Federal Register

Monday,
December 1, 2008

# Part IV

# Department of Education

34 CFR Part 300

**Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities; Final Rule**

**DEPARTMENT OF EDUCATION**

**34 CFR Part 300**

**[DOCKET ID ED–2008–OSERS–0005]**

**RIN 1820–AB60**

## Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities

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

**ACTION:** Final regulations.

**SUMMARY:** The Secretary issues final regulations governing the Assistance to States for Education of Children with Disabilities Program and the Preschool Grants for Children with Disabilities Program. These regulations are needed to clarify and strengthen current regulations in 34 CFR Part 300 governing the Assistance to States for the Education of Children with Disabilities Program and Preschool Grants for Children with Disabilities Program, as published in the **Federal Register** on August 14, 2006, in the areas of parental consent for continued special education and related services; non-attorney representation in due process hearings; State monitoring, technical assistance, and enforcement; and allocation of funds. The regulations also incorporate a statutory requirement relating to positive efforts to employ and advance in employment individuals with disabilities that was inadvertently omitted from the 2006 regulations.

**DATES:** These regulations take effect on December 31, 2008.

**FOR FURTHER INFORMATION CONTACT:** Tracy R. Justesen, U.S. Department of Education, 400 Maryland Avenue, SW., room 5107, Potomac Center Plaza, Washington, DC 20202–2600, Telephone: (202) 245–7605. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay System (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternate format (e.g., braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

**SUPPLEMENTARY INFORMATION:** These regulations implement changes in the regulations governing the Assistance to States for Education of Children with Disabilities Program and the Preschool Grants for Children with Disabilities Program that we have determined are necessary for effective implementation and administration of the programs.

On May 13, 2008, the Secretary published a notice of proposed rulemaking in the **Federal Register** (73 FR 27690) (NPRM) to amend the regulations in 34 CFR Part 300 governing these programs. In the preamble to the NPRM, the Secretary discussed, on pages 27691 through 27697, the changes being proposed; specifically, (1) parental revocation of consent after consenting to the initial provision of services; (2) a State's or local educational agency's (LEA) obligation to make positive efforts to employ qualified individuals with disabilities; (3) representation of parents by non-attorneys in due process hearings; (4) State monitoring, technical assistance, and enforcement of the Part B program; and (5) the allocation of funds, under sections 611 and 619 of the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Act or IDEA), to LEAs that are not serving any children with disabilities.

### Major Changes in the Regulations

The following is a summary of the major changes in these final regulations from the regulations proposed in the NPRM (the rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section of this preamble):

- Section 300.300(b)(4) has been revised to require that parental revocation of consent for the continued provision of special education and related services must be in writing and that upon revocation of consent a public agency must provide the parent with prior written notice in accordance with § 300.503.
- The exception clause in § 300.512(a)(1), regarding the right to be represented by non-attorneys, has been revised to apply to any party to a hearing, not just parents.
- The timeline in § 300.602(b)(1)(i)(A), regarding the State's public reporting on the performance of each LEA located in the State, has been changed from 60 days to 120 days following the State's submission of the annual performance report to the Secretary.

### Analysis of Comments and Changes

*Introduction*

In response to the invitation in the NPRM, more than 700 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM immediately follows this introduction. The perspectives of parents, individuals with disabilities, teachers, related services providers, State and local officials, and others were very important in helping us identify where changes to the proposed regulations were necessary, and in formulating the changes. In light of the comments received, a number of changes are reflected in these final regulations.

We discuss substantive issues under the pertinent section. The analysis generally does not address—

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

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

(c) Suggested changes that are beyond the scope of the changes proposed in the NPRM; and

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

*Consent (§ 300.9)*

*Comment:* A few commenters supported proposed § 300.9(c)(3), which states that if a parent revokes consent for his or her child's receipt of special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent. The commenters stated that this revision provides clear direction to schools regarding the management of student records when a parent revokes consent. The commenters stated that schools must have the ability to keep accurate records pertaining to the child and the child's receipt of special education and related services. One commenter recommended that proposed § 300.9(c)(3) would be more appropriately placed in either §§ 300.618 or 300.624, regarding the amendment of education records and the destruction of information, respectively.

*Discussion:* We appreciate the commenters' support for this provision. Concerning the recommendation that the substance of proposed § 300.9(c)(3) be placed in either §§ 300.618 or 300.624, we have included the provision in § 300.9 because the provision specifically relates to the definition of *consent*. Section 300.9(c) addresses revocation of consent, explaining that consent is voluntary and

may be revoked at any time. Further, § 300.9(c) states that the parent's revocation of consent is not retroactive in that revocation does not negate an action that has occurred after the consent was given and before the consent was revoked. Proposed § 300.9(c)(3) further defines the effect of a parent's revocation of consent on the content of his or her child's education records. A parent's revocation of consent is not retroactive; consequently, the public agency would not be required to amend the child's education records to remove any references to the child's receipt of special education and related services in the event the child's parent revokes consent. Therefore, we decline to follow the commenters' recommendation to remove § 300.9(c)(3) and include the content of this provision in either §§ 300.618 or 300.624.

*Changes:* None.

*Comment:* One commenter recommended adding a rule of construction in § 300.9 to clarify that nothing in proposed § 300.9(c)(3) reduces a parent's right to request an amendment of their child's record in accordance with the confidentiality provisions in §§ 300.618 through 300.621. Another commenter requested that the language in proposed § 300.9(c)(3) be clarified to require public agencies to maintain a child's special education records to ensure that public agencies are not allowed to amend the child's records or remove information at their sole discretion.

*Discussion:* Proposed § 300.9(c)(3) specifies that if a parent revokes consent for the child's receipt of special education and related services, the public agency is not required to remove any references to the child's receipt of special education and related services because of the parent's revocation of consent. This provision does not affect the rights provided to parents in §§ 300.618 through 300.621, including the opportunity to request amendments to information in education records that is inaccurate or misleading, or violates the privacy or other rights of a child. Additionally, proposed § 300.9(c)(3) does not affect a public agency's responsibilities under § 300.613, concerning a parent's right to inspect and review any education records relating to his or her children that are collected, maintained, or used by the agency under Part B of the Act, or § 300.624, requiring a public agency to (a) inform parents when personally identifiable information collected, maintained, or used under Part B of the Act is no longer needed to provide educational services to the child, and (b) destroy, at the request of the parent, such information. Given the protections available to parents to monitor the information in education records, to amend records, to be notified if the public agency intends to destroy information in education records, and to ultimately have the records destroyed, adding a rule of construction to § 300.9(c)(3), as requested by the commenter, is not necessary.

We also decline to make the change recommended regarding a public agency's maintenance of a child's special education records, as the regulations already provide sufficient protection of the child's and parents' interests with regard to monitoring, amending, and removing information from the child's records. Parents have the right, under § 300.613, to inspect and review any education records relating to their child that are collected, maintained, or used by the agency under Part B of the Act. If a parent believes that information in the education records collected, maintained, or used under Part B of the Act is inaccurate or misleading or violates the privacy or other rights of the child, the parent may request that the participating agency amend the information in the records. Additionally, under § 300.619, the agency must, on request, provide the parent with an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate.

Further, § 300.624 requires that a public agency inform parents when personally identifiable information is no longer needed to provide educational services to a child. This notice would normally be given after a child graduates or otherwise leaves the agency. In instances when an agency intends to destroy personally identifiable information that is no longer needed to provide educational services to a child and informs the parents of that determination, the parents may want to exercise their right, under § 300.613, to access those records and request copies of the records they may need to acquire post-school benefits.

*Changes:* None.

*Comment:* One commenter requested that the word "parents" in proposed § 303.9(c)(3) be replaced with the word "parent" because the word "parent" has a particular meaning under the IDEA, and because both the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. 1232g) and the implementing regulations (34 CFR Part 99) and IDEA give rights to each individual parent.

*Discussion:* We agree with the commenter that the word "parent" is more consistent with the language of the other IDEA parental consent provisions; therefore, we have made the requested change.

*Changes:* The word "parents" in § 300.9(c)(3) has been changed to "parent."

*Parental Revocation of Consent for Special Education Services (§ 300.300)*

*Comment:* Some commenters, including parents, teachers, and State educational agencies (SEAs), supported the requirements in proposed § 300.300(b)(4) that would allow a parent of a child receiving special education and related services to revoke consent for those services. Commenters stated that if a parent has the right to initially consent to special education and related services, the parent also should have the right to revoke consent for special education and related services, particularly given that the plain language in § 300.9(c)(1) states that consent may be revoked at any time. Other commenters stated that parents are the ultimate experts on their children and have a fundamental right to direct their education. One commenter stated that schools should not have the right to force evaluations or services on a child through legal processes. Another commenter stated that a student should have every right to attempt to become independent and take responsibility for his or her academic achievement, without the assistance of an individualized education program (IEP).

Some commenters generally supported a parent's right to revoke consent, but only if changes were made to proposed § 300.300(b)(4). Their recommendations included giving a parent the right to revoke consent at any time while still ensuring that the parent receives the time and information needed to make informed decisions regarding his or her child's continued need for services. Several commenters recommended procedures that could be implemented when a parent unilaterally revokes consent for special education and related services. For example, commenters suggested requiring—that a parent's revocation be in writing; a meeting between the parent and the public agency to discuss the parent's decision to revoke consent for special education and related services; a timeline from the revocation of consent through discontinuation of services and a specific deadline for convening a meeting with the parent and providing prior written notice to the parent; written notice of the receipt of the

parent's revocation and the public agency's intent to discontinue services; and that the parent be given an opportunity to meet with the State's Parent Training Information center (PTI) to receive additional information concerning the potential impact of the parent's decision. Other suggested procedures included requiring a parent to acknowledge in writing that the parent has been fully informed of the educational services and supports that their child will no longer receive. In contrast, a few commenters stated that no additional procedures should be required when a parent revokes consent.

*Discussion:* We appreciate the commenters' support for this provision. We agree with the commenters that revocation of consent for special education and related services must be in writing to ensure that both the public agency and the parent have documentation that the child will no longer receive special education and related services. Therefore, we have revised §§ 300.9(c)(3) and 300.300(b)(4) to require that consent be revoked in writing.

Concerning the comments about written notice of the receipt of a parent's revocation and the public agency's intent to discontinue services and the comment concerning an opportunity to meet with the State's PTI center to receive additional information about the potential effect of the parent's decision, we have not adopted additional procedures for parental revocation of consent for special education and related services because the regulations already provide sufficient notice protections to enable parents to understand the implications of the decision they are making. To clarify this point, we have revised § 300.300(b)(4)(i) to specify that prior written notice consistent with § 300.503 be provided to parents before a public agency discontinues special education and related services to their child. Public agencies, under § 300.503, are required to give the parents of a child with a disability written notice that meets the requirements in § 300.503(b) within a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education (FAPE) to the child. Once a public agency receives a parent's written revocation of consent for a child's receipt of special education and related services, the public agency, under § 300.503, must provide prior written notice to the parent regarding the change in educational placement and services that will result from the revocation of consent. The notice must include, among other matters, information on sources for the parents to contact that can assist the parents in understanding the requirements of Part B of the Act and its implementing regulations. Section 300.503(c)(1)(i) also requires that this prior notice be written in language understandable to the general public. It is imperative that the public agency provide the required prior notice in a meaningful manner. Accordingly, § 300.503(c)(1)(ii) requires that any notice required by § 300.503 must be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. Additionally, if the parent's native language or other mode of communication is not a written language, § 300.503(c)(2) requires the public agency to take additional measures to communicate the information contained in the notice. These measures involve taking steps to ensure that the notice is translated orally or by other means to the parent in the parent's native language or other mode of communication, that the parent understands the content of the notice, and that there is written evidence that the requirements of § 300.503(c) have been met.

Concerning the comment about ensuring that the parent receives the time and information needed to make informed decisions regarding their child's continued need for services, a public agency cannot discontinue services until prior written notice consistent with § 300.503 has been provided to the parents. Therefore, we expect public agencies to promptly respond to receipt of written revocation of consent by providing prior written notice to the parents under § 300.503. Section 300.503 specifies that, within a reasonable time before a public agency discontinues services, the public agency must provide the parents of a child with a disability written notice of the proposal to discontinue services based on receipt of the parent's written revocation of consent. Providing such notice a reasonable time before the public agency discontinues services gives parents the necessary information and time to fully consider the change and determine if they have any additional questions or concerns regarding the discontinuation of services.

While the notice required under § 300.503 provides sufficient information to parents regarding revocation of consent for special education and related services, a State may choose to establish additional procedures for implementing § 300.300(b)(4), such as requiring a public agency to offer to meet with parents to discuss concerns for their child's education. However, the State must ensure that any additional procedures are voluntary for the parents, do not delay or deny the discontinuation of special education and related services, and are otherwise consistent with the requirements under Part B of the Act and its implementing regulations. For example, while a public agency may inquire as to why a parent is revoking consent for special education and related services, a public agency may not require a parent to provide an explanation, either orally or in writing, prior to ceasing the provision of special education and related services.

Concerning the suggestion that the Department establish a timeline from revocation of consent through discontinuation of services with a specific deadline for convening a meeting with the parent and providing prior written notice to the parent, we expect the discontinuation of services to occur in a timely manner. However, we understand that the specific timeline may differ, to some extent, due to parent-specific factors, such as whether the parent wants to meet with the public agency or another entity prior to the discontinuation of services. Thus, to provide needed flexibility, we have not mandated a specific timeline.

With regard to the comment about ensuring parents acknowledge in writing that they have been fully informed of the educational services and supports that they are declining, it is the Department's position that the prior written notice informs parents of the educational services and supports that they are declining and establishes a sufficient record that parents have been appropriately informed.

We also note that under § 300.504, public agencies must provide parents, at least annually, a procedural safeguards notice that includes a full explanation of the procedural safeguards available to the parents of a child with a disability. This notice must explain the requirements in § 300.300, including that a parent has the right to revoke consent, in writing, to his or her child's continued receipt of special education and related services.

