The Final Regulations
as they specifically address
Students with Limited English Proficiency and Parents Whose Native Language is Other Than English.

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The final regulations govern the Assistance to States for Education of Children with Disabilities Program and the Preschool Grants for Children with Disabilities and implement changes made to the reauthorized Individuals with Disabilities Education Act (IDEA).

The focus of this document is to concentrate attention on the regulations directed to students with limited English proficiency and parents whose native language is other than English. Although this document's value is its focus on a particular group of students and their parents, that is also its limitation. The complete Final Regulations should be read and studied as they contain essential information on many other topics, as well as put the information in this document in perspective.

The texts contained in this document are straight from the Final Regulations which can be found at the website www. http://www.ed.gov/legislation/FedRegister/finrule/2006-3/081406a.html No changes were made, but to facilitate finding information in this document, callouts with a short description of the text are placed on the right side of the margin for the first two sections of this document. Page numbers where the text can be found in the Final Regulations are included throughout the document.

This document is divided into the same three sections as the Final Regulations:

- **the summary of major substantive changes,**
- **analysis of comments and changes, and**
- **code of regulations.**

The first section is simply a summary of changes to the final regulations from the regulations proposed in. The second section presents the comments on the proposed regulations submitted by interested individuals and the accompanying discussion by the Department of Education. This discussion section is especially valuable in understanding the regulations and the basis for the regulations. The third section are selected texts from Part 300—Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities.

SUMMARY OF THE MAJOR SUBSTANTIVE CHANGES

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Section 300.309 (Determining the existence of a specific learning disability) has been revised, as follows:

(1) Paragraph (a) of Sec. 300.309 has been changed (A) to clarify that the group described in 300.306 may determine that a child has a specific learning disability if the child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of eight areas (e.g., oral expression, basic reading skill, etc.), when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards; and (B) to add ``limited English proficiency'' to the other five conditions that could account for the child's learning problems, and that the group considers in determining whether the child has an SLD.

In determining if a SLD exists, the "group" must consider if limited English proficiency is the possible source of the learning problems.

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(3) A new Sec. 300.311(a)(6) has been added to clarify that the documentation must include a statement of the determination of the group concerning the effects of visual, hearing, or motor disability, mental retardation, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency on the child's achievement level.

For a student suspected of SLD, there must be a statement of the effects of cultural factors and limited English proficiency

Section 300.322, regarding parent participation, has been revised to: (1) Include, in Sec. 300.322(d), examples of the records a public agency must keep of its attempts to involve the parents in IEP meetings; (2) add a new Sec. 300.322(e), which requires the public agency to take whatever action is necessary to ensure that the parent understands the proceedings of the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English; and (3) redesignate paragraph (e) as paragraph (f) accordingly.

Ensures parents understand proceedings of ARD/IEP meeting

ANALYSIS OF COMMENTS AND CHANGES

Page 46551

Comment: A few commenters suggested clarifying the word ``cultural'' in Sec. 300.8(c)(10)(ii) to clarify that cultural disadvantage or language cannot be the basis for determining that a child has a disability.

Discussion: We believe the term ``cultural'' is generally understood and do not see a need for further clarification. We also do not believe that it is necessary to clarify that language cannot be the basis for determining whether a child has a specific learning disability. Section 300.306(b)(1)(iii), consistent with section 614(b)(5)(C) of the Act, clearly states that limited English proficiency cannot be the basis for determining a child to be a child with a disability under any of the disability categories in Sec. 300.8.

Changes: None.

Cultural and language difference cannot be the basis for determining SLD.

Pages 6564 & 46565

Limited English Proficient (Sec. 300.27)

Comment: One commenter requested specific information about bilingual qualified personnel and qualified interpreters. Some commenters recommended including the definition of ``limited English

proficient'' in the regulations.

Discussion: Each State is responsible for determining the qualifications of bilingual personnel and interpreters for children with limited English proficiency.

The term limited English proficient is defined in the ESEA. For the reasons set forth earlier in this notice, we are not adding the definitions from other statutes to these regulations. However, we will include the current definition in section 9101(25) of the ESEA here for reference.

Definition of "Limited English Proficient"

The term limited English proficient when used with respect to an individual, means an individual--

(A) Who is aged 3 through 21;

(B) Who is enrolled or preparing to enroll in an elementary school or secondary school;

(C)(i) who was not born in the United States or whose native language is a language other than English;

(ii)(I) who is a Native American or Alaska Native, or a native resident of the outlying areas; and

(ii) who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or

(iii) who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and

(D) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual--

(i) the ability to meet the State's proficient level of achievement on State assessments described in section 1111(b)(3);

(ii) the ability to successfully achieve in classrooms where the language of instruction is English; or

(iii) the opportunity to participate fully in society.

Changes: None.

Page 46565

Comment: A few commenters expressed support for retaining the definition of native language, stating that it is important to clarify that sign language is the native language of many children who are deaf. One commenter stated it is important to clarify that the language normally used by the child may be different than the language normally used by the parents. Another commenter stated that the definition of native language does not adequately cover individuals with unique language and communication techniques such as deafness or blindness or children with no written language.

Definition of "native language"

Discussion: The definition of native language was expanded in the 1999 regulations to ensure that the full range of needs of children with disabilities whose native language is other than English is appropriately addressed.

Any direct contact including an evaluation of the child must be in the language normally used by the child.

The definition clarifies that in all direct contact with the child including an evaluation of the child), native language means the language normally used by the child and not that of the parents, if there is a difference between the two. The definition also clarifies that for individuals with deafness or blindness, or for individuals with no written language, the native language is the mode of communication that is normally used by the individual (such as sign language, Braille, or oral communication). We believe this language adequately addresses the commenters' concerns.

Page 46572

Comment: A few commenters recommended changing the definition of

interpreting services to clarify that the need for interpreting services must be based on a child's disability and not degree of English proficiency.

Discussion: The definition of interpreting services clearly states that interpreting services are used with children who are deaf or hard of hearing. The nature and type of interpreting services required for children who are deaf or hard of hearing and also limited in English proficiency are to be determined by reference to the Department's regulations and policies regarding students with limited English proficiency. For example, the Department's regulations in 34 CFR part 100, implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, require that recipients of Federal financial assistance ensure meaningful access to their programs and activities by students who are limited English proficient, including those who are deaf or hard of hearing. The requirement to provide services to students who are limited English proficient and others is also governed by various Department policy memoranda including the September 27, 1991 memorandum, ``Department of Education Policy Update on Schools' Obligations Toward National Origin Minority Students With Limited English Proficiency''; the December 3, 1985 guidance document, ``The Office for Civil Rights' Title VI Language Minority Compliance Procedures''; and the May 1970 memorandum to school districts, ``Identification of discrimination and Denial of Services on the Basis of National Origin,'' 35 FR 11595. These documents are available at http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklog&to=http://www.lep.gov. We do not believe additional clarification is necessary.

Changes: None.

Addresses the following:
- nature and type of interpreting services
- meaningful access to programs and activities by students who are LEP; and
- requirement to provide services to students who are LEP.

Page 46608

Comment: One commenter suggested changing ``parental consent'' to ``informed parental consent.'' One commenter recommended requiring public agencies to obtain parental consent each time the public agency seeks to access the parent's public benefits or insurance. Some commenters recommended removing the requirement to obtain parental consent to use Medicaid benefits to pay for services required under Part B of the Act. A few commenters opposed requiring parental consent, stating the process is an administrative burden. Other commenters recommended waiving the requirement for consent if the agency has taken reasonable measures to obtain such consent or the parent's consent was given to the State Medicaid Agency.

