessary to enable them to benefit from those other services. Paragraph (b)(2) of this section would clarify that the cost of that transportation may be included in calculating whether the LEA has met the requirement of § 300.453. A second note following this section would explain that transportation is not required between the student's home and the private school, but only between the site of the services, if other than the private school, and the student's private school or the student's home, depending on the time of the services.

In proposed § 300.457(a), the Secretary interprets the statutory provision regarding services to private school children with disabilities to mean that the due process procedures of the Act do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.452–300.462, including the provision of services indicated on the child's IEP. This provision is based on the statutory scheme, which does not include any individual right to services for private school students placed by their parents. Proposed § 300.457(b) would clarify that complaints that an SEA or LEA has failed to meet the requirements of §§ 300.451–300.462 may be filed under the State complaint procedures addressed in this NPRM at §§ 300.660–300.662.

Proposed §§ 300.458–300.462 would incorporate, with only minor changes that are not intended to be substantive, the requirements from 34 CFR §§ 76.657–76.662 that have applied to the Part B program of the Act for many years. The Secretary believes that these provisions are necessary to ensure that funds under Part B of the Act are not used to benefit private schools or in ways that could raise questions of inappropriate assistance to religion.

Proposed §§ 300.480–300.487 would repeat, with only minor nonsubstantive changes, the bypass provisions from the current regulations. The bypass provisions in section 612(f) are unchanged from prior law.

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

Proposed § 300.500 would combine in one section two current regulatory provisions that establish the general responsibility of SEAs for establishing and implementing procedural safeguards and define ''consent,'' ''evaluation,'' and ''personally identifiable.'' The provision in proposed § 300.500(a) regarding the general responsibility of SEAs would be updated to include all the procedural safeguards in the proposed regulations, consistent with the requirements of section 615(a) of the Act. Similarly, the definition of ''evaluation'' in proposed § 300.500(b)(2) would be updated to refer to all of the evaluation procedures in Subpart E of the proposed regulation, which are based on the statutory provisions of sections 612(a)(6)(B) and 614 (a)–(c). A new note following this section would be added to clarify that a parent's revocation of consent is not retroactive in effect. For example, if a parent grants consent for an evaluation, and after the evaluation is completed the parent revokes consent for the evaluation, the IEP team would still be able to consider that evaluation in making decisions about the child's program and placement.

Based on the requirements of section 615(b)(1), proposed § 300.501(a) would be revised to address the parents' opportunity to inspect and review all educational records, as in the current regulation, and the new statutory

requirements that parents be given an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. In paragraph (b) of this section the Secretary proposes that the statutory obligation to afford parents the opportunity to participate in meetings means that parents must be given notice of the meeting, including the purpose, time and location, and who will be in attendance, early enough so that they have an opportunity to attend, because these requirements seem essential to giving parents an opportunity to participate in these meetings. In paragraph (b)(2), the Secretary proposes to define ''meeting'' to make clear that only certain conversations about providing educational services to a child are covered, to eliminate potential confusion about the scope of this requirement. Paragraph (c) of this section would incorporate the requirement of section 614(f) that public agencies ensure that parents are members of any group that makes decisions on the educational placement of their child. The Secretary proposes in this paragraph to require that public agencies use procedures like those required for parent involvement in IEP team meetings, to ensure that parents are members of the group that makes decisions on the educational placement of their child, including notice of the meeting as described, using other methods to involve parents in the meeting when parents cannot be physically present, maintaining a record of attempts to ensure the participation of the parents, and taking steps to ensure that parents are able to understand and participate in the meetings. The Secretary would adopt this position as necessary to ensure that parents participate in these meetings, as required by section 614(f), and as these procedures have been used for many years by all public agencies regarding parent participation in IEP meetings. In many, if not most instances, placement decisions will be made as a part of IEP meetings, as is already the case in many jurisdictions.

Proposed § 300.502 (a), (c), and (d) would contain, with minor modifications, the current regulatory provisions setting out the general requirements regarding independent educational evaluations, parent-initiated evaluations, and requests for evaluations by hearing officers, consistent with the statutory provision of section 615(b)(1). Proposed paragraph (b) would restate the current regulatory provision concerning the parent's right to evaluation at public expense to make clear that if a parent requests an independent educational evaluation, the agency, without unnecessary delay, must either initiate a due process hearing to show that its evaluation is appropriate, or insure that an independent educational evaluation is provided at public expense, reflecting the Secretary's interpretation that a public agency must take action to respond to a parent's request for an independent educational evaluation, and may not just refuse to respond. Paragraph (e) of this proposed section would restate, with modifications, the current regulatory provision concerning agency criteria for evaluations. The Secretary proposes to add a new paragraph (e)(2) to clarify that other than the agency's criteria for an agency-initiated evaluation, the public agency may not impose conditions or timelines on a parent's right to obtain an independent educational evaluation at public expense. This proposal reflects the Department's analysis of the statutory provision that an independent educational evaluation must be available if the parent objects to an evaluation that a school district is using. A note following this section would explain that a public agency may not impose conditions on obtaining an independent educational evaluation other than the agency criteria for the agency's own evaluations, but must either timely provide the independent educational evaluation at public expense or initiate a due process hearing. A second note would be added to encourage public agencies to make information about the agency's criteria for evaluations known to the public, so that parents who disagree with an agency evaluation will know what standards an independent evaluation should meet. A third note would explain how agency criteria apply to an independent educational evaluation.

Proposed § 300.503(a)(1) would repeat, unchanged, the current regulatory provision concerning the basic obligation to provide prior written notice, based on the statutory requirements for prior notice. Proposed paragraph (a)(2) would be added to clarify that an agency may provide the prior written notice at the same time that it requests parent consent, if an action proposed by a public agency requires parent consent and prior written notice, reflecting the Secretary's interpretation that these activities are closely related. The new statutory requirements concerning the content of prior written notice from section 615(c) would be addressed in proposed § 300.503(b) (1) through (7). These new content requirements are different from, and would replace, the provision in current regulations on the content of prior written notice. The Secretary proposes to add to this paragraph a requirement that the prior written notice include a statement informing parents about the State complaint procedures, including a description of how to file a complaint and the timelines under those procedures. The Secretary believes that insuring that parents know about these procedures, which are an alternative mechanism to due process, should help, in conjunction with the new statutory provisions regarding mediation that are also contained in these proposed regulations, to reduce the number of disagreements between parents and school districts that go to due process. Based on the requirement of section 615(b) (3) and (4) of the Act, paragraph (c) of proposed § 300.503 would maintain the provision from current regulations concerning providing this notice in language understandable to the general public and in the native language or other mode of communication used by the parent, unless it is clearly not feasible to do so.

Proposed § 300.504 would contain the new statutory provisions concerning procedural safeguards notice, including in paragraph (a) when that notice must be provided, and in paragraph (b) what content it must include, as provided in section 615(d) of the Act. Paragraph (c) of this section would address the statutory requirements, also from section 615(d), that this notice be in language understandable to the general public and in the native language or other mode of communication used by the parent unless clearly not feasible to do so, in the same way as similar requirements would be treated regarding prior written notice.

Changes were made in how the statute addresses parent consent (in sections 614 (a)(1)(C) and (c)(3)), and so the existing regulatory provision would be revised in the following ways at proposed § 300.505. Paragraph (a) would be revised in recognition of the new statutory provision concerning parent consent for reevaluations. The Secretary proposes to read this provision to require parent consent before conducting a new test as a part of a reevaluation. The statute now discusses evaluation and reevaluation as including reviewing existing data and, if appropriate, conducting new assessments or tests when new information is needed. The Secretary does not believe that in adding a parent right to consent to reevaluations that Congress intended to require school

personnel to obtain parent consent before reviewing existing data about a child. Therefore, the proposed regulation would make clear that as to reevaluations, parent consent is needed only before conducting a new test as part of that reevaluation. Paragraph (b) of this section would reflect the statutory requirement of section 641(a)(1)(C)(ii) regarding parent refusals to consent.

Paragraph (c)(1) of this proposed section would reflect the statutory requirement of section 614(c)(3) of the Act that parent consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent, and the parent fails to respond. In paragraph (c)(2) of this section the Secretary proposes to describe the demonstration of ''reasonable measures'' as procedures consistent with those required to demonstrate attempts to involve a parent in an IEP meeting. Those procedures, which are unchanged from the current regulations, would be in proposed § 300.345(d) (1) and (2). Proposed paragraphs (d) and (e) of this section would restate current regulatory provisions concerning additional State consent requirements and a limitation on using parent consent for a Part B service or activity as a condition on other benefits to the parent or child. Note 1 following the consent provision in the current regulations would be removed as unnecessary. Note 2 from current regulations would be shortened and revised consistent with the proposed regulatory changes and renumbered as Note 1. Note 3 in current regulations would be renumbered as Note 2 and a new Note 3 would be added addressing agency choices when a parent refuses to consent to a reevaluation.

Proposed § 300.506 would reflect the new statutory provisions of section 615(e) of the Act concerning mediation in paragraphs (a), (b), and (d)(1), which set forth the general responsibility to establish and implement mediation procedures, specific requirements regarding the mediation process, and the statutory provision concerning requiring parents who elect not to use mediation to meet with a disinterested party who would explain the benefits of mediation and encourage its use. In paragraph (c) the Secretary proposes to clarify the requirement that mediation be conducted by an impartial mediator by specifying that a mediator may not be an employee of an LEA or State agency acting as an LEA or an SEA that is providing direct services to the child who is the subject of the mediation and must not have a personal or professional conflict of interest. This position reflects the explanation of this statutory provision in congressional committees' reports. Given Congress' interest in encouraging the use of mediation, it is unlikely that it would have considered any person not meeting basic standards of impartiality to be an acceptable mediator. The Secretary believes that these standards will encourage the use of mediation by ensuring parties to a dispute the availability of an objective third party to mediate disputes. The Secretary proposes to add, in paragraph (d)(2), a clarification that a public agency may not deny or delay a parent's right to a due process hearing based on a parent's failure to participate in the meeting described in proposed paragraph (d)(1). This proposal is made in recognition of the statutory provision of section 615(e)(2)(A)(ii) which provides that the mediation process not be used to deny or delay a parent's right to due process. A note following this section would quote language from the House Committee Report, noting the Committee's intention that if a mediator is not selected at random from the list maintained by the SEA, both the parents and the agency must be involved in selecting the mediator and in agreement about the selection. A second note would note the discussion of House Committee Report's the confidentiality provisions regarding mediation.

Proposed § 300.507(a)(1) would set out the general provision, from section 615(b)(6) of the Act, regarding the right of parents and public agencies to initiate a due process hearing on any matter relating to the identification, evaluation, educational placement or provision of FAPE to a child. In paragraph (a)(2), the Secretary would interpret the requirement of section 615(e)(1) that mediation be available whenever a hearing is requested, as requiring that parents be notified of the availability of mediation whenever a due process hearing is initiated. Paragraph (a)(3) would restate the requirement from the current regulations that the public agency inform the parent of free or low-cost legal and other relevant services if the parents request it, and whenever a due process hearing is initiated. Paragraph (b) of this proposed section would reflect the statutory requirement of section 615(f)(1) of the Act that the hearing be conducted by the SEA or public agency directly responsible for the education of the child. Paragraph (c) of this proposed section would reflect the new statutory requirements of section 615(b) (7) and (8) concerning the notice that a parent is required to provide to a public agency in a request for a due process hearing, and the model form that must be developed by the SEA to assist parents in filing a request for due process that includes the information required in proposed paragraphs (c) (1) and (2). In paragraph (c)(4) the Secretary proposes to clarify that failure to provide the notice specified in paragraphs (c) (1) and (2) cannot be used to deny or delay a parent's right to a due process hearing, as the Secretary believes that Congress did not intend that failure of a parent to provide this notice would prevent them from using procedures necessary to protect their child's right to FAPE. A note following this section would be added to clarify that a public agency may not deny a parent's request for due process, even if it believes that the issues raised are not new, and that this determination must be made by a hearing officer. A second note would quote the House Committee Report noting that a consequence of failure to provide this notice may be a possible reduction in attorneys' fees, noting that the provision is designed to encourage early resolution of disputes and foster partnerships between parents and school districts.

Proposed § 300.508 would maintain the current regulatory requirements concerning impartial hearing officers, consistent with the requirement of section 615(f)(3).

Proposed § 300.509 would add, to existing regulatory provisions concerning rights of all parties to a due process hearing, the new statutory requirement of section 615(f)(2) of the Act regarding disclosure, at least 5 business days prior to a hearing, of all evaluations and recommendations based on those evaluations that have been completed by that date and that a party intends to introduce at the hearing. This provision would be in addition to the existing regulatory requirement of disclosure of any evidence to be introduced at the hearing at least 5 days before the hearing. The provisions from current regulations concerning the parties' rights to obtain a verbatim record of the hearing and the findings of fact and decisions of the hearing officer would be modified consistent with statutory changes in section 615(h) (3) and (4) of the Act, which give parents the right to choose either a written or electronic version of these documents. Paragraph (c)(1) of this proposed section would maintain the existing regulatory provision concerning parents' rights to have the child who is the subject of the hearing present, and to open the hearing to the public. Paragraph (c)(2) would specify that the record of the hearing and the findings of fact and decisions of

hearings must be provided to parents at no cost. This reflects the Department's longstanding interpretation that parents must have access to copies of records of hearings and findings of fact and decisions at no cost so that the right to appeal due process hearing decisions in order to protect their child's right to FAPE is not foreclosed. Proposed paragraph (d) of this section would maintain the current regulatory provision requiring public agencies, after deleting personally identifiable information, to transmit findings and decisions of due process hearings to the State advisory panel and make them available to the public, consistent with section 615(h)(4).

Proposed § 300.510(a) maintains, with minor changes, the current regulatory provision regarding finality of decisions, consistent with section 615(i)(1)(A). Proposed § 300.510 (b), (c), and (d), reflecting the statutory requirements, maintain current regulatory provisions concerning the State level review procedure, including the reviewing official's duties; the responsibility, after deleting personally identifiable information, to make findings and decisions in reviews available to the public and transmit them to the State advisory panel; and finality of review decisions. The notes following the provision on these subjects in current regulations would be retained.

Proposed §§ 300.511 and 300.512(a) would maintain the current regulatory provisions concerning the timelines for due process hearings and State review proceedings and the right of an aggrieved party to bring a civil action. Proposed § 300.512 (b) and (c) would add the statutory requirements of section 615 (i)(2) and (i)(3)(A) of the Act regarding the duties of the court in reviewing a due process decision or State level review and the jurisdiction of the Federal district courts. Proposed § 300.511(d) would add to the regulation the statutory rule of construction of section 615(l) of the Act regarding the applicability of other laws such as the Constitution, the Americans with Disabilities Act of 1990, and title V of the Rehabilitation Act of 1973, to actions seeking relief that is also available under section 615 of the Act.

Proposed § 300.513(a) would maintain the current regulatory provision concerning attorneys' fees, reflecting the requirements of section 615(i)(3)(B)–(G). The Secretary proposes to add a new paragraph (b) to specify that funds provided under Part B of the Act may not be used to pay attorneys' fees awarded under the Act. The Secretary does not believe that funds awarded under the Act for special education and related services should be used to pay attorneys' fees because it would divert limited Federal resources from direct services. A note would be added following this section to explain that States may permit hearing officers to award attorneys' fees to prevailing parents.

Proposed § 300.514(a) would revise the current regulation consistent with the new statutory provision in section 615(j), which adds, as an explicit exception to the ''pendency'' provision, the provisions of section 615(k)(7) of the Act. Proposed paragraph (b) of this section would retain the current regulatory provision concerning due process complaints involving an initial admission to public school. The Secretary proposes to add a new paragraph (c) to clarify that if a hearing officer in a due process hearing or a review official in a State level review agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and local agency and the parents for purposes of determining the child's current placement during subsequent appeals. The pendency provision is designed as a protection to be used by parents of children with disabilities when there is a dispute between the parents and school district about the identification, evaluation, or placement of the child, or about any matter related to the provision of a free appropriate public education to the child. When parents are in agreement with the decision reached in a due process hearing or appeal, the pendency provision should not be invoked to prevent the implementation of that decision. The note from current regulations concerning children who are endangering themselves or others would be retained.

Proposed § 300.515 would maintain, without change, the current regulatory provisions concerning surrogate parents, consistent with the provisions of section 615(b)(2) of the Act.

Proposed § 300.517 would add the new statutory provision regarding transfer of parent rights at the age of majority from section 615(m) of the Act. The Secretary would interpret this to clarify that whenever an agency transfers rights the agency must notify both the individual and the parents of the transfer, consistent with basic standards of due process. With regard to the permissive transfer of rights to individuals who are in correctional institutions, the reference to Federal correctional facilities would be removed, as States do not have an obligation to provide special education and related services under the Act to individuals in Federal facilities. Minor changes for the sake of clarity, that are not intended to affect the substance, would be made to the provision in paragraph (b) regarding a ''special rule.''

Discipline Procedures

Proposed § 300.520 would incorporate the provisions of section 615(k)(1) of the Act regarding the ability of school personnel to remove a child with a disability from his or her current placement for not more than 10 school days, and the ability of school personnel to place a child with a disability in an interim alternative educational setting for not more than 45 days, if the child carries a weapon to school or a school function or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at school or a school function. These provisions would be incorporated in paragraph (a) of this proposed section.