*Changes:* We have added the phrase "in writing" after the words "revokes consent" in §§ 300.9(c)(3) and 300.300(b)(4). We also have revised § 300.300(b)(4)(i) to clarify that a public agency must provide prior written notice in accordance with § 300.503

before ceasing the provision of special education and related services.

*Comment:* Many commenters opposed the requirements in proposed § 300.300(b)(4) that would allow a parent to revoke consent for special education and related services. These commenters stated that the decision to terminate services should be made by the IEP Team because the IEP Team includes both the parent and professionals. Some commenters stated that children cannot be placed unilaterally into special education because eligibility for special education and related services is determined by a group of qualified individuals and the parent; therefore, if a parent believes special education services are not needed, the parent should consult with the IEP Team rather than making that determination unilaterally.

Other commenters suggested that when a parent believes his or her child is not progressing, an IEP Team meeting should be held so that the IEP Team, as a whole and not just the parent, can determine whether the level of services is appropriate for the child. The commenters stated that allowing the IEP Team to determine whether the child needs special education and related services, rather than allowing parental revocation of consent, would be in the child's best interest.

One commenter stated that revoking consent should be treated differently than refusing to provide initial consent because revoking consent results in changing the status quo (i.e., terminating services that are currently being provided to the child). This commenter argued that the party seeking a change in the status quo should bear the burden of showing that the change is warranted. One commenter expressed concern specifically about a situation in which a parent revokes consent for special education and related services for a child placed in a residential setting.

Another commenter expressed concern that allowing a parent to revoke consent goes too far beyond providing for meaningful parental participation because it gives the parent a right to veto the IEP Team.

*Discussion:* We agree with the commenters that the IEP Team (defined in § 300.23, which includes the child's parents) plays an important role in the special education decision-making process. For example, through the development, review and revision of the child's IEP, the IEP Team determines how to make FAPE available to a child with a disability. However, the IEP Team does not have the authority to consent to the provision of special education and related services to a child. That authority is given exclusively to the parent under section 614(a)(1)(D)(i)(II) of the Act. The Secretary strongly believes that a parent also has the authority to revoke that consent, thereby ending the provision of special education and related services to their child. Allowing parents to revoke consent for the continued provision of special education and related services at any time is consistent with the IDEA's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.

We expect that after a parent revokes consent for the continued provision of special education and related services, the parent will continue to work with the child's school to support the child in the general education curriculum. Parents of nondisabled children serve as partners in their children's education in the same manner as parents of children with disabilities.

We agree that an IEP Team meeting should be convened if any member of the IEP Team, including a parent, believes the child is not progressing. Section 300.324(b)(1)(i) and (ii)(A) requires each public agency to review a child's IEP periodically, but not less than annually, and revise the IEP as appropriate to address any lack of expected progress. However, the review of a child's IEP by the IEP Team does not replace a parent's right to revoke consent for the continued provision of special education and related services to his or her child.

Concerning the comment that revoking consent should be treated differently than refusing to provide initial consent because the parent is seeking to terminate special education services that are presently provided, thus seeking to change the status quo and the comment expressing concern about revoking consent for a child whose current placement is in a residential setting, we appreciate that there are differences between consent for special education and related services and revocation of such consent. However, at their core, both issues entail a parent's decision of whether a child will receive special education and related services. Thus, section 614(a)(1)(D)(i)(II) and (ii)(II) of the Act, which provides a parent unilateral authority to refuse special education and related services, informs our decision on the related issue of revocation of consent for the continued provision of special education and related services.

Lastly, we disagree with the comments that allowing parents to revoke consent exceeds the parental participation requirements in Part B of the Act. As previously discussed, a parent's right to revoke consent is consistent with the parent's right, in section 614(a)(1)(D)(i)(II) and (ii)(II) of the Act, to determine if his or her child should receive special education and related services.

*Changes:* None.

*Comment:* Many commenters stated that parents may revoke consent for various reasons or beliefs that are not in the best interest of the child. Commenters provided specific examples such as conflicts between the parent and school personnel; an insufficient understanding or knowledge of the importance of special education and related services; a belief that continued participation in the special education program would hinder the child's success in life or stigmatize the child; and concerns that the special education program is not appropriate. The commenters expressed concern that parental revocation of consent for special education and related services could be detrimental to the academic future of a child with a disability, as well as the academic future and safety of children in the general education classroom.

Other commenters expressed concern that allowing a parent to unilaterally revoke consent for the continued provision of special education and related services is not in the best interest of the child because these children may not receive instruction from trained professionals.

*Discussion:* A parent, under section 614(a)(1)(D)(i)(II) and (ii)(II) of the Act, has the authority to consent to the initial provision of special education and related services, and this parental right applies regardless of the parent's reasons. As previously discussed, the Secretary believes that a parent also should have the authority to revoke that consent, thereby ending the provision of special education and related services to their child. Allowing parents to revoke consent for special education and related services at any time is consistent with the IDEA's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.

Concerning the comments asserting that parental revocation of consent for special education and related services could be detrimental to the academic future of a child with a disability, the Act presumes that a parent acts in the best interest of their child. If a child

experiences academic difficulties after a parent revokes consent to the continued provision of special education and related services, nothing in the Act or the implementing regulations would prevent a parent from requesting an evaluation to determine if the child is eligible, at that time, for special education and related services.

Safety of all students in the classroom is of primary concern to the Secretary. The Department expects that schools will continue to maintain the safety of all students in all classrooms regardless of whether children are receiving special education and related services.

We do not agree with the commenters that students whose parents revoke consent for the continued provision of special education and related services will no longer receive instruction from trained professionals. The Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001 (ESEA), requires that all teachers in a State who are teaching core academic subjects be "highly qualified." Therefore, States are required to ensure that students in both general and special education programs are receiving instruction in core academic subjects from highly qualified teachers, as that term is defined in section 9101 of the ESEA and 34 CFR 200.56.

*Changes:* None.

*Comment:* A few commenters expressed concern that proposed § 300.300(b)(4) may result in students removing themselves from services when they reach the age of majority. Other commenters asked whether a child who reaches the age of majority can hold a school responsible for lost services. One commenter suggested adding a new paragraph to § 300.300(b)(4) that would grant immunity to an LEA if a child with a disability attains the age of majority and seeks to sue the LEA for failure to make FAPE available because the child's parent revoked consent for the continued provision of special education and related services. Another commenter asked whether unilaterally withdrawing a child with a disability from special education releases the LEA from any liability, past or future, with regard to providing FAPE to the child and the remedies available for denial of FAPE.

*Discussion:* Section 615(m)(1) of the Act allows, but does not require, a State to transfer all rights accorded to parents under Part B of the Act to children who have reached the age of majority under State law. If State law grants a child who has reached the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) all rights previously granted to parents, then the parents' rights are transferred to the child as provided in § 300.520(a), enabling that child to revoke consent for special education and related services under § 300.300(b)(4). However, in accordance with section 615(m)(1) of the Act and § 300.520(a)(1)(i), the public agency must provide any notice required under Part B of the Act to the child and the parents. Therefore, the parents would receive prior written notice, consistent with § 300.503, of the public agency's proposal to discontinue special education and related services based on receipt of the written revocation of consent from a child to whom rights transferred under § 300.520(a). This parental notice could facilitate discussion between the child and parent of the decision to revoke consent and the potential ramifications of that decision.

Concerning the comments about a student who reaches the age of majority holding a school responsible for loss of Part B services, § 300.300(b)(4)(iii) provides that, if the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services. Therefore, granting the public agency immunity is not necessary because the public agency will not be considered to be in violation of the requirement to make FAPE available to the child if the parent revokes consent for special education and related services. Revocation of parental consent releases the LEA from liability for providing FAPE from the time the parent revokes consent for special education and related services until the time, if any, that the child is evaluated and deemed eligible, once again, for special education and related services.

*Changes:* None.

*Comment:* Several commenters stated that the right to FAPE is a child's right and allowing parents to revoke consent for special education and related services undermines that right.

*Discussion:* We do not agree with the commenters that § 300.300(b)(4) undermines a child's right to FAPE. Section 300.101 requires that FAPE must be available to all children with disabilities residing in a State between the ages of 3 and 21, inclusive, except that public agencies are not required to serve children aged 3 through 5 and aged 18 through 21 if serving such children is inconsistent with State law, practice or the order of any court with respect to the provision of public education to children of those ages. The child's parents, under the Act, are afforded rights regarding the provision of FAPE to their child, including the right to determine whether their child will receive special education and related services. Specifically, under section 614(a)(1)(D)(i)(II) and (ii)(II) of the Act, a parent has the authority to determine whether a public agency may begin to provide special education and related services to their child. As discussed previously, it is the Department's position that a parent also should have the authority to revoke consent to the continued provision of special education and related services to their child. The Act presumes that parents act in the best interest of their child. Therefore, affording a parent the right to consent to the initial provision of special education and related services or the right to revoke consent, in writing, to the continued provision of special education and related services is consistent with the Act and does not undermine a child's right to FAPE under § 300.101.

*Changes:* None.

*Comment:* A few commenters expressed concern about how the revocation of consent provisions would affect children who live in foster homes, or where guardianship is in dispute. Another commenter proposed replacing the words "the parent" in § 300.300(b)(4) with the words "each parent" because when custody of a child is in dispute the provision should require that each legally responsible parent revoke consent before special education and related services are discontinued.

*Discussion:* Certain provisions in the Part 300 regulations, such as the definition of *parent* in § 300.30 and the requirements regarding surrogate parents in § 300.519, ensure that a child with a disability has an individual who can act as a parent to make educational decisions on behalf of the child. *Parent*, as defined in § 300.30, means a biological or adoptive parent of a child; a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State); an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally

responsible for the child's welfare. The definition of *parent* also includes a surrogate parent who has been appointed in accordance with § 300.519 and section 639(a)(5) of the Act. The duty to appoint a surrogate parent under § 300.519 arises when no parent can be identified, the public agency, after reasonable efforts, cannot locate a parent, the child is a ward of the State, or the child is an unaccompanied homeless youth, as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434(a)(6)).

The language in § 300.300(b)(4) is consistent with other regulatory language concerning parental rights in the Part B regulations. Under § 300.30, when guardianship or custody of a child with a disability is at issue, the parental rights established by the Act apply to both parents, unless a court order or State law specifies otherwise. Therefore, we decline to make the change requested by the commenter.

*Changes:* None.

*Comment:* A few commenters questioned whether a parent may revoke consent for the continued provision of some services and not others and, therefore, require the public agency to continue to provide only those services for which the parent has not revoked consent.

*Discussion:* Section 300.300(b)(4) allows a parent at any time after the initial provision of special education and related services to revoke consent for the continued provision of special education and related services to their child in their entirety. Under § 300.300(b)(1), parental consent is for the initial provision of special education and related services generally, not for a particular service or services. Once a public agency receives a parental revocation of consent, in writing, for all special education and related services for a child and provides prior written notice in accordance with § 300.503, the public agency must, within a reasonable time, discontinue all special education and related services to the child. In this circumstance, the public agency may not use the procedures in subpart E of these regulations, including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516, to obtain agreement or a ruling that the services may be provided to the child.

In situations where a parent disagrees with the provision of a particular special education or related service and the parent and public agency agree that the child would be provided with FAPE if the child did not receive that service, the public agency should remove the service from the child's IEP and would not have a basis for using the procedures in subpart E to require that the service be provided to the child.

If, however, the parent and public agency disagree about whether the child would be provided with FAPE if the child did not receive a particular special education or related service, the parent may use the due process procedures in subpart E of these regulations to obtain a ruling that the service with which the parent disagrees is not appropriate for their child.

Additionally, under the regulations in § 300.300(d)(2), States are free to create additional parental consent rights, such as requiring parental consent for particular services, or allowing parents to revoke consent for particular services, but in those cases, the State must ensure that each public agency in the State has effective procedures to ensure that the parents' exercise of these rights does not result in a failure to provide FAPE to the child.

*Changes:* None.

*Comment:* Some commenters asked how proposed § 300.300(b)(4) will affect a school district's adequate yearly progress (AYP) reporting under the ESEA and whether children who previously received special education and related services would be counted in the special education subgroup. The commenters requested clarification as to whether the student will remain in the students with disabilities subgroup if services are discontinued after school has begun but before the State assessment is administered and whether or not the State will be required to provide accommodations on assessments to the student. Another commenter expressed concern that teachers will be blamed if a child fails to succeed after a parent revokes consent for the continued provision of special education and related services because educators are "liable" for all students under the ESEA. One commenter expressed concern about an LEA's and State's ability to accurately track the progress of students with disabilities over time, especially if large numbers of parents choose to exercise their right to revoke consent. Lastly, another commenter expressed concern that a parent who unilaterally withdraws his or her child from special education and related services may sue an LEA if a student fails to make progress.

*Discussion:* Once a parent revokes consent for a child to receive special education and related services, the child is considered a general education student and will be considered a general education student under the ESEA. Therefore, if a parent revokes consent after the school year begins but before administration of the annual State assessment required under the ESEA, the child is considered a general education student who has exited special education for accountability purposes. Section 200.20(f) of the Title I regulations allows States to include, for a period of up to two AYP determination cycles, the scores of students who were previously identified with a disability under the Act, but who no longer receive special education services, in the special education subgroup for purposes of calculating AYP (but not for reporting purposes). Therefore, the State may continue to include a child whose parent revokes consent for special education and related services in the special education subgroup for purposes of calculating AYP for two years following parental revocation of consent. While the State may continue to include the child in the students with disabilities subgroup for purposes of calculating AYP for up to two years, the child will not have an IEP; therefore, the State will no longer be required under the IDEA to provide accommodations that were previously included in the child's IEP.

