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§ 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 § 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 § 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 § 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 §§ 300.320 through 300.324. (Authority: 20 U.S.C. 1414(b)(4) and (5))

Additional Procedures for Identifying Children With Specific Learning Disabilities
§ 300.307 Specific learning disabilities.

- (a) *General.* A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10). In addition, the criteria adopted by the State—
- (1) Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10);
 - (2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and
 - (3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10).
- (b) *Consistency with State criteria.* A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability. (Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§ 300.308 Additional group members.

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in § 300.8, must be made by the child's parents and a team of qualified professionals, which must include—

- (a)(1) The child's regular teacher; or
 - (2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
 - (3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and
- (b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. (Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§ 300.309 Determining the existence of a specific learning disability.

- (a) The group described in § 300.306 may determine that a child has a specific learning disability, as defined in § 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 §§ 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—

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(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 §§ 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 §§ 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 § 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. (Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§ 300.310 Observation.

(a) The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty.

(b) The group described in § 300.306(a)(1), in determining whether a child has a specific learning disability, must decide to—

(1) Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or

(2) Have at least one member of the group described in § 300.306(a)(1) conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with § 300.300(a), is obtained.

(c) In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age. (Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§ 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 § 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 § 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 § 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 § 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 § 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. (Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

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Comment:

Group Members (§ 300.308)

Comment: Several commenters requested an explanation of the use of "group members" rather than "team members" to describe the group that determines whether a child suspected of having an SLD is a child with a disability. One commenter stated that the eligibility determination is an IEP Team function and, therefore, using the term "group members" is inappropriate. One commenter stated that § 300.308 is confusing because the group seems to be the same as the IEP Team.

Discussion: The change from "team members" to "group members" was made in the 1999 regulations to distinguish this group from the IEP Team, because the team of qualified professionals and the parent in § 300.306(a)(1) that makes the eligibility determination does not necessarily have the same members as an IEP Team. In some States, this group of professionals may have the same individuals as the IEP Team, but in other States, this is not the case. We inadvertently referred to "team members" in 300.309(a)(2)(ii) and, therefore, will change this to "group."

Changes: We have changed "team members" to "group" in § 300.309(a)(2)(ii) to be consistent with § 300.306(a)(1).

Comment: Several commenters stated that the requirements for the qualifications of the group members in proposed § 300.308(a) are unnecessary and should be removed because they are not included in the Act, are overly prescriptive, and add another set of procedural requirements. On the other hand, a number of commenters recommended additional or different qualifications that should be required of the group members in § 300.308. Several commenters recommended that the group members be qualified to conduct assessments in the area of "cognition" rather than "intellectual development" to ensure that specific cognitive abilities are assessed, rather than global intellectual abilities.

Several commenters recommended that proposed § 300.308(a)(2), requiring group members to apply "critical analysis" to the data, be changed to require group members to apply "clinical" analysis to the data. One commenter stated that clinical analysis should be defined and suggested a definition that includes professional judgment informed by empirical research, training, and experience, and guided by interpretation of patterns in evaluation findings from a number of sources (e.g., test scores; interviews; work samples; observational data; and information from parents, school personnel, and other related services providers).

A few commenters recommended requiring evaluations to be completed by certified speech-language pathologists and school psychologists to ensure that qualified professionals conduct the assessments.

One commenter recommended that the examples of the areas for diagnostic assessments be preceded by "such as" to avoid a misinterpretation that a speech-language pathologist, for example, is mandated to participate in every SLD determination.

Several commenters agreed with the professional competencies for the group members described in § 300.308(a). However, one commenter stated that "collectively qualified" is too broad a term and should be more narrowly defined. Another commenter stated that there is no way to ensure that the group members possess the necessary expertise unless there is a mechanism to determine whether the group members have the specified competencies in proposed § 300.308(a).

One commenter stated that, although professionals from more than one discipline may be qualified to administer certain assessments, they do not bring the same expertise to the process. One commenter asked if a special education teacher, a regular education teacher, and parent were all that would be necessary if they collectively met the competency requirements.

Several commenters stated that the list of professionals in proposed § 300.308(b) for the eligibility group should be removed and decisions about group members left to schools and districts.

Other commenters stated that the requirements for the eligibility group should be the same as those for the group that determines the eligibility of children suspected of all other disabilities.

Many commenters recommended that additional or different professionals should be included in the group. Numerous commenters recommended including speech-language pathologists in the group because of their expertise in reading and conducting individual diagnostic assessments in the areas of speech and language.

A few commenters stated that a school psychologist should be a required member of the group, rather than listed as “if appropriate.” One of these commenters stated that, even if school psychologists are no longer required to administer assessments to determine whether there is a discrepancy between the child’s achievement and ability, school psychologists conduct assessments related to cognitive functioning, behavior, and other issues that may affect a child’s learning.