Section 615(k)(1) also requires an IEP meeting to review a child's behavioral intervention plan or to develop an assessment plan to address that behavior. The Secretary proposes to adopt these requirements in paragraph (b) with the following clarifications: (1) The statute's provision that the IEP team meeting occur within 10 days of taking a disciplinary action would specify that this meeting occur within 10 business days of the disciplinary action rather than 10 calendar days; and (2) if the child does not have a behavioral intervention plan, the purpose of the IEP meeting is to develop an assessment plan and appropriate behavioral interventions to address that behavior. The Secretary believes that the business day interpretation would allow school personnel an adequate amount of time to convene the meeting, while ensuring that it occur within the window of time during which a child may be removed from the regular placement under proposed § 300.520(a)(1). The Secretary believes that the purpose of the IEP meeting should be not just development of an assessment plan, but also development of appropriate behavioral interventions so that some behavioral interventions can be instituted without delay. The Secretary also proposes to specify, in paragraph (c), that if a child with a disability is removed from his or her current educational placement for 10 school days or less in a given school year, and no further removal or disciplinary action is contemplated, the IEP team review of the child's behavioral interventions, or need for them, need not be conducted. In light of the legislative history of the IDEA Amendments of 1997, the Secretary

does not believe that these procedures were contemplated if children with disabilities would only be out of their regular educational placements for short periods of time in a given school year; that is, for less than 10 school days in a school year.

Paragraph (d) of proposed § 300.520 would incorporate the statutory definitions of ''controlled substance,'' ''illegal drug,'' and ''weapon'' from section 615(k)(10) (A), (B), and (D) of the Act. A note following this section would explain the Department's longstanding interpretation that removing a child from his or her current educational placement for no more than 10 school days does not constitute a change in placement under the Part B regulations. However, a series of short-term suspensions totaling more than 10 days could amount to a change of placement based on the circumstances of the individual case. A second note following this section would encourage public agencies whenever removing a child with disabilities from the regular placement to review as soon as possible the circumstances surrounding the child's removal and consider whether the child was receiving services in accordance with the child's IEP and whether the child's behavior could be addressed through minor classroom or program adjustments or whether the child's IEP team should be reconvened to address changes in that document.

Proposed § 300.521 reflects the provisions of section 615(k)(2) of the Act regarding the authority of a hearing officer to place a child with a disability in an interim alternative educational setting for not more than 45 days if the hearing officer determines that the public agency has demonstrated by substantial evidence that maintaining the child in the child's current educational placement is likely to result in injury to the child or to others, and considers the appropriateness of the child's current placement, whether the agency has made reasonable efforts to minimize the risk of harm, including the use of supplementary aids and services, and then determines that the interim alternative educational setting meets certain requirements. The Secretary is proposing to clarify how this determination is made by specifying that the determination is made by a hearing officer in an expedited due process hearing. The Secretary believes that a due process hearing was contemplated by Congress in view of the requirement that the agency demonstrate the likely risk of harm by ''substantial evidence'', which is defined at section 615(k)(10) as beyond a preponderance of the evidence. Paragraph (e) of this section would include the statutory definition of this term.

Proposed § 300.522 would incorporate the section 615(k)(3) requirements that the alternative educational setting be determined by the IEP team and that it be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP, and include services and modifications designed to address the behavior, so that it does not recur. This statutory language would be interpreted only as necessary to make clear that, consistent with proposed §§ 300.520 and 300.121, these requirements would have to be met if a child is removed from his or her current educational placement for more than 10 school days in a school year.

Proposed § 300.523 would reflect the provisions of section 615(k)(4) concerning when and how a manifestation determination review is conducted with the following modifications: (1) a paragraph (b) would include the Secretary's proposal that if a child with disabilities is removed from the child's current educational placement for 10 school days or less in a given school year, and no further disciplinary action is contemplated, the manifestation review need not be conducted; (2) a paragraph (e) would clarify that if the IEP team determines that any of the standards described in the statute are not met, the team must consider the child's behavior to be a manifestation of the child's disability; and (3) a paragraph (f) would make clear that the manifestation review may be conducted at the same meeting in which the behavioral review of proposed § 300.520(b) is done. The interpretation in paragraph (e) on how the manifestation determination is made, using on the standards described in the statute, is based on the explanation of this decision process in the congressional committee reports. A note following this section would quote the language of the House Committee Report on how the manifestation determination is made. A second note would explain that if the decision is that the behavior is a manifestation of the child's disability, the LEA must take steps to remedy any deficiencies found during that review in the child's IEP or placement or in their implementation. Often these steps will enable a child whose behavior is a manifestation of his or her disability to return to the child's current educational placement before the expiration of the 45-day period.

Proposed § 300.524 (a) and (b) would reflect the provisions of section 615(k)(5) regarding behavior that is not a manifestation of a child's disability. Proposed paragraph (c) would clarify that the requirements of the ''pendency'' provision apply if a parent requests a hearing to appeal a decision that a child's behavior is not a manifestation of the child's disability. Section 615(j) of the Act provides that the only exceptions to the ''pendency'' rule are those specified in section 615(k)(7) of the Act, which concerns placement during parent appeals of 45-day interim alternative educational placements. A note following this section would further explain this issue.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability, including disciplining children with disabilities for behavior that is a manifestation of their disability. For example, disciplining a child with a seizure disorder for behavior that results from that disability would violate Section 504. The Secretary invites comment on whether further clarification of this point should be provided in these regulations.

Proposed § 300.525 would reflect the requirements of section 615(k)(6) regarding parent appeals of manifestation determinations or any decision regarding placement, including the requirement for an expedited hearing, and the standards used by the hearing officer in reviewing these decisions.

Proposed § 300.526 would adopt the requirements of section 615(k)(7) involving placement if a parent requests a hearing to challenge the interim alternative educational setting or the manifestation determination, including the requirement that the child remain in the interim alternative educational setting until the decision of the hearing officer or the expiration of the 45-day period, whichever comes first, the requirement that an LEA may request an expedited due process hearing to seek to demonstrate to the hearing officer that it would be dangerous to return the child to his of her current educational placement, and the standards that the hearing officer uses in reaching a decision. Proposed paragraph (c)(3) would clarify that these placements would be for a duration of not more than 45 days, as the 45-day limit is one of the standards in section 615(k)(2) referred to in section 615(k)(7)(C). A note following this section would explain that if the LEA maintains that the child is still dangerous at the

expiration of the 45 days and the issue has not been resolved through due process, the LEA could seek a subsequent expedited hearing on the issue of dangerousness.

Proposed § 300.527 would incorporate the statutory requirements of section 615(k)(8) regarding the application of these rules to children not yet determined eligible for special education and related services, with certain clarifications. Paragraph (b)(1) would clarify that oral communication from the child's parents would constitute a basis for knowledge only if the parent is illiterate in English or has a disability that prevents a written statement. Proposed paragraphs (c)(2)(ii) and (iii) would clarify that if the parents have requested an evaluation, the child remains in the educational placement determined by school authorities until the evaluation is completed, and that if the result of the evaluation is that the child is a child with a disability, the agency must provide special education and related services in accordance with the provisions of Part B, including the requirements of proposed §§ 300.520–300.529 and section 612(a)(1)(A) of the Act.

In proposed § 300.528, the Secretary proposes to specify what an expedited due process hearing must entail, including time frames and hearing procedures, the qualifications of hearing officers, and appeal rights. These provisions are based on the Secretary's belief that all expedited hearings under these discipline procedures should result in decisions within a very short period of time in order to protect the interests of both schools and children with disabilities, and that a 10-business-day limit would allow these hearings to result in decisions before the expiration of a potential 10-school-day removal of a child from the regular placement. The Secretary believes that requiring that due process hearing officers under these procedures meet the same requirements that apply to hearing officers under other due process procedures under the Act and that the hearings meet the same basic standards that apply to other due process hearings will ensure that these proceeding meet basic standards of due process, and are perceived as fair, while allowing some flexibility by allowing States to adjust their own procedural rules to accommodate these very swift hearings.

Proposed § 300.529 incorporates the provisions of section 615(k)(9) of the Act regarding reporting crimes committed by a child with a disability to appropriate authorities and transmitting copies of the special education and disciplinary records of the child to the authorities to whom the agency reports the crime.

Procedures for Evaluation and Determinations of Eligibility

Proposed § 300.530 would reflect section 612(a)(7), which gives general responsibility to the SEA to ensure that each public agency establishes and implements evaluation procedures that meet the requirements of the Act. Proposed § 300.531 incorporates the requirement of section 614(a)(1) that each public agency conduct a full and complete initial evaluation before initiating the provision of special education and related services to a child with a disability. Proposed § 300.532 incorporates the requirements of section 614(b) (2) and (3) and section 612(a)(6)(B) with the requirements of current regulations that a variety of assessment tools and strategies must be used to gather information about the child; that evaluation materials include those tailored to assess specific areas of educational need and not merely designed to provide a single general intelligence quotient; and that tests must be selected and administered so as to best insure that the test results accurately reflect the child's aptitude or achievement level or whatever the test purports to measure, rather than the child's impaired sensory, manual, or speaking skills. Three notes following proposed § 300.532 would explain how a public agency meets its obligation to properly evaluate a child who is limited English proficient and suspected of having a disability.

Proposed § 300.533 would reflect the provisions of section 614(c) (1), (2), and (4) of the Act regarding review of existing evaluation data and determinations of whether more data is needed. Proposed § 300.534 would incorporate the requirements of section 614 (b) (4) and (5) and (c)(5) of the Act regarding determinations of eligibility.

Proposed § 300.535 would maintain from the current regulations the procedures for determining eligibility.

Proposed § 300.536 would reflect the statutory provisions of section 614(a)(2) concerning reevaluation and the existing regulatory provision regarding review of IEPs, with minor modifications.

Additional Procedures for Evaluating Children with Specific Learning Disabilities

Proposed § 300.540 would be changed from the current regulation only as necessary to reflect the new requirements as described, concerning the composition of the teams of individuals who make determinations about eligibility. Proposed §§ 300.541 and 300.542, regarding the criteria for determining the existence of a specific learning disability and observation of a child suspected of having a specific learning disability, would be unchanged from current regulations. Proposed § 300.543, concerning the written report, would be changed from current regulations only to make clear that for a child suspected of having a specific learning disability, this report satisfies the requirement for documentation of the determination of eligibility as described with reference to proposed § 300.534(a).

The Secretary intends to review carefully over the next several years the additional procedures for evaluating children suspected of having a specific learning disability contained in proposed §§ 300.540–300.543 in light of research, expert opinion and practical knowledge of identifying children with a specific learning disability with the purpose of considering whether legislative proposals should be advanced for revising these procedures.

Least Restrictive Environment

Proposed §§ 300.550–300.556 are taken from current regulations, with the exceptions noted. These provisions interpret the statutory provision regarding placement in the least restrictive environment in Section 612(a)(5)(A), which is substantively the same as prior law. A minor change to proposed § 300.550(a) would be made to reflect the new organization of the statute around State eligibility requirements, and a conforming change to the note following proposed § 300.552 to update a reference to another section of this regulation. A note following proposed § 300.551 would be added explaining that home instruction is generally only appropriate for children who are medically fragile and those who are unable to participate with nondisabled children in any activities. Section 300.552 from current regulations would be revised to incorporate the provisions of current regulations in § 300.533(a) (3) and (4) regarding how the placement decision is made. A note following this section would be added to explain that the group of persons making the placement decision may also serve as the child's IEP team, as long as all appropriate IEP team members are included. Another note would be added suggesting that if IEP teams appropriately consider and include in IEPs positive behavioral interventions and supplementary aids and services many children who would otherwise be disruptive will be able to

participate in regular education classrooms.

Confidentiality of Information

With the following exceptions, proposed §§ 300.560–300.575 and § 300.577 retain the provisions of current regulations on confidentiality of information, with only very minor, nonsubstantive changes. These provisions interpret the statutory provision regarding confidentiality in sections 612(a)(8) and 617(c). A new note would be added as Note 2 following proposed § 300.574 explaining the relationship between these procedures and the new requirements concerning transfer of rights to students at the age of majority, as discussed under proposed § 300.517. A new regulation would be added (proposed § 300.576) reflecting the statutory authority from section 613(j) of the Act for SEAs to require LEAs to include in records of a child with a disability a statement of current or previous disciplinary action, and transmit that statement to the same extent that disciplinary information is included in, and transmitted with, records of nondisabled children, including a description of information relevant to the discipline. The statute also requires that if a State adopts such a policy and the child transfers from one school to another, any transmission of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action taken against the child.

Department Procedures

Proposed §§ 300.580–300.586 largely restate existing regulatory provisions concerning Department procedures for State plan disapproval as Department procedures for determinations of State ineligibility, in light of the restructuring of the Act to eliminate the State plan. Reflecting the requirement in section 612(d) of the Act, a new proposed § 300.580 would state that if the Secretary determines a State is eligible to receive a grant, the Secretary notifies the State.

A new § 300.587 would be added to incorporate the statutory provisions of section 616(a) of the Act regarding enforcement by the Department if a SEA or LEA fails to comply with Part B of the Act or its regulations. This section would incorporate the types of enforcement actions available to the Department—withholding payments in whole or in part, and referral to the Department of Justice, mentioned in section 616(a), and taking any other enforcement action authorized by law, such as other actions authorized under 20 U.S.C. 1234. The Secretary proposes to regulate to clarify the type of notice and hearing provided before withholding and referral for enforcement action because the type of hearing appropriate before announcement of an enforcement action that itself involves an adversarial hearing logically will be different than the adversarial hearing before a withholding or eligibility decision. Proposed paragraph (e) of this section would address enforcement in situations in which a State has assigned responsibility for children with disabilities who are convicted as adults under State law and incarcerated in adult prisons to an agency other than the SEA.

In proposed § 300.589, the Secretary proposes to revise the current regulatory provision regarding the statutory requirement in section 612(a)(18)(C) permitting a waiver, in whole or in part, of the supplement, not supplant rule for use of funds provided under Part B if the State demonstrates by clear and convincing evidence that all children with disabilities in the State have FAPE available to them, and the Secretary concurs with the evidence provided by the State. Section 612(a)(19)(C)(ii) now also provides that the Secretary may waive the new maintenance of State financial support requirement of section 612(a)(19)(A) if the Secretary determines that the State meets the standard described in section 612(a)(18)(C). Section 612(a)(19)(E) directs the Secretary to issue proposed regulations establishing procedures, including objective criteria and consideration of the results of compliance reviews of the State conducted by the Department, within 6 months of the enactment of the IDEA Amendments of 1997 (or December 4, 1997) and final regulations on this topic within one year of enactment (or June 4, 1998). The Secretary proposes to implement these requirements by providing that a State wishing to request a waiver must submit: (1) an assurance that FAPE is and will remain available to all children with disabilities in the State; (2) the evidence that the State wishes the Secretary to consider that details the basis on which the State has concluded that FAPE is available to all children with disabilities in the State and State procedures regarding child find, monitoring, State complaint handling and due process hearings; (3) a summary of all State and Federal monitoring reports and hearing decisions for the prior three years that include any finding that FAPE was not available and evidence that FAPE is now available to all children addressed in those reports and decisions; and (4) evidence that the State in reaching its conclusion that FAPE is available to all children with disabilities in the State consulted with interested organizations and parents in the State and a summary of that input. If the Secretary determines that the State has made a prima facie showing that FAPE is available to all children with disabilities in the State, the Secretary conducts a public hearing on whether FAPE is and will be available to all children with disabilities in the State. If the Secretary concludes that the evidence clearly and convincingly demonstrates that FAPE is and will be available to all children with disabilities in the State, the Secretary provides a waiver for a one-year period. The Secretary also proposes that a State use these same procedures to obtain a waiver in subsequent years. The Secretary believes that these procedures would appropriately allow States to demonstrate that all children with disabilities in the State are, and will be, appropriately served so that a waiver could be granted without violating the rights of children with disabilities.

Subpart F—State Administration

General

Proposed § 300.600 (a) through (c) would retain, with minor nonsubstantive changes, the provisions of current regulations concerning SEA responsibility for all educational programs for children with disabilities in the State, consistent with section 612(a)(11). Paragraph (d) of this section would add the new provision from section 612(a)(11)(C) of the Act which permits the Governor (or other authorized individual under State law), consistent with State law, to assign to another public agency of the State the responsibility of ensuring that the requirements of Part B of the Act are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. The note following this section in current regulations would be maintained.

Proposed § 300.601 would retain, with only minor, nonsubstantive revisions, the current regulation specifying that Part B of the Act not be construed to permit a State to reduce medical and other assistance available to children with disabilities or alter the eligibility of a child with a disability to receive services that are also part of FAPE, based on the statutory provision at section 612(e).

Proposed § 300.602 would reflect the new statutory cap on the amount of funds that States can retain for administration and other State-level activities. Section 611(f)(1) provides that each year the Secretary will determine and report to each State an amount that is 25 percent of the amount the State received under section 611 for fiscal year 1997 cumulatively adjusted annually by the lesser of the percentage increase of the State's allocation from the prior year's allocation or the rate of inflation, which will be the maximum amount that the State can retain for these purposes.