Discussion: In order for a public agency to use the Medicaid or other public benefits or insurance program in which a child participates to provide or pay for services required under the Act, the public agency must provide the benefits or insurance program with information from the child's education records (e.g., services provided, length of the services). Information from a child's education records is protected under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232(g) (FERPA), and section 617(c) of the Act. Under FERPA and section 617(c) of the Act, a child's education records cannot be released to a State Medicaid agency without parental consent, except for a few specified exceptions that do not include the release of education records for insurance billing purposes. Parental consent requires, among other things, that the parent be fully informed in his or her native language, or other mode of communication, consistent with Sec. 300.9. Thus, there is no need to change ``parental consent'' to ``informed consent,'' as recommended by one commenter. However, we believe it would avoid confusion for the references to ``consent'' in paragraphs (d) and (e) in Sec. 300.154 to be consistent. Therefore, we will add a reference to Sec. 300.9 in Sec. 300.154(d)(2)(iv)(A) and delete ``informed'' from Sec. 300.154(e)(1).

Requires that parents be fully informed in native language or other mode of communication

We believe obtaining parental consent each time the public agency seeks to use a parent's public insurance or other public benefits to provide or pay for a service is important to protect the privacy rights of the parent and to ensure that the parent is fully informed of a public agency's access to his or her public benefits or insurance and the services paid by the public benefits or insurance program. Therefore, we will revise Sec. 300.154(d)(2)(iv) to clarify that parental consent is required each time the public agency seeks to use the parent's public insurance or other public benefits. We do not believe that it would be appropriate to include a provision permitting waiver of parental consent in this circumstance, even where a public agency makes reasonable efforts to obtain the required parental consent. However, we agree with the commenter that a public agency could satisfy parental consent requirements under FERPA and section 617(c) of the Act if the parent provided the required parental consent to the State Medicaid agency, and the consent satisfied the Part B definition of consent in Sec. 300.9.

We also believe that it is important to let parents know that their refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. We will, therefore, add a new paragraph (B) to Sec. 300.154(d)(2)(iv) to make this clear.

Finally, because we have referenced the definition of consent in Sec. 300.9 throughout the rest of these regulations, rather than the consent provisions in Sec. 300.622, we have removed the reference to Sec. 300.622.

Changes: Section 300.154(d)(2)(iv) has been changed to clarify that consent must be obtained each time the public agency seeks to access a parent's public benefits or insurance and to clarify that a parent's refusal to allow access to the parent's public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parent. The reference to Sec. 300.622 has been removed and we have added ``consistent with Sec. 300.9'' following ``parental consent'' in Sec. 300.154(d)(2)(iv)(A). For consistency, we have removed ``informed'' before ``consent'' in Sec. 300.154(e)(1).

Pages 46626 & 46627

Comment: One commenter recommended specifying that unless LEAs have significant over-identification and over-representation of minority students in special education, LEAs may not use Federal Part B funds for early intervening services unless they can demonstrate that all eligible children are receiving FAPE. Another commenter suggested prohibiting the use of Part B funds for early intervening services if an LEA is not providing FAPE to all eligible children.

Discussion: The Act does not restrict the use of funds for early intervening services only to LEAs that can demonstrate that all eligible children with disabilities are receiving FAPE. Section 613(f)(1) of the Act generally permits LEAs to use funds for early intervening services for children in kindergarten through grade 12 (with a particular emphasis on children in kindergarten through grade 3) who have not been identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment. No other restrictions on this authority, such as a requirement that the LEA first demonstrate that it is providing FAPE to all eligible children, are specified or appropriate. The authority to use some Part B funds for early intervening services has the potential to benefit special education, as well as the education of other children, by reducing academic and behavioral problems in the regular educational environment and reducing the number of referrals to special education that could have been avoided

by relatively simple regular education interventions. Therefore, we believe the use of Part B funds for early intervening services should be encouraged, rather than restricted.

In one instance, however, the Act requires the use of funds for early intervening services. Under section 618(d)(2)(B) of the Act, LEAs that are identified as having significant disproportionality based on race and ethnicity with respect to the identification of children with disabilities, the placement of children with disabilities in particular educational settings, and the incidence, duration, and type of disciplinary actions taken against children with disabilities, including suspensions and expulsions, are required to reserve the maximum amount of funds under section 613(f)(1) of the Act to provide early intervening services to children in the LEA, particularly to children in those groups that were significantly over-identified. This requirement is in recognition of the fact that significant disproportionality in special education may be the result of inappropriate regular education responses to academic or behavioral issues.

Changes: None.

Requires that Federal Part B Funds be fully used on early intervening services if there is a significant disproportionality based on race and ethnicity.

Additionally specifies that funds be for the early intervening services targeted to over-represented students.

Page 46631

Comment: One commenter recommended that the regulations specify the minimum steps that public agencies must take to obtain consent for initial evaluations from parents of children who are wards of the State. Another commenter recommended that the regulations define ``reasonable efforts,'' as used in new Sec. 300.300(a)(1)(iii) (proposed Sec. 300.300(a)(2)(i)). One commenter recommended requiring LEAs to maintain documentation of their efforts to obtain parental consent for initial evaluations, including attempts to obtain consent by telephone calls, visits to the parent's home, and correspondence in the parent's native language. Several commenters requested that the requirements in current Sec. 300.345(d) be included in new Sec. 300.300(a)(2)(i) (proposed Sec. 300.300(a)(2)(ii)(A)). Current Sec. 300.345(d) requires a public agency to document the specific steps it has taken to arrange a mutually convenient time and place for an IEP Team meeting (e.g., detailed records of telephone calls, any correspondence sent to the parents, visits made to the parent's home or place of employment) and it is cross-referenced in current Sec. 300.505(c)(2) to identify documentation of the reasonable measures that an LEA took to obtain consent for a reevaluation.

Discussion: We believe it is important to emphasize that a public agency must make reasonable efforts to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability. This includes the parent of a child who is a ward of the State. Therefore, we will add a new paragraph (a)(1)(iii) to Sec. 300.300 to make clear that a public agency must make reasonable efforts to obtain informed parental consent whenever a public agency seeks to conduct an initial evaluation of a child to determine whether the child is a child with a disability. This requirement applies to all children including children who are wards of the State. With the addition of this new paragraph, the requirement for public agencies to make reasonable efforts to obtain informed consent from the parent for an initial evaluation for children who are wards of the State in Sec. 300.300(a)(2)(i) is no longer necessary and will be removed.

Informed consent from the parent for initial evaluation.

We also agree with the commenters that a public agency should document and make the same reasonable efforts to obtain consent for an initial evaluation from a parent, including a parent of a child who is a ward of the State, that are required when a public agency attempts to arrange a mutually convenient time and place for an IEP Team meeting (e.g., detailed records of telephone calls, any correspondence sent to the parents, visits made to the parent's home or place of employment),

and will add a new paragraph (d)(5) to make this clear. We recognize that the statute uses both ``reasonable measures'' and ``reasonable efforts'' when referring to a public agency's responsibility to obtain parental consent for an evaluation, initial services, and a reevaluation. We believe these two phrases, when used in this context, have the same meaning and, therefore, have used ``reasonable efforts'' throughout the regulations related to parental consent for consistency.