Numerous commenters recommended requiring the special education teacher who is part of the eligibility group to have expertise in the area of SLD. However, one commenter stated that it is unnecessary for a special education teacher to be part of the group because the teacher would not have any instructional experience with the yet-to be identified child and nothing in the Act requires special education teachers to possess any diagnostic expertise in the area of SLD.

One commenter recommended that the group include a teacher with experience in teaching children who are failing or at-risk for failing, in addition to a general education and special education teacher. Several commenters recommended adding a reading specialist as a required member. A few commenters recommended including a social worker as a required member, stating that it is important that one of the members examine the child’s home and community environment to rule out environmental and economic factors as a primary source of the child’s learning difficulties. Another commenter recommended adding a guidance counselor as a required member. One commenter recommended including a school nurse and stated that a school nurse can contribute information about educationally relevant medical findings.

One commenter stated that a reading teacher and an educational therapist should always be included in the group. A few commenters were not familiar with the role of an educational therapist and requested a definition or elimination of the term from the list of “other professionals.” One commenter stated that two of the three professionals listed as “other professionals” (school psychologist, reading teacher, educational therapist) are not credentialed and questioned why they were included in the group.

Discussion: The Department has considered the diversity of comments received and, given the lack of consensus about which individuals should be included in the group that makes eligibility determinations for children suspected of having an SLD, believes that the requirements in current § 300.540 should be retained. Current § 300.540 states that the eligibility group for children suspected of having SLD must include the child’s parents and a team of qualified professionals, which must include the child’s regular teacher (or if the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age) or for a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist or remedial reading teacher. We believe this allows decisions about the specific qualifications of the members to be made at the local level, so that the composition of the group may vary depending on the nature of the child’s suspected disability, the expertise of local staff, and other relevant factors. For example, for a child suspected of having an SLD in the area of reading, it might be important to include a reading specialist as part of the eligibility group. However, for a child suspected of having an SLD in the area of listening comprehension, it might be appropriate for the group to include a speech language pathologist with expertise in auditory processing disorders. Current § 300.540 provides flexibility for schools and districts, and ensures that the group includes individuals with the knowledge and skills necessary to interpret the evaluation data and make an informed determination as to whether the child is a child with an SLD, and the educational needs of the child.

Changes: Section 300.308 has been changed to include the requirements from current § 300.540. Determining the Existence of a Specific Learning Disability (§ 300.309)

Comment: One commenter stated that there is no authority in the Act for the SLD eligibility requirements outlined in § 300.309.

Discussion: We agree that the statutory language is broad and does not include the specific requirements to determine whether a child suspected of having an SLD is a child with a disability. The purpose of these regulations, however, is to provide details to assist States in the appropriate implementation of the Act. We believe the requirements in § 300.309 are necessary to ensure that States have the details necessary to implement the Act.

Changes: None.

Comment: One commenter stated that RTI was Congress’ preference for determining eligibility under SLD, and therefore, the criteria for RTI should be the first paragraph of § 300.309 (Determining the existence of a specific learning disability).

Discussion: The Department believes that the criteria in § 300.309 are presented in a logical order and are consistent with the Act.

Changes: None.

Comment: One commenter stated that a discrepancy between intellectual ability and achievement can differentiate between children with disabilities and children with general low achievement, and noted that the problems with discrepancy models have been in implementation, rather than in the concept itself for identifying children with SLD.

Discussion: There is a substantial research base summarized in several recent consensus reports (Donovan & Cross, 2002; Bradley et al., 2003) and meta-analyses (Hoskyn & Swanson, 2000; Steubing et al., 2002) that does not support the hypothesis that a discrepancy model by itself can differentiate children with disabilities and children with general low achievement.² Therefore, we disagree with the comment because such a differentiation is not possible with any single criterion, including RTI.

Changes: None.

Comment: One commenter requested retaining the language in current § 300.541, regarding the use of discrepancy models.

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Discussion: Section 614(b)(6) of the Act prohibits States from requiring a discrepancy approach to identify children with SLD. Current § 300.541 requires a discrepancy determination and is, therefore, inconsistent with the Act.

Changes: None.

Comment: One commenter requested that the eligibility group be allowed to consider the results from standardized, individualized testing (not just criterion-based testing or functional assessments) in the eligibility determination.

Discussion: Nothing in the Act or these regulations would preclude the eligibility group from considering results from standardized tests when making eligibility determinations.

Changes: None.