Use of Funds

Section 611(f)(2) specifies that a State can use for State administration of the Part B program, including section 619, not more than twenty percent of the amount that the State may retain, or $500,000 adjusted cumulatively for inflation, whichever is greater, and that each outlying area can retain $35,000 for that purpose. This provision is reflected in proposed § 300.620.

Proposed § 300.621 would maintain the requirements of current regulations on the allowable uses of funds retained by the State for State administration, reflecting the Secretary's interpretation of section 611(f)(2) of the Act. The Secretary believes that these provisions adequately address the statutory purpose of these funds while giving States reasonable flexibility in how they use these funds.

Section 611(f)(4) of the Act creates a new category of subgrants that SEAs, under certain circumstances, will make to LEAs for capacity building and improvement.

Proposed § 300.622 would reflect this new authority, including the statutorily prescribed purposes of these subgrants to LEAs.

Proposed § 300.623 would describe the amount reserved for capacity-building and improvement subgrants to LEAs, consistent with the requirement of section 611(f)(4)(B) of the Act. A note would be added following this section that would explain that the amount of funds available for these capacity-building and improvement subgrants to LEAs will vary year to year, and that in each year following a year in which these subgrants are made, these funds become part of the required flow-through subgrants to all LEAs.

In proposed § 300.624, the Secretary proposes to provide clear authority for States to establish priorities to award capacity building and improvement subgrants competitively or on a targeted basis because the Secretary believes that this flexibility is necessary to enable States to design these subgrants to suit State needs. A note following this provision would recognize that the purpose of these subgrants is to address particular needs that are not readily addressed through formula assistance, and that SEAs can use these subgrants to promote innovation, capacity building, and systemic improvement.

State Advisory Panel

Proposed § 300.650 would retain the provisions of current regulation concerning establishment of State advisory panels, consistent with section 612(a)(21)(A) of the Act. A note would be added to follow this section making clear that the State advisory panel advises the State regarding the education of all children with disabilities in the State, including in situations where the State has divided State responsibility for eligible children with disabilities who have been convicted as adults and are incarcerated in adult prisons.

Proposed § 300.651 would reflect the new statutory membership requirements for the State advisory panel, as provided in section 612(a)(21) (B) and (C), including a new statutory requirement that a majority of the members of the panel must be individuals with disabilities or parents of children with disabilities.

Proposed § 300.652 would reflect the duties of the advisory panel, as specified in section 612(a)(21)(D) of the Act.

Proposed § 300.653 would maintain from the current regulations the advisory panel procedures, representing the Secretary's interpretation of reasonable rules for the operations of an advisory panel under the Act.

State Complaint Procedures

The current Part 300 regulations establish a State complaint mechanism that individuals, organizations, and other interested parties can use to bring to the SEA's attention, for resolution, allegations that a public agency is violating a requirement of Part B or its implementing regulations. The Secretary views these State complaint procedures as an important, less costly, less time consuming, and less formal alternative to due process hearings and other dispute resolution mechanisms through which disagreements under Part B and its regulations may be resolved. Proposed §§ 300.660–300.662 would retain these State complaint procedures with the changes described.

The Secretary proposes in proposed § 300.660(b) to revise the current regulation to require that States widely disseminate to parents and others information about the State's complaint procedures. The Secretary intends, through this requirement, in conjunction with the provision in proposed § 300.503(b)(8) that would require that prior written notice to parents of children with disabilities include a description of the State complaint procedures and how to file a complaint, to ensure that persons interested in special education in a State know that there are alternatives to resorting to due process hearings that can be used to resolve disputes. A new note would be added following this section that would explain that in resolving an alleged denial of FAPE, an SEA may award compensatory education if appropriate.

Proposed § 300.661 would retain from current regulation the minimum State complaint procedures in current regulations, with one exception. In this proposed regulation the Secretary proposes to delete the provision regarding Secretarial review. This change reflects a recommendation of the Department's Inspector General in his report of August, 1997 on the utility and efficiency of the Secretarial review process under the IDEA. In that report the Inspector General noted that in the Secretarial review process the Department's limited resources for implementation of the IDEA are being diverted to an activity that is providing minimal benefits to children with disabilities or to the program. The Secretary expects that removing the Secretarial review provision will allow the Department to spend more of its time and attention on evaluating States' systems for ensuring compliance with program requirements, which will have benefit for all parties interested in special education.

Two new notes would be added following proposed § 300.661. The first would clarify that if a complaint is received that raises an issue that is also the subject of a due process hearing, or multiple issues, some of which are also the subject of a due process hearing, the SEA must set aside the issues in due process until the end of the hearing, but resolve the remaining issues in the complaint within the 60-day complaint time line. The second proposed note would explain that if an issue raised in a complaint previously had been the subject of a due process hearing, the hearing decision would be binding, and the SEA would satisfy its obligation under these procedures by informing the complainant that the hearing decision is binding as to that issue. The note would also explain that the SEA would have to resolve an alleged failure

to implement a due process hearing decision.

The Secretary proposes in proposed § 300.662 to maintain the provisions of current regulation regarding filing a complaint, and add a new paragraph (c) that would specify that complaints must be received within one year of the alleged violation, unless a longer period is reasonable because the violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received by the SEA. The Secretary believes that SEAs should not be required in the future to use their resources to resolve complaints that do not involve issues that are relevant to the current operation of the State's special education program and that do not involve the possibility of educational remedy for particular children. A note following this section would be added to explain that SEAs must resolve complaints that meet the complaint requirements, even if filed by an organization or individual from another State.

Subpart G—Allocation of Funds; Reports

Allocations

Proposed § 300.700 would adopt the special definition of ''State'' from section 611(h)(2) of the Act with regard to distribution of funds provided under section 611 of the Act.

Proposed § 300.701 would describe the purpose of the grants under section 611 of the Act and the maximum amount of those grants, as provided in section 611(a) of the Act.

Proposed § 300.702 would incorporate the statutory definition of ''average per-pupil expenditure in public elementary and secondary schools in the United States'' from section 611(h)(1) of the Act.

The IDEA Amendments of 1997 create a new formula for distribution of funds under section 611 of the Act that is first applied when the appropriation for section 611 of the Act is more than a certain trigger amount—$4,924,672,200. Until that time, funds under section 611 will continue to be distributed based on the formula under section 611 before enactment of the IDEA Amendments of 1997, with certain minor changes stipulated in the statute.

Proposed § 300.703(a) would incorporate the general order of distribution of funds, consistent with section 611(d)(1) of the Act, which applies to both the interim and new formula distribution.

Proposed § 300.703(b) would incorporate the interim formula for distribution among States, including the new statutory provision permitting States to count the number of children receiving special education and related services as of the last Friday in October or December 1, at the State's discretion, as specified in section 611(d)(2) of the Act.

Proposed § 300.706 reflects the section 611(e) (1) and (2) requirements for when the permanent formula takes effect, and calculation of the ''base year'' amount for purposes of that new formula.

Proposed § 300.707 would include the requirements of the new formula from section 611(e)(3) of the Act, which specifies that funds in excess of those distributed to a State in the base year are allocated 85 percent on relative population of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of FAPE and 15 percent on the basis of relative populations of children of those ages who are living in poverty, based on the most recent data available and satisfactory to the Secretary.

Proposed § 300.708 would specify the statutory floors and a cap in the size of any State's increased allocation, as provided in section 611(e)(3) (B) and (C) of the Act. The requirements of section 611(e)(4), regarding what happens if the section 611 appropriation decreases, would be incorporated in proposed § 300.709.

Proposed § 300.710 would retain, with minor modifications, the provisions of current regulations regarding allocations to a State in which a bypass is implemented for private school children with disabilities, consistent with section 612(f)(2) of the Act.

Under section 611(g) of the Act, States will use a mechanism for distributing the formula subgrant funds to LEAs that parallels the distribution among States. This will include an interim formula, based on the formula in the Act prior to the enactment of the IDEA Amendments of 1997, and, after the 611 appropriation is greater than $4,924,674,200, a new permanent procedure that, like the one at the State level, allocates new funds 85 percent based on the relative numbers of children enrolled in public and private elementary and secondary schools in the agency's jurisdiction, and 15 percent in accordance with the relative numbers of children living in poverty, as determined by the SEA.

Proposed § 300.711 would reflect the requirement of section 611(g)(1) that funds not retained at the State level for State administration and other State purposes, or distributed to LEAs as capacity building and improvement subgrants, must be distributed to LEAs and State agencies under the statutory formula that applies in that year. Proposed § 300.712 would set forth the statutory interim formula and permanent procedure for distribution of funds to LEAs and State agencies, reflecting section 611(g)(2) of the Act. A note following this section would explain that States should use the best data that is available to them on enrollment in public and private schools, and that States have discretion in determining what data to use regarding children living in poverty, and suggests some options for poverty data. Proposed § 300.713 would reflect the statutory requirements of section 611(g)(3) concerning treatment of former Chapter 1 State agencies in the distribution of funds. The Secretary proposes minor adjustments to make the count date for children in these agencies compatible with the count date used by the State for LEA reporting because requiring a different count date in a State that chooses to count in LEAs on the last Friday in October could result in double counting.

Proposed § 300.714 would retain with minor nonsubstantive changes the current regulatory provision concerning reallocation of LEA funds to other LEAs. This provision reflects the requirements of section 611(g)(4) of the Act.

Proposed §§ 300.715 and 300.716 reflect the statutory provisions of sections 611(c) and 611(i) (1) (A) and (B) and (3) regarding payments to the Secretary of the Interior for the education of Indian children and for Indian children aged 3 through 5. The new statutory provisions concerning grants to the outlying areas and freely associated States of section 611(b) would be incorporated in proposed §§ 300.717 through 300.722.

Reports

Proposed §§ 300.750 through 300.754 would retain, from the current regulation, the provisions concerning report requirements for the annual report of children served, the information required in the report, certification, criteria for counting children, and other responsibilities of the SEA regarding these reports. These provisions are consistent with the statutory requirement in section 611(d) that directs that funds appropriated for section 611 of the Act continue to be allocated based on a child count as in effect before enactment of the IDEA Amendments of 1997 for some time into the future. Minor changes would be

made to reflect the fact that a child count for distribution of funds will not be required under the permanent funding formula, and to reflect the new State option on when the count will be conducted. A reference to the old Chapter 1 handicapped program would be eliminated, as that program no longer exists.

Proposed § 300.755 would incorporate the new statutory requirements regarding State collection and examination of data to determine if significant disproportionality based on race is occurring in the State regarding the identification and placement of children with disabilities.

Proposed § 300.756 would reflect new rules specified in section 605 of the Act regarding use of funds provided under Part B of the Act for the acquisition of equipment or construction.

2. Part 301—Preschool Grants for Children With Disabilities

Subpart A—General

Proposed § 301.1 in the proposed regulations would conform the regulatory purpose for the Preschool Grants for Children with Disabilities Program with the provisions of section 619(a) of the Act, to provide grants to States to assist them in providing special education and related services to children with disabilities aged three through five years, and, at a State's discretion, to two-year-old children with disabilities who will turn three during the school year.

Proposed § 301.4 would list regulations found in parts other than Part 301 that also apply to the Preschool Grants program. The proposed regulations would be consistent with the existing regulations, with three exceptions. First, the proposed regulations would specify that the provisions of 34 CFR 76.125–76.137 do not apply to the program, consistent with the requirements of section 611(b)(4) providing that consolidation of grants is no longer possible for the outlying areas. Second, the proposed regulations would specify that the requirements of 34 CFR 76.650–76.662 do not apply, in light of the changes proposed under Part 300 regarding the provision of services to children placed by their parents in private schools. Third, the reference to Part 86 would be removed, as that part no longer applies to SEAs and LEAs.

Proposed § 301.5 would specify the definitions that apply to certain terms used in Part 301. The section would be unchanged from the existing regulations, with the following exceptions: Consistent with the IDEA Amendments of 1997, proposed § 301.5(a) would replace the term ''intermediate educational unit'' with ''educational service agency,'' and proposed § 301.5(c) would add a definition of ''State'' and delete definitions of ''comprehensive service delivery system'' and ''excess appropriation.''

Subpart B—State Eligibility for a Grant

Proposed § 301.10 would be conformed with section 619(b) of the Act, and provide that a State is eligible to receive a grant under the program if the State is eligible under 34 CFR Part 300 and the State demonstrates to the satisfaction of the Secretary that it has in effect policies and procedures that assure the provision of FAPE to all children with disabilities aged three through five years in accordance with the requirements of 34 CFR Part 300, and for any two-year-old children who are provided services by the State or by an LEA. Proposed § 301.12 would restate the current regulation concerning sanctions if a State does not make FAPE available to all preschool children with disabilities to conform to the changes made by the IDEA Amendments of 1997 and other law.

Subpart C—Allocation of Funds to States

Proposed § 301.20 would be conformed with section 619(c)(1) of the Act, and provide that, after reserving funds for studies and evaluations under section 674(e) of the Act, the Secretary will allocate the remaining amount among the States in accordance with §§ 301.21–301.23.

Proposed § 301.21 would incorporate the requirements of section 619(c)(2)(A) of the Act which sets forth the basis on which, subject to certain limitations (described in this NPRM under § 301.22), allocations to States under the Preschool Grants program would be calculated if the amount available to States were equal to or greater than the amount allocated to States for the preceding fiscal year. Consistent with this statutory provision, proposed § 301.21(a) would provide that, except as provided in § 301.22, the Secretary will first allocate to each State the amount it received for fiscal year 1997, and then allocate 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 5 and allocate 15 percent of those remaining funds to States on the basis of their relative populations of all children aged 3 through 5 who are living in poverty. Also reflecting the statutory requirements, proposed § 301.21(b) would further provide that in making these calculations, the Secretary will use the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

Consistent with section 619(c)(2)(B) of the Act, proposed § 301.22 (a) and (b) would set forth floors and caps for calculating the allocations to States under the Preschool Grants program in fiscal years in which the amount available to States under § 301.20 were equal to or greater than the amount allocated to States for the preceding fiscal year. Proposed § 301.22(c) would also be conformed to section 619(c)(2)(C) of the Act and provide for ratable reductions if available funds are insufficient to make allocations to the States consistent with the provisions of § 301.22 (a) and (b).

Proposed § 301.23 would, consistent with the requirements of section 619(c)(3) of the Act, set forth the basis on which allocations to States under the Preschool Grants program would be calculated if the amount available to States under § 301.20 were less than the amount allocated to States for the preceding fiscal year. Proposed § 301.23(a) would provide that if the amount available for allocations were greater than the amount allocated to the States for fiscal year 1997, each State would be allocated the sum of the amount it received for fiscal year 1997 plus an amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over fiscal year 1997 bears to the total of all of those increases for all States. Proposed § 301.23(b) would provide that if the amount available for allocations is equal to or less than the amount allocated to the States for fiscal year 1997, each State would be allocated the amount it received for that year, ratably reduced, if necessary.

Consistent with section 619(d) of the Act, proposed § 301.24 would provide that for each fiscal year a State may retain for administration and other State-level activities, in accordance with §§ 301.25 and 301.26, not more, as calculated by the Secretary, than 25 percent of the amount the State received under the section 619 of the Act for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—(1) the percentage increase, if any, from the preceding fiscal year in the State's allocation under section 619 of the Act; or (2) the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban

Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

Consistent with section 619(e) of the Act, proposed § 301.25 would provide that a State may use not more than 20 percent of the maximum amount it may retain under § 301.24 for any fiscal year for (a) administering section 619 of the Act (including the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children with disabilities); or for the administration of Part C of the Act, or both, if the SEA is the lead agency for the State under that part.

Consistent with section 619(f) of the Act, proposed § 301.26 would provide that a State must use any funds that it retains under § 301.24 and does not use for administration under § 301.25 for any of the following: (1) support services (including establishing and implementing the mediation process required by section 615(e) of the Act), which may benefit children with disabilities younger than 3 or older than 5 as long as those services also benefit children with disabilities aged 3 through 5; (2) direct services for children eligible for services under section 619 of the Act; (3) developing a State improvement plan under subpart 1 of part D of the Act; (4) activities at the State and local levels to meet the performance goals established by the State under section 612(a)(16) of the Act and to support implementation of the State improvement plan under subpart 1 of part D of the Act if the State receives funds under that subpart; or (5) supplementing other funds used to develop and implement a Statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not to exceed one percent of the amount received by the State under section 619 of the Act for a fiscal year. A note following this section would provide an example of an authorized use of these funds.

Subpart D—Allocation of Funds to Local Educational Agencies

Proposed § 301.30 would provide that a State must distribute any funds that it does not retain under § 301.24 to LEAs that have established their eligibility under section 613 of the Act, consistent with the requirements of section 619(g)(1) of the Act.

Proposed § 301.31 would, in conformity with section 619(g)(1), set forth the basis on which a State must distribute the funds described in § 301.30 to LEAs that have established their eligibility under section 613 of the Act. Proposed § 301.31(a) would require that the State first award to each of those agencies the amount it would have received under section 619 of the Act for fiscal year 1997 if the State had distributed 75 percent of its grant for that year under section 619(c)(3), as then in effect. Proposed § 301.31(b) would further require that, after making the base payment allocations required by § 301.28(a), the State allocate 85 percent of any remaining funds to each LEA on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction, and 15 percent of those remaining funds in accordance with their relative numbers of children living in poverty, as determined by the SEA. A note following this section would explain that States should use the best data that is available to them on enrollment in public and private schools, and that States have discretion in determining what data to use regarding children living in poverty, and proposes some options for poverty data.