Changes: We have added a new paragraph (a)(1)(iii) to Sec. 300.300 to require a public agency to make reasonable efforts to obtain informed parental consent for an initial evaluation. We will remove Sec. 300.300(a)(2)(i) because it is redundant with the new paragraph. Section 300.300(a)(2) has been reformatted consistent with the removal of paragraph (a)(2)(i). We also have added a new paragraph (d)(5) to Sec. 300.300 to require a public agency to document its attempts to obtain parental consent using the procedures in Sec. 300.322(d).

Page 46632

Comment: A few commenters recommended clarifying the parental consent requirements for an initial evaluation. Many commenters recommended that LEAs maintain documentation that the parent has been fully informed and understands the nature and scope of the evaluation. One commenter recommended that the regulations require that informed parental consent for an initial evaluation be documented in writing.

Discussion: Section 300.300(a)(1)(i), consistent with section 614(a)(1)(D)(i)(I) of the Act, is clear that the public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under Sec. 300.8 must obtain consent from the parent of the child before conducting the evaluation. Consent, as defined in Sec. 300.9, means that the parent has been fully informed in his or her native language, or other mode of communication, and understands and agrees in writing to the initial evaluation. The methods by which a public agency seeks to obtain parental consent for an initial evaluation (beyond the requirement that the public agency use the parent's native language or mode of communication) and how a public agency documents its efforts to obtain the parent's written consent are appropriately left to the discretion of SEAs and LEAs.

Parent informed in his/her native language or other mode of communication and understands & agrees in writing to initial evaluation.

Page 46642

Comment: A few commenters stated that the notice to parents regarding the evaluation procedures the agency proposes to use must be provided in the native language of the parents, and recommended that this requirement be clarified in Sec. 300.304.

Discussion: Information regarding the evaluation procedures the agency proposes to use, as required in Sec. 300.303(a), is included in the prior written notice required in Sec. 300.503(c)(1)(ii). Section 300.503(c)(1)(ii) requires, that the prior written notice to parents 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. We see no need to repeat these requirements in Sec. 300.304 and believe that doing so could cause confusion about the status of other applicable requirements that would not be repeated in this section.

Changes: None.

Prior written notice to parents in native language or other mode of communication.

Page 46642

Comment: One commenter recommended clarifying that differences in language and socialization practices must be considered when determining eligibility for special education and related services, including biases related to the assessment.

Discussion: We do not believe that the clarification requested by the commenter is necessary. The Act and these regulations recognize

that some assessments may be biased and discriminatory for children with differences in language and socialization practices. Section 614(b)(3)(A)(i) of the Act requires that assessments and other evaluation materials used to assess a child under the Act are selected and administered so as not to be discriminatory on a racial or cultural basis. Additionally, in interpreting evaluation data for the purpose of determining eligibility of a child for special education and related services, Sec. 300.306(c) requires each public agency to draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, as well as information regarding a child's physical condition, social or cultural background, and adaptive behavior. We believe that these provisions provide adequate protection for the concerns raised by the commenter.

Changes: None.

Reminds that assessments and other evaluation materials are to be selected so as not to be discriminatory on a racial or cultural basis

Additionally requires that interpretation include information from other sources and information on cultural background

Page 46642

Comment: One commenter requested that the regulations clarify that a public agency should not use the ``not clearly feasible'' exception in Sec. 300.304(c)(1)(ii) to improperly limit a child's right to be evaluated in the child's native language or other mode of communication.

Discussion: Section 300.304(c)(1)(ii), consistent with section 614(b)(3)(A)(ii) of the Act, requires that assessments and other evaluation materials used to assess a child be provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do, unless it is clearly not feasible to so provide or administer. We agree that this provision should not be improperly used to limit evaluations in a child's native language, but we do not believe that a change to the regulations is necessary or that it would prevent inappropriate application of the existing rule.

Changes: None.

Assures that an evaluation must be in the language and form of the student most likely to yield accurate information.

Page 46643

Comment: Many commenters recommended that the evaluation report include a description of the extent to which an assessment varied from standard conditions because there are few assessments that produce valid and reliable information for English language learners suspected of having a disability. Several commenters stated that it is standard practice for professionals administering assessments to include information in their reports when assessments are conducted using nonstandard conditions. One commenter recommended that the regulations require all evaluation reports to clearly indicate the language or other mode of communication used in assessing a child and a determination of whether using such language or other mode of communication yielded accurate information.

Discussion: As stated by several commenters, it is standard test administration practice to include in the evaluation report the extent to which an assessment varied from standard conditions, including the language or other mode of communication that was used in assessing a child. It is, therefore, unnecessary to include this requirement in the regulations.

Changes: None.

Evaluation report includes extent to which assessment varied from standard conditions, including language used in assessing child.

Page 46647

Comment: Many commenters opposed the use of RTI models to determine whether a child has an SLD, stating that there is a lack of scientific evidence demonstrating that RTI models correctly identify children with SLD. One commenter stated that RTI is a subjective method of determining whether treatment is effective and is not a treatment itself. A few commenters requested additional research demonstrating

the efficacy of the wide-scale use of RTI models. Some commenters stated that research on the use of RTI models has been conducted only in the area of reading in the primary grades and pointed to the lack of scientific data on achievement gains or long-term success. One commenter stated that there is no evidence that RTI is effective for non-native speakers of English and minority populations. Another commenter stated that RTI would fail to identify young children with SLD. One commenter stated that when a child fails to respond to an intervention, it is unclear why the child failed (e.g., inappropriate intervention, ineffective teaching, unreasonable expectations). One commenter stated that longitudinal data are needed to determine if children who succeed in an RTI process later become eligible under the category of SLD based on reading fluency and comprehension difficulties, or difficulties in other academic areas, such as mathematics problem-solving or written expression.

Discussion: The Act requires that LEAs be permitted to use a process that determines if a child responds to research-based interventions. Further, there is an evidence base to support the use of RTI models to identify children with SLD on a wide scale, including young children and children from minority backgrounds. These include several large-scale implementations in Iowa (the Heartland model; Tilly, 2002); the Minneapolis public schools (Marston, 2003); applications of the Screening to Enhance Equitable Placement (STEEP) model in Mississippi, Louisiana, and Arizona (VanDerHeyden, Witt, & Gilbertson, in press); and other examples (NASDE, 2005).\1\ While it is true that much of the research on RTI models has been conducted in the area of reading, 80 to 90 percent of children with SLD experience reading problems. The implementation of RTI in practice, however, has included other domains. RTI is only one component of the process to identify children in need of special education and related services. Determining why a child has not responded to research-based interventions requires a comprehensive evaluation.

Changes: None.

Assures that there is evidence to support RTI models for children from minority backgrounds.

Page 46653

Comment: Many commenters requested more detail and specific guidelines on RTI models, such as information on who initiates the RTI process and who should be involved in the process; how one ensures there is a strong leader for the RTI process; the skills needed to implement RTI models; the role of the general education teacher; how to determine that a child is not responsive to instruction, particularly a child with cultural and linguistic differences; the number of different types of interventions to be tried; the responsibility for monitoring progress; the measurement of treatment integrity; and ways to document progress. One commenter stated that it is imperative that the regulations allow the flexibility necessary to accommodate the array of RTI models already in use.