Concerning the suggestion that teachers are "liable" and will be blamed if a child fails to succeed after a parent revokes consent for special education and related services, we disagree. Teachers play a critical role in ensuring that all children progress academically regardless of whether a child receives special education and related services. The majority of children who receive special education and related services receive their special education services in the general education classroom; therefore, general education teachers have a vital role in promoting their educational progress. These general education teachers will continue to have an important role in fostering the educational progress of all children, regardless of whether they receive special education and related services.

We disagree that LEAs and States will not have the ability to accurately track the progress of students with disabilities over time. LEAs currently track the progress of all students through student records, report cards, progress reports, and State assessments. Students who no longer receive special education and related services due to a parent revoking consent will have their progress tracked in the same manner as students who do not receive special education and related services.

Lastly, concerning the comment that a parent who revokes consent for special education and related services may sue an LEA if their child fails to make

progress, § 300.300(b)(4)(iii) states that a public agency will not be considered in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services based on the parent's revocation of consent. Additionally, there is no private right of action under the ESEA for a parent to sue an LEA if a child fails to make progress.

*Changes:* None.

*Comment:* One commenter asked if a teacher is required to provide the accommodations listed in a child's IEP in the general education environment for any child for whom consent for special education and related services is revoked. Another commenter expressed concern that the children whose parents revoke consent for special education and related services may not receive needed accommodations and modifications thereby compromising the child's success in school and perhaps in later life.

*Discussion:* Once a parent revokes consent in writing under § 300.300(b)(4) for the continued provision of special education and related services, a teacher is not required to provide the previously identified IEP accommodations in the general education environment. However, general education teachers often provide classroom accommodations for children who do not have IEPs. Nothing in § 300.300(b)(4) would prevent a general education teacher from providing a child whose parent has revoked consent for the continued provision of special education and related services with accommodations that are available to non-disabled children under relevant State standards.

*Changes:* None.

*Comment:* A few commenters requested that the Department clarify that the right of a parent to revoke consent for special education and related services does not relieve the LEA of its obligation under child find to identify, locate, and evaluate all children with disabilities, including children whose parents revoke consent for special education and related services. Other commenters requested clarification as to the time frame that applies for an LEA to comply with the child find and service obligations for a child who exits special education without the agreement of the IEP Team and whether the child should be referred for services each school year. One commenter expressed concern that allowing revocation of parental consent would potentially create a disincentive for general educators to refer students to special education because teachers would be reluctant to repeatedly refer a student for special education if a parent previously revoked consent for services.

*Discussion:* The child find provisions in section 612(a)(3) of the Act and § 300.111 require each State to have in effect policies and procedures to ensure that all children with disabilities residing in the State and who are in need of special education and related services are identified, located, and evaluated. Children who have previously received special education and related services and whose parents subsequently revoke consent should not be treated any differently in the child find process than any other child, including a child who was determined eligible and whose parent refused to provide initial consent for services. A parent who previously revoked consent for special education and related services may continue to refuse services; however, this does not diminish a State's responsibility under § 300.111 to identify, locate and evaluate a child who is suspected of having a disability and being in need of special education and related services. A public agency must obtain informed written parental consent, consistent with § 300.300(a), before conducting an initial evaluation. A parent who previously revoked consent for the continued provision of special education and related services, like any parent of a child suspected of having a disability, may refuse to provide consent for an initial evaluation.

Concerning the request for clarification of the child find timeline, child find is an ongoing process. The Department expects that children whose parents revoke consent will be identified, located and offered an evaluation in the same manner as any other child if the child is suspected of having a disability and being in need of special education and related services. Similarly, we do not agree with the commenter that general education teachers will not refer children who previously received special education and related services. States are required to have policies and procedures in place to ensure effective child find. Ensuring that general education teachers make appropriate referrals of children suspected of having a disability, which would include the referral of children whose parents have previously revoked consent for such services, is consistent with this responsibility.

*Changes:* None.

*Comment:* One commenter requested that § 300.300 be amended to specifically state that, for discipline purposes, a public agency will not consider the child to be a child with a disability if the parent refuses consent, fails to respond to a request for consent, or revokes consent for special education and related services. Other commenters stated that revocation of consent for special education and related services should not impact discipline protections for children whose parents have revoked consent because the school has prior knowledge that the child is a child with a disability and the child has been determined eligible for services. The commenters stated that § 300.534, consistent with section 615(k)(5) of the Act, applies to children not yet determined to be eligible for special education and related services who have engaged in behavior in violation of a code of student conduct. One commenter expressed concern that subjecting previously eligible students to general education discipline procedures would leave these students without any education.

*Discussion:* Section 300.534 generally provides protections for children not yet determined eligible for special education and related services in instances when the public agency is deemed to have knowledge that a child is a child with a disability before the behavior that precipitated the disciplinary action occurred. However, § 300.534(c)(1)(ii) states that a public agency is not deemed to have knowledge under this section if the parent of the child has refused services under the regulations implementing Part B of the Act. When a parent revokes consent for special education and related services under § 300.300(b), the parent has refused services as described in § 300.534(c)(1)(ii); therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the Act's discipline protections.

We do not agree that additional clarification of the discipline procedures is needed in § 300.300 or with the comment that revocation of consent for special education and related services should not affect discipline protections because the school has prior knowledge that the child has been determined eligible for services. The provisions in § 300.534(c), which mirror the language in section 615(k)(5)(C) of the Act, are clear that once a parent refuses services the public agency will not be deemed to have knowledge that the child is a child with a disability and the child will be subject to the same disciplinary procedures and timelines applicable to general education students.

We also disagree that previously eligible students who are subject to general education discipline procedures will be left without any education. Students who are no longer receiving special education and related services due to the revocation of parental consent to the continued provision of special education and related services will be subject to the LEA's discipline procedures without the discipline protections provided in the Act. However, students will continue to receive the full benefit of education provided by the LEA as long as they have not committed any disciplinary violations that affect access to education (*e.g.*, violations that result in suspension). We expect that parents will consider possible consequences of discipline procedures when making the decision to revoke consent for the provision of special education and related services.

*Changes:* None.

*Comment:* One commenter asked whether a school will be able to place a student with a disability whose parent has revoked consent for special education and related services in a general education classroom that is co-taught by a special education teacher. Another commenter asked if a child must meet all the statewide assessment and credit requirements for graduation applicable to students in the general education setting if a parent revokes consent for special education and related services when the child is a high school senior.

*Discussion:* Once a parent revokes consent for special education and related services under § 300.300(b), the child is a general education student. Consequently, the child may be placed in any classroom where other general education students are placed. If a child whose parent has revoked consent is placed in a classroom that is co-taught by a general education teacher and a special education teacher, then that child is placed in the classroom as a general education student and should be treated the same as all other general education students in that classroom.

High school graduation requirements are within the purview of each State. However, it is reasonable to assume that any student, regardless of whether they are receiving special education and related services, will be required to meet statewide assessment and credit requirements for graduation with a regular diploma.

*Changes:* None.

*Comment:* Some commenters raised questions about the protections under Section 504 of the Rehabilitation Act of 1973, as amended (Section 504), and Title II of the Americans with Disabilities Act of 1990, as amended (ADA), and their relationship to children with disabilities whose parents revoke consent for special education and related services under the Act. Some commenters questioned whether the Section 504 and ADA protections would continue to apply, and the relationship between a Section 504 or ADA plan and an IEP, whenever a parent withdraws consent for continued services under the IDEA. One commenter asked whether students would remain eligible for discipline protections under Section 504 even after a parent revokes consent for special education and related services. Another commenter maintained that, under Section 504 and the Fourteenth Amendment to the U.S. Constitution, a child with a disability has a right not to be discriminated against by imposing disciplinary sanctions for behavior that is a manifestation of his disability. Several commenters cited the statement in the Department's March 12, 1999 Analysis of Comments and Changes to the Final Part B regulations that "[u]nder Section 504 of the Rehabilitation Act of 1973, children with disabilities may not be disciplined for behavior that is a manifestation of their disability if that disciplinary action constitutes a change of placement" (see 64 FR 12626), and asked how this interpretation affects the use of disciplinary measures for students with disabilities, protected under Section 504 and the ADA, but whose parent has revoked consent for services under Part B of the Act.

*Discussion:* These final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA.

*Changes:* None.

*Comment:* A few commenters asked whether § 300.300(b)(4) would affect supplemental security income (SSI) or accommodations in college.

*Discussion:* If a parent revokes consent for the provision of special education and related services pursuant to § 300.300(b)(4), the child's eligibility for other programs, such as SSI, may be affected. A parent may seek additional information concerning eligibility requirements for other programs from the agency responsible for implementing those programs. Regarding accommodations in postsecondary educational institutions, Office for Civil Rights (OCR) offers helpful guidance on the transition of individuals with disabilities to postsecondary education, which is available on OCR's Web page: *http://www.ed.gov/about/offices/list/ocr/transitionguide.html.*

*Changes:* None.

*Comment:* Some commenters expressed concern that a parent could assert that the public agency should have done more to convince the parent not to unilaterally revoke consent for special education and related services under § 300.300(b)(4).

*Discussion:* A public agency does not have any obligation to "convince" parents to accept the special education and related services that are offered to a child. Section 300.300(b)(3)(iii) and (4)(iii) provides that the public agency will not be considered to be in violation of the requirement to make FAPE available to the child if the parent of a child revokes consent for the continued provision of special education and related services. No provision in the Act or implementing regulations imposes an obligation on public agencies to dissuade parents from revoking consent.

*Changes:* None.

*Comment:* One commenter recommended that if a parent revokes consent, the LEA should be required to offer FAPE thereafter, including three year reevaluations, progress monitoring, and an annual IEP until the LEA and the responsible SEA report under the ESEA that 80 percent or more of the students with disabilities in the LEA are meeting State standards and graduating with a regular high school diploma.

*Discussion:* Section 300.300(b)(4)(iii) through (iv) makes clear that once a parent revokes consent for special education and related services, the public agency (a) will not be considered in violation of the obligation to make FAPE available to the child for failure to provide the child with further special education and related services, and (b) will not be required to convene an IEP Team meeting or develop an IEP, under §§ 300.320 through 300.324. As noted earlier, a child whose parent has revoked consent should be treated the same as any other child in the LEA's child find process.

We do not agree that a State should be required to offer FAPE, triennial reevaluations, or an annual IEP until a certain percentage of students with disabilities meet State standards and graduate with a regular high school diploma. Decisions concerning the provision of FAPE and special educational services are individualized and made by an IEP Team, which includes the child's parents. If a parent revokes consent for special education and related services, the child will be treated as a general education student

and will not be eligible for FAPE, triennial evaluations, or an annual IEP.

*Changes:* None.

*Comment:* Some commenters expressed concern that school district personnel may encourage a parent to remove their child from special education and related services, and a few of these commenters requested that the regulations be amended to prohibit a school district from doing so. One commenter requested that the regulations require LEAs to track the number of children whose parents revoke consent in each LEA (including a child's name, identifying information, and school name) and report that information to the SEA each year.

*Discussion:* It is inappropriate for school personnel to encourage a parent to revoke consent for special education and related services. If school personnel believe a child no longer qualifies as a child with a disability, Part B of the Act and its implementing regulations provide a process for making that determination. Specifically § 300.305(e), consistent with section 614(c)(5) of the Act, requires that an LEA evaluate a child before determining that the child is no longer a child with a disability. This provision applies when eligibility is in question and an LEA believes a child may no longer be eligible for special education services. A public agency must follow this long-standing procedure if the agency believes a child should no longer receive special education and related services.

Concerning the commenter's request that the Department require LEAs to track the number of children whose parents withdraw consent in each LEA, we decline to impose additional data collection requirements on LEAs to track the number of children whose parents revoke consent in each LEA because we believe the number of children whose parents revoke consent will be small. However, nothing in these regulations prevents a State from separately tracking the number of children whose parents revoke consent in each LEA.

*Changes:* None.

*Comment:* One commenter requested that the Department clarify in these regulations that the placement of a child in a private school when FAPE is at issue, pursuant to § 300.148 and section 612(a)(10)(C) of the Act, does not constitute a revocation of consent under § 300.300(b)(4).

*Discussion:* We agree with the commenter that the placement of a child in a private school when FAPE is at issue does not constitute a revocation of consent under § 300.300(b). However, the provisions concerning the placement of a child in a private school when FAPE is at issue do not need to be referenced in § 300.300, as suggested by the commenter, because those provisions are clearly outlined in § 300.148. Section 300.148 addresses the steps a parent must take when enrolling a child with a disability in a private school when FAPE is at issue. If the parent seeks reimbursement for the cost of the private school, then the parent must follow the procedures in § 300.148(c) through (e). The parent must inform the IEP Team at the most recent IEP Team meeting that he or she is rejecting the placement proposed by the public agency and must inform the IEP Team of his or her intent to enroll the child in a private school at public expense or give written notice 10 business days prior to the removal of the child from the public school. These actions, which are required in response to a disagreement between the parent and public agency about the provision of FAPE, do not constitute parental revocation of consent for special education and related services.

*Changes:* None.

*Comment:* Some commenters expressed concern that allowing parents to revoke consent for special education and related services would result in parents pulling their children in and out of special education and related services. The commenters noted that pulling children in and out of special education and related services would have a negative effect on student progress, would cause a loss of instructional time, and could affect the provision of FAPE. Other commenters expressed concern that parents, who previously revoked consent for services, will ask for special education and related services when the child has a discipline issue or is at risk of not graduating. A few commenters requested that there be a limit to how frequently a parent can revoke consent and then subsequently request reinstatement in special education for their child.

*Discussion:* Section 300.300(b)(4) clarifies that parents have the right to withdraw their child from special education and related services. After revoking consent for his or her child, a parent always maintains the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education and related services. Nothing in the Act or the implementing regulations prevents a parent from requesting an evaluation when their child has a discipline issue or is at risk of not succeeding in school. This is because, consistent with § 300.101, the public agency has an affirmative obligation to make FAPE available to a child with a disability. The child's right to have FAPE available does not cease to exist upon the revocation of consent. Therefore, a parent may consider discipline and graduation requirements when determining whether to request special education and related services for their child.