Proposed § 301.32(a) would, in conformity with section 619(g)(2) of the Act, provide that: (a) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged 3 through 5 residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that the LEA does not need in order to provide FAPE to other LEAs that are not adequately providing special education and related services to all children with disabilities aged 3 through 5 residing in the areas they serve.

Proposed § 301.32(b) would provide that if a State provides services to preschool children with disabilities because some or all LEAs are unable or unwilling to provide appropriate programs, the SEA may use payments that would have been available to those LEAs to provide special education and related services to children with disabilities aged 3 through 5 years, and to two-year-old children with disabilities, residing in the areas served by those LEAs and ESAs.

3. Part 303—Early Intervention Program for Infants and Toddlers With Disabilities

A few changes would be made to the Part 303 regulations to conform to similar changes proposed for the Part 300 regulations. As indicated, other changes to incorporate statutory changes made by the IDEA Amendments of 1997 with regard to the Early Intervention Program for Infants and Toddlers with Disabilities will be made at a later date as technical changes.

In § 303.18, the Secretary proposes to add a new paragraph (b) specifying that a State may provide that a foster parent qualifies as a parent under Part 303 if certain specified standards are met. The note following this section would be revised, consistent with the change to the regulation. These changes would be consistent with changes proposed in proposed § 300.19.

In § 303.403, the Secretary proposes to add a new subparagraph (b)(4) to provide that prior notice to parents under this part includes information about the State complaint procedures required by §§ 303.510—303.512, including how to file a complaint and the timelines under the State complaint procedures. This change would conform to proposed § 300.503, concerning the content of prior notice under Part 300. The Secretary believes that if parents know about these procedures, they may use them as an alternative to the more costly and formal mechanisms of due process and mediation.

In § 303.510, the Secretary proposes to amend paragraph (b) to specify that the lead agency's State complaint procedures must include procedures for widely disseminating to parents and others the State's complaint procedures. The Secretary intends, through this requirement and the change proposed in § 303.403, to insure that persons interested in early intervention services for infants and toddlers with disabilities in the State know that there are alternatives to resorting to due process hearings that can be used to resolve disputes. A note would be added following this section to explain that in resolving a complaint alleging a failure to provide services in accordance with an IFSP, a lead agency may award compensatory services as a remedy. These changes would be consistent with changes proposed to § 300.660.

In § 303.511, the Secretary proposes to add a new paragraph (c) that would specify that complaints must be received by the public agency within one year of the alleged violation, unless a longer period is reasonable because the violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received. The Secretary believes that public agencies should not be required in the future to use their resources to resolve complaints that do not involve issues that are relevant to the current operation of the State's program and that do not involve the possibility of remedy for particular

children. A note would be added following this section to explain that the lead agency must resolve any complaint that meets the requirements of this section, even if it has been filed by an organization or individual from another State. These changes would conform to changes in proposed § 300.662.

In § 303.512, the Secretary proposes to delete the provision from the current regulation regarding Secretarial review. This change reflects a recommendation of the Department's Inspector General in his report of August 1997 on the utility and efficiency of the Secretarial review process under the IDEA. In that report, the Inspector General noted that the Secretarial review process is diverting the Department's limited resources to an activity that is providing minimal benefits to children with disabilities and the program. The Secretary expects that removing the Secretarial review provision will allow the Department to spend more of its time and attention on evaluating States' systems for ensuring compliance with program requirements, which will have benefit for all parties interested in these programs. Two notes would be added following this section. Note 1 would clarify that if a complaint raises an issue that is also the subject of a due process hearing, or multiple issues, some of which are also the subject of a due process hearing, the State must set aside the issues in due process until the end of the hearing, but resolve the remaining issues in the complaint within the 60-day complaint timeline. Note 2 would explain that if an issue raised in a complaint previously had been the subject of a due process hearing, the hearing decision would be binding, and the State would satisfy its obligation under these procedures by informing the complainant that the hearing decision is binding as to that issue. The note would also explain that the State would have to resolve an alleged failure to implement a due process hearing decision. These changes would conform to changes in proposed § 300.661.

In § 303.520, a new paragraph (d) would be added that would provide that a lead agency may not require parents, if they would incur a financial cost, to use private insurance proceeds to pay for the services that must be provided to an eligible child under this part. The Department recognizes the important policy underlying this program that requires States to use all available sources of funding for providing services. Therefore, this new provision would permit States to require families to use private insurance if the families would incur no financial cost. Proposed paragraph (d) would incorporate the Department's interpretation that requiring parents to use their private insurance if that would result in a financial cost to the family is not compatible with the statutory requirement that early intervention services be at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees. It would also identify what is meant by the term ''financial cost.'' A note would be added following this section to explain how this applies if families are covered by both private insurance and Medicaid.

As noted in the section of this preamble discussing the Part 300 regulations, the Secretary believes that the same basic principle would be equally applicable to parents who are eligible for public insurance, but that there is no current need to regulate on the public insurance issue because there is no risk of financial loss to parents under current public insurance programs such as Medicaid. The Secretary invites comment on whether a policy on public insurance similar to the proposed section on private insurance should be added to the final regulation. A second note would be added to explain that if a State cannot get parent consent to use public or private insurance for a service, the agency may use funds under this part to pay for that service. In addition, the note would explain that to avoid financial cost to parents who otherwise would consent to the use of private insurance, the lead agency may use funds under this part to pay the costs of accessing the insurance, such as deductible or co-pay amounts.

In addition, the Secretary proposes to add a new paragraph (e) to specify that proceeds from public or private insurance may not be treated as program income for purposes of 34 CFR § 80.25. That section imposes limitations on how program income can be spent that could lead to States returning reimbursements from public and private insurance to the Federal government or requiring those funds be used under this part, which could discourage States from using all the resources available in paying for services under this part. Given the current small percentage that Federal funds under this part are of total funding for this program, and the fact that eligible infants and toddlers with disabilities are guaranteed services under this part, the Secretary believes that States should be given some flexibility in how they use and account for funds received as reimbursements from other sources. A note would be added after this section explaining the consequences, under the nonsupplanting requirement, of various State choices in accounting for these funds. These changes would be similar to provisions in proposed § 300.142.

Goals 2000: Educate America Act

The Goals 2000: Educate America Act (Goals 2000) focuses the Nation's education reform efforts on the eight National Education Goals and provides a framework for meeting them. Goals 2000 promotes new partnerships to strengthen schools and expands the Department's capacities for helping communities to exchange ideas and obtain information needed to achieve the goals.

These proposed regulations would address the following National Education Goals:

- All children in America will start school ready to learn.
- The high school graduation rate will increase to at least 90 percent.
- All students will leave grades 4, 8, and 12 having demonstrated competency in challenging subject matter, including English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography; and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our Nation's modern economy.
- United States students will be first in the world in mathematics and science achievement.
- Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.
- Every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning.
- The Nation's teaching force will have access to programs for the continued improvement of their professional skills and the opportunity to acquire the knowledge and skills needed to instruct and prepare all American students for the next century.
- Every school will promote partnerships that will increase parental involvement and participation in promoting the social, emotional, and academic growth of children.

Executive Order 12866

1. Potential Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive

Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

These proposed regulations implement changes made to the Individuals with Disabilities Education Act by the IDEA Amendments of 1997 and make other changes determined by the Secretary as necessary for administering this program effectively and efficiently.

The IDEA Amendments of 1997 made a number of significant changes to the law. While retaining the basic rights and protections that have been in the law since 1975, the amendments strengthened the focus of the law on improving results for children with disabilities. The amendments accomplished this through changes that promote the early identification of and provision of services to children with disabilities, the development of individualized education programs that enhance the participation of children with disabilities in the general curriculum, the education of children with disabilities with nondisabled children, higher expectations for children with disabilities and accountability for their educational results, the involvement of parents in their children's education, and reducing unnecessary paperwork and other burdens to better direct resources to improved teaching and learning.

All of these objectives are reflected in the proposed regulations, which largely reflect the changes to the statute made by IDEA Amendments of 1997.

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed regulations, the Secretary has determined that the benefits of the proposed regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Burdens specifically associated with information collection requirements are identified and explained elsewhere in this preamble under the heading Paperwork Reduction Act of 1995.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the program.

This is a significant regulatory action under section 3(f)(1) of Executive Order 12866, and an economic analysis was conducted consistent with section 6(a)(3)(C) of the Executive Order. Due to the lack of data, the Secretary particularly request public comments to assist in determining whether these regulations are economically significant under the Executive Order.

Summary of Potential Benefits and Costs

Benefits and Costs of Statutory Changes: For the information of readers, the following is an analysis of the costs and benefits of the most significant statutory changes made by IDEA Amendments of 1997 that are incorporated into the IDEA regulations. Based on this analysis, the Secretary has concluded that the statutory changes included in this regulation will not, in total, impose significant costs in any one year, and may result in savings to State and local educational agencies. An analysis of specific provisions follows:

Participation in Assessments

Proposed § 300.138 incorporates statutory requirements relating to the inclusion of children with disabilities in general State and district-wide assessments and the conduct of alternate assessments for children who cannot be appropriately included in general assessments.

Although children with disabilities have not been routinely included in State and district-wide assessments, the requirement to include children with disabilities in assessment programs in which they can be appropriately included, with or without accommodations, does not constitute a change in Federal law. Because the Secretary regards this statutory change as a clarification, not a change, in the law, no cost impact is assigned to this requirement, which is incorporated in § 300.138(a) requiring the participation of children with disabilities in general assessments.

However, States were not previously required to conduct alternate assessments for children who could not participate in the general assessments. The statutory requirement to develop and conduct alternate assessments beginning July 1, 2000, therefore, imposes a new cost for States and districts.

The impact of this change will depend on the extent to which States and districts administer general assessments, the number of children who cannot appropriately participate in those assessments, the cost of developing and administering alternate assessments, and the extent to which children with disabilities are already participating in alternate assessments.

In analyzing the impact of this requirement, the Secretary assumes that alternate tests would be administered to children with disabilities on roughly the same schedule as general assessments. This schedule will vary considerably from State to State and within States, depending on their assessment policy. In most States, this kind of testing does not begin before the third grade. In many States and districts, general assessments are not administered to children in all grades, but rather at key transition points (typically grades 4, 8, and 11).

The extent to which States and districts will need to provide for alternate assessments will also vary depending on how the general assessments are structured. Based on the experience of States that have implemented alternate assessments for children with disabilities, the Secretary estimates that about one to two percent of the children in any age cohort will be taking alternate assessments.

Based on this information, the Secretary predicts that about 18 to 36 million of the children who are expected to be enrolled in public schools in school year 2000–2001 will be candidates for general assessments. Of these, the Secretary estimates that approximately 200,000 to 700,000 will be children with disabilities who may require alternate assessments.

The costs of developing and administering these assessments are also difficult to gauge. In its report *Educating One and All,* the National Research Council states that the estimated costs of performance-based assessments programs range from less than $2 per child to over $100 per student tested. The State of Maryland has reported start-up costs of $191 per child for testing a child with a disability and $31 per child for the ongoing costs of administering an alternate assessment.

The cost impact of requiring alternate assessments will be reduced to the extent that children with disabilities are already participating in alternate assessments. Many children with disabilities are already being assessed outside the regular assessment program in order to determine their progress in meeting the objectives in their IEPs. In many cases, these assessments might be adequate to meet the new statutory requirement.

Based on all of this information, the Secretary has concluded that the cost impact of this statutory change is not likely to be significant, and will be

justified by the benefits of including all children in accountability systems.

Incidental Benefits

The change made by section 613(a)(4) of the IDEA, incorporated in proposed § 300.235, generates savings by reducing the time that would have been spent by special education personnel on maintaining records on how their time is allocated in regular classrooms among children with and without disabilities.

To calculate the impact of this change, one needs to estimate the number of special education personnel who will be providing services to children with and without disabilities in regular classrooms and the amount and value of time that would have been required to document their allocation of time between disabled and nondisabled children.

Based on State-reported data on placement, it appears that about 4 million children will spend part of their day in a regular classroom this school year. It is difficult to predict the extent to which these children will be receiving services in the regular classroom from a special education teacher or related services provider. However, the Secretary believes that this statutory change will not only eliminate unnecessary paperwork in situations in which special education personnel have been working in the regular classroom and documenting their allocation of time, but will encourage the provision of special education services in the regular classroom—a change that will benefit children with disabilities.

Individualized Education Programs

The proposed regulations incorporate a number of statutory changes in section 614(d) that relate to the IEP process and the content of the IEP. With the exception of one requirement (the requirement to include a regular education teacher in IEP meetings), the Secretary has determined that, on balance, these changes will not increase the cost of developing IEPs. Moreover, all the changes will produce significant benefits for children and families. Key changes include:

Clarifying that the team must consider a number of special factors to the extent they are applicable to the individual child. The Secretary does not regard the statutory changes that are incorporated in § 300.346 as imposing a new burden on school districts because the factors that are listed should have been considered, as appropriate, under the IDEA before the enactment of IDEA Amendments of 1997. These include: behavioral interventions for a child whose behavior impedes learning, language needs for a child with limited English proficiency, Braille for a blind or visually impaired child, the communication needs of the child, and the child's need for assistive technology.

Strengthening the focus of the IEP on access to the general curriculum in statements about the child's levels of performance and services to be provided. The Secretary does not regard the statutory changes that are incorporated in § 300.347 relating to the general curriculum as burdensome because the changes merely refocus the content of statements that were already required to be included in the IEP on enabling the child to be involved in and progress in the general curriculum.

Requiring an explanation of the extent to which a child will not be participating with nondisabled children. This statutory requirement, which is incorporated in § 300.347(a)(4), does not impose a burden because it replaces the requirement for a statement of the extent to which the child will be able to participate in regular educational programs.

Requiring the IEP to include a statement of any needed modifications to enable a child to participate in an assessment, and, in cases in which a child will not be participating in a State or districtwide assessment, to include a statement regarding why the assessment is not appropriate and how the child will be assessed. The Secretary does not believe the inclusion of these statements, required statute and incorporated in § 300.447(a)(5), will be unduly burdensome. Many school districts already include statements in the IEP regarding assessments, including information about needed accommodations.

Allowing the IEP team to establish benchmarks rather than short-term objectives in each child's IEP. There is considerable variation across States, districts, schools, and children in the amount of time spent on developing and describing short-term objectives in each child's IEP. While it would be difficult to estimate the impact of this statutory change, contained in § 300.347(a)(2), it clearly affords schools greater flexibility and an opportunity to reduce paperwork in those cases in which the team has previously included unnecessarily detailed curriculum objectives in the IEP document.

Prior to the enactment of the IDEA Amendments of 1997, IDEA required the participation of the ''child's teacher,'' typically read as the child's special education teacher, but it did not explicitly require a regular education teacher. The IDEA Amendments of 1997, incorporated in § 300.344(a)(2) of this proposed regulation require the participation of the child's special education teacher and a regular education teacher if the child is or may be participating in the regular education classroom.

The impact of this change will be determined by the number of children with disabilities who are or who may be participating in the regular classroom in a given year, the number and length of IEP meetings, the opportunity cost of the regular education teacher's participation, and the extent to which regular education teachers are already attending IEP meetings.

State-reported data for school year 1994–95 indicates that about 3.8 million children with disabilities aged 3 through 21 spend at least 40 percent of their day in a regular classroom (children reported as placed in regular classes and resource rooms). The participation of the regular education teacher would be required for all of these children since these children are spending at least part of their day in the regular classroom.

State data also show that an additional 1.2 million children were served in separate classrooms. A regular education teacher's participation will clearly be required for those children in separate classes who are spending part of their school day in regular classes (less than 40 percent of their day). Other children may be participating with nondisabled children in some activities in the same building. While a child's individual needs and prospects will determine whether a regular education teacher would need to attend a child's IEP meeting in those cases, the Secretary believes that some proportion of these children are children for whom participation in regular classrooms is a possibility, therefore requiring the participating of a regular education teacher.

Although the prior statute did not require the participation of a regular education teacher, it is not uncommon for States or school districts to require a child's regular education teacher to attend IEP meetings.

Based on all of this information, the Secretary estimates that the participation of a regular education teacher may be required in an additional 3.7 to 5.2 million IEP meetings in the next school year.

While the opportunity costs of including a regular education teacher in these meetings will be significant because of the number of meetings involved, the Secretary believes these costs will be more than justified by the benefits to be realized by teachers,

schools, children, and families. Involving the regular education teacher in the development of the IEP will not only provide the regular education teacher with needed information about the child's disability, performance, and educational needs, but will help ensure that a child receives the supports the child needs in the regular classroom, including services and modifications that will enable the child to progress in the general curriculum.

Parentally-Placed Students in Private Schools

This statutory change, which is incorporated in § 300.453, would require school districts to spend a proportionate amount of the funds received under Part B of the IDEA on services to children with disabilities who are enrolled by their parents in private elementary and secondary schools.