Several commenters requested that the Department define and set a standard for responsiveness that calls for demonstrated progress and improvement in the rate of learning, to indicate that a child can function in the classroom. Several commenters stated that there would be a dramatic increase in the number of children identified with an SLD without a clearly defined system in place.

Discussion: There are many RTI models and the regulations are written to accommodate the many different models that are currently in use. The Department does not mandate or endorse any particular model. Rather, the regulations provide States with the flexibility to adopt criteria that best meet local needs. Language that is more specific or prescriptive would not be appropriate. For example, while we recognize that rate of learning is often a key variable in assessing a child's response to intervention, it would not be appropriate for the regulations to set a standard for responsiveness or improvement in the

Commenter expresses concern about RTI models for CLD children. Department of Education responds that the Department does not mandate or endorse a particular RTI model.

rate of learning. As we discussed earlier in this section, we do not believe these regulations will result in significant increases in the number of children identified with SLD.

Changes: None.

Page 46654

Comment: Some commenters stated that using a pattern of strengths and weaknesses in a child's performance to identify a child with an SLD could be misinterpreted to identify children, other than children with disabilities, who are underperforming due to cultural factors, environmental or economic disadvantage, or low effort.

Discussion: Section 300.309(a)(3) is clear that children should not be identified with SLD if the underachievement is primarily the result of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; or environmental or economic disadvantage. The eligibility group makes the determination after the evaluation of the child is completed. Therefore, we believe that there is minimal risk that a child who is underachieving due to these factors will be identified as having an SLD.

Changes: None.

Reiterates that students should not be identified with SLD if the underachievement is primarily the result of cultural factors.

Page 46655

Comment: One commenter asked what kind of assessment identifies culture as a primary cause of academic performance deficits and recommended removing the requirement in Sec. 300.309(a)(3)(iv) unless there are objective methods to determine whether a child's low performance is a result of cultural factors.

Discussion: The identification of the effect of cultural factors on a child's performance is a judgment made by the eligibility group based on multiple sources of information, including the home environment, language proficiency, and other contextual factors gathered in the evaluation. The Department believes that the identification of children with SLD will improve with models based on systematic assessments of a child's response to appropriate instruction, the results of which are one part of the information reviewed during the evaluation process to determine eligibility for special education and related services. States and public agencies must follow the evaluation procedures in Sec. Sec. 300.304 and 300.305 and section 614(b) of the Act, including using assessments and other evaluation materials that do not discriminate on a racial or cultural basis, consistent with Sec. 300.304(c)(1)(i) and section 614(b)(3)(A)(i) of the Act.

Changes: None.

States that the "eligibility group" makes the determination of the effect of cultural factors on the student's performance.

Reminds that assessments and other evaluation materials should not discriminate on a racial or cultural basis.

Comment: Many commenters recommended that limited English proficiency be among the factors that the eligibility group must rule out as a primary factor affecting a child's performance.

Discussion: Section 300.306(b)(1)(iii), consistent with section 614(b)(5)(C) of the Act, is clear that a child must not be identified as a child with a disability if the determinant factor for that determination is limited English proficiency. However, we agree that it is important to re-emphasize this requirement in Sec. 300.309 and will add this to the list of factors that the eligibility group must rule out as a primary factor affecting a child's performance.

Changes: We have added a new paragraph (vi) to Sec. 300.309(a)(3) to include ``limited English proficiency'' in the list of factors that must be ruled out as a primary factor affecting a child's performance before determining that a child is eligible for special education services under the category of SLD.

The determinant factor for identifying a disability can not be limited English proficiency.

Pages 46655 & 46656

Comment: We received a number of comments concerning the

requirement for high-quality, research-based instruction provided by qualified personnel. One commenter stated that it would be difficult for rural school districts to meet this requirement because of staffing requirements in the regular education setting. Several commenters stated that the requirement for high-quality, research-based instruction exceeds statutory authority and should be removed, because it provides a basis for challenging any determination under the category of SLD. One commenter asked for clarification regarding the legal basis for providing high-quality, research-based instruction if the child is not determined eligible for special education. Another commenter stated that attorneys will read Sec. 300.309(b) as providing a legal entitlement to ESEA, research-based instruction and data-based documentation for every child considered for eligibility under the category of SLD, and that when this standard is not met, will bring the matter to a due process hearing and request compensatory education.

Numerous commenters requested a definition of high-quality, research-based instruction. One commenter asked who validates that the research meets the highest quality. Another commenter asked that the regulations specify how much research a program must undergo before it is deemed to be research-based. One commenter stated that the Department must address how States determine whether a child has been provided with a high-quality, research-based instructional program; whether appropriate classroom interventions were delivered; and whether an intervention has been successful. One commenter stated that the absence of additional clarification would result in great disparity in States' policies and lead to inappropriate interventions and procedures. One commenter recommended that there be evidence that the instruction is effective for the child's age and cultural background.

Commenter recommends that instruction provided to student be based on evidence that it is effective for the child's age and cultural background.

A few commenters recommended that children who are not progressing because they have not received research-based instruction by a qualified teacher should immediately receive intensive, high-quality, research-based instruction by qualified personnel. One commenter expressed concern that Sec. 300.309(b) restricts referrals to only those children who have received high-quality, research-based instruction from qualified teachers. One commenter stated that a child's eligibility to receive special education services under the category of SLD appears to be contingent on the LEA's commitment to providing effective regular education services by qualified staff, and, as such, a child with an SLD is held hostage by a system that is not working. One commenter asked whether the eligibility group can make a determination that a child has an SLD in the absence of a child's response to high-quality research-based instruction.

Several commenters stated that the lack of research-based instruction by a qualified teacher should not limit a child's eligibility for services. Another commenter recommended clarifying that a child should not be found ineligible under the category of SLD because the child either did not respond to a scientific, research-based intervention during a truncated evaluation, or because the child was not provided an opportunity to respond to such an intervention.

Discussion: Watering down a focus on appropriate instruction for any children, including children with disabilities or children living in rural areas would be counter to both the Act and the ESEA. However, we agree that the requirement for high quality, research-based instruction exceeds statutory authority. The Act indicates that children should not be eligible for special education if the low achievement is due to lack of appropriate instruction in reading or math. Therefore, we will change the regulations to require that the eligibility group consider evidence that the child was provided appropriate instruction and clarify that this means evidence that lack of appropriate instruction was the source of underachievement.

Requires the "eligibility group" make the determination if student's underachievement is lack of appropriate instruction.

The eligibility group should not identify a child as eligible for special education services if the child's low achievement is the result

of lack of appropriate instruction in reading or math. Eligibility is contingent on the ability of the LEA to provide appropriate instruction. Determining the basis of low achievement when a child has been given appropriate instruction is the responsibility of the eligibility group.

Whether a child has received ``appropriate instruction'' is appropriately left to State and local officials to determine. Schools should have current, data-based evidence to indicate whether a child responds to appropriate instruction before determining that a child is a child with a disability. Children should not be identified as having a disability before concluding that their performance deficits are not the result of a lack of appropriate instruction. Parents of children with disabilities have due process rights that allow them to file a complaint on any matter that relates to the identification, evaluation, and educational placement of their child with a disability, and the provision of FAPE to their child.

State and local officials are responsible in ensuring current, data-based evidence that students are receiving appropriate instruction.