We do not agree with the commenter that the Department should limit how frequently a parent may revoke consent and then subsequently request reinstatement in special education services because retaining flexibility to address the unique and individualized circumstances surrounding each child's education is important. A public agency will not be considered in violation of the obligation to make FAPE available to the child for failure to provide the child with further special education services following a parent's revocation of consent. We understand the commenter's concern that placing a child in and out of special education services may affect the provision of FAPE; however, a public agency is only responsible for providing FAPE during the time period that the parent has provided consent for special education and related services.

*Changes:* None.

*Comment:* One commenter expressed concern about potential staffing implications, especially for small school districts that may have hired a teacher with unique expertise for a child whose parent subsequently revokes consent for the continued provision of special education and related services.

*Discussion:* The Department appreciates that a parent's revocation of consent could affect staffing at the school and district levels and that there may be instances where staff members are no longer providing special education and related services. However, such issues should not affect a parent's right to revoke consent for special education and related services because a parent's right to determine whether his or her child will receive special education and related services is paramount.

*Changes:* None.

*Comment:* Some commenters requested that the Department clarify the procedures to be followed when a parent provides consent for special education and related services after previously revoking consent (re-enrollment), including whether re-enrollment would be considered an initial evaluation that would trigger the 60-day or other State-imposed evaluation timeline. Another commenter expressed concern about the

expenditure of resources toward a "new" initial evaluation and IEP for a student for whom consent for special education and related services has been revoked and then granted again.

*Discussion:* If a parent who revoked consent for special education and related services later requests that his or her child be re-enrolled in special education, an LEA must treat this request as a request for an initial evaluation under § 300.301 (rather than a reevaluation under § 300.303). However, depending on the data available, a new evaluation may not always be required. An initial evaluation, under § 300.305, requires a review of existing evaluation data that includes classroom based, local, or State assessments, and classroom based observations by teachers and related services providers. On the basis of that review and input from the child's parents, the IEP Team and other qualified professionals must identify what additional data, if any, are needed to determine whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child. Therefore, a public agency may not always have to expend resources on a "new" initial evaluation.

*Changes:* None.

*Comment:* A few commenters argued that the Department does not have the authority to issue regulations that allow a parent to revoke consent for special education and related services. One commenter argued that there is no statutory language in section 614(a)(1)(D)(ii) of the Act that authorizes a parent to revoke consent once services have been provided. Other commenters argued that the Department does not have the authority to regulate in this manner because doing so violates the requirements of section 607 of the Act, which prohibits the adoption of any regulation that procedurally or substantively lessens the protections provided to children with disabilities as embodied in the regulations in effect on July 20, 1983 unless the regulation "reflects the clear and unequivocal intent of Congress in legislation." These commenters noted that the current regulations (i.e., without provisions permitting the parent to revoke consent) are designed to safeguard the rights of the child, not the unilateral preferences of the parent.

*Discussion:* As discussed elsewhere in this preamble, although section 614(a)(1)(D) of the Act does not explicitly state that parents have the right to revoke consent for special education and related services, the parent's right to revoke consent for special education and related services at any time is consistent with the Act's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.

We also disagree that allowing a parent to revoke consent for the provision of special education and related services under § 300.300(b)(4) procedurally or substantively lessens protections provided to children with disabilities as embodied in regulations in effect on July 20, 1983. As previously stated in response to other comments, a parent is recognized under the Act as the party responsible for protecting the child's interest in obtaining appropriate educational services. It is the Department's position that the protections provided to children with disabilities are enlarged rather than lessened by amending the regulations to provide that a parent's decision to revoke consent for the continued provision of special education and related services cannot be challenged by the public agency. Furthermore, the change reflected in § 300.300(b)(4) is consistent with the legislative changes made to the Act in 2004, which included adding to section 614(a)(1)(D)(ii)(II) of the Act the requirement that parental consent be obtained before the public agency begins to provide special education and related services to their child. In our view, the better reading of the Act, especially in light of the Department's long-standing regulatory definition of "consent," which has included the concept that consent can be revoked at any time, is that a parent's revocation of consent for the continued provision of services cannot be challenged by a public agency any more than a parent's refusal to provide consent for the initial provision of special education and related services can be.

*Changes:* None.

*Comment:* One commenter suggested that allowing parents to discontinue special education and related services without a reevaluation is inconsistent with the requirement in section 614(c)(5) of the Act that a public agency conduct a reevaluation of a child before determining that the child is no longer a child with a disability.

*Discussion:* We disagree with the commenter that allowing a parent to revoke consent for special education and related services is inconsistent with the requirements in section 614(c)(5) of the Act. Section 614(c)(5) of the Act requires that an LEA evaluate a child before determining that the child is no longer a child with a disability. This provision applies when eligibility is in question and the LEA believes the child may no longer be eligible for special education services. Section 300.300(b)(4) allows a parent to revoke consent for the continued provision of special education and related services and does not trigger an LEA's obligation to conduct an evaluation for a child that is receiving services before determining that a child is no longer a child with a disability. If a parent revokes consent for the continued provision of special education and related services for his or her child, the public agency is not determining that the child is no longer a child with a disability as contemplated by section 614(c)(5) of the Act and § 300.305(e). Instead, the public agency is discontinuing the provision of special education and related services pursuant to the decision of the parent and there is no obligation for the LEA to evaluate the child.

*Changes:* None.

*Comment:* Some commenters requested that the final regulations provide dispute resolution options for public agencies when a parent revokes consent for special education and related services. The commenters cited various reasons as to why dispute resolution options should be included in § 300.300(b)(4) such as: The ability to strike a suitable balance among the interests of the public agency, parent, and child with a disability; the need for proposed § 300.300(b)(4) to be consistent with section 615(b)(6)(A) of the Act and § 300.507, providing that a parent or a public agency may file a due process complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child; and the ability of a public agency to determine that a child is no longer a child with a disability.

Lastly, some commenters requested that public agencies be allowed to initiate the mediation process when a parent revokes consent, while another commenter stated that public agencies should, at least, be able to offer mediation and that parents can refuse to participate, at their sole discretion.

*Discussion:* While the dispute resolution mechanisms in section 615 of the Act generally are appropriate to resolve disputes between a parent and the public agency, it is the Department's position that they are not appropriate when a parent revokes consent for all special education and related services. Section 615(b)(6)(A) of the Act and § 300.507 allow a parent or public agency to file a due process complaint on any matter relating to the identification, evaluation, and educational placement of a child with a

disability, or the provision of FAPE to the child. However, section 614(a)(1)(D)(ii)(II) of the Act does not allow an LEA to use the due process procedures under section 615 of the Act, including mediation, if a parent refuses to provide consent for the initial provision of services. If an LEA cannot use the due process procedures in section 615(b)(6)(A) of the Act and § 303.507 to override a parent's refusal to provide initial consent for services, then an LEA also should not be allowed to use these due process procedures to override a parent's revocation of consent for the continued provision of services. As discussed throughout this preamble, the Secretary believes that protecting the interest of parents to make the decision as to whether or not their child receives special education and related services is consistent with the intent of the Act.

We agree that the application of the due process procedures to disputes between parents and public agencies generally balances the interests of public agencies, parents, and children. However, as evidenced by section 614(a)(1)(D)(ii)(II) of the Act, which prohibits LEAs from using the due process procedures under section 615 of the Act if a parent refuses to provide consent for the initial provision of services, a public agency's right to use the due process procedures in section 615(b)(6)(A) of the Act and § 303.507 is not absolute. Similarly, a public agency should not have the ability to override a parent's revocation of consent for the continued provision of special education services and related services.

Moreover, we do not agree with the commenter who suggested that allowing a parent to revoke consent will affect a public agency's ability to determine that a child is no longer a child with a disability. If a public agency believes a child is no longer a child with a disability then, as required in § 300.305(e), a public agency must evaluate the child before making that determination. If the parent disagrees with the eligibility determination, then the parent may challenge the decision using the due process procedures in section 615 of the Act.

Lastly, mediation, pursuant to § 300.506(a), may be used to resolve any disputes under Part B of the Act and its implementing regulations before a parent revokes consent for the continued provision of special education and related services. However, for the same reasons that mediation is not allowed when a parent refuses to provide initial consent for services, mediation is not appropriate once a parent revokes consent for the provision of special education and related services.

*Changes:* None.

*Comment:* One commenter expressed concern that allowing a parent to remove their child from special education and related services will affect LEAs' and SEAs' ability to meet their State Performance Plans (SPP) and the Annual Performance Report (APR) targets for graduation in Indicator 1 and the targets for the participation and performance of children with disabilities on statewide assessments in Indicator 3. The commenter also expressed concern about the potential failure of students with disabilities whose parents revoke consent for special education and related services to participate fully in post-school opportunities, reflected in Indicators 13 and 14, regarding secondary transition and post-school outcomes, respectively.

*Discussion:* Section 616(a)(3) of the Act requires the Secretary to monitor the States, and the States to monitor LEAs, using quantifiable indicators in the following priority areas: The provision of FAPE in the LRE; the State's exercise of general supervisory authority; and disproportionate representation of racial and ethnic groups in special education and related services to the extent the representation is the result of inappropriate identification. As required by the Act, the Secretary established, with broad stakeholder input, 20 indicators. States established rigorous targets for each indicator and developed activities to improve performance to meet those targets in their SPPs. States report to the Department in their APR on their performance in meeting their targets.

Generally, if a parent revokes consent for his or her child to receive special education and related services, the child is no longer required to be included in calculations for children with disabilities for indicators in the SPP/APR. States may choose to handle students whose parents revoke consent to the continued provision of special education and related services in graduation rate calculations for purposes of the SPPs/APRs in the same way that they treat other students who exit from special education and related services prior to graduation. Additionally, students whose parents revoke consent to the continued provision of special education and related services are no longer children with disabilities whose participation in post-school opportunities would be tracked by the SPP/APR Indicators 13 and 14.

*Changes:* None.

*Comment:* One commenter noted that some States' mandatory reporting requirements for abuse and neglect may be triggered when a parent revokes consent for special education and related services, especially in cases where a child may require medical services.

*Discussion:* The commenter is correct that each State has established reporting requirements and professional codes of conduct concerning suspected abuse and neglect. Nothing in these regulations will alter any responsibilities under those State laws.

*Changes:* None.

*States' Sovereign Immunity and Positive Efforts To Employ and Advance Qualified Individuals With Disabilities (§ 300.177)*

*Comment:* A few commenters requested clarification of the term "positive efforts," as it is used in § 300.177(b). One commenter recommended that the regulations clarify that the term "positive efforts" includes making reasonable accommodations during the recruitment and interview process, and ensuring that assistive technology devices are provided in the workplace.

*Discussion:* Consistent with section 606 of the Act, positive efforts must be made to recruit and advance qualified individuals with disabilities in programs assisted under Part B of the Act. We decline to define the term "positive efforts" in these regulations because the positive efforts taken by States will vary based on the unique and individual needs of a State and public agency, and those needs may change over time. For example, a public agency's positive efforts might include participating in an employment fair that is targeted at individuals with disabilities, sending vacancy announcements to organizations for individuals with disabilities and ensuring that employees with disabilities are aware of promotion opportunities. As a separate obligation under Section 504, each recipient of assistance must provide reasonable accommodations, which may include assistive technology devices, to each qualified individual with a disability who applies for employment, or is employed in programs assisted under Part B of the Act.

*Changes:* None.

*Comment:* One commenter opposed proposed § 300.177 because, according to the commenter, section 606 of the Act is silent on the Department's authority to issue regulations relating to the employment of individuals with disabilities. The commenter argued that

doing so would be contrary to Congress' intent, in section 607(a) of the Act, that the Secretary issue regulations only to the extent that such regulations are necessary to ensure compliance with the specific requirements of the IDEA. The commenter further noted that proposed § 300.177(b) is unnecessary because in order to receive a grant under Part B of the IDEA, each State must already have on file with the Department a description of the steps the State proposes to take to ensure equitable access to, and participation in, activities conducted under Part B of the Act, as required by section 427 of the General Education Provisions Act (GEPA).

Another commenter opposed this provision because the changes pertain to employment requirements rather than to the provision of special education. The commenter suggested that the Department provide guidance on this issue rather than include it in the regulations.

*Discussion:* Section 606 of the Act requires the Secretary to ensure that each recipient of assistance under Part B of the Act makes positive efforts to employ and advance in employment qualified individuals with disabilities in programs assisted under the Act. Section 300.177(b), consistent with section 606 of the Act, makes clear that this requirement applies to each recipient of Part B funds, including both SEAs and LEAs. This provision does not replace or contradict protections afforded to individuals with disabilities under other State or Federal laws, including requirements under GEPA, Section 504, Title II of the ADA, and applicable employment laws. Additionally, § 300.177(b) implements statutory provisions; the fact that it addresses employment matters rather than the provision of special education services does not mean that it should not be included in the regulations. The Department therefore declines to adopt the suggestion that this matter be addressed through guidance rather than through the regulations.

*Changes:* None.

*Comment:* One commenter questioned whether the Department might add the provision in § 300.177(b) as one of the Secretary's monitoring priorities for reporting by SEAs and LEAs in the SPP and APR.

*Discussion:* As previously discussed in this preamble, section 616(a)(3) of the Act specifies the Department's IDEA monitoring priorities and requires the Secretary to monitor the States' performance in these priority areas using quantifiable indicators. At this time, the Department does not expect to include an additional indicator to monitor the implementation of the requirements in § 300.177(b).

*Changes:* None.