The change does not have an impact on most States because the statute does not represent a change in the Department's interpretation of the law as it was in effect prior to the enactment of IDEA Amendments of 1997. However, prior to the change in the law in three Federal circuits, the courts concluded that school districts generally were responsible for paying for the total costs of special education and related services needed by students with disabilities who have been parentally placed in private schools. Therefore, this change does produce potential savings for school districts in those 12 States affected by these court decisions. The States are: Colorado, Connecticut, Kansas, Louisiana, Mississippi, New Mexico, New York, Oklahoma, Texas, Utah, Vermont, and Wyoming.

To determine the impact of the change, one needs to estimate the number of parentally placed children with disabilities that LEAs would have been required to serve, but for this change. Using private school enrollment data for school year 1993–94 and projected growth rates, the Secretary estimates that approximately 1.2 million students will be enrolled in private schools in these 12 States in this school year.

There is no reliable data on the number of children with disabilities who are parentally placed in private schools. However, if one assumes that children with disabilities are found in private schools in the same proportion as they are found in public schools in these States, or at least in the same proportion that children with speech impairments and learning disabilities are found in public schools, one would estimate that there are between 60,000 and 89,000 children with disabilities who are parentally placed in private schools.

If one assumes that, on average, the cost of providing a free appropriate education to these students would be approximately equal to the average excess costs for educating students with disabilities—$6,797 per child for school year 1997–98, the costs of providing FAPE to these children would be significant.

Under the statutory change, public schools would still be required to provide services to parentally-placed children in an amount proportionate to their share of the total population of children with disabilities. Therefore, in estimating the impact of this statutory change, one needs to subtract the cost of the public school obligation from the total projected savings. This amount will vary with the proportion of children attending private schools and the size of the Federal appropriation. While the precise amount of this obligation is indeterminate, the Secretary has concluded that the total net savings to the public sector attributable to the change in the law for these 12 States will be very significant.

Mediation

Proposed § 300.506 reflects the new statutory provisions in section 615(e) of the IDEA, which require States to establish and implement mediation procedures that would make mediation available to the parties whenever a due process hearing is requested. The Act specifies how mediation is to be conducted.

The impact of this change will depend on the following factors: the number of due process hearings that will be requested, the extent to which the parties to those hearings will agree to participate in mediation, the cost of mediation, the extent to which mediation would have been used in the absence of this requirement to resolve complaints, and the extent to which mediation obviates the need for a due process hearing.

Data for previous years suggests one can expect about one complaint for every 1000 children served or about 5,800 requests for due process hearings during the next year. This projection probably overstates the number of complaints because it does not take into account the effect of IDEA Amendments of 1997, which, on balance, can be expected to result in better implementation of the law and higher parental satisfaction with the quality of services and compliance with the IDEA.

Many of these complaints would have been resolved through mediation even without the statutory change. Over 39 States had mediation systems in place prior to the enactment of IDEA Amendments of 1997. Data for 1992 indicate that, on average, States with mediation systems held mediations in about 60 percent of the cases in which hearings were requested. Nevertheless, the Secretary expects the number of mediations to increase even in States that already have mediation systems. Although most States report using mediation as a method of resolving disputes, there have been considerable differences in its implementation and use. In general, the extent to which mediation has been used in States probably depends on the extent to which parents and others were informed of its availability and possible benefits in resolving their complaints and the extent to which the mediator was perceived as a neutral third-party. The Secretary believes that the changes made by IDEA Amendments of 1997 will eliminate some of the differences in State mediation systems that have accounted for its variable use and effectiveness.

The benefits of making mediation more widely available are expected to be substantial, especially in relation to the costs. States with well-established mediation systems conduct considerably fewer due process hearings. For example, in California hearings were held in only 5 and 7 percent of the cases in which they were requested in 1994 and 1995, respectively. The average mediation appears to cost between $350 and $1,000, while a due process hearing can cost tens of thousands of dollars. Based on the experience that many different States have had with mediation, the Secretary estimates that hundreds of additional complaints will be resolved through mediation. The benefits to school districts and benefits to families are expected to be substantial.

Discipline

The proposed regulations (§§ 300.121, 300.122, 300.520, and 300.521) incorporate a number of significant changes to the IDEA that relate to the procedures for disciplining children with disabilities.

Some of the key changes contained in section 615(k) afford school districts additional tools for responding to serious behavioral problems, and in that regard, do not impose any burdens on schools or districts.

The statutory change reflected in proposed § 300.520 would give school officials the authority to remove children who engaged in misconduct involving weapons or illegal drugs.

Under prior law, school officials had the authority to remove children who brought guns, but could not remove children who engaged in misconduct involving other weapons or illegal drugs over the objection of their parents unless they prevailed in a due process proceeding or obtained a temporary restraining order from a court. The statutory change reflected in proposed § 300.521 would give school officials the option of seeking relief from a hearing officer rather than a court in the case of a child the school is seeking to remove because the child poses a risk of injury to the child or others. In both cases, the child would continue to receive services in an alternative educational setting that is required to meet certain standards. It is difficult to assess the impact of either of these statutory changes on schools because there is virtually no information available on the extent to which parents disagree with districts that propose to remove these children. This new authority would only be used in those cases. Nevertheless, the Secretary believes the benefits of this authority to be substantial insofar as the changes help schools provide for a safe environment for all children, while ensuring that any children with disabilities who are moved to an alternative setting continue to receive the services they need.

The statutory change reflected in proposed § 300.520(b) will require school officials to convene the IEP team in cases in which removal for more than 10 school days is contemplated to develop an assessment plan and behavioral interventions (or to review the child's behavioral intervention plan if there is one). These would include all cases in which a school is proposing to suspend a child for more than 10 days in a given year or to expel a child.

Because of the dearth of data on the number and length of suspensions, it is difficult to estimate the impact of this change. However, based on data collected by the Office for Civil Rights on the number of children suspended each year, the Secretary estimates about 300,000 children with disabilities will be suspended for at least one school day this year. Based on an analysis of data from selected States, the Secretary estimates that this review may have to be conducted for only a portion of these children since most of the children who are suspended receive only short-term suspensions. Although there will be a cost associated with convening the IEP team, in many cases, this review will be conducted at the same time as the required manifestation determination and much of the information needed for that determination could be used in conducting this review. Moreover, the benefits of this review are expected to be substantial. The Secretary believes that the development and implementation of appropriate behavioral interventions for children with disabilities will reduce the need for disciplinary actions and all the concomitant costs.

The requirement in section 612(a)(1)(A), incorporated in proposed § 300.121, that all children aged 3 through 21 must have made available to them a free appropriate public education, including children who have been suspended or expelled from school, does not represent a change in the law as the law was interpreted by the Department prior to the enactment of the IDEA Amendments of 1997. It clarifies the Department's long-standing position that the IDEA requires the continuation of special education and related services even to children who have been expelled from school for conduct that has been determined not to be a manifestation of their disability.

However, this statutory change does represent a change in the law in two circuits in which Federal Circuit courts disagreed with the Department's interpretation of the law—the 4th and 7th Circuits. The affected States are: Virginia, Maryland, North Carolina, South Carolina, West Virginia, Illinois, Indiana, and Wisconsin.

To assess the impact of this change, one needs to estimate the extent to which students would have been excluded from education, but for this change in the statute, and the cost of providing the required services to these students during the period they are expected to be excluded from their regular school due to a long-term suspension or expulsion.

There is a paucity of data available on disciplinary actions, and very little for the States in the 4th and 7th circuits. Using data collected by the Office for Civil Rights for school year 1994, the Secretary estimates that approximately 60,000 students aged 6 through 21 will be suspended during this school year. But to determine the impact of the prohibition on ceasing services in these States, one needs to know the number of suspensions each student received and their duration—information that is not provided by OCR data. However, more detailed data compiled by a few States would suggest that a relatively small percentage of students who are suspended receive suspensions of greater than 10 days at a time and a much smaller number of students are expelled.

No information is available on the cost of providing services in an alternative setting for a student who has been suspended temporarily or expelled from school. However, it is reasonable to assume that the cost probably would be no greater than the average daily *total* costs of serving children with disabilities and no less than the cost of providing instruction in a Home or Hospital setting, or between $29 and $70 per day.

While this statutory change will have a cost impact on the States in the fourth and seventh circuits, the Secretary believes the costs for these States will be justified by the benefits of continuing educational services for children who are the least likely to succeed without the help they need.

The statutory change reflected in proposed § 300.122 could generate potential savings for all States by removing the obligation to provide educational services to individuals 18 years old or older who were incarcerated in adult prisons and who were not previously identified as disabled. We have no information on the number of prisoners with disabilities who were not previously identified.

Triennial Evaluation

The existing regulations require a school district to conduct an evaluation of each child served under the IDEA every three years to determine, among other things, whether the child is still eligible for special education. The IDEA Amendments of 1997 change this requirement to reduce unnecessary testing and therefore reduce costs. Specifically, section 614(c) of the IDEA, incorporated in proposed § 300.533, allows the evaluation team to dispense with tests to determine the child's continued eligibility if the team concludes this information is not needed. However, these tests must be conducted if the parents so request.

The savings resulting from this change will depend on the following factors: the number of children for whom an evaluation is conducted each year to comply with the requirement for a triennial evaluation, the cost of the evaluation, and an estimate of the extent to which testing will be reduced because it is determined by the IEP team to be unnecessary and is not requested by the parents.

Based on an analysis of State-reported data, the Secretary estimates that approximately 1.4 million children will be eligible for triennial evaluations in school year 1997–98 or roughly 25 percent of the children to be served.

The IDEA Amendments of 1997 make it clear that districts no longer need to conduct testing to determine whether a

child still has a disability, if the evaluation team determines this information is not needed and the parent agrees. However, while the regulation permits the team to dispense with unneeded testing to determine whether the child still has a disability, the team still has an obligation to meet to review any existing evaluation data and to identify what additional data are needed to determine whether the child is still eligible for special education and related services, the present levels of performance of the child, and whether any modifications in the services are needed. In view of these requirements, the Secretary assumes that there will be some cost associated with conducting the triennial evaluation even in those cases in which both the team and the parents agree to dispense with testing. The Secretary estimates that the elimination of unnecessary testing could reduce the personnel costs by as much as 25 to 75 percent. While there is no national data on the average cost of conducting a triennial evaluation under the current regulations, the Secretary believes that a triennial evaluation has typically required the participation of several professionals for several hours and has cost as much as $1000.

If one assumes, for purposes of this analysis, that savings are achievable in roughly half of the triennial evaluations that will be conducted and that elimination of unnecessary testing could reduce personnel costs by at least 25 percent, one would project substantial savings for LEAs that are attributable to this change.

Benefits and Costs of Proposed Non-statutory Regulatory Changes: The following is an analysis of the benefits and costs of the nonstatutory proposed regulatory changes that includes consideration of the special effects these proposals may have for small entities.

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

For purposes of this analysis as it relates to small entities, the Secretary has focused on local educational agencies because these proposed regulations most directly affect local school districts. The Secretary proposes to use a definition of small school district developed by the National Center for Education Statistics for purposes of its recent publication, ''Characteristics of Small and Rural School Districts.'' In that publication, NCES defines a small district as ''one having fewer students in membership than the sum of (a) 25 students per grade in the elementary grades it offers (usually K–8) and (b) 100 students per grade in the secondary grades it offers (usually 9–12)''. Using this definition, approximately 34 percent of the Nation's school districts would be considered small and serve about 2.5 percent of the Nation's students. NCES reports that approximately 12 percent of these students have IEPs.

Both small and large districts will experience economic impacts from this proposed rule. Little data are available that would permit a separate analysis of how the proposed changes affect small districts in particular. Therefore, the Secretary specifically invites comments on the differential effects of the proposed regulations on small districts.

For purposes of this analysis, the Secretary assumes that the effect of the proposed regulations on small entities would be roughly proportional to the number of children with disabilities served by those districts.

For school year 1997–98, we estimate that approximately 50 million children will be enrolled in public elementary and secondary schools. Using the NCES definition and assuming all districts grew at the same rate between school year 1993–94 and 1997–98, the Secretary estimates that approximately 1.25 million children are enrolled in small districts. Applying the NCES estimate of 12 percent, we estimate that these districts serve approximately 150,000 children with disabilities of the 5.806 million children with disabilities served nationwide.

There are many changes in the proposed regulations that are expected to result in economic impacts—both positive and negative. For purposes of this analysis, we estimated the impact of those non-statutory changes that were not required by changes that were made in the statute by the IDEA amendments.

The following is a summary of the estimated economic and non-economic impact of the key changes in this proposed regulation:

Section 300.12—Definition of ''General Curriculum''—This proposed regulation does not limit flexibility or impose any burden. Its inclusion helps to clarify what is intended by this term.

Sections 300.19(b) and 303.18(b)—Definition of ''Parent''—Proposed paragraph (b), which defines the circumstances under which a State may treat a foster parent as a parent for purposes of IDEA, does not impose any burden on State or local agencies. The proposed definition is intended to promote the appropriate involvement of foster parents consistent with the best interests of the child by ensuring that those who best know the child are involved in decisions about the child's education. To the extent there is any economic impact of this proposal, it should reduce costs on States and local agencies that they would otherwise incur for training and appointing surrogate parents for children whose educational interests under this proposal could appropriately be represented by their foster parents.

Section 300.24(b)(3)—Definition of ''Specially-designed instruction''—Proposed paragraph (b)(3) defines ''specially-designed instruction'' in order to give more definition to the term ''special education,'' which is defined in this section as ''specially-designed instruction.'' The definition is intended to clarify that the purpose of adapting the content, methodology or delivery of instruction is to address the child's unique needs and to ensure access to the general curriculum. This provision increases the potential of children with disabilities to participate more effectively in the general curriculum.

Section 300.121—Continuation of Services—Proposed section 300.121 would add the statutory provision that the right to a free appropriate public education extends to children with disabilities who have been suspended or expelled from school. Proposed paragraph (c)(1) would define children who have been suspended or expelled from school to mean children who have been removed from their current educational placement for more than 10 school days in a given school year. Proposed paragraph (c) would clarify that in providing FAPE to these children an agency shall meet the requirements provided in the statute for interim alternative educational settings for children removed for possessing weapons or drugs or if they are likely to injure themselves or others if they remain in their current placement.

In determining whether and how to regulate on this issue, the Secretary considered the impact of various alternatives on small and large school districts and children with disabilities and their families, and tried to strike an appropriate balance between the educational needs of students and the burden on schools.

Many of the comments received in response to the Department's notice published in July expressed concern that the statute may be read to require school districts to continue to provide services to a child who has been suspended regardless of the duration of the suspension. School districts argue

that if the statute is interpreted to require these services, this will impose a significant burden on schools and interfere with their ability to ensure a safe and orderly environment for all children.

Some will argue that the statute could and should be read to give schools the flexibility they had under IDEA before it was amended not to provide services to children suspended for fewer than 10 school days at a time, regardless of the cumulative effect, as long as there is no pattern of exclusion that warrants treating an accumulation that exceeds 10 school days as a change in placement.

While it is difficult to quantify the cost of requiring schools to provide services to all children who are suspended for one or more school days, the Secretary agrees that the burden for schools districts could be substantial. Based on data collected by the Office for Civil Rights for school year 1992 and data on the number of children who are currently being served under the IDEA, the Secretary estimates that approximately 300,000 children with disabilities will be suspended for at least one school day during the next school year. Many of these children will be suspended on more than one occasion for one or more days. Because of the differences among the children who are expected to be suspended and the range of their service needs, the costs of and the burden associated with providing individualized services in an alternative setting to every child who is suspended for one or more school days could be substantial, especially for small districts, who are expected to suspend about 8,000 children with disabilities during this school year.

At the same time, the Secretary is concerned about the adverse educational impact on a child who has been suspended for more than a few days and on more than one occasion. In balancing these concerns, the Secretary proposes an alternative that takes into account both impacts. Schools will be relieved of the potential obligation to provide services for a significant population of children who are briefly suspended a few times during the course of the school year, and required to anticipate possible service needs of children with chronic or more serious behavioral problems who are repeatedly excluded from school.

Section 300.122(a)(3)—Exception to right to FAPE (Graduation)—Proposed paragraph (a)(3) provides that a student's right to FAPE ends when the student has graduated with a regular high school diploma, but not if the student graduates with some other certificate, such as a certificate of attendance, or a certificate of completion. Given the importance of a regular high school diploma for a student's post-school experiences, including work and further education, the Secretary believes that there is a significant benefit to children protected by the Act to make clear that the expectation for children with disabilities is the same as for nondisabled children. The impact of this proposal, however, is difficult to assess. Many States, including most of those that report a high number of children with disabilities leaving school with a certificate of completion or some other certificate that is not a regular high school diploma, indicate that students with disabilities have the right to continue to work to earn a regular high school diploma after receiving that certificate. Little information is available to evaluate how many students who now can return to school after receiving some other certificate of completion do so, or how many would return to school under this proposal, although several State directors of special education indicated that relatively few students who now can return, do so. The Secretary anticipates that there may be some small impact on small districts, but does not expect it to be substantial, because of the likely small number of students who would return and could not do so now.

Section 300.139—Reporting on Assessments—Proposed 300.139 would require SEA reports on wide-scale assessments to include children with disabilities in aggregated results for all children to better ensure accountability for results for all children. This proposed regulation is expected to have a minimal impact on the cost of reporting assessment results. It could increase the number of data elements reported depending on whether States continue to report trend data for a student population that does not include children with disabilities to the extent required by section 300.138. There will be no impact on small (or large) school districts since this requirement applies to reports that are prepared by the State educational agency.