Changes: We have revised the introductory material in Sec. 300.309(b) to emphasize that the purpose of the review is to rule out a lack of appropriate instruction in reading or math as the reason for a child's underachievement. We have also revised Sec. 300.309(b)(1) to refer to appropriate instruction rather than high-quality, research-based instruction, and removed the cross reference to the ESEA.

Page 46657

Comment: One commenter recommended that data be maintained on the number of children identified with SLD.

Discussion: Data are maintained on the number of children identified with SLD. Section 618 of the Act requires States to report annually to the Department the number and percentage of children with disabilities by disability category, in addition to race, ethnicity, limited English proficiency status, and gender.

Data maintained on children identified as SLD by race, ethnicity, limited English proficiency and gender.

Changes: None.

Page 46661

Comment: Several commenters requested that the written report include the determination of the group concerning the effects of cultural factors, limited English proficiency, and environmental or economic disadvantage to be consistent with all the elements in Sec. 300.309(a)(3).

Discussion: We agree that it is important to emphasize the importance of considering such factors in determining eligibility under SLD and will add these factors in Sec. 300.311(a).

States again that written report must have a statement on the effects of cultural factors, limited English proficiency, environmental, or economic disadvantage.

Changes: We have added a new paragraph (6) to Sec. 300.311(a) to require the written report to include a statement on the effects of cultural factors, limited English proficiency, environmental, or economic disadvantage.

Page 46661

Comment: Some commenters recommended requiring the IEP to include a statement of the relevant social and cultural background of a child and how those factors affect the appropriate participation, performance, and placement of the child in special education.

Discussion: Section 614(d)(1)(A)(ii)(I) of the Act precludes the Department from interpreting section 614 of the Act to require public agencies to include information in a child's IEP other than what is explicitly required in the Act. Therefore, we cannot require the IEP to include the statement requested by the commenters. However, a child's social or cultural background is one of many factors that a public agency must consider in interpreting evaluation data to determine if a child is a child with a disability under Sec. 300.8 and the

Public agency must consider student's social or cultural background when interpreting evaluation data.

educational needs of the child, consistent with Sec. 300.306(c)(1)(i).

Changes: None.

Pages 46673 & 46674

Comment: One commenter asked whether parents must be provided any information when asked to excuse IEP Team members. A few commenters recommended that the request for an excusal include the reason for the request to excuse a member of the IEP Team, that it be written in the chosen language of the parent, and accompanied by written evaluations and recommendations of the excused IEP Team member.

A few commenters recommended that no IEP Team member should be excused from attending an IEP Team meeting until the parent is informed about the purpose of the meeting for which the public agency proposes to excuse the IEP Team member; the IEP Team member's name and position; the reason(s) the public agency wants to excuse the IEP Team member; the parent's right to have the IEP Team member present; and the parent's right to discuss with the IEP Team member any issues in advance of the meeting so the parent is adequately informed. The commenters stated that this notice should be included in any statement of parent's rights that is distributed.

Numerous commenters recommended that the regulations include specific language to clarify that, before agreeing to excuse an IEP Team member, serious consideration must be given to determining if written input will be sufficient to thoroughly examine what services are needed and whether changes to the current IEP are necessary. A few commenters recommended that parents be informed of the roles and responsibilities of the excused member prior to giving consent for the excusal. Some commenters stated that parents must understand that they have the right to disagree and not excuse a member of the IEP Team who the parents believe may be essential to developing or revising an IEP. One commenter recommended that the written agreement be required to include information that the parent was informed of the parent's right to have all IEP Team members present.

One commenter recommended permitting States to establish additional procedural safeguards that guarantee that parents who consent to excuse an IEP member from a meeting do so freely and are aware of the implications of their decisions. Some commenters expressed concern that a parent could be pressured to agree to excuse an IEP Team member for what, in reality, are economic or staffing reasons. One commenter stated that parents should have the right to consent to excusal only after conferring with the individual to be excused. Some commenters recommended that parents be informed that they have a legal right to require an IEP Team member to participate in the meeting.

A few commenters expressed concern that the permission to excuse IEP Team members from attending IEP Team meetings will be abused, particularly with language-minority parents who are often misinformed or misled by school districts. Some commenters stated that parents do not understand the roles of the various members and could easily be pressured into excusing vital members of the IEP Team.

Commenters express concern about language-minority parents pressured or misled to excuse IEP Team members from attending IEP meeting.

A few commenters recommended that the regulations include requirements to guard against excessive excusals. Some commenters stated that an LEA that routinely prevents general or special education teachers, or related services providers, from attending IEP Team meetings using the excusal provisions should be subject to monitoring and review.

Discussion: When an IEP Team member's area is not being modified or discussed, Sec. 300.321(e)(1), consistent with section 614(d)(1)(C) of the Act, provides that the member may be excused from the meeting if the parent and LEA agree in writing that the member's attendance is not necessary. We believe it is important to give public agencies and parents wide latitude about the content of the agreement and, therefore, decline to regulate on the specific information that an LEA

must provide in a written agreement to excuse an IEP Team member from attending the IEP Team meeting when the member's area of the curriculum or related services is not being modified or discussed.

When an IEP Team member's area is being modified or discussed, Sec. 300.321(e)(2), consistent with section 614(d)(1)(C)(ii) of the Act, requires the LEA and the parent to provide written informed consent. Consistent with Sec. 300.9, consent means that the parent has been fully informed in his or her native language, or other mode of communication, and understands that the granting of consent is voluntary and may be revoked at any time. The LEA must, therefore, provide the parent with appropriate and sufficient information to ensure that the parent fully understands that the parent is consenting to excuse an IEP Team member from attending an IEP Team meeting in which the member's area of the curriculum or related services is being changed or discussed and that if the parent does not consent the IEP Team meeting must be held with that IEP Team member in attendance.

To modify or discuss an IEP Team member's area, parent must be fully informed in his or her native language or other mode of communication.

We believe that these requirements are sufficient to ensure that the parent is fully informed before providing consent to excuse an IEP Team member from attending an IEP Team meeting in which the member's area of the curriculum will be modified or discussed, and do not believe that it is necessary to include in the regulations the more specific information that commenters recommended be provided to parents.

We also do not believe it is necessary to add a regulation permitting States to establish additional procedural safeguards for parents who consent to excuse an IEP Team member, as recommended by one commenter, because we believe the safeguard of requiring consent will be sufficient to prevent parents from feeling pressured to excuse an IEP Team member. Furthermore, parents who want to confer with an excused team member may ask to do so before agreeing or consenting to excusing the member from attending the IEP Team meeting, but it would be inappropriate to add a regulation that limited parent rights by requiring a conference before the parent could agree or consent to the excusal of an IEP Team member.

With regard to the recommendation that the notice state that the parent has a legal right to require an IEP Team member to participate in an IEP Team meeting, it is important to emphasize that it is the public agency that determines the specific personnel to fill the roles for the public agency's required participants at the IEP Team meeting. A parent does not have a legal right to require other members of the IEP Team to attend an IEP Team meeting. Therefore, if a parent invites other public agency personnel who are not designated by the LEA to be on the IEP Team, they are not required to attend.

An LEA may not routinely or unilaterally excuse IEP Team members from attending IEP Team meetings as parent agreement or consent is required in each instance. We encourage LEAs to carefully consider, based on the individual needs of the child and the issues that need to be addressed at the IEP Team meeting whether it makes sense to offer to hold the IEP Team meeting without a particular IEP Team member in attendance or whether it would be better to reschedule the meeting so that person could attend and participate in the discussion. However, we do not believe that additional regulations on this subject are warranted.