*Hearing Rights (§ 300.512)*

*Comment:* Several commenters supported proposed § 300.512 stating that a parent's right to be represented by non-attorneys at due process hearings is best decided by State law. Other commenters disagreed with our statement in the preamble to the NPRM that the language of the Act is not clear about whether non-attorneys can represent parties in due process hearings. These commenters stated that the Act and its implementing regulations both provide that any party to a hearing shall be accorded the right to be accompanied and advised "by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities * * *." The commenters stated that because the term "counsel" is referenced separately and distinguished from "individuals with special knowledge or training" in both the Act and the regulations, the Department should conclude that such "individuals" may, in fact, be other than counsel (i.e., attorneys) and represent a parent in a due process hearing. One commenter noted that experienced advocates can be very helpful to parents who represent themselves in due process hearings. Another commenter stated that proposed § 300.512 should not permit a State's rules related to the unauthorized practice of law to prohibit a parent from being "accompanied and advised" by a lay advocate because this would be contrary to the actual text of the Act. Moreover, several commenters stated that proposed § 300.512 violates the intent of the Act, which they describe as providing parents with the broadest opportunities for assistance in due process hearings. These commenters stated further that nothing in the language or intent of the Act permits the Department's interpretation that States have the authority to decide whether parents can be represented by non-attorneys in due process hearings under the Act.

*Discussion:* Section 615(h)(1) of the Act is clear that parties to a due process hearing may be "accompanied and advised" by counsel and by individuals, such as non-attorney advocates, who have special knowledge or training regarding the problems of children with disabilities. Nothing in these regulations or State law can limit this right. However, neither the Act nor the current regulations implementing Part B of the Act address the issue of whether individuals who are not attorneys, but have special knowledge or training regarding the problems of children with disabilities, may "represent" parties in due process hearings under the Act. Congress considered the question of non-attorney representation during the 2003–2004 IDEA reauthorization process. The version of H.R. 1350 passed by the House of Representatives in 2003 included a provision giving a party the "right to be represented by counsel and by non-attorney advocates and to be accompanied and advised by individuals with special knowledge or training with respect to the problems of children with disabilities" (63 Cong. Rec. H3458 and H3495 (daily ed. Apr. 30, 2003)). The final version of the bill enacted in 2004, however, did not adopt this language. In other areas, though, the Act, as revised in 2004, now specifically addresses duties applicable to "either party, or the attorney representing a party" (see section 615(b)(7)(A) and (B) of the Act). Given that the Act is silent regarding the representational role of non-attorneys in IDEA due process hearings, the issue of whether non-attorneys may "represent" parties to a due process hearing is a matter that is left, by the statute, to each State to decide. As the commenter notes, even if a State law prohibits non-attorney representation in due process hearings, the Act still affords parties to due process hearings the right to be accompanied and advised by individuals with special knowledge or training with respect to the problems of children with disabilities.

*Changes:* None.

*Comment:* Several commenters expressed dissatisfaction with proposed § 300.512 because it would give too much deference to States, permit inconsistent rules across States, and would limit a party's right under Federal law to be represented by a non-attorney in a due process hearing based on States' interest in regulating the practice of law. Other commenters stated that federalism concerns should not override the national interest, reflected in the Act, in the equal opportunity of children with disabilities to appropriate education.

*Discussion:* As noted elsewhere in this preamble, the Act does not state that parties to a due process hearing have a right to representation in those hearings by non-attorney advocates. Given the Act's silence in this regard, the Act does not prevent States from regulating whether non-attorneys may "represent" parties in due process hearings.

*Changes:* None.

*Comment:* One commenter requested that the final regulations clarify whether

it is sufficient for an SEA to provide by regulation or procedural rule that a lay advocate may represent parties at due process hearings or whether the ability of a lay advocate to represent a party at a due process hearing instead is controlled by State law regarding the unauthorized practice of law. Another commenter requested that we add a provision to the regulations to clarify that nothing in the Act authorizes parents to be represented by non-attorneys if State law is silent on the issue.

*Discussion:* Whether an SEA may have a State regulation or procedural rule permitting non-attorney advocates to represent parties at due process hearings or whether that issue is controlled by State attorney practice laws is determined by State law. If State law is silent on the question of whether non-attorney advocates can represent parties in due process hearings, there is no prohibition under the Act or its implementing regulations on non-attorney advocates assuming a representational role in due process hearings.

*Changes:* None.

*Comment:* Many commenters asserted that the proposed changes to § 300.512 would negatively affect future cases as parents unable to afford attorneys' fees, or unable to find an attorney knowledgeable about special education law, will be faced with the choice of either representing themselves or foregoing a due process hearing. Other commenters suggested that the proposed regulatory change has the potential to disrupt the State system of administrative due process hearings when lay advocates are not available to assist parents. One commenter noted that lay advocates are necessary to help represent parents because school officials are more knowledgeable about the law than parents, and there are more school lawyers than there are lawyers willing to represent parents in due process hearings. Some commenters noted that publicly funded programs providing legal representation to persons with disabilities are not funded at the level that meets the need for free or low-cost assistance. Another commenter noted that non-attorney advocates provide a necessary and valuable service to children with disabilities, and that limiting the role of non-attorney advocates will adversely affect the rights of children with disabilities in due process hearings. Other commenters argued that lay advocates serve an important function and are an excellent resource for families.

*Discussion:* We agree with the commenters that non-attorney advocates can perform a valuable service to parties in due process hearings. As just one example, non-attorney advisors with special knowledge of or training in the problems of children with disabilities who speak languages other than English can play an important role in accompanying and advising parents who do not speak English at due process hearings. However, because the Act is silent about the representational role of non-attorneys in due process hearings, States are not prohibited by the Act from regulating on that issue. Therefore, we make clear, in § 300.512, that whether non-attorneys can "represent" parties in due process hearings is a matter that is controlled by State law. There currently are States that prohibit non-attorney representation in due process hearings, and parties to due process hearings in those States need to understand that they may not be "represented" in a due process hearing by a non-attorney, although they may be "accompanied and advised" by a non-attorney in the due process hearing if that individual has special knowledge or training respecting the problems of children with disabilities.

*Changes:* None.

*Comment:* A few commenters recommended that States be required to provide parents with a list of available and affordable attorneys if State law does not allow for non-attorney representation in due process hearings. The commenters also recommended that the Department identify strategies to ensure that parents have access to free or reduced-fee representation by knowledgeable attorneys when legal counsel is necessary, such as appealing due process decisions in court.

*Discussion:* Current § 300.507 requires public agencies to inform a parent of any free or low-cost legal and other relevant services in the area if the parent requests the information or if the parent or public agency files a due process complaint. We expect States to work to ensure that parents for whom legal counsel under Part B of the Act is necessary have easy access to information about free or low-cost legal or other relevant services available in their area. Each State is in the best position to determine effective strategies to ensure that parents have access to information about free or low-cost assistance. For these reasons, we decline to make the requested changes to these regulations.

*Changes:* None.

*Comment:* One commenter opposed the proposed changes to § 300.512 and expressed concern that these changes will limit parents' representation during the IEP process. Another commenter stated that parents are intended to be "equal partners" in the educational decision-making process for their child under the Act, and therefore, should be able to utilize non-attorney assistance whenever necessary. Some commenters stated that effective advocacy is necessary to ensure that children have access to the services and programs necessary to develop an appropriate IEP.

*Discussion:* We agree with commenters that parents should be equal partners in the educational decision-making process for their child and that parents should be able to utilize assistance from non-attorney advocates whenever necessary, such as in securing an appropriate IEP for their child and, as noted previously in this preamble, in preparing for and participating in due process hearings. The proposed changes to § 300.512 only address whether a party can be represented by a non-attorney in a due process hearing, specifying that this matter is determined by State law. Whether parents may be "represented" by non-attorney advocates at other stages of the process is not addressed by the Act and also depends on State law. That said, under § 300.321(a)(6), the IEP Team may include, at the discretion of the parent or public agency, individuals who have knowledge or special expertise regarding the child, including non-attorney advocates. While these individuals are members of the IEP Team, their role is not to "represent" or speak for the parents.

*Changes:* None.

*Comment:* Several commenters expressed concern that proposed § 300.512 could lead to confusion because not all States have a clear position as to whether lay advocates can represent parents at due process hearings. Some of these commenters noted that 10 States currently bar lay advocates, 12 States permit lay advocates to represent parents in due process hearings, and that the positions of the remaining States are unclear. Given this disparity across States, these commenters expressed concern that leaving the decision to States could lead to more confusion and litigation, not less. A few commenters questioned whether States would be required to amend their laws to specify whether lay advocates can represent parties in due process hearings.

One commenter stated that proposed § 300.512 raises an issue to the national level that is only a problem in a few jurisdictions, and would lead to increased, and tangential, disputes. Another commenter stated that

appropriate representation should remain a matter of State law, but that the Department should not make the changes proposed to § 300.512 in the NPRM.

*Discussion:* We disagree with commenters that confusion will result from the changes reflected in proposed § 300.512. To the contrary, we expect that the effect of this amended provision will be to reduce confusion and the potential for litigation because parties will know to look to State law to determine whether non-attorneys can represent parties in due process hearings; States will know they are free to continue to permit or prohibit such representation. In the absence of State law on this point, there is nothing in the Act or these regulations that would prohibit non-attorneys with special knowledge or training respecting the problems of children with disabilities from representing parties in due process hearings. Nothing in proposed § 300.512 requires States to adopt changes to State law to address this issue.

Even though a relatively small number of States may prohibit non-attorneys from representing parties in IDEA due process hearings, it is still important for the Department to address this issue in its regulations. In the absence of that clarification, parties may not consider this issue at the time they are making decisions about how to proceed in a due process hearing, or may mistakenly rely on the April 8, 1981 letter from Theodore Sky, Acting General Counsel of the Department of Education, to the Honorable Frank B. Brouillet, in which the Department interpreted section 615 of the Act and implementing regulations to mean that attorneys and lay advocates may perform the same functions at due process hearings. As noted in the NPRM, the Department no longer interprets section 615 of the Act and implementing regulations in this manner. Nothing in amended § 300.512 should increase disputes, or raise an issue that is not already an issue under State law.

*Changes:* None.

*Comment:* One commenter noted that non-attorney lay advocates have long represented underprivileged persons in a variety of administrative hearings, including those concerning veterans' benefits, welfare benefits, and social security benefits.

*Discussion:* The programs cited by the commenter are Federal programs under which administrative hearings are conducted before the Federal agency. Due process hearings under IDEA, however, are conducted before a local or State hearing officer, as determined under State law. Absent specific statutory authority to require States to permit non-attorney representation, we do not believe we should impose such a requirement on States.

*Changes:* None.

*Comment:* A number of commenters stated that in some States school districts are represented by lay advocates and expressed concern that a rule applying only to parents would be both inconsistent and unfair. Some commenters stated that State regulations of the practice of law should affect equally parents and school districts. One commenter reported that lay advocates commonly represent a school district, but are not subject to license-based sanctions or censure or held to the legal profession's standards of candor and fair dealing. Others noted that school districts are often "represented" at hearings by agency representatives, including special education directors or other administrators, rather than attorneys.

*Discussion:* We agree with the commenters that a further change is needed to § 300.512 to specify that State law controls whether non-attorneys can represent any party in a due process hearing under the Act. We are persuaded by commenters who pointed out that public agencies also retain non-attorney advocates, and agree that the Act's silence on the matter of non-attorney representation in a due process hearing means that State law applies to all parties to a due process hearing.

*Changes:* We have revised the exception clause in § 300.512(a)(1) to specify that whether parties have the right to be represented by non-attorneys at due process hearings is determined under State law.

*Comment:* Several commenters stated that proposed § 300.512 violates section 607 of the Act, which prohibits the adoption of any regulation that procedurally or substantively lessens the protections provided to children with disabilities in the regulations in effect on July 20, 1983 unless the regulation reflects the clear and unequivocal intent of Congress in legislation. These commenters noted that proposed § 300.512 was not in effect in 1983 and that no legislative change has been made to the right "to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities."

*Discussion:* We disagree that the change reflected in proposed § 300.512 violates the provisions of section 607 of the Act. As the regulations that were in effect on July 20, 1983 did not address whether non-attorneys could "represent" parties to due process hearings, the regulations in effect at that time did not embody a right to representation by non-attorneys. Section 607 of the Act does not prevent the Department from addressing rights that were not in the regulations that were in effect on July 20, 1983.

*Changes:* None.

*Comment:* One commenter asked who proposed the changes to § 300.512, on what data the changes were based, and whether the Protection and Advocacy system was involved in proposing the changes to this section.

*Discussion:* The Department proposed the changes to § 300.512 because we came to accept, after the Delaware Supreme Court's decision in *In re Arons*, 756 A.2d 867 (Del. 2000), *cert. denied sub nom, Arons* v. *Office of Disciplinary Counsel*, 532 U.S. 1065 (2001), that the interpretation of the regulations in the 1981 letter from the Acting General Counsel of the Department was not persuasive, and that, because the Act does not specifically address non-attorney representation in due process hearings, State law controls whether non-attorneys can represent parties to due process hearings. The Protection and Advocacy system was not involved in proposing the change.

*Changes:* None.

*Comment:* One commenter expressed concern that the proposed changes in § 300.512 would increase the number of lawsuits against school districts by requiring the use of a lawyer and court action.

*Discussion:* We disagree with this comment because § 300.512 does not require the use of lawyers and does not concern court actions.

*Changes:* None.

*Comment:* A number of commenters stated that the issue of whether to allow parents to be represented by non-lawyers in IDEA due process hearings should be left to Congress to resolve. Many of these commenters stated that given the pending reauthorization of the Act, regulating on this topic is premature. Some commenters stated that this issue should be reviewed in Congressional oversight hearings. Many commenters argued that there is a need for review and consideration of available research data, or that research should first be conducted on the special education administrative due process systems of States and districts, before a change is made. Others called for research on the availability of legal representation for parents in due process hearings before a change in the Department's policy is made.