Sections 300.142(f) and 303.520(e)—Program Income—These provisions would specify that proceeds from public and private insurance will not be treated by the Department as ''program income'' under other regulations that limit how program income can be used. Therefore, this proposal increases flexibility for State and local agencies in using the proceeds from insurance.

Section 300.156(b)—Annual Description of Part B Set-aside Funds—Proposed paragraph (b) provides that if a State's plans for the use of its State level or State agency funds do not differ from those for the prior year the State may submit a letter to that effect instead of submitting a description of how the funds would be used. The effect of this proposed regulation is inconsequential because it implements the Department's long-standing interpretation that a letter is sufficient in this case.

Section 300.232(a)—Exception to the LEA Maintenance of Effort—Proposed paragraph (a) makes it clear that an LEA may only reduce expenditures associated with departing personnel if those personnel are replaced by qualified, lower-salaried personnel. Congress made its intent clear in this regard in the Committee Report, which is quoted, in part, in a Note following this proposed regulation. Allowing LEAs to reduce their expenditures by not replacing departing personnel would violate congressional intent and diminish special education services in those districts.

Section 300.342(c)—Use of IFSP—Proposed paragraph (c) would require school districts to obtain written informed consent from parents before using an IFSP instead of an IEP, which is based on an explanation of the differences between the two documents. The proposed regulation would impose a cost burden on districts in those States that elect to allow parents to opt for the use of an IFSP instead of an IEP. However, once a form is developed that explains the differences between an IFSP and an IEP, the cost of providing this form to parents and obtaining written consent are probably minimal, and are justified by the benefits of ensuring that parents understand the role of the IEP in providing access to the general education curriculum.

Section 300.342(d)—Effective Date of IEP Requirements—Proposed paragraph (d) would provide that IEPs are to meet the requirements of the statute by July 1, 1998, which is the statutory effective date for the new IEP requirements. Given the potential benefits to families and schools of complying with these requirements, the Secretary believes that implementation of these requirements should not depend on parents exercising their rights or vary within and across districts and States. The impact of this proposal is difficult to estimate because the cost of complying includes both the one-time cost of providing all affected parties with the information, training, and materials needed to implement the new requirements appropriately and the

annual costs of complying with new IEP requirements such as including the regular education teacher on the IEP team. The impact of these costs on State and local agencies is increased the sooner these costs are incurred.

The Secretary anticipates some impact on small districts, but does not expect it to be substantial because of the number of children involved—about 150,000 children with disabilities in total.

Section 300.344(b)—Including the Child in the IEP Meeting—Proposed paragraph (b) would require the school to invite students to participate in IEP meetings if the meeting will include consideration of transition services needs or transition services. The effect of this provision is to give 14- and 15-year-olds, and in some cases, younger students the opportunity to participate. The existing regulations have required schools to invite students to meetings in which transition services were to be discussed. These would include all students aged 16 years and older, and in some cases, younger students. The law has also given other children when appropriate the opportunity to participate in the IEP meeting. Therefore, in some cases, 14- and 15-year-olds may be already participating. The Secretary believes that the costs of notifying students about a meeting or trying to ensure that the students' interests and preferences are accommodated are more than justified by the benefits of including students in a discussion of their own transition needs, including their planned course of study in secondary school.

Section 300.501(b)—Parental Access to Meetings—Proposed paragraph (b) of section 300.501 would define when and how to provide notice to parents of meetings in which they are entitled to participate. It would further define what is meant by the term ''meeting.'' The Secretary believes these proposed regulations impose the minimal requirements necessary to implement the statute. The language in paragraph (b)(1) helps to clarify what is required to provide parents with a meaningful opportunity to attend meetings while the language in (b)(2) is designed to reduce unnecessary burden by clarifying what constitutes a ''meeting.''

Section 300.501(c)—Placement Meetings—Paragraph (c) of 300.501 specifies that the procedures used to be to meet the new statutory requirement of parental involvement in placement decisions. It provides that the procedures used for parental involvement in IEP meetings also be used for placement meetings. These include specific requirements relating to notice, methods for involving parents in the meeting, and recordkeeping of attempts to ensure their participation. Because in many cases placement decisions will be made as part of IEP meetings, as is already the case in most jurisdictions, the Secretary believes the impact of this proposed regulation will be minimal. In those cases in which placement meetings are conducted separately from the IEP meetings, the Secretary believes the benefits of making substantial efforts to secure the involvement of parents and provide for their meaningful participation in any meeting to discuss their child's placement more than justify the costs.

Section 300.502(b) and (c)—Right to an Independent Evaluation—Proposed paragraph (b) would clarify language from the current regulations that make it clear that if a parent requests an independent educational evaluation (IEE), the agency must either initiate a due process hearing to show that its evaluation is appropriate or provide for an IEE at public expense. The Secretary interprets the provision permitting parents to request an IEE to require the agency to take action. This requirement at most represents a small burden for school districts because if the agency did not take action, parents would be free to request due process to compel action.

Proposed paragraph (c) provides that a public agency may not impose conditions or timelines related to obtaining an independent evaluation. The Secretary believes that this requirement, which arguably limits the flexibility of school districts, is critical to ensuring that school districts do not find ways to circumvent the right provided by the IDEA to parents to obtain an independent evaluation.

Sections 300.503(b)(8) and 303.403(b)(4)—Notice to Parents Regarding Complaint Procedures—These provisions require that the required prior written notice to parents include information about how to file a complaint under State complaint procedures. Because districts are already required to provide a written notice to parents, the Secretary estimates that the additional cost of adding this information will be one-time and minimal. The burden on small districts could be minimized if each SEA were to provide its LEAs with appropriate language describing the State procedures for inclusion in the parental notices. Making parents award of a low cost and less adversarial mechanism that they can use to resolve disputes with school districts should result in cost savings and more cooperative relationships between parents and districts.

Section 300.505 (a)(1)(iii) and (c)(2)—Parental Consent for Reevaluation—Proposed paragraph (a)(1)(iii) would clarify that the new statutory right of parents to consent to a reevaluation of their child means parental consent prior to the administration of any test that is needed as a part of a reevaluation. The Secretary does not believe that the intent of this change was to require school districts to obtain parental consent before reviewing existing data about the child and the child's performance, an activity that school districts, as a matter of good practice, should be engaged in on an on-going basis. That interpretation would impose a significant burden on school districts with little discernable benefit to the children served under these regulations.

Proposed paragraph (c)(2) would use the procedures that are in current regulations dealing with inviting parents to IEP meetings as a basis for defining what it means to undertake ''reasonable measures'' in obtaining parental consent. The intent of the proposal is to meaningfully operationalize the statutory right of parents to consent to a reevaluation of their child. Given the importance of parental involvement in all parts of the process, the Secretary believes that any burden imposed by the proposed recordkeeping requirements is justified by the benefits of securing parental consent to the reevaluation.

Section 300.506(c)—Impartial Mediation—Proposed paragraph (c) would interpret the statutory requirement that mediation be conducted by an impartial mediator to mean that a mediator may not be an employee of an LEA or a State agency that is providing direct services to the child and must not have a personal or professional conflict of interest. The Secretary believes that, by definition, parents would not regard an employee of the other party to the dispute to be impartial or a person who has a personal or professional conflict of interest. The Secretary believes providing for impartiality would help promote the use of mediation, which is voluntary, and improve its overall effectiveness in resolving disagreements. The impact of disallowing these individuals from serving as mediators is not likely to have a significant impact on States, given current practices. Many States contract with private organizations to conduct their mediations. Others use employees of the State educational agency, which, in most cases, is not the agency providing direct services. Given

the significant benefits to children, families, and school districts of expeditiously resolving disagreements without resort to litigation, the Secretary concluded that benefits of this proposal easily justify any cost or inconvenience to States.

Section 300.506(d)(2)—Failure to Participate in Meeting—Proposed paragraph (d)(2) would specify that a parent's failure to participate in a meeting at which a disinterested person explains the benefits of and encourages the use of mediation could not be used as a reason to deny or delay the parent's right to a due process hearing. This change is not likely to limit the benefits to school districts of mediation as the Secretary believes that it is extremely unlikely that parents who are unwilling to participate in such a meeting with a disinterested person would be willing to engage in the voluntary mediation provided for in the statute.

Section 300.507(c)(4)—Failure to Provide Notice—Proposed paragraph (c)(4) makes it clear that failure by parents to provide the notice required by the statute cannot be used by a school district to delay or deny the parents' right to due process. This proposed regulation would eliminate the possibility that public agencies will delay a due process hearing pending receipt of a notice that they deem to be acceptable. This regulation does not impose any cost on school districts and would help ensure that parents are afforded appropriate and timely access to due process.

Section 300.513(b)—Attorneys' Fees—Proposed paragraph (b) would provide that funds provided under Part B of IDEA could not be used to pay attorneys' fees. This proposal does not increase the burden on school districts or otherwise substantially affect the ability of school districts to pay attorneys' fees that are awarded under the Act or to pay for their own attorneys. It merely establishes that attorneys' fees must be paid by a source of funding other than Part B based on the Department's position that limited Federal resources not be used for these costs. The Secretary does not expect this proposal to have a cost impact on small (or large) districts because all districts have non-Federal sources of funding that are significantly greater than the funding provided under IDEA. Currently, funds provided to States under the IDEA represent about eight percent of special education expenditures.

Section 300.514(c)—Hearing Officer Decisions—Proposed 300.514(c) would clarify that if a hearing officer in a due process hearing or a review official in a State level review agrees with the parents that a change in placement is appropriate, the child's placement must be treated in accordance with that agreement. It is difficult to assess the impact of this proposal because the statutory language is ambiguous. If paragraph (c) were not included in the regulation. In some cases, parents can be expected to successfully argue, as they have in the past, that the hearing officer's decision to change the placement of a child be implemented. In other cases, as was the case in *Board of Education Sacramento Unified School District* v. *Holland* (9th Cir., 1994), a change to the placement initially sought by the parents and approved by the hearing officer may not occur until all appeals have been exhausted. The cost impact of this proposal is also indeterminate because in some cases implementation of the hearing officer's decision will result in moving children to more costly placements and, in other cases, to less costly placements. In either case, the Secretary concluded that the benefits to the child of securing an appropriate placement justify any potential increase in costs or other burdens to the school district.

The Secretary estimates that the effect of this proposal on small districts will be minimal. The Secretary estimates that no more than 2000 due process hearings will be conducted during the next school year, of which only a small proportion are expected to involve small districts (fewer than 60). Not all of these will involve disputes about placement and the hearing officer or State review official can be expected to agree with the parents in only a portion of the cases.

Section 300.520 (b) and (c)—Behavioral Interventions—Proposed paragraph (b) of this section would specify that the IEP team meeting to consider behavioral interventions occur within 10 business days of the behavior that leads to discipline rather than 10 calendar days, and would clarify that, if the child does not have a behavior intervention plan, the purpose of the meeting is to develop an assessment plan and appropriate behavioral interventions to address that behavior. In proposing the business day alternative, the Secretary determined that it would minimize the burden on school districts and would not have a significant impact on children with disabilities, in light of other regulatory proposals in the discipline area. The change to clarify that the IEP meeting develop appropriate behavioral interventions to address the child's behavior may impose some additional burden on school districts, but the Secretary determined that burden was justified by the benefit to the child, the child's teacher, and the educational process as a whole if appropriate behavioral intervention strategies are implemented without delay to address the behavior that led to discipline.

Proposed paragraph (c) of section 300.520 makes it clear that if a child is removed from his or her current placement for 10 school days or fewer in a given year, the school is not required to convene the IEP team to develop an assessment plan and behavioral interventions. (A school would be required to do so if a child were suspended for more than 10 school days in a given school year.) In determining whether to regulate on this issue, the Secretary considered the potential benefits of providing behavioral interventions to children who need them and the impact on school districts of convening the IEP team to develop behavioral interventions if children are suspended.

Based on consideration of the costs and benefits to children and schools, the Secretary concluded that the IEP team should not be required to meet and develop or review behavioral interventions for a child unless the child was engaged in repeated or significant misconduct. The Secretary determined that the costs and burden of convening the team the first time a child is suspended outweigh any potential benefits to the child if the child is receiving a short-term suspension for an infraction. However, the Secretary also considered the significant benefits that early intervention can produce for students and schools by effectively addressing behavioral problems. The Secretary concluded that if a child is engaged in behavior that warrants removal for more than 10 school days in a given year, intervention is in order.

The Secretary believes that this proposal may reduce costs for school districts because, in the absence of a regulation on this issue, the statute will be read by some to require that the IEP team be convened to develop an assessment plan the first time a child is suspended, regardless of the duration of the suspension or the child's disciplinary record. Alternatively, the statute could be read, in the absence of regulation, to require the IEP team to be convened only for suspensions that exceed 10 school days at a time.

Little data are available that would permit the Secretary to assess the economic impact of this proposal on school districts or the number of children who will benefit. Based on data collected by the Office for Civil Rights, the Secretary estimates that

approximately 300,000 children with disabilities will be suspended during the next school year for at least one school day. Based on an analysis of State-reported data from selected States, we estimate that most of the children who are suspended receive only short-term suspensions, but we have no information on the length or frequency of individual suspensions.

Section 300.521—Due Process Hearing for Removal—Proposed 300.521 specifies that a hearing officer is to make the determination authorized by section 615(k)(2) of the IDEA (regarding whether a child's current educational placement is substantially likely to result in injury to self or others) in a due process hearing.

The Secretary concluded that a hearing that meets the requirement for a due process hearing is the most appropriate forum for expeditiously and fairly determining whether the district has demonstrated by substantial evidence (defined by statute as ''beyond a preponderance of the evidence'') that maintaining the current placement is substantially likely to result in injury and to consider the appropriateness of the child's current placement and the efforts of the district to minimize the risk of harm.

The Secretary believes that the cost impact of this proposed regulation on large and small districts will be minimal because of the limited number of cases in which school districts and parents will disagree about the proposed removal of a dangerous child. (If the parents agree to removing a child, a school district may do so without the approval of a hearing officer.) In those few cases in which there is disagreement, the Secretary believes that the benefits of conducting a due process hearing justify the costs.

Section 300.523—Manifestation Determination—Proposed paragraph (b) would make it clear that if a child was removed for 10 or fewer school days in a given school year, and no further disciplinary action is contemplated, the school is not required to conduct a manifestation review. As was the case in considering section 300.520(c), the Secretary considered the potential benefits to the child and impact on districts of convening the IEP team if children are suspended.

The Secretary similarly concluded that the IEP team should not be required to meet and determine whether the child's behavior was a manifestation of the disability unless the child was engaged in repeated or significant misconduct. The cost of convening the team, whether to develop a behavioral assessment or to conduct a manifestation review, outweigh the potential benefits to a child who has been briefly suspended a few times. However, in proposing this regulation, the Secretary also considered the adverse impact on the child if the child is repeatedly suspended without any effort to determine whether the child should be punished for his or her behavior. One of the primary purposes of the manifestation review is to determine whether the child's disability has impaired his or her ability to understand the impact and consequences of his or her behavior and whether the child's disability has impaired the child's ability to control the behavior subject to discipline. Conducting this review, along with the behavioral assessment, will help ensure that the district responds appropriately to the child's behavior.

The Secretary believes that this proposal may reduce costs for school districts to the extent the statute is being read by some to require a manifestation review every time a child is suspended. Alternatively, this proposal may limit flexibility to the extent the statute could be read not to require a review for any single suspension that is fewer than 10 school days.

Section 300.528—Procedures for an Expedited Due Process Hearing—Proposed 300.528 defines what an expedited due process hearing to remove a dangerous child must entail. As discussed, the Secretary does not believe the requirement for the hearing officer to conduct a due process hearing to have a substantial cost impact because of the small number of cases involved. In proposing this regulation, the Secretary attempted to provide some flexibility to the States in establishing timelines and procedures in order to accommodate the interests of school officials in obtaining an expeditious decision. However, the Secretary has little basis for projecting the cost of hearings conducted in accordance with the proposed regulations in comparison to other appropriate procedures.

Section 300.587—Procedures for Enforcement—This proposal would clarify the types of notice and hearing that the Department would provide before taking an enforcement action under Part B of the IDEA. Providing clarity about the applicable procedures for the various types of enforcement actions will benefit potential subjects of enforcement actions and the Department by ensuring that time and resources are not spent on unnecessary disputes about procedures or needless process.

Section 300.589—Waiver Procedures—This proposal describes the procedures to be used by the Secretary in considering a request from an SEA of a waiver of the supplement, not supplant and maintenance of effort requirements in IDEA. This proposed regulation does not impose any cost on local school districts. The proposed procedures will affect any State requesting a waiver under Part B. While the Secretary believes the benefits of the proposed process to children with disabilities justify any possible cost or burden for State educational agencies, the Secretary welcomes public comment on the impact of this proposal and alternative ways for the Secretary to implement these statutory provisions.

Section 300.624—Capacity-building Subgrants—This proposal would make it clear that States could establish priorities in awarding these subgrants. This proposal, which provides permissive authority to be used at the discretion of each State, clarifies the intent of the statutory change and imposes no burden on State agencies. Allowing States to use these funds to foster State-specific improvements should lead to improving educational results for children with disabilities.