An LEA that routinely excuses IEP Team members from attending IEP Team meetings would not be in compliance with the requirements of the Act, and, therefore, would be subject to the State's monitoring and enforcement provisions.

Changes: None.

Page 46679

Comment: Many commenters recommended retaining current Sec. 300.345(e), which requires the public agency to take whatever action is

necessary to ensure that the parent understands the proceedings at an IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. Some commenters stated that current Sec. 300.345(e) is protected by section 607(b) of the Act and, therefore, cannot be removed.

Many commenters acknowledged that there are other Federal laws that require public agencies to take appropriate measures to ensure that parents understand the proceedings at an IEP Team meeting, but stated that not all stakeholders are aware of the applicability of those other protections in IEP Team meetings. Several commenters expressed concern with the removal of current Sec. 300.345(e) stating that other Federal laws are not enforceable at special education due process hearings.

Discussion: We agree that current Sec. 300.345(e) is an important safeguard of parent participation for parents with deafness or whose native language is other than English. We will, therefore, add the requirements in current Sec. 300.345(e) to the regulations.

Changes: We have added the requirements in current Sec. 300.345(e) as new Sec. 300.322(e), and redesignated the subsequent paragraph as Sec. 300.322(f).

Parent Copy of Child's IEP (New Sec. 300.322(f)) (Proposed Sec. 300.322(e))

Commenters expressed concern that parents understand the proceedings at an IEP Team meeting and require that public agencies arrange for an interpreter for parents whose native language is other than English.

Department of Education agreed and added the requirement in 300.345 (e)

Page 46682

Comment: A few commenters requested that the regulations require the IEP Team to consider the social and cultural background of the child in the development, review, or revision of the child's IEP.

Discussion: Under Sec. 300.306(c)(1)(i), a child's social or cultural background is one of many factors that a public agency must consider in interpreting evaluation data to determine if a child is a child with a disability under Sec. 300.8 and the educational needs of the child. We do not believe it is necessary to repeat this requirement in Sec. 300.324.

Changes: None.

The Department reiterates that a student's social and cultural background is considered when interpreting evaluation data.

Pages 46688 & 46689

Comment: Many commenters suggested adding language in Sec. 300.501(b)(2) requiring the public agency to take whatever action is necessary to ensure that parents understand the proceedings at any of the meetings described in this section. The commenters stated that this requirement is not unnecessarily duplicative and removing it gives the impression that interpreters are no longer required. Several commenters recommended that if school staff determines that a parent has difficulty understanding the procedural safeguards, the public agency must explain the parent's rights at any time that a change in services is contemplated.

Discussion: It is not necessary to add language to Sec. 300.501(b)(2) to require a public agency to take whatever action is necessary to ensure that parents understand the proceedings at any of the meetings described in this section. Public agencies are required by other Federal statutes to take appropriate actions to ensure that parents who themselves have disabilities and limited English proficient parents understand proceedings at any of the meetings described in this section. The other Federal statutory provisions that apply in this regard are Section 504 of the Rehabilitation Act of 1973 and its implementing regulations in 34 CFR part 104 (prohibiting discrimination on the basis of disability by recipients of Federal financial assistance), title II of the Americans With Disabilities Act and its implementing regulations in 28 CFR part 35 (prohibiting discrimination on the basis of disability by public entities, regardless of receipt of Federal funds), and title VI of the Civil Rights Act of 1964 and its implementing regulations in 34 CFR part 100 (prohibiting discrimination

Summarizes all the Federal statues that require public agencies to fully inform parents with limited English proficiency

on the basis of race, color, or national origin by recipients of Federal financial assistance).

As noted in the Analysis of Comments and Changes section to subpart D, we have retained the requirements in current Sec. 300.345(e), which require the public agency to take whatever action is necessary to ensure that the parent understands the proceedings at an IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. This requirement is in new Sec. 300.322(e). We have also included a cross reference to new Sec. 300.322(e) in Sec. 300.501(c)(2) to clarify that.

Parents must fully understand proceedings at an IEP Team meeting. Interpreters required for parents whose native language is other than English.

It is not necessary to include regulations to require a public agency to explain the procedural safeguards to parents any time that a change in services is contemplated. Section 300.503 already requires prior written notice to be given to the parents of a child with a disability 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 FAPE to the child. As required in Sec. 300.503(b)(4), the prior written notice must include a statement that the parents have protections under the procedural safeguards of this part. Consistent with Sec. Sec. 300.503(c) and 300.504(d), the prior written notice and the procedural safeguards notice, respectively, must be written in language understandable to the general public and provided in the native language or other mode of communication of the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication and that the parent understands the content of the notice.

Procedural safeguard notice in native language of parent. If native language is not written, public agency must translate orally or by other means to parents.

Changes: None.

Pages 46703 & 46704

Comment: Many commenters recommended including language in the regulations to ensure that parents are informed orally and in writing that either party to a resolution agreement may reconsider and void the resolution agreement within three business days. One commenter expressed concern that some parents lack the education or legal expertise of school districts, and will miss this important right unless informed both orally and in writing. A few commenters stated that this notice must be provided to parents in their native language or primary mode of communication.

Discussion: Section 300.504(a), consistent with section 615(d)(1)(A) of the Act, requires a public agency to provide parents with a copy of the procedural safeguards notice at least one time in a school year and under the exceptional circumstances specified in Sec. 300.504(a), which includes the first occurrence of the filing of a due process complaint in a school year. The procedural safeguards notice, which must be written in language understandable to the general public and in the native language of the parent, unless clearly not feasible to do so, must include a full explanation of the Act's procedural safeguards. If the native language or other mode of communication of the parent is not a written language, Sec. 300.503(c)(2) requires the public agency to take steps to ensure that the notice is translated orally or by other means for the parent in his or her native language or other mode of communication and that the parent understands the content of the notice. Under Sec. 300.504(c)(5)(ii), the notice must inform parents about the opportunity to present and resolve a due process complaint in accordance with the resolution process required in Sec. 300.510 and section 615(f)(1)(B) of the Act, including a party's right to void the resolution agreement within three business days of execution. We believe it would be overly burdensome to require public agencies to

Reiterates that procedural safeguards notice must be in native language and if native language is not a written language, then it be translated orally or by other means for the parent.

provide the procedural safeguards notice both orally and in writing to an individual parent, and, therefore, decline to change the regulation.
Changes: None.

Page 46706

Comment: Some commenters stated that exceptions to the timeline in Sec. 300.511(f) should include situations in which a parent is unable to file a due process complaint because the parent is not literate or cannot write in English. One commenter recommended considering the parent's degree of English fluency and other factors in determining the parent's ability to have knowledge about the alleged action that is the basis for the due process complaint.

Discussion: Section 300.511(f), consistent with section 615(f)(3)(D) of the Act, provides explicit exceptions to the statute of limitations for filing a due process complaint. These exceptions include situations in which the parent is prevented from filing a due process complaint because the LEA withheld from the parent information that is required to be provided to parents under these regulations, such as failing to provide prior written notice or a procedural safeguards notice that was not in the parent's native language, as required by Sec. Sec. 300.503(c) and 300.504(d), respectively. Additionally, in States using the timeline in Sec. 300.511(e) (i.e., ``within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint''), hearing officers will have to make determinations, on a case-by-case basis, of factors affecting whether the parent ``knew or should have known'' about the action that is the basis of the complaint. Therefore, we decline to add additional exceptions to Sec. 300.511(f).