*Discussion:* We disagree with commenters that this matter should be left to Congress to resolve or that it is premature to address this issue given the pending reauthorization of the Act. Participants in due process hearings should understand that, under the current state of the law, the Act does not prohibit States from determining whether parties to due process hearings can be represented in those hearings by non-attorneys. We also disagree with commenters that additional research is needed to better understand the current state of State law on this issue before amending § 300.512. That said, we agree that additional information about the availability of legal representation for parties might be useful in helping Congress decide whether a change in the statute is advisable.

*Changes:* None.

*Comment:* A number of commenters remarked that Congressional inaction on the issue of lay advocate representation of parties in due process hearings after the *Arons* decision indicates that Congress did not mean to reverse the Department's longstanding policy that the Act permits non-attorney representation.

*Discussion:* We do not agree that Congressional acquiescence in the Department's prior interpretation can be inferred in this case. The commenters' assessment of the reasons that Congress decided to take no action in this regard is speculative. Congress was aware, at the time of the 2004 reauthorization, that non-attorneys were not permitted to represent parties in due process hearings in at least one State, Delaware. Therefore, we cannot assume that Congressional inaction meant that Congress viewed the Department's prior interpretation as controlling. Lack of congressional action could also mean that Congress believed that the *Arons* case was correctly decided, and that State law should control the representational role of non-attorneys in IDEA due process hearings.

*Changes:* None.

*State Monitoring and Enforcement (§ 300.600)*

*Comment:* None.

*Discussion:* In the course of our internal review of this provision, we noted that § 300.600(e) implied, but did not clearly state, that the one-year timeline for correction begins with the State's identification of the noncompliance.

*Changes:* We have revised § 300.600(e) to specify that correction of noncompliance must be completed no later than one year after the State's identification of the noncompliance.

*Comment:* A few commenters acknowledged that there are some areas of noncompliance that can be corrected within one year of identification; however, the commenters expressed concern that the one-year timeline is not realistic for findings of systemic noncompliance in substantive areas such as the provision of FAPE, placement in the least restrictive environment (LRE), and child find. Other commenters requested that proposed § 300.600(e) be revised to reflect "degrees" of noncompliance. For example, one commenter suggested that some instances of noncompliance (e.g., those related to a specific child's IEP implementation) should not take one year to correct; whereas instances of noncompliance related to systemic issues may take longer than one year to correct. The commenter also questioned how proposed § 300.600(e) will address situations involving longstanding noncompliance. Lastly, one commenter agreed with the intent of proposed § 300.600(e) but requested that the timeline be modified to allow for exceptions, such as allowing a State to initiate appropriate action to correct noncompliance within one year of identification or as soon as possible thereafter.

*Discussion:* Section 300.600(e) requires that all noncompliance related to the implementation of Part B of the Act be corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance. These changes are necessary to ensure that children with disabilities are provided with the FAPE to which they are entitled so that they are able to make progress towards meeting IEP goals and statewide achievement standards.

While we agree with the commenters that some areas of noncompliance are more difficult to correct than others, we do not agree that the timeline should be extended beyond one year. Our experience has been that most States can correct noncompliance, including noncompliance that is spread broadly across a system, in less than one year from identification of the noncompliance. For example, States have required the implementation of short-term correction strategies while they are developing and implementing a plan for long-term change to ensure sustained compliance. An example of a short-term correction strategy coupled with a longer-term change might include contracting with speech therapists to provide the speech pathology services needed by current students while developing an in-district program to support speech pathology assistants to become certified speech language pathologists. Therefore, § 300.600(e) provides an appropriate timeline for correcting noncompliance, including systemic and long-standing noncompliance. In cases where a State is unable to correct noncompliance within one year of identification, as provided in § 300.600(e), a State may enter into a compliance agreement with the Department under section 457 of GEPA (Compliance Agreement), if the Department deems a Compliance Agreement appropriate. The purpose of a Compliance Agreement is to allow a State the time needed to correct long-standing systemic noncompliance and come into full compliance with the applicable requirements of the Federal program as soon as feasible, but not later than three years from the date of the Compliance Agreement. A Compliance Agreement allows a State to continue to receive its grant award under Part B of the Act while it works toward achieving full compliance under the terms of the agreement. Section 300.600(e), when read together with the provisions in section 457 of GEPA, adequately address the commenters' concerns.

We decline to amend the regulations to distinguish between or stratify types of noncompliance. Any noncompliance with the provisions in 34 CFR Part 300 is subject to the provisions in § 300.600(e), and, therefore, must be corrected as soon as possible, and in no case later than one year from identification. However, we do agree with the commenter who suggested that some instances of noncompliance, e.g., those related to child-specific IEP timelines, may be corrected far more quickly than one year from identification. We expect that all noncompliance in those instances will be corrected as soon as possible. We recognize, though, that not all noncompliance can be corrected immediately. In our more than 30 year experience in implementing Part B of the Act, we have found that one year is a reasonable outside time limit for States for correcting noncompliance.

For reasons previously stated in this preamble and because a State must initiate appropriate corrective actions immediately upon the identification of noncompliance, we decline to amend the regulations to allow for exceptions to the timely correction timeline in § 300.600(e) or to indicate that a State must only initiate appropriate action to correct noncompliance within one year or as soon as possible thereafter. The one-year timeline to correct noncompliance will ensure that most cases of noncompliance are corrected in one year or less, thereby facilitating the

provision of FAPE to children with disabilities.

*Changes:* None.

*Comment:* One commenter expressed concern that proposed § 300.600(e) contradicts the logic of § 300.604(b)(2)(ii), which allows compliance agreements if the Secretary has reason to believe that the State cannot correct the problem within one year. Additionally, the commenter stated that proposed § 300.600(e) will be problematic for data collection and analysis purposes because the strict one-year timeline may impede the SEA's ability to use the most current LEA data in determining whether or not a systemic violation has been corrected. The commenter noted that an SEA could erroneously determine, based on outdated data, that an LEA has corrected its noncompliance, allowing for the continuation of the violation and ultimately poor student outcomes.

*Discussion:* We do not agree that the provisions in § 300.600(e) contradict the provisions in § 300.604(b)(2)(ii). These two regulatory sections address two separate and distinct processes. While § 300.600(e) addresses the standard for the timely correction of noncompliance, § 300.604(b)(2)(ii) addresses enforcement actions available to the Secretary if the Secretary determines, for three or more consecutive years, that a State needs intervention under § 300.603(b)(1)(iii) in implementing the requirements of Part B of the Act. In situations where the Secretary determines, for three or more consecutive years, that a State needs intervention in implementing the requirements of Part B of the Act, the Secretary may require a State to enter into a Compliance Agreement if the Secretary has reason to believe that the State cannot correct noncompliance that has existed for multiple years, within one year.

We do not agree with the commenter that a one-year timeline will in any way impede the use of data in determining the correction of systemic noncompliance or contribute to diminished student outcomes. Many States collect compliance data using a real-time database. Therefore, correction of systemic noncompliance, or the continuation of noncompliance, can be determined at any time.

*Changes:* None.

*Comment:* One commenter stated that there is no statutory authority that requires correction of noncompliance within one year after the State's identification. The commenter further noted that under Indicator 15 in the State Performance Plan (SPP), a State must report on the percentage of noncompliance corrected within one year of identification and for any noncompliance not corrected within one year, the State must describe those actions, including technical assistance and enforcement actions the State has taken. The commenter noted that proposed § 300.600(e) appears to give a State two different policies to follow with respect to noncompliance.

*Discussion:* Section 612(a)(11) of the Act and § 300.149 require States to ensure that each educational program for children with disabilities administered within the State is under the general supervision of individuals responsible for educational programs for children with disabilities in the SEA. Section 616(a)(1)(C) of the Act and section 441a(b)(3)(A) of GEPA require a State to monitor implementation of Part B of the Act in each of its LEAs. Additionally, § 300.100, consistent with section 612(a) of the Act, requires that all States receiving funds under Part B of the Act provide assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the requirements of Part B of the Act, including the monitoring and enforcement requirements in §§ 300.600 through 300.602 and §§ 300.606 through 300.608.

The Act is silent regarding a timeline for correction of noncompliance with the requirements of Part B of the Act. However, the Department recognizes that full, continuous compliance with Part B of the Act may not be possible. Therefore, the Department allows States, through § 300.600(e), a reasonable timeframe for correcting noncompliance; that is, any noncompliance must be corrected as soon as possible and in no case later than one year from identification. It is the Department's position that specifying a one-year timeline for correcting noncompliance is necessary to ensure proper and effective implementation of the requirements of Part B of the Act.

As noted previously, section 616(a)(3) of the Act requires the Secretary to monitor the States, and the States to monitor their LEAs, using quantifiable indicators in several priority areas, including a State's exercise of its general supervisory authority. As required by the Act, the Secretary established 20 indicators to monitor these priority areas.

Indicator 15 in the SPP measures the effectiveness of a State's general supervision by determining the percentage of noncompliance that was corrected within one year of identification. It is the Department's longstanding position, as reflected in Indicator 15 of the SPP, that when a State identifies noncompliance with the requirements of Part B of the Act by its LEAs, the noncompliance must be corrected as soon as possible, and in no case later than one year after the State identifies the noncompliance. The Department has established a target of 100 percent for Indicator 15, meaning States are expected to correct 100 percent of noncompliance as soon as possible, and in no case later than one year. Further, in our experience, when a State makes a good faith effort to correct noncompliance, the needed corrective actions can be accomplished and their effectiveness verified within one year. Finally, we expect that in the limited circumstances where correction does not occur within one year of the State's identification, the State will take specific enforcement actions with the LEA that are designed to achieve compliance. Section 300.600(e) is consistent with the Department's policy and guidance concerning the State's monitoring and enforcement responsibilities under Part B of the Act and the reporting requirements for Indicator 15.

*Changes:* None.

*Comment:* One commenter requested that the regulations include a more uniform process for States to follow in making annual determinations on the performance of LEAs because current practice differs from State to State.

*Discussion:* It is the Department's position that States should have some discretion in making annual determinations on the performance of their LEAs and, therefore, decline to establish, in regulation, a uniform process for making annual determinations under section 616(b)(2)(C)(ii)(I) of the Act. We have advised States that, at a minimum, a State's annual determination process must include consideration of the following: an LEA's performance on all SPP compliance indicators (e.g., Indicators 9, 10, 11, 12, 13, 15, 16, 17, and 20), whether an LEA submitted valid and reliable data for each indicator, LEA-specific audit findings, and any uncorrected noncompliance from any source. Additionally, we have advised States to consider performance on results indicators, such as an LEA's graduation and dropout rates, or the participation rate of students with disabilities in State assessments.

*Changes:* None.

*Comment:* One commenter recommended requiring the participation of federally funded Parent Training and Information Centers, Community Parent Resource Centers, Protection and Advocacy Agencies, and

parent and advocacy organizations and coalitions in the Federal and State monitoring processes.

*Discussion:* The Department encourages States to involve all stakeholders, including those noted by the commenter, in monitoring the implementation of Part B of the Act and these regulations. However, regulating, as the commenter requested, is not necessary because the commenter's concern is adequately addressed through other means. The Department engaged a number of stakeholders, including parent and advocacy organizations, in developing the Federal monitoring system, and continues to ensure that States include broad stakeholder input in the development of State targets and improvement activities. Additionally, under §§ 300.167 through 300.169, regarding the State Advisory Panel, States must establish and maintain an advisory panel with broad membership for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State. Section 300.169 specifies many duties of the State Advisory Panel, including advising the SEA of unmet needs in the education of children with disabilities within the State, developing corrective action plans to address findings identified in Federal monitoring reports under Part B of the Act, and developing and implementing policies relating to the coordination of services for children with disabilities. All of these activities are integral to the effective ongoing monitoring of the full implementation of Part B of the Act.

*Changes:* None.

*Timeframe for Public Reporting About LEA Performance Public Reporting and Privacy (§ 300.602(b))*

*Comment:* Several commenters requested that we change the public reporting timeline in proposed § 300.602(b)(1)(i)(A). Some of these commenters argued that the Secretary does not have the statutory authority to establish a timeline and that meeting the timeline would be an excessive burden on States. Other commenters agreed with the concept of a timeline and offered suggestions as to what the timeline should be. Some commenters suggested that the regulations allow for State-determined timelines; others recommended timelines ranging from 90 to 120 days following a State's submission of its APR to the Secretary; still others recommended a 60 day timeline beginning with a State's receipt of its annual determination from the Secretary. Commenters stated that a State-determined timeline or a timeline triggered by the State's receipt of it annual determination from the Secretary would allow for a more careful analysis of individual LEA data, thereby ensuring more accurate public reporting on the performance of each LEA.

*Discussion:* Section 300.602(b)(1)(i)(A) implements section 616(b)(2)(C)(ii)(I) of the Act. Although the Act is silent on the timeline for public reporting, section 607(a) of the Act provides that the Secretary shall issue regulations to the extent that such regulations are necessary to ensure that there is compliance with specific requirements of the Act. We proposed a timeline for public reporting in the NPRM because there was uncertainty in the field about reporting requirements. Specifically, following the publication of the Part B regulations in 2006, the Department received many informal inquiries from SEA personnel and other interested parties regarding the timeline for reporting information to the public about LEAs' performance relative to its State's targets. It is still the Department's position, after consideration of the comments, that establishing a definitive timeline is necessary to ensure that each State provides timely information to the public.

We agree, however, with the commenters who suggested that an extended timeline would allow for more accurate analysis of LEA data, thereby improving the quality of information reported to the public and, ultimately, contributing to improved outcomes for children with disabilities and their families. Additionally, extending the timeline will reduce the burden associated with establishing a timeline for public reporting. Therefore, we have revised the timeline in § 300.602(b)(1)(i)(A) to require a State to report annually on the performance of each LEA located in the State on the targets in the State's SPP as soon as practicable but no later than 120 days following the submission of its APR to the Secretary under § 300.602(b)(2).

*Changes:* We have replaced the 60 day timeline in § 300.602(b)(2) with the requirement that the State report on the performance of each LEA located in the State on the targets in the State's SPP as soon as practicable but no later than 120 days following the State's submission of its APR to the Secretary.