Sections 300.660(b) and 303.510(b)—Information about State Complaint Procedures—Proposed paragraph (b) would require States to widely disseminate their complaint procedures. While this proposed requirement would increase costs for those State educational agencies that have not established procedures for widely disseminating this information, the Secretary could have prescribed specific mechanisms for this dissemination but chooses not to, in order to give SEAs flexibility in determining how to accomplish this. The requirement would not have any direct impact on small districts and would benefit parents who believe that a public agency is violating a requirement of these regulations, by providing them the information they would need to get an official resolution of their issue without having to resort to a more formal, and generally more costly, dispute resolution mechanism.

Sections 300.661 and 303.512—Secretarial Review—This proposal would delete the provision providing for Secretarial review of complaints filed under State complaint procedures. The effect of this proposal on small (and large) districts would be inconsequential because of the small number of requests for these reviews. This proposal was developed in recognition of the report of the Department's Inspector General of August 1997, that noted that this procedure provides very limited benefits to children with disabilities or

to the IDEA programs and involves a considerable expenditure of the resources of the Office of Special Education Programs and other offices of the Department. The Inspector General's report concluded that greater benefit to the programs and individuals covered by the IDEA would be achieved if the Department eliminated the Secretarial review process and focused on improving State procedures for resolving complaints and implementing the IDEA programs. This change, and the changes proposed in §§ 300.660(b) and 300.503(b)(8) and §§ 303.510(b) and 303.403(b)(4) that would require greater public notice about the State complaint procedures, would implement those recommendations.

Sections 300.662 and 303.511—State Reviews—This proposal would relieve States of the requirement to review complaints about violations that occurred more than three years before the complaint. This proposed limitation on the age of the complaints is expected to reduce the cost to SEAs of investigating and reviewing complaints. There is no reason to believe this proposal would adversely affect small districts. There is also no reason to expect that this proposal would have a significant negative impact on individuals or entities submitting complaints under these procedures as it is unlikely that complaints alleging a violation that occurred more than three years in the past and that do not allege a continuing violation or request compensatory services would result in an outcome that puts the protected individuals under these regulations in a better position than they would have been in if no complaint had been filed. On the other hand, allowing States to focus their complaint resolution procedures on issues that are relevant to the current operation of the State's special education program may serve to improve services for these children.

2. Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the proposed regulations contain technical terms or other wording that interfere with their clarity? (3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the proposed regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§'' and a numbered heading; for example, § 300.2 *Applicability to State, local, and private agencies.*) (4) Is the description of the proposed regulations in the ''Supplementary Information'' section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to make the proposed regulations easier to understand?

A copy of any comments that concern how the Department could make these proposed regulations easier to understand should be sent to Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue, SW. (room 5121, FB–10), Washington, DC 20202–2241.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these proposed regulations are small local educational agencies (LEAs) receiving Federal funds under this program. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

Paperwork Reduction Act of 1995

Sections 300.110, 300.121, 300.123–300.130, 300.133, 300.135–300.137, 300.141–300.145, 300.155–300.156, 300.180, 300.192, 300.220–300.221, 300.240, 300.280–300.281, 300.284, 300.341, 300.343, 300.345, 300.347, 300.380–300.382, 300.402, 300.482–300.483, 300.503–300.504, 300.506, 300.508, 300.510–300.511, 300.532, 300.535, 300.543, 300.561–300.563, 300.565, 300.569, 300.571–300.572, 300.574–300.575, 300.589, 300.600, 300.653, 300.660–300.662, 300.750–300.751, 300.754, 303.403, 303.510–303.512, and 303.520 contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of Information: Assistance for Education of All Children with Disabilities: Complaint Procedures, §§ 300.600–300.662 and 303.510–303.512. Each SEA is required to adopt written procedures for resolving any complaint that meets the requirements in these proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 10 hours to issue a written decision to a complaint. There is an estimated average annual total of 1079 complaints submitted for processing. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 10,790 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: State Eligibility, §§ 300.110, 300.121, 300.123–300.130, 300.133, 300.135–300.137, 300.141–300.145, 300.155–300.156, 300.280–300.281, 300.284, 300.380–300.382, 300.402, 300.482–300.483, 300.510–300.511, 300.589, 300.600, 300.653, 303.403, and 303.520. Each State must have on file with the Secretary policies and procedures to demonstrate to the satisfaction of the Secretary that the State meets the specified conditions for assistance under this part. In the past, States were required to submit State plans every three years with one-third of the entities submitting plans to the Secretary each year. With the new statute, States will no longer be required to submit State plans. Rather, the policies and procedures currently approved by, and on file with, the Secretary that are not inconsistent with the IDEA Amendments of 1997 will remain in effect unless amended.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 30 hours for each response for 58 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 1740 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: LEA Eligibility, §§ 300.180, 300.192, 300.220–300.221, 300.240, 300.341, 300.343, 300.345, 300.347, 500.503–300.504, 300.532, 300.535, 300.543, 300.561–300.563, 300.565, 300.569, 300.571–300.572, and 300.574–300.575. Each local educational agency (LEA) and each State agency must have on file with the State educational agency (SEA) information to demonstrate that the agency meets the specified requirements for assistance under this part. In the past, each LEA

was required to submit a periodic application to the SEA in order to establish its eligibility for assistance under this part. Under the new statutory changes, LEAs are no longer required to submit such applications. Rather, the policies and procedures currently approved by, and on file with, the SEA that are not inconsistent with the IDEA Amendments of 1997 will remain in effect unless amended.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 2 hours for each response for 15,376 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 30,752 hours. The Secretary invites comment on the estimated time it wills take for LEAs to meet this reporting and recordkeeping requirement.

Collection of Information: Assistance for Education of All Children with Disabilities: List of Hearing Officers and Mediators, §§ 300.506 and 300.508. Each State must 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. Each public agency must, also, keep a list of the persons who serve as hearing officers.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 25 hours for each response for 58 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 3050 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: Report of Children and Youth with Disabilities Receiving Special Education, §§ 300.750–300.751, and 300.754. Each SEA must submit an annual report of children served.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 262 hours for each response for 58 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 15,196 hours.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on these proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Anyone may also view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (pdf) on the World Wide Web at either of the following sites:

http://gcs.ed.gov/fedreg.htm

http://www.ed.gov/news.html

To use the pdf you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the pdf, call the U.S. Government Printing Office toll free at 1–888–293–6498.

Anyone may also view these documents in text copy only on an electronic bulletin board of the Department. Telephone: (202) 219–1511 or, toll free, 1–800–222–4922. The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

Note: The official version of this document is the document published in the **Federal Register**.

List of Subjects

34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

34 CFR Part 301

Education of individuals with disabilities, Elementary and secondary education, Grant programs—education, Infants and children, Reporting and recordkeeping requirements.

34 CFR Part 303

Education of individuals with disabilities, Grant programs—education, Infants and children, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Number: 84.027 Assistance for the Education of All Children with Disabilities, 84.173 Preschool Grants for Children with Disabilities, and 84.181 Early Intervention Program for Infants and Toddlers with Disabilities)

Dated: October 6, 1997.

Richard W. Riley,

Secretary of Education.

The Secretary proposes to amend Title 34 of the Code of Federal Regulations by revising parts 300, 301, and 303 as follows:

1. Part 300 is revised to read as follows:

PART 300—ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

Subpart B—State and Local Eligibility—General

State Eligibility—General

State Eligibility—Specific Conditions

LEA and State Agency Eligibility—General

LEA Eligibility—Specific Conditions

Secretary of the Interior—Eligibility

Public Participation

Subpart C—Services

Free Appropriate Public Education

Evaluations and Reevaluations 300.320 Initial evaluations.

Individualized Education Programs

Direct Services by SEA

Authority: 20 U.S.C. 1411–1420, unless otherwise noted.

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

§ 300.1 Purposes.

The purposes of this part are—

(a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(b) To ensure that the rights of children with disabilities and their parents are protected;

(c) To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and

(d) To assess, and ensure the effectiveness of, efforts to educate children with disabilities.

(Authority: 20 U.S.C. 1400 note)

Note: With respect to paragraph (a) of this section (related to preparing children with disabilities for employment and independent living, section 701 of the Rehabilitation Act of 1973 describes the philosophy of independent living as including a philosophy of consumer control, peer support, self-help, self-determination, equal access, and individual and system advocacy, in order to maximize the leadership, empowerment, independence, and productivity of individuals with disabilities, and the integration and full inclusion of individuals with disabilities into the mainstream of American society.

§ 300.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State that receives payments under Part B of the Act.

(b) *Public agencies within the State.* The provisions of this part apply to all political subdivisions of the State that are involved in the education of children with disabilities. These political subdivisions include—

(1) The State educational agency;

(2) LEAs and educational service agencies;

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for students with deafness or students with blindness); and

(4) State and local juvenile and adult correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for ensuring that the rights and protections under Part B of the Act are given to children with disabilities

(1) Referred to or placed in private schools and facilities by that public agency, or

(2) Placed in private schools by their parents under the provisions of § 300.403(c).

(Authority: 20 U.S.C. 1412)

Note: The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 300.3 Regulations that apply.

The following regulations apply to this program:

(a) 34 CFR part 76 (State-Administered Programs) except for §§ 76.125–76.137 and 76.650–76.662.

(b) 34 CFR part 77 (Definitions).

(c) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(d) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(e) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(f) 34 CFR part 82 (New Restrictions on Lobbying).

(g) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(h) The regulations in this part—34 CFR part 300 (Assistance for Education of Children with Disabilities).

(Authority: 20 U.S.C. 1221e–3(a)(1))

Definitions

Note 1: Definitions of terms that are used throughout these regulations are included in this Subpart. Other terms are defined in the specific subparts in which they are used. A list of those terms and the specific sections in which they are defined:

Appropriate professional requirements in the State (§ 300.136(a)(1))
Average per-pupil expenditure in public elementary and secondary schools in the United States (§ 300.702)
Base year (§ 300.706(b)(1))
Comparable quality (§ 300.455(c))
Consent (§ 300.500(b)(1))
Controlled Substance (§ 300.520(d)(1))
Destruction (§ 300.560)
Direct services (§ 300.370(b)(1))
Education records (§ 300.560)
Evaluation (§ 300.500(b)(2))
Excess costs (§ 300.184(b))
Extended school year services (§ 300.309(b))
Financial costs (§ 300.142(e)(2))
Freely associated States (§ 300.722)
Highest requirements in the State applicable to a specific profession or discipline (§ 300.136(a)(2))
Illegal drug (§ 300.520(d)(2))
Independent educational evaluation (§ 300.503(a)(3)(i))
Indian (§ 300.264(a))
Indian tribe (§ 300.264(b))
Outlying area (§ 300.718)
Participating agency, as used in the IEP requirements in §§ 300.347 and 300.348 (§ 300.340(b))
Participating agency, as used in the confidentiality requirements in §§ 300.560–300.576(§ 300.340(b))
Party or parties (§ 300.583(a))
Personally identifiable (§ 300.500(b)(3))
Private school children with disabilities (§ 300.450)
Profession or discipline (§ 300.136(a)(3))
Public expense (§ 300.502(a)(3)(ii))
Revoke consent at any time (§ 300.500 note)
State, special definition (§ 300.700)
State-approved or recognized certification, licensing, registration, or other comparable requirements (§ 300.136(a)(4))
Substantial evidence (§ 300.521(e))
Support services (§ 300.370(b)(2))
Weapon (§ 300.520(d)(3))

Note 2: The following abbreviations for selected terms are used throughout these regulations: ''CSPD'' means ''comprehensive system of personnel development.''

''ESA'' means ''education service agency.''
''FAPE'' means ''free appropriate public education.''
''IDEA'' means ''Individuals with Disabilities Education Act.''
''IEP'' means ''individualized education program.''
''IFSP'' means ''individualized family service plan.''
''LEA'' means ''Local educational agency.''

''LRE'' means ''least restrictive environment.''
''SEA'' means ''State educational agency.''

Each abbreviation is used interchangeably with its nonabbreviated term.

§ 300.4 Act.

As used in this part, *Act* means the Individuals with Disabilities Education Act, as amended (IDEA).

(Authority: 20 U.S.C. 1400(a))

§ 300.5 Assistive technology device.

As used in this part, *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability.

(Authority: 20 U.S.C. 1401(1))

§ 300.6 Assistive technology service.

As used in this part, *Assistive technology service* means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes—

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

(Authority: 20 U.S.C. 1401(2))

Note: The Act's definitions of ''Assistive technology device'' and ''Assistive technology service'' are substantially identical to the definitions of these terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988.

§ 300.7 Child with a disability.

(a) (1) As used in this part, the term *child with a disability* means a child evaluated in accordance with §§ 300.530–300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or a multiple disability, and who because of that impairment needs special education and related services.

(2) The term *child with a disability* for children aged 3 through 9 may include a child—

(i) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development;

(ii) Who, for that reason, needs special education and related services; and

(iii) If the State adopts the term for children of this age range (or a subset of that range) and the LEA chooses to use the term.

(b) The terms used in this definition are defined as follows:

(1) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (b)(4) of this section.

(2) *Deaf-blindness* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) *Deafness* means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) *Emotional disturbance* is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

(5) *Hearing impairment* means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(6) *Mental retardation* means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

(7) *Multiple disability* means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational problems that the problems cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

(8) *Orthopedic impairment* means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(9) *Other health impairment* means having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia,

epilepsy, lead poisoning, leukemia, or diabetes, that adversely affects a child's educational performance.

(10) *Specific learning disability* is defined as follows:

(i) *General.* The term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) *Disorders not included.* The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) *Speech or language impairment* means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

(12) *Traumatic brain injury* means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

(13) *Visual impairment including blindness* means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(Authority: 20 U.S.C. 1401(3) (A) and (B); 1401(26))

Note 1: If a child manifests characteristics of the disability category ''autism'' after age 3, that child still could be diagnosed as having ''autism'' if the criteria in paragraph (b)(1) of this section are satisfied.

Note 2: As used in paragraph (a)(2) of this section, the phrase ''at the discretion of the State and LEA'' means that if the State adopts the term ''developmental delay'' for children aged 3 through 9, or for a subset of that age range (e.g., children aged 3 through 5, etc.), LEAs that choose to use ''developmental delay,'' rather than identify these children as being in a particular disability category, must conform to the State's definition of the term. However, a State may not require an LEA to use ''developmental delay'' for this age range. LEAs in a State that does not adopt the term ''developmental delay'' for children in this age range, or for a sub-set of this age range, cannot independently use ''developmental delay'' as a basis for establishing a child's eligibility.

Note 3: With respect to paragraph (a)(2) of this section (relating to ''developmental delay''), the House Committee Report on Pub. L. 105–17 includes the following statement:

The Committee believes that, in the early years of a child's development, it is often difficult to determine the precise nature of the disability. Use of ''developmental delay'' as part of a unified approach will allow the special education and related services to be directly related to the child's needs and prevent locking the child into an eligibility category which may be inappropriate or incorrect, and could actually reduce later referrals of children with disabilities to special education. (H. Rep. No. 105–95, p. 86 (1997))

Note 4: With respect to paragraph (b)(4) of this section (relating to using the term ''emotional disturbance'' instead of ''serious emotional disturbance''), the House Committee Report on Pub. L. 105–17 includes the following statement:

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

Note 5: A child with attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) may be eligible under Part B of the Act if the child's condition meets one of the disability categories described in § 300.7, and because of that disability the child needs special education and related services. Some children with ADD or ADHD who are eligible under Part B of the Act meet the criteria for ''other health impairments'' (see paragraph (b)(9) of this section). Those children would be classified as eligible for services under the ''other health impairments'' category if (1) the ADD or ADHD is determined to be a chronic health problem that results in limited alertness, that adversely affects educational performance, and (2) special education and related services are needed because of the ADD or ADHD. The term ''limited alertness'' includes a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.

Other children with ADD or ADHD may be eligible under Part B of the Act because they satisfy the criteria applicable to other disability categories in § 300.7(b). For example, children with ADD or ADHD would be eligible for services under the ''specific learning disability category'' if they meet the criteria in paragraph (b)(10) of this section, or under the ''emotional disturbance'' category if they meet the criteria in paragraph (b)(4). Even if a child with ADD or ADHD is found to be not eligible for services under Part B of the Act, the requirements of Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 34 CFR Part 104 may still be applicable.

§ 300.8 Day.

As used in this part, the term *day* means calendar day unless otherwise indicated as school day or business day.

(Authority: 20 U.S.C. 1221e–3)

§ 300.9 Educational service agency.

As used in this part, the term *educational service agency*—

(a) Means a regional public multiservice agency—

(1) Authorized by State law to develop, manage, and provide services or programs to LEAs; and

(2) Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary and secondary schools of the State; and

(b) Includes any other public institution or agency having administrative control and direction over a public elementary or secondary school.

(Authority: 20 U.S.C. 1401(4))

§ 300.10 Equipment.

As used in this part, the term *equipment* means—

(a) Machinery, utilities, and built-in equipment and any necessary enclosures or structures to house the machinery, utilities, or equipment; and

(b) All other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

(Authority: 20 U.S.C. 1401(6))

§ 300.11 Free appropriate public education.