Changes: None.

Statue of limitations for filing a due process complaint has exceptions in situations such as when LEA's withhold information from the parent

Page 46732

Comment: One commenter recommended clarifying that racial disproportionality in educational placements falls within the monitoring priority areas for monitoring and enforcement.

Discussion: New Sec. 300.600(d), consistent with section 616(a)(3) of the Act, includes 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 a monitoring priority. Because the monitoring priority area clearly refers to disproportionate representation to the extent the representation is a result of inappropriate identification of children with disabilities, and not placement, we do not believe we can include disproportionate representation resulting from educational placement within the scope of this monitoring priority area.

Changes: None.

Disproportionate representation of racial and ethnic groups in special education and related services is considered the result of inappropriate identification, not inappropriate placement.

Page 46733

Comment: Several commenters recommended revising Sec. 300.602 to specify that the State performance plan and the public report on LEAs' performance must be in language that is accessible to, and understandable by, all interested parties.

Discussion: The Department expects the information that a State reports in its annual performance reports and in the public reports on LEA performance will be made available in an understandable and uniform format across the State, including alternative formats upon request, and, to the extent practicable, in a language that parents understand. We do not believe it is necessary to add a specific requirement to the regulations because other Federal laws and policies already require that information to parents be available in alternative formats and to parents who are limited English proficient. Specifically, Title VI of

the Civil Rights Act of 1964 requires SEAs and LEAs to communicate to parents with limited English proficiency what is communicated to parents who are not limited English proficient. Under Title VI, SEAs and LEAs have flexibility in determining what mix of oral and written translation services may be necessary and reasonable for communicating this information. Similarly, Executive Order 13166 requires that recipients of Federal financial assistance take reasonable steps to ensure meaningful access by individuals with limited English proficiency. For individuals with disabilities, title II of the Americans with Disabilities Act requires that State and local governments, and Section 504 of the Rehabilitation Act of 1973 requires that recipients of Federal financial assistance, ensure that their communications with individuals with disabilities are as effective as their communications with others, and that appropriate auxiliary aids and services are available when necessary to ensure effective communication.

Changes: None.

Reiterates that information to parents be available in alternative formats and to parents who are limited English proficient.

Page 46734

Comment: One commenter recommended that Sec. 300.602 specify that data on disproportionality be reported to the public, pursuant to sections 616(b)(2)(C) and 618 of the Act.

Discussion: The provisions in Sec. 300.602 already include the requirement suggested by the commenter. Section 300.602, consistent with section 616(b)(2)(C) of the Act, requires each State to use the targets established in its State performance plan and the monitoring priority areas described in Sec. 300.600(d), to analyze the performance of each LEA in the State, and to report annually to the public on such performance. As described in new Sec. 300.600(d), the monitoring priority areas on which the State will report include the disproportionate representation of racial and ethnic groups in special education and related services, to the extent the disproportionate representation is the result of inappropriate identification. Accordingly, States are required to report this information to the public. States must establish targets on each of the indicators set by the Secretary.

We also note that Sec. 300.642(a), consistent with section 618(b) of the Act, requires that data collected pursuant to section 618 of the Act be reported publicly. These data will include State-level data on the number and percentage of children with disabilities by race and ethnicity on a number of measures, including identification as children with disabilities, placement, graduation and drop-out, and discipline. Accordingly, we do not believe any further changes to the regulations are necessary.

Changes: None.

Each State must report annually to the public the performance of each LEA including any disproportionate representation of racial and ethnic groups in special education and related services and the extent this is the result of inappropriate identification.

Page 46738

Comment: One commenter requested clarification as to whether the determination of disproportionality is based solely on a numerical formula or on district policies, procedures, and practices. One commenter recommended amending the regulations to clarify that the determination of disproportionality is based on a review of LEA policies and procedures, and not just a numerical determination. Another commenter requested a definition of significant disproportionality. Several commenters requested that the regulations clarify that States need only address statistically significant disproportionality based on the use of reliable data.

Discussion: Section 618(d)(1) of the Act is clear that the determination of significant disproportionality by race or ethnicity is based on a collection and examination of data and not on a district's policies, procedures, or practices. This requirement is clearly

Determination of significant disproportionality by race or ethnicity is based on data, not the district's policies, procedures, or practices.

reflected in Sec. 300.646. We do not believe it is appropriate to change Sec. 300.646 because the commenter's suggestion is inconsistent with the provisions in section 618(d) of the Act.

With respect to the definition of significant disproportionality, each State has the discretion to define the term for the LEAs and for the State in general. Therefore, in identifying significant disproportionality, a State may determine statistically significant levels. The State's review of its constituent LEAs' policies, practices, and procedures for identifying and placing children with disabilities would occur in LEAs with significant disproportionality in identification, placement, or discipline, based on the examination of the data. The purpose of this review is to determine if the policies, practices, and procedures are consistent with the Act. Establishing a national standard for significant disproportionality is not appropriate because there are multiple factors at the State level to consider in making such determinations. For example, States need to consider the population size, the size of individual LEAs, and composition of State population. States are in the best position to evaluate those factors. The Department has provided guidance to States on methods for assessing disproportionality. This guidance can be found at: http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklog&to=http://www.ideadata.org/docs/Disproportionality%20

The State determines the definition of disproportionality.

Once an LEA is determined with significant disproportionality, then the State reviews the LEAs policies, practices, and procedures to determine if they are consistent with IDEA 2004.

Page 46738

Comment: Several commenters raised concerns and made recommendations regarding Sec. 300.646(b)(2), which requires the State to require any LEA identified with significant disproportionality to reserve the maximum amount under section 613(f) of the Act for comprehensive, coordinated early intervening services to serve children in the LEA, particularly, but not exclusively children in those groups that were significantly overidentified. A few commenters recommended that LEAs not be required to reserve the maximum amount under section 613(f) of the Act. Several commenters recommended adding language in Sec.300.646(b)(2) to require LEAs to monitor the effect of early intervening services on disproportionate representation.

Discussion: The requirements in Sec. 300.646(b)(2) follow the specific language in section 616(d) of the Act. To allow LEAs to reserve less than the maximum amount required in section 613(f) of the Act when significant disproportionality is identified would be inconsistent with the Act. Therefore, we do not believe a change in this requirement is appropriate.

As part of the requirements in Sec. Sec. 300.600 through 300.604, States must report annually on indicators in three monitoring priority areas. One of the monitoring priority areas is disproportionality, for which there are two indicators. In addition to annually reviewing State performance on each indicator in each monitoring priority area, the State must review each LEA against indicators established for each monitoring priority area, so the State will be examining data annually to identify any disproportionality. If disproportionality is identified in LEAs, the policies, procedures, and practices of the LEAs will be examined to determine if they are leading to inappropriate identification, and, pursuant to section 618(d)(2)(C) of the Act and Sec. 300.646(b)(3), the LEA will be required to report publicly on the revision of policies, practices, and procedures used in identification or placement. It is, therefore, unnecessary to add a requirement that LEAs monitor the effect of early intervening services on disproportionality because the LEAS will have to continue to publicly report on their revision of policies, practices and procedures until the significant disproportionality in the LEA is eliminated. We believe that the intent of the suggestion will be accomplished through this other requirement.