*Comment:* One commenter suggested that changes to § 300.602 are not necessary and that issuing administrative guidance on public reporting requirements, including timelines, would be more appropriate.

*Discussion:* Public accountability is served by requiring States to make the documents referenced in § 300.602(b)(1)(i)(B) available to the public within a specific timeframe. A regulation provides a degree of certainty on the timing of notice to the public that administrative guidance would not. We are aware that a number of States did not post public reports on LEA performance for FFY 2005 year by the time they submitted their APRs on FFY 2006. Therefore, regulatory action, rather than non-regulatory guidance is needed to ensure the proper and effective implementation of the requirements of Part B of the Act.

*Changes:* None.

*Comment:* One commenter noted that proposed § 300.602(b)(1)(i)(B) differs from current § 300.602(b) in that it refers to the State's Web site as opposed to the SEA's Web site. This commenter requested that the Department clarify whether the information must be posted on the SEA's or the State's Web site in instances where SEAs have Web sites that are separate from State government Web sites.

*Discussion:* We agree that the reference in the regulations should be to the SEA's Web site, rather than to the State's Web site, and have made this change.

*Changes:* Sections 300.602(b)(1)(i)(B) and 300.606 have been revised to require posting on the SEA's Web site, rather than the State Web site.

*Comment:* Another commenter requested that the Department clarify each State's obligation to make public any former reports on the performance of the LEAs within the State as well as the time frame when this information must be made available to the public.

*Discussion:* Neither the Act nor the regulations address the public posting of reports on the performance of the LEAs that were issued prior to the promulgation of these regulations. Posting historical documents related to the implementation of the IDEA on an SEA's Web site may be beneficial, but it is not required by the Act or the regulations implementing Part B of the Act. The decision to post historical documents and a timeline for posting these reports and notices would be most appropriately decided by each State.

*Changes:* None.

*Additional Information To Be Made Available to the Public (§ 300.602)*

*Comment:* One commenter suggested that the requirement in § 300.602(b)(1)(i)(B) to distribute the State's SPP, the State's APR, and the State's annual reports on the performance of LEAs to the media and public agencies represents an undue paperwork burden on SEAs and would

result in the excessive distribution of paper.

*Discussion:* Neither § 300.602(b)(1)(i)(B) nor section 616(b)(2)(C)(ii)(I) of the Act requires the distribution of paper copies of the SPP and APRs to the media and public agencies. Therefore, we do not agree that implementing this requirement would result in an excessive distribution of paper copies of these reports.

*Changes:* None.

*Notifying the Public of Enforcement Actions (§ 300.606)*

*Comment:* One commenter requested that the Department require SEAs to report to the public any enforcement actions taken against their LEAs pursuant to § 300.604 because doing so would be consistent with publication of enforcement actions against the State by the Secretary of Education.

*Discussion:* Neither the Act nor these regulations require SEAs to publicly report on enforcement actions taken against LEAs in the State. The decision to report to the public on enforcement actions imposed on an LEA is best left to each State to decide because individual LEA circumstances vary across each State and no one set of requirements is appropriate in every situation. For example, publicly reporting enforcement actions taken against an LEA with limited numbers of children with disabilities would not be appropriate if that public reporting would in any way reveal personally identifiable information of children with disabilities in that LEA. However, in the interest of transparency and public accountability, the Department encourages States, where appropriate, to report to the public on any enforcement actions taken against LEAs under § 300.604.

*Changes:* None.

*Comment:* One commenter stated that increasing public accountability is important and requested that the regulations require States and districts to publicly post and make available to the public the Department's SPP/APR determination letters as well as Federal- or State-required corrective actions and enforcement actions.

*Discussion:* We encourage States to post all information, including corrective actions and enforcement actions related to their SPP/APR, on their Web sites. However, regulating on this issue, as the commenter requested, is not necessary because this information is posted on the Department's Web site when the Department responds to States' SPP/APR submission. These response letters are typically issued in June of each year following the States' submission of their SPP/APR and posted on the Department's Web site at: *http://www.ed.gov/fund/data/report/idea/partbspap/index.html.*

*Changes:* None.

*Comment:* One commenter requested that the phrase "proposing to take" in proposed § 300.606 be clarified or eliminated. The commenter recommended using the language from page 27694 of the NPRM stating that a State must provide public notice when the Secretary "takes" an enforcement action as a result of annual determinations under § 300.604.

*Discussion:* The language in § 300.606 is accurate and we decline to make the requested change for the following reasons. Section 300.606 implements section 616(e)(7) of the Act, and requires a State that has received notice, under section 616(d)(2) of the Act, of a pending enforcement action against the State under section 616(e) of the Act to provide public notice of the pendency of that action. Pursuant to section 616(d)(2)(B) of the Act, a State that has been determined to "need intervention" for three consecutive years or "need substantial intervention" in implementing the requirements of Part B of the Act, faces enforcement actions and is entitled to reasonable notice and an opportunity for a hearing on such a determination. If a State requests a hearing on a determination, the Department's final determination would not be made until after that hearing. In this situation, the enforcement action also would depend on the outcome of the hearing and final determination. Therefore, in a case such as this, the public must be notified that the Secretary is proposing to take, but has not yet taken, an enforcement action pursuant to § 300.604.

*Changes:* None.

*Comment:* One commenter stated that the changes in proposed § 300.606 are unnecessary because current § 300.606 already requires the public to be notified of an action "taken pursuant to § 300.604." The commenter stated that specifying in these regulations that "public notice" consists of posting information on a Web site and distributing information to the media and public agencies is unnecessary to ensure compliance with IDEA.

*Discussion:* We disagree with the commenter. We have received numerous inquiries regarding current § 300.606 and whether this provision requires public notification of each determination of "needs assistance", "needs intervention" and "needs substantial intervention" or whether it merely requires States to notify the public of enforcement actions taken by the Secretary. We intend for § 300.606, as proposed in the NPRM, to clarify the public reporting requirements by indicating that a State must provide public notice of any enforcement action taken by the Secretary pursuant to § 300.604 by posting the notice on the SEA's Web site and distributing the notice to the media and through public agencies. This clarification is further designed to minimize a State's reporting burden while providing the public with appropriate notice of the actions taken by the Secretary as a result of the determinations required by section 616(d) of the Act and § 300.603. For these reasons, we decline to make any regulatory changes based on this comment.

*Changes:* None.

*Subgrants to LEAs (§ 300.705(a))*

*Comment:* A few commenters supported the proposed changes to § 300.705(a) clarifying that States are required to make a subgrant under section 611(f) of the Act to eligible LEAs, including public charter schools that operate as LEAs, even if the LEA is not serving any children with disabilities, because all LEAs have a responsibility to identify and provide services to children with disabilities. The commenters stated that the Department should ensure that a newly created LEA not serving any children with disabilities in the first year would still be eligible for some IDEA funds (e.g., based on enrollment and the number of students in poverty) to allow the new LEA to conduct child find activities and serve any students who are identified as eligible for special education services later in the year.

Some commenters opposed this provision and recommended that given the current level of IDEA Federal funding, funds should be used for direct services for students who are currently eligible for special education and related services. Additionally, one of these commenters expressed concern that § 300.705(a) would require revising current State and local funding processes, which would place accounting and administrative burdens on both State and local systems. A few commenters stated that the proposed change to § 300.705(a) is unnecessary because States have been successful in ensuring that small school districts receive allocations when they enroll a student with a disability. Lastly, one commenter suggested that the proposed changes could be handled through administrative guidance, rather than regulations.

*Discussion:* Section 300.705(a), consistent with section 611(f)(1) of the Act, requires each State to provide subgrants to LEAs, including public charter schools that operate as LEAs in the State, that have established their eligibility under section 613 of the Act. Section 613(a) of the Act states that an LEA is eligible for assistance under Part B of the Act for a fiscal year if the LEA submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in section 613(a) of the Act. There is no requirement in section 613(a) of the Act that an LEA must be serving children with disabilities for an LEA to be eligible for a subgrant. Requiring States to make a subgrant to all eligible LEAs, including public charter schools that operate as LEAs, will ensure that LEAs have Part B funds available if they are needed to conduct child find activities or to serve children with disabilities who subsequently enroll or are identified during the year. Regardless of the level of funding made available for the Part B program under the Act, neither the Act nor the implementing regulations require that Part B funds be spent only for direct services for students who are currently eligible for special education and related services. As in the past, LEAs may use Part B funds for direct services to children with disabilities or for other permissible activities, such as child find, professional development, and more recently, for coordinated early intervening services in accordance with § 300.226.

The Grants to States and Preschool Grants for Children with Disabilities Programs are forward-funded programs and LEAs generally receive a subgrant at the beginning of the school year to cover the costs of providing special education and related services to children with disabilities during the school year. Ensuring that all LEAs, including those that have no children with disabilities enrolled at the beginning of the school year, have section 611 and section 619 funds available will enable LEAs to meet their responsibilities under the Act during the school year if a child with a disability subsequently enrolls or a child is subsequently identified as having a disability.

We understand the commenter's concern that this change in the regulations may require States to revise their procedures for distributing Part B funds, and that there may be some administrative burden associated with these changes. However, the importance of ensuring consistency across States concerning the distribution of section 611 and section 619 funds outweighs the potential administrative burden. As previously stated in this preamble, making these funds available to LEAs is critical to ensure that each LEA is able to fulfill its responsibilities under the Act. We agree with commenters that some States have been successful in ensuring small LEAs receive allocations when they enroll students with disabilities after the school year has begun. However, given that the Act and the implementing regulations are silent on whether an SEA must make a subgrant to an LEA that is not serving any children with disabilities, clarification is necessary in §§ 300.705(a) and 300.815 to remove any ambiguity in this regard. Revising the regulations, rather than remaining silent on the issue or issuing guidance, will ensure that all States treat LEAs in the same manner, including those LEAs that are not serving any children with disabilities, when allocating Part B funds.

*Changes:* None.

*Comment:* A few commenters recommended that the proposed regulations be modified to give States the option of making subgrants to eligible LEAs, including public charter schools that operate as LEAs, when an LEA is not currently serving any students with disabilities. The commenters stated that States have different needs and some have policies in place to help new charter schools meet their child find obligations.

*Discussion:* We recognize that States are in a unique position to assist new LEAs, including charter schools that operate as LEAs. However, requiring States to make a subgrant under section 611(f) and section 619(g) of the Act to eligible LEAs, including public charter schools that operate as LEAs, even if the LEA is not serving any children with disabilities, ensures consistency across States and an equitable distribution of Part B funds. We also recognize that some States may not assign child find responsibility to public charter schools that operate as LEAs. However, all LEAs, including public charter schools that operate as LEAs, have other responsibilities under the IDEA that may need to be carried out during the school year, such as serving a child with a disability who is identified during the school year. It is the Department's position that it is necessary to require States to make (rather than give them the option of making) subgrants to eligible LEAs not currently serving any students with disabilities, to ensure that all States treat LEAs in the same manner, including those LEAs that are not serving any children with disabilities, when allocating Part B funds.

*Changes:* None.

*Comment:* One commenter recommended that the Department withdraw the proposed changes and add, if necessary, a new paragraph in §§ 300.705 and 300.815 that would allow a new or expanded charter school to receive an allocation under §§ 300.705 and 300.815, respectively, if the school demonstrates to the SEA that the school is serving children with disabilities in accordance with the requirements of Part B of the Act within the time frame established by the SEA under 34 CFR 76.788(b)(2)(i), which provides that once a charter school LEA has opened or significantly expanded its enrollment, the charter school LEA must provide actual enrollment and eligibility data to the SEA at a time the SEA may reasonably require.

*Discussion:* We do not agree that the change suggested by the commenter is necessary. An eligible public charter school LEA has the responsibility to meet the requirements of the Act during the school year regardless of whether the LEA is serving children with disabilities at the time the subgrant is calculated based on actual enrollment and eligibility data. In recognition of these responsibilities, requiring an SEA to make an initial subgrant to a new or expanded public charter school LEA is appropriate, even if it is not serving any children with disabilities at the time actual enrollment and eligibility data are provided to the SEA.

*Changes:* None.

*Reallocation of LEA Funds (§ 300.705(c))*

*Comment:* One commenter supported proposed § 300.705(c). Another commenter requested clarification as to the types of activities that could be supported with the Part B funds that an LEA does not need to provide FAPE, if a State chooses to retain the funds, instead of reallocating the funds to other LEAs in the State. One commenter recommended that the State be authorized to reallocate the funds intended to be allocated to an LEA or retain them for State-level activities only after consulting with the LEA to assess the LEA's needs and after determining that the LEA does not need the funds.

*Discussion:* A State, under § 300.705(c), may use funds from an LEA that does not need the funds for any allowable activities permitted under § 300.704, to the extent that the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704(a) and (b). To the extent the State has not reserved the maximum

amount for administration, the State may use those funds for administrative costs consistent with § 300.704(a). To the extent the State has not reserved the maximum amount of funds available for other State-level activities, the State may use those funds for any allowable activities permitted under § 300.704(b)(3) and (4) including, but not limited to, technical assistance, personnel preparation, and assisting LEAs in providing positive behavioral interventions and supports. Additionally, if the State has opted to finance a high-cost fund under § 300.704(c) and has not reserved the maximum amount available for the fund, the State may use those funds for the LEA high-cost fund consistent with § 300.704(c).

In response to the commenter that recommended that the State be permitted to reallocate funds only after consulting with the LEA to assess the LEA's needs, nothing in these regulations prohibits a State from working with an LEA to assess the needs of the LEA before determining that the LEA will not be able to use the funds prior to the end of the carryover period. However, we believe it would be burdensome and unnecessary to require that an SEA consult with an LEA to assess the LEA's needs prior to a reallocation of the LEA's remaining unobligated funds. The LEA would have already had sufficient time and incentive during the carryover period of availability to assess its own needs and make appropriate obligations for needed expenditures.

*Changes:* None.