As used in this part, the term *free appropriate public education* means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State; and

(d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340–300.351.

(Authority: 20 U.S.C. 1401(8))

§ 300.12 General curriculum.

As used in this part, the term *general curriculum* means the curriculum adopted by an LEA, schools within the LEA, or where applicable, the SEA for all children from preschool through secondary school.

(Authority: 20 U.S.C. 1401)

Note: The term ''general curriculum'', as defined in this section, relates to the content of the curriculum and not to the setting in which it is used. Thus, to the extent applicable to an individual child with a disability and consistent with the LRE provisions under §§ 300.500—300.553, the general curriculum could be used in any educational environment along a continuum of alternative placements described under § 300.551.

§ 300.13 Include.

As used in this part, the term *include* means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1221e–3)

§ 300.14 Individualized education program.

As used in this part, the term *individualized education program or IEP* has the meaning given the term in § 300.340.

(Authority: 20 U.S.C. 1401(11))

§ 300.15 Individualized education program team.

As used in this part, the term *individualized education program team* or *IEP team* means a group of individuals described in § 300.344 that is responsible for developing, reviewing, or revising an IEP for a child with a disability.

(Authority: 20 U.S.C. 1221e–3)

Note: The IEP team may also serve as the placement team.

§ 300.16 Individualized family service plan.

As used in this part, the term *individualized family service plan* or *IFSP* has the meaning given the term in 34 CFR 303.340(b).

(Authority: 20 U.S.C. 1401(12))

§ 300.17 Local educational agency.

(a) As used in this part, the term *local educational agency* means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

(b) The term includes—

(1) An educational service agency, as defined in § 300.9; and

(2) Any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(c) The term includes an elementary or secondary school funded by the Bureau of Indian Affairs, but only to the extent that the inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under this Act with the smallest student population, except that the school may not be subject to the jurisdiction of any SEA other than the Bureau of Indian Affairs.

(Authority: 20 U.S.C. 1401(15))

Note: A public charter school that meets the definition of ''LEA'' is eligible to receive Part B funds as an LEA. If a public charter school receives Part B funds it must comply with the requirements of this part that apply to LEAs.

§ 300.18 Native language.

As used in this part, the term *native language*, if used with reference to an individual of limited English proficiency, means the language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child.

(Authority: 20 U.S.C. 1401(16))

Note: The term ''native language'' is used in the prior notice, procedural safeguards notice, and evaluation sections: § 300.503(c), § 300.504(c) and § 300.532(a)(2). In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) For individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual (such as sign language, braille, or oral communication).

§ 300.19 Parent.

(a) As used in this part, the term *parent* means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 300.515. The term does not include the State if the child is a ward of the State.

(b) State law may provide that a foster parent qualifies as a parent under Part B of the Act if—

(1) The natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law;

(2) The foster parent has an ongoing, long-term parental relationship with the child;

(3) The foster parent is willing to participate in making educational decisions in the child's behalf; and

(4) The foster parent has no interest that would conflict with the interests of the child.

(Authority: 20 U.S.C. 1401(19))

Note: The term ''parent'' is defined to include persons acting in the place of a parent, such as a grandparent or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare, and at the discretion of the State, a foster parent who meets the requirements in paragraph (b) of this section.

§ 300.20 Public agency.

As used in this part, the term *public agency* includes the SEA, LEAs, ESAs, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. 1412 (a)(1)(A), (a)(11))

§ 300.21 Qualified.

As used in this part, the term *qualified* means that a person has met SEA-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. 1221e–3)

§ 300.22 Related services.

(a) As used in this part, the term *related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early

identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) *Audiology* includes—

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) *Counseling services* means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) *Early identification and assessment of disabilities in children* means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) *Medical services* means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(5) *Occupational therapy* includes —

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) *Orientation and mobility services* means services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community, including —

(i) Teaching students spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (for example, using sound at a traffic light to cross the street);

(ii) Teaching students to use the long cane, as appropriate, to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;

(iii) Teaching students to understand and use remaining vision and distance low vision aids, as appropriate; and

(iv) Other concepts, techniques, and tools, as determined appropriate.

(7) *Parent counseling and training* means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(8) *Physical therapy* means services provided by a qualified physical therapist.

(9) *Psychological services* includes —

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies.

(10) *Recreation* includes —

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(11) *Rehabilitation counseling services means* services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(12) *School health services* means services provided by a qualified school nurse or other qualified person.

(13) *Social work services in schools* includes —

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and

(v) Assisting in developing positive behavioral intervention strategies.

(14) *Speech-language pathology services* includes—

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(15) *Transportation* includes—

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(22))

Note 1: All related services may not be required for each individual child. The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, art, music, and dance therapy, travel training, nutrition services, and independent living services), if they are required to assist a child with a disability to benefit from special education in order for the child to receive FAPE.

There are certain kinds of services that might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under Part B of the Act may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

Note 2: While ''orientation and mobility services'' was added to the list of examples of related services in recognition of its critical importance to children who are blind or have visual impairments, children with other disabilities may also need to be taught the skills they need to navigate their environments (e.g. ''travel training''). The House Committee Report on Public Law 105–17 states:

* * *it is important to keep in mind that children with other disabilities may also need instruction in traveling around their school, or to and from school. A high school aged child with a mental disability, for example, might need to be taught how to get from class to class so that he can participate in his inclusive program. The addition of orientation and mobility services to the list of identified related services is not intended to result in the denial of appropriate services for children with disabilities who do not have visual impairments or blindness. (H. Rep. No. 105–95, p.86 (1997))

In addition, travel training is important to enable students to attain systematic orientation to and safe movement within their environment in school, home, at work, and in the community.

Note 3: With respect to paragraph (b) of this section, nothing in this part prohibits the use of paraprofessionals to assist in the provision of services described under this section, if doing so is consistent with § 300.136(f).

Note 4: It should be assumed that most children with disabilities receive the same transportation services as nondisabled children. For some children with disabilities, integrated transportation may be achieved by providing needed accommodations such as lifts and other equipment adaptations on regular school transportation vehicles.

§ 300.23 Secondary school.

As used in this part, the term *secondary school* means a nonprofit institutional day or residential school that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

(Authority: 20 U.S.C. 1401(23))

§ 300.24 Special education.

(a) (1) As used in this part, the term *special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) The term includes speech-language pathology services, or any other related service, if the service consists of specially-designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, and is considered special education rather than a related service under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(b) The terms in this definition are defined as follows:

(1) *At no cost* means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) *Physical education* is defined as follows:

(i) The term means the development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adaptive physical education, movement education, and motor development.

(3) *Specially-designed instruction* means adapting content, methodology or delivery of instruction—

(i) To address the unique needs of an eligible child under this part that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(Authority: 20 U.S.C. 1401(25))

Note: The definition of special education is a particularly important one under these regulations, since a child does not have a disability under Part B of the Act unless he or she needs special education. (See the definition of child with a disability in § 300.7). The definition of related services (§ 300.22) also depends on this definition, since to be a related service, a service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act. A related services provider may be a provider of specially-designed instruction if under State law the person is qualified to provide such instruction.

§ 300.25 State.

As used in this part, the term *State* means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(Authority: 20 U.S.C. 1401(27))

§ 300.26 Supplementary aids and services.

As used in this part, the term *supplementary aids and services* means, aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.550–300.556.

(Authority: 20 U.S.C. 1401(29))

§ 300.27 Transition services.

As used in this part, *transition services* means a coordinated set of activities for a student with a disability that—

(a) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(b) Is based on the individual student's needs, taking into account the student's preferences and interests; and

(c) Includes—

(1) Instruction;

(2) Related services;

(3) Community experiences;

(4) The development of employment and other post-school adult living objectives; and

(5) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(Authority: 20 U.S.C. 1401(30))

Note: Transition services for students with disabilities may be special education, if they are provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education. The list of activities in paragraph (c) of this section is not intended to be exhaustive.

§ 300.28 Definitions in EDGAR.

The following terms used in this part are defined in 34 CFR 77.1:

Application
Award
Contract
Department
EDGAR
Fiscal year
Grant
Project
Secretary
Subgrant

(Authority: 20 U.S.C. 1221e–3(a)(1))

Subpart B—State and Local Eligibility—General State Eligibility—General

§ 300.110 Condition of assistance.

A State is eligible for assistance under Part B of the Act for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets the conditions in §§ 300.121–300.156.

(Authority: 20 U.S.C. 1412(a))

§ 300.111 Exception for prior State policies and procedures on file with the Secretary.

If a State has on file with the Secretary policies and procedures approved by the Secretary that demonstrate that the State meets any requirement of § 300.110, including any policies and procedures filed under Part B of the Act as in effect before June 4, 1997, the Secretary considers the State to have met the requirement for purposes of receiving a grant under Part B of the Act.

(Authority: 20 U.S.C. 1412(c)(1))

§ 300.112 Amendments to State policies and procedures.

(a) *Modifications made by a State.* (1) Subject to paragraph (b) of this section, policies and procedures submitted by a State in accordance with this subpart remain in effect until the State submits to the Secretary the modifications that the State decides are necessary.

(2) The provisions of this subpart apply to a modification to a State's policies and procedures in the same manner and to the same extent that they apply to the State's original policies and procedures.

(b) *Modifications required by the Secretary.* The Secretary may require a State to modify its policies and procedures, but only to the extent necessary to ensure the State's compliance with this part, if—

(1) After June 4, 1997, the provisions of the Act or the regulations in this part are amended;

(2) There is a new interpretation of this Act or regulations by a Federal court or a State's highest court; or

(3) There is an official finding of noncompliance with Federal law or regulations.

(Authority: 20 U.S.C. 1412(c) (2) and (3))

§ 300.113 Approval by the Secretary.

(a) *General.* If the Secretary determines that a State is eligible to receive a grant under Part B of the Act, the Secretary notifies the State of that determination.

(b) *Notice and hearing before determining a State is not eligible.* The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until after providing the State reasonable notice and an opportunity for a hearing in accordance with the procedures in §§ 300.581–300.587.

(Authority: 20 U.S.C. 1412(d))

§§ 300.114–300.120 [Reserved]

State Eligibility—Specific Conditions

§ 300.121 Free appropriate public education.

(a) *General.* Each State must have on file with the Secretary information that shows that, subject to § 300.122, the State has in effect a policy that ensures that all children with disabilities aged 3 through 21 residing in the State have the right to FAPE, including children with disabilities who have been suspended or expelled from school.

(b) *Required information.* The information described in paragraph (a) of this section must—

(1) Include a copy of each State statute, court order, State Attorney General opinion, and other State documents that show the source of the State's policy relating to FAPE; and

(2) Show that the policy—

(i) Applies to all public agencies in the State; and

(ii) Applies to all children with disabilities, including children who have been suspended or expelled from school.

(c) *FAPE for children suspended or expelled from school.*

(1) For the purposes of this section, the term ''children with disabilities who have been suspended or expelled from school'' means children with disabilities who have been removed from their current educational placement for more than 10 school days in a given school year.

(2) The right to FAPE for children with disabilities who have been suspended or expelled from school begins on the eleventh school day in a school year that they are removed from their current educational placement.

(3) In providing FAPE to children with disabilities who have been suspended or expelled from school, a public agency shall meet the requirements of § 300.522.

(Authority: 20 U.S.C. 1412(a)(1))

Note 1: With respect to paragraph (a) of this section, a public agency's obligation to make FAPE available to each eligible child means that the obligation begins no later than the child's third birthday. Thus, an IEP or an IFSP must be in effect for the child by that date, in accordance with § 300.342. The IEP would specify 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. If a child who is receiving early intervention services under Part C of the Act will be participating in a preschool program under Part B of the Act, the transition requirements of § 300.132 would apply.

Note 2: School districts are not relieved of their obligation to provide appropriate special education and related services to individual disabled students who need them even though they are advancing from grade to grade. The decision whether a student with a disability who is advancing from grade to grade is eligible for services under this part must be determined on an individual basis by the child's IEP team.

§ 300.122 Exception to FAPE for certain ages.

(a) *General.* The obligation to make FAPE available to all children with disabilities does not apply with respect to—

(1) Children aged 3, 4, 5, 18, 19, 20, or 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in one or more of those age groups;

(2) Students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility—

(i) Were not actually identified as being a child with a disability under § 300.7; and

(ii) Did not have an IEP under Part B of the Act.

(3)(i) Students with disabilities who have graduated from high school with a regular high school diploma.

(ii) The exception in paragraph (a)(3)(i) of this section does not apply to students who have graduated but have not been awarded a regular high school diploma.

(b) *Documents relating to exceptions.* The State must have on file with the Secretary—

(1)(i) Information that describes in detail the extent that the exception in paragraph (a)(1) of this section applies to the State; and

(ii) A copy of each State law, court order, and other documents that provide a basis for the exception; and

(2) With respect to paragraph (a)(2) of this section, a copy of the State law that excludes from service under Part B of the Act certain students who are

incarcerated in an adult correctional facility.

(Authority: 20 U.S.C. 1412(a)(1)(B))

Note 1: Under paragraph (a)(3) of this section, a student's eligibility for FAPE ceases upon graduation from high school with a regular high school diploma. Under Part B of the Act, graduation is considered to be a change in placement, and would require that prior written notice, in accordance with § 300.503, be given to the parents and the student, if appropriate. The notice would inform the parents and the student of this fact and of their right to challenge the student's pending graduation (through the due process procedures in § 300.507), if they believe that the student has not met the requirements for graduation with a regular high school diploma. Since graduation changes a student's eligibility status, a reevaluation would be required under § 300.534(c).

In a small number of cases, a school district may be awarding a special certificate to some children with disabilities. If a high school awards a student with a disability 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.

Note 2: With respect to paragraph (a)(2) of this section, (relating to certain students with disabilities in adult prisons), the House Committee Report on Pub. L. 105–17 includes the following statement:

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. Rep. No. 105–95, p. 91 (1997))

§ 300.123 Full educational opportunity goal.

The State must have on file with the Secretary detailed policies and procedures through which the State has established a goal of providing full educational opportunity to all children with disabilities aged birth through 21.

(Authority: 20 U.S.C. 1412(a)(2))

§ 300.124 FEOG—timetable.

The State must have on file with the Secretary a detailed timetable for accomplishing the goal of providing full educational opportunity for all children with disabilities.

(Authority: 20 U.S.C. 1412(a)(2))

§ 300.125 Child find.

(a) *General requirement.* The State must have in effect policies and procedures to ensure that—

(1) All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(b) *Documents relating to child find.* The State must have on file with the Secretary the policies and procedures described in paragraph (a) of this section, including—

(1) The name of the State agency (if other than the SEA) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) The name of each agency that participates in the planning and implementation of the child find activities and a description of the nature and extent of its participation;

(3) A description of how the policies and procedures under paragraph (a) of this section will be monitored to ensure that the SEA obtains—

(i) The number of children with disabilities within each disability category that have been identified, located, and evaluated; and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(4) A description of the method the State uses to determine which children are currently receiving special education and related services.

(c) *Construction.* Nothing in the Act requires that children be classified by their disability so long as each child who has a disability listed in § 300.7 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

(Authority: 20 U.S.C. 1412 (a)(3) (A) and (B))

Note 1: Collection and use of data are subject to the confidentiality requirements of §§ 300.560–300.577.

Note 2: The services and placement needed by each child with a disability to receive FAPE must be based upon the child's unique needs and may not be determined or limited based upon a category of disability.

Note 3: Under both Parts B and C of the Act, States are responsible for identifying, locating, and evaluating infants and toddlers from birth through 2 years of age who have disabilities or who are suspected of having disabilities. In States where the SEA and the State's lead agency for the Part C program are different and the Part C lead agency will be participating in the child find activities described in paragraph (a) of this section, the nature and extent of the Part C lead agency's participation must, under paragraph (b)(2) of this section, be provided. With the SEA's agreement, the Part C lead agency's participation may include the actual implementation of child find activities for infants and toddlers. The use of an interagency agreement or other mechanism for providing for the Part C lead agency's participation would not alter or diminish the responsibility of the SEA to ensure compliance with all child find requirements, including the requirement in paragraph (a)(1) of this section that all children with disabilities who are in need of special education and related services are evaluated.

Note 4: Each State has an obligation to ensure that State and local child find responsibilities under Part B of the Act extend to highly mobile children (such as migrant and homeless children).

§ 300.126 Procedures for evaluation and determination of eligibility.

The State must have on file with the Secretary policies and procedures that ensure that the requirements of §§ 300.530–300.536 are met.

(Authority: 20 U.S.C. 1412(a) (6)(B), (7))

§ 300.127 Confidentiality of personally identifiable information.

(a) The State must have on file in detail the policies and procedures that the State has undertaken in order to ensure the protection of the confidentiality of any personally identifiable information, collected, used, or maintained under Part B of the Act.

(b) The Secretary uses the criteria in §§ 300.560–300.577 to evaluate the policies and procedures of the State under paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(8))

Note: The regulations implementing the Family Educational Rights and Privacy Act are in 34 CFR Part 99. Those regulations are incorporated in §§ 300.560–300.577.

§ 300.128 Individualized education programs.

(a) *General.* The State must have on file with the Secretary information that shows that an IEP, or IFSP that meets the requirements of section 636(d) of the Act, is developed, reviewed, and revised for each child with a disability in accordance with §§ 300.340–300.351.