Changes: None.

State must report disproportionality and must annually review each LEA for disproportionality.

If disproportionality is identified in LEAs, the policies, procedures and practices will be examined by the State.

Sec. 300.600 State monitoring and enforcement.

(a) The State must monitor the implementation of this part, enforce this part in accordance with Sec. 300.604(a)(1) and (a)(3), (b)(2)(i) and (b)(2)(v), and (c)(2), and annually report on performance under this part.

(b) The primary focus of the State's monitoring activities must be on--

(1) Improving educational results and functional outcomes for all children with disabilities; and

(2) Ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.

(c) As a part of its responsibilities under paragraph (a) of this section, the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in paragraph (d) of this section, and the indicators established by the Secretary for the State performance plans.

(d) The State must monitor the LEAs located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:

(1) Provision of FAPE in the least restrictive environment.

(2) State exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services as defined in Sec. 300.43 and in 20 U.S.C. 1437(a)(9).

(3) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

Page 46757

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

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

Pages 46759 & 46760

Sec. 300.29 Native language.

(a) Native language, when used with respect to an individual who is limited English proficient, means the following:

(1) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in paragraph (a)(2) of this section.

(2) In all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment.

(b) For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).

Page 46775

Sec. 300.173 Overidentification and disproportionality.

The State must have in effect, consistent with the purposes of this part and with section 618(d) of the Act, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in Sec. 300.8.

Page 46785

Sec. 300.304 Evaluation procedures.

(a) Notice. The public agency must provide notice to the parents of a child with a disability, in accordance with Sec. 300.503, that describes any evaluation procedures the agency proposes to conduct.

(b) Conduct of evaluation. In conducting the evaluation, the public agency must--

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining--

(i) Whether the child is a child with a disability under Sec. 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative

contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) Other evaluation procedures. Each public agency must ensure that--

(1) Assessments and other evaluation materials used to assess a child under this part--

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with Sec. 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under Sec. Sec. 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Sec. 300.306 Determination of eligibility.

(a) General. Upon completion of the administration of assessments and other evaluation measures--

(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and

(2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

(b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part--

(1) If the determinant factor for that determination is--

(i) Lack of appropriate instruction in reading, including the

essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(ii) Lack of appropriate instruction in math; or

(iii) Limited English proficiency; and

(2) If the child does not otherwise meet the eligibility criteria under Sec. 300.8(a).

(c) Procedures for determining eligibility and educational need. (1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under Sec. 300.8, and the educational needs of the child, each public agency must--

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Sec. Sec. 300.320 through 300.324.

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Sec. 300.309 Determining the existence of a specific learning disability.

(a) The group described in Sec. 300.306 may determine that a child has a specific learning disability, as defined in Sec. 300.8(c)(10), if--

(1) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards:

(i) Oral expression.

(ii) Listening comprehension.

(iii) Written expression.

(iv) Basic reading skill.

(v) Reading fluency skills.

(vi) Reading comprehension.

(vii) Mathematics calculation.

(viii) Mathematics problem solving.

(2)(i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; or

(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with Sec. Sec. 300.304 and 300.305; and

(3) The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of--

(i) A visual, hearing, or motor disability;

(ii) Mental retardation;

(iii) Emotional disturbance;

(iv) Cultural factors;

(v) Environmental or economic disadvantage; or

(vi) Limited English proficiency.

(b) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in Sec. Sec. 300.304 through 300.306--

(1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

(c) The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in Sec. Sec. 300.301 and 300.303, unless extended by mutual written agreement of the child's parents and a group of qualified professionals, as described in Sec. 300.306(a)(1)--

(1) If, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in paragraphs (b)(1) and (b)(2) of this section; and

(2) Whenever a child is referred for an evaluation.

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Sec. 300.311 Specific documentation for the eligibility determination.

(a) For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in Sec. 300.306(a)(2), must contain a statement of--

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination, including an assurance that the determination has been made in accordance with Sec. 300.306(c)(1);

(3) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;

(4) The educationally relevant medical findings, if any;

(5) Whether--

(i) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards consistent with Sec. 300.309(a)(1); and

(ii)(A) The child does not make sufficient progress to meet age or State-approved grade-level standards consistent with Sec. 300.309(a)(2)(i); or

(B) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development consistent with Sec. 300.309(a)(2)(ii);

(6) The determination of the group concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and

(7) If the child has participated in a process that assesses the child's response to scientific, research-based intervention--

(i) The instructional strategies used and the student-centered data collected; and

(ii) The documentation that the child's parents were notified about--

(A) The State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;

(B) Strategies for increasing the child's rate of learning; and

(C) The parents' right to request an evaluation.

(b) Each group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member must submit a separate statement presenting the member's conclusions.

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(e) Use of interpreters or other action, as appropriate. The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

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Sec. 300.324 Development, review, and revision of IEP.

(a) Development of IEP--(1) General. In developing each child's IEP, the IEP Team must consider--

(i) The strengths of the child;

(ii) The concerns of the parents for enhancing the education of their child;

(iii) The results of the initial or most recent evaluation of the child; and

(iv) The academic, developmental, and functional needs of the child.

(2) Consideration of special factors. The IEP Team must--

(i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child needs assistive technology devices and services.

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Sec. 300.503 Prior notice by the public agency; content of notice.

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency--

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Content of notice. The notice required under paragraph (a) of this section must include--

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused

action;
(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
(7) A description of other factors that are relevant to the agency's proposal or refusal.
(c) Notice in understandable language. (1) The notice required under paragraph (a) of this section must be--
(i) Written in language understandable to the general public; and
(ii) 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.
(2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure--
(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;
(ii) That the parent understands the content of the notice; and
(iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met.

Sec. 300.600 State monitoring and enforcement.

(a) The State must monitor the implementation of this part, enforce this part in accordance with Sec. 300.604(a)(1) and (a)(3), (b)(2)(i) and (b)(2)(v), and (c)(2), and annually report on performance under this part.
(b) The primary focus of the State's monitoring activities must be on--
(1) Improving educational results and functional outcomes for all children with disabilities; and
(2) Ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.
(c) As a part of its responsibilities under paragraph (a) of this section, the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in paragraph (d) of this section, and the indicators established by the Secretary for the State performance plans.
(d) The State must monitor the LEAs located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:
(1) Provision of FAPE in the least restrictive environment.
(2) State exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services as defined in Sec. 300.43 and in 20 U.S.C. 1437(a)(9).
(3) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

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Sec. 300.612 Notice to parents.

(a) The SEA must give notice that is adequate to fully inform parents about the requirements of Sec. 300.123, including--

(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under FERPA and implementing regulations in 34 CFR part 99.

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

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Sec. 300.646 Disproportionality.

(a) General. Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to--

(1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act;

(2) The placement in particular educational settings of these children; and

(3) The incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

(b) Review and revision of policies, practices, and procedures. In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with paragraph (a) of this section, the State or the Secretary of the Interior must--

(1) Provide for the review and, if appropriate revision of the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of the Act.

(2) Require any LEA identified under paragraph (a) of this section to reserve the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly overidentified under paragraph (a) of this section; and

(3) Require the LEA to publicly report on the revision of policies, practices, and procedures described under paragraph (b)(1) of this section.