*Subgrants to LEAs (§ 300.815)*

*Comment:* One commenter supported the changes proposed to § 300.815. Another commenter opposed this provision, which would require States to allocate funds under section 619 of the Act to an LEA even if the LEA is not serving children with disabilities; this commenter stated that the funds should be directed toward serving preschool children with disabilities.

*Discussion:* Section 300.815, consistent with section 619(g) of the Act, requires that each State provide subgrants to LEAs, including public charter schools that operate as LEAs in the State, that are responsible for providing education to children aged three through five years and have established their eligibility under section 613 of the Act. Section 613(a) of the Act states that an LEA is eligible for assistance under Part B of the Act for a fiscal year if the LEA submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in section 613(a) of the Act. There is no requirement in section 613(a) of the Act that an LEA must be serving preschool children with disabilities for an LEA to be eligible for a subgrant. Requiring States to make a subgrant to all eligible LEAs responsible for providing education to preschool children, including public charter schools that operate as LEAs, will help ensure that LEAs have Part B funds available if they are needed to conduct child find activities or to serve preschool children with disabilities who subsequently enroll or are identified during the school year. As in the past, LEAs may use section 619 funds for direct services to preschool children with disabilities or for other permissible activities, such as child find and professional development.

*Changes:* None.

*Reallocation of LEA Funds (§ 300.817)*

*Comment:* One commenter supported the changes reflected in proposed § 300.817. Another commenter opposed the changes, stating that the time and effort needed for States to monitor LEAs as provided in § 300.817 could be better used elsewhere.

*Discussion:* We understand the commenter's concern that this provision will require States to revise their procedures for monitoring the obligation of funds. However, requiring an SEA, after it distributes Part B funds to an LEA that is not serving any children with disabilities, to determine, within a reasonable period of time prior to the end of the carryover period in § 300.709, whether the LEA has obligated those funds will prevent the funds from lapsing and enable the State to use those funds for other purposes. Therefore, the benefit of this provision outweighs the potential administrative burden.

*Changes:* None.

**Executive Order 12866**

*Costs and Benefits*

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive Order and review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive Order.

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action as required by Executive Order 12866.

*Summary of Public Comments*

The Department received one comment on the analysis of costs and benefits included in the NPRM. These commenters suggested that the Department should only propose new regulations in conjunction with the reauthorization of the Act because any subsequent regulations would require States to amend their regulations and this process is expensive and time consuming. These comments were considered in conducting the analysis of the costs and benefits of the final regulations. The Department's estimates and assumptions included in the analysis are described in the following paragraphs.

1. Summary of Costs and Benefits

The potential costs associated with these final regulations are those resulting from statutory requirements and those we have determined are necessary to administer these programs effectively and efficiently. In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs. We also have determined that this regulatory action will not unduly interfere with State, local, private, and tribal governments in the exercise of their governmental functions.

The following is an analysis of the costs and benefits of the most significant changes reflected in these final regulations. In conducting this analysis, the Department examined the extent the changes made by these regulations add to or reduce the costs for States, LEAs, and others, as compared to the costs of implementing the current Part B program regulations. Variations in practice from State to State and a lack of pertinent data make it difficult to predict the effect of these changes. However, based on the following analysis, the Secretary has concluded

that the changes reflected in the final regulations will not impose significant net costs on the States, LEAs, and others.

*Parental Revocation of Consent for Special Education Services (§§ 300.9 and 300.300)*

Section 300.300(b)(4) allows a parent, at any time subsequent to the initial provision of special education and related services, to revoke consent in writing for the continued provision of special education and related services. Once the parent revokes consent for special education and related services the public agency must provide the parent with prior written notice consistent with § 300.503. The final regulations do not allow public agencies to take steps to override a parent's refusal to consent to further services.

We do not agree with the commenters who recommended that the Department postpone making these regulatory revisions until the next reauthorization of IDEA. The changes reflected in §§ 300.9 and 300.300 were made in response to comments received on the consent provisions proposed in the notice of proposed rulemaking for Part B of the Act that was published in the **Federal Register** on June 21, 2005 (70 FR 35782), including comments requesting that we address situations when a child's parent wants to discontinue special education and related services because he or she believes that the child no longer needs those services. In response to these comments, we indicated that we would solicit comment on this suggested change in a subsequent notice of proposed rulemaking. While States may have to revise some of their regulations to conform with the changes in §§ 300.9 and 300.300, the provisions related to parental revocation of consent may reduce burden on, and costs to, LEAs by relieving them of the obligation to override a parent's refusal to consent subsequent to the initiation of special education services through informal means or through due process procedures. Therefore, the Department's position is that allowing parents to revoke consent for special education and related services will not have a significant cost impact on States, LEAs, or others.

2. Clarity of the Regulations

The Department received one comment concerning the clarity of the regulations proposed in the NPRM. The commenter stated that the regulations are written at an advanced reading level, not written in plain language, and are in a font that is too small. We have reviewed the regulations to ensure that they are easy to understand and written in plain language. Additionally, the final regulations will be posted on the Department's Web site and the Department's Web site meets the accessibility standards included in section 508 of the Rehabilitation Act of 1973, as amended.

**Paperwork Reduction Act of 1995**

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), we have assessed the information collections in these regulations that are subject to review by the Office of Management and Budget. Based on this analysis, the Secretary has concluded that these amendments to the Part B IDEA regulations do not impose additional information collection requirements. The changes to § 300.602(b)(1)(i)(B) add the State's APR to the list of documents that a State must make available through public means, and specify that the SEA must make the State's SPP/APR and the State's annual reports on the performance of each LEA in the State available to the public by posting the documents on the SEA's Web site and distributing the documents to the media and through public agencies. Each State already is required to report to the Secretary on the annual performance of the State as a whole in the APR. We expect the additional time for reporting to the public to be minimal because the APR is a completed document. Additionally, this reporting requirement is within the established reporting and recordkeeping estimate of current information collection 1820–0624 (71 FR 46751–46752). States already are required by current § 300.602(a) and (b)(1)(i)(A) to analyze the performance of each LEA on the State's targets, and to report annually to the public on the performance of each LEA in meeting the targets. Requiring that these documents be posted on the SEA's Web site and be distributed to the media and through public agencies merely adds specificity about the means of public reporting. The additional time for reporting to the public through these means will be minimal and is within the established reporting and recordkeeping estimate of current information collection 1820–0624 (71 FR 46751–46752).

**Intergovernmental Review**

This program is subject to 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 Federal financial assistance.

In accordance with this order, we intend this document to provide early notification of the Department's specific plans and actions for these programs.

**Assessment of Educational Impact**

In the NPRM, and in accordance with section 411 of GEPA, 20 U.S.C. 1221e–4, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our own review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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**List of Subjects in 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.

Dated: November 21, 2008.

**Margaret Spellings,**

*Secretary of Education.*

■ For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations as follows:

## PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

■ 1. The authority citation for part 300 continues to read as follows:

**Authority:** 20 U.S.C. 1221e–3, 1406, 1411–1419, unless otherwise noted.

* * * * *

■ 2. Section 300.9 is amended by adding a new paragraph (c)(3).

The addition reads as follows:

**§ 300.9 Consent.**

* * * * *

(c) * * *

(3) If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

* * * * *

■ 3. Section 300.177 is revised to read as follows:

**§ 300.177 States' sovereign immunity and positive efforts to employ and advance qualified individuals with disabilities.**

(a) *States' sovereign immunity.*

(1) A State that accepts funds under this part waives its immunity under the 11th amendment of the Constitution of the United States from suit in Federal court for a violation of this part.

(2) In a suit against a State for a violation of this part, remedies (including remedies both at law and in equity) are available for such a violation in the suit against any public entity other than a State.

(3) Paragraphs (a)(1) and (a)(2) of this section apply with respect to violations that occur in whole or part after the date of enactment of the Education of the Handicapped Act Amendments of 1990.

(b) *Positive efforts to employ and advance qualified individuals with disabilities.* Each recipient of assistance under Part B of the Act must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act.

(Authority: 20 U.S.C. 1403, 1405)

■ 4. Section 300.300 is amended by:

■ A. Revising paragraphs (b)(3) and (b)(4).

■ B. In paragraph (d)(2), removing the words "paragraph (a)" and inserting, in their place, the words "paragraphs (a), (b), and (c)".

■ C. In paragraph (d)(3), adding after the words "paragraphs (a)" the words ", (b), (c),".

The revision reads as follows:

**§ 300.300 Parental consent.**

* * * * *

(b) * * *

(3) If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency—

(i) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;

(ii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and

(iii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child.

(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency—

(i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with § 300.503 before ceasing the provision of special education and related services;

(ii) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and

(iv) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for further provision of special education and related services.

* * * * *

■ 5. Section 300.512 is amended by revising paragraph (a)(1) to read as follows:

**§ 300.512 Hearing rights.**

(a) * * *

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, except that whether parties have the right to be represented by non-attorneys at due process hearings is determined under State law;

* * * * *

■ 6. Section 300.600 is amended by:

■ A. Revising paragraph (a).

■ B. Adding a new paragraph (e).

The revision and addition read as follows:

**§ 300.600 State monitoring and enforcement.**

(a) The State must—

(1) Monitor the implementation of this part;

(2) Make determinations annually about the performance of each LEA using the categories in § 300.603(b)(1);

(3) Enforce this part, consistent with § 300.604, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in § 300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA), (b)(2)(i) (a corrective action plan or improvement plan), (b)(2)(v) (withholding funds, in whole or in part, by the SEA), and (c)(2) (withholding funds, in whole or in part, by the SEA); and

(4) Report annually on the performance of the State and of each LEA under this part, as provided in § 300.602(b)(1)(i)(A) and (b)(2).

* * * * *

(e) In exercising its monitoring responsibilities under paragraph (d) of this section, the State must ensure that when it identifies noncompliance with the requirements of this part by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance.

* * * * *

■ 7. Section 300.602(b)(1)(i) is revised to read as follows:

**§ 300.602 State use of targets and reporting.**

* * * * *

(b) * * *

(1) * * *

(i) Subject to paragraph (b)(1)(ii) of this section, the State must—

(A) Report annually to the public on the performance of each LEA located in the State on the targets in the State's performance plan as soon as practicable but no later than 120 days following the State's submission of its annual performance report to the Secretary under paragraph (b)(2) of this section; and

(B) Make each of the following items available through public means: the State's performance plan, under § 300.601(a); annual performance reports, under paragraph (b)(2) of this section; and the State's annual reports on the performance of each LEA located in the State, under paragraph (b)(1)(i)(A)

of this section. In doing so, the State must, at a minimum, post the plan and reports on the SEA's Web site, and distribute the plan and reports to the media and through public agencies.

* * * * *

■ 8. Section 300.606 is revised to read as follows:

**§ 300.606 Public attention.**

Whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action pursuant to § 300.604, the State must, by means of a public notice, take such actions as may be necessary to notify the public within the State of the pendency of an action pursuant to § 300.604, including, at a minimum, by posting the notice on the SEA's Web site and distributing the notice to the media and through public agencies.

(Authority: 20 U.S.C. 1416(e)(7))

■ 9. Section 300.705 is amended by:
■ A. Revising paragraph (a).
■ B. In paragraph (b)(2)(ii), removing the word "and" at the end of the paragraph.
■ C. In paragraph (b)(2)(iii), removing the punctuation "." and adding, in its place, the words "; and".
■ D. Adding a new paragraph (b)(2)(iv).
■ E. Revising paragraph (c).

The revisions and addition read as follows:

**§ 300.705 Subgrants to LEAs.**

(a) *Subgrants required.* Each State that receives a grant under section 611 of the Act for any fiscal year must distribute any funds the State does not reserve under §300.704 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act for use in accordance with Part B of the Act. Effective with funds that become available on the July 1, 2009, each State must distribute funds to eligible LEAs, including public charter schools that operate as LEAs, even if the LEA is not serving any children with disabilities.

(b) * * *

(2) * * *

(iv) If an LEA received a base payment of zero in its first year of operation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities. The State must divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on July 1, 2009.

* * * * *

(c) *Reallocation of LEA funds.* (1) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under this part that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704.

(2) After an SEA distributes funds under this part to an eligible LEA that is not serving any children with disabilities, as provided in paragraph (a) of this section, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those funds not obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704.

* * * * *

■ 10. Section 300.815 is revised to read as follows:

**§ 300.815 Subgrants to LEAs.**

Each State that receives a grant under section 619 of the Act for any fiscal year must distribute all of the grant funds the State does not reserve under § 300.812 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act. Effective with funds that become available on July 1, 2009, each State must distribute funds to eligible LEAs that are responsible for providing education to children aged three through five years, including public charter schools that operate as LEAs, even if the LEA is not serving any preschool children with disabilities.

(Authority: 20 U.S.C. 1419(g)(1))

■ 11. Section 300.816 is amended by:
■ A. In paragraph (b)(2), removing the word "and".
■ B. In paragraph (b)(3), removing the punctuation "." and adding, in its place, the words "; and".
■ C. Adding a new paragraph (b)(4) to read as follows:

**§ 300.816 Allocations to LEAs.**

* * * * *

(b) * * *

(4) If an LEA received a base payment of zero in its first year of operation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities aged three through five years. The State must divide the base allocation determined under paragraph (a) of this section for the LEAs that would have been responsible for serving children with disabilities aged three through five years now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities aged three through five years currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on July 1, 2009.

* * * * *

■ 12. Section 300.817 is revised to read as follows:

**§ 300.817 Reallocation of LEA funds.**

(a) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged three through five years residing in the area served by the LEA with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.

(b) After an SEA distributes section 619 funds to an eligible LEA that is not serving any children with disabilities aged three through five years, as provided in § 300.815, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those funds not

obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.

(Authority: 20 U.S.C. 1419(g)(2))

[FR Doc. E8–28175 Filed 11–28–08; 8:45 am]
BILLING CODE 4000–01–P