Comment: Many commenters recommended adding the concept of psychological processing disorders to the eligibility criteria in § 300.309. Several commenters noted that the criteria in § 300.309 do not fully address the definition of SLD in § 300.8(c)(10), which includes a processing disorder in one or more of the basic psychological processes. Several commenters stated that, without requiring documentation of a basic psychological processing disorder, the number of children identified with SLD will significantly increase and the use of assessment tools that have the potential to significantly guide instruction will decrease. Several commenters stated that failure to consider individual differences in cognitive processing skills reverses more than 20 years of progress in cognitive psychology and developmental neuroscience. One commenter stated that identifying a basic psychological processing disorder would help ensure that children identified with an SLD are not simply victims of poor instruction. One commenter stated that the shift away from requiring diagnostic assessments in the area of cognition would make it conceptually impossible to document that a child has a disorder in one or more of the basic psychological processes, as required in the definition of SLD in § 300.8(c)(10).

Discussion: The Department does not believe that an assessment of psychological or cognitive processing should be required in determining whether a child has an SLD. There is no current evidence that such assessments are necessary or sufficient for identifying SLD. Further, in many cases, these assessments have not been used to make appropriate intervention decisions. However, § 300.309(a)(2)(ii) permits, but does not require, consideration of a pattern of strengths or weaknesses, or both, relative to intellectual development, if the evaluation group considers that information relevant to an identification of SLD. In many cases, though, assessments of cognitive processes simply add to the testing burden and do not contribute to interventions. As summarized in the research consensus from the OSEP Learning Disability Summit (Bradley, Danielson, and Hallahan, 2002), “Although processing deficits have been linked to some SLD (e.g., phonological processing and reading), direct links with other processes have not been established. Currently, available methods for measuring many processing difficulties are inadequate. Therefore, systematically measuring processing difficulties and their link to treatment is not yet feasible * * *. Processing deficits should be eliminated from the criteria for classification * * *.” (p. 797).³ Concerns about the absence of evidence for relations of cognitive discrepancy and SLD for identification go back to Bijou (1942; ⁴ see Kavale, 2002) ⁵. Cronbach (1957) ⁶ characterized the search for aptitude by treatment interactions as a “hall of mirrors,” a situation that has not improved over the past few years as different approaches to assessment of cognitive processes have emerged (Fletcher *et al.*, 2005; Reschly & Tilly, 1999) ⁷.

Changes: None.

Comment: Several commenters requested that the regulations include a definition of “intellectual development.”

Discussion: We do not believe it is necessary to define “intellectual development” in these regulations. Intellectual development is included in § 300.309(a)(2)(ii) as one of three standards of comparison, along with age and State-approved grade-level standards. The reference to “intellectual development” in this provision means that the child exhibits a pattern on strengths and weaknesses in performance relative to a standard of intellectual development such as commonly measured by IQ tests. Use of the term is consistent with the discretion provided in the Act in allowing the continued use of discrepancy models.

Changes: None.

Comment: Several commenters stated that intra-individual differences, particularly in cognitive functions, are essential to identifying a child with an SLD and should be included in the eligibility criteria in § 300.309.

Discussion: As indicated above, an assessment of intra-individual differences in cognitive functions does not contribute to identification and intervention decisions for children suspected of having an SLD. The regulations, however, allow

for the assessment of intra-individual differences in achievement as part of an identification model for SLD. The regulations also allow for the assessment of discrepancies in intellectual development and achievement.

Changes: None.

Comment: One commenter requested guidance on how to determine whether a child was provided with learning experiences appropriate for the child's age, as required in § 300.309(a)(1).

Discussion: While such guidance might be helpful, we believe SEAs and LEAs are in the best position to provide guidance on age-appropriate learning experiences.

Changes: None.

Comment: Several commenters expressed support for the requirements in § 300.309(a)(1) and stated that the first element of determining eligibility for an SLD is a finding that the child does not achieve commensurate with the child's age in one or more of the eight areas when provided with learning experiences appropriate to the child's age. However, several commenters requested requiring that eligibility determinations for an SLD include evidence that the child's achievement level is not commensurate with the child's age *and* ability (emphasis added). One commenter indicated that knowledge of a child's ability level is important to ensure that a determination is not based on deficits in areas not related to cognitive processing (e.g., lack of opportunity to learn, social or emotional disturbances), and to prevent misdiagnosis of children with mental retardation and SLD.

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One commenter stated that § 300.309(a)(1) would allow many child who failed to achieve commensurate with his or her age to be considered to have an SLD, and this will increase the number of children referred for special education and related services. Several commenters expressed concern that the eligibility determination for SLD is based on whether the child achieves commensurate with his or her age because current practice uses normative data that are based on grade level. These commenters recommended clarifying that grade level or classmate performance should also be considered.

Discussion: The first element in identifying a child with SLD should be a child's mastery of grade-level content appropriate for the child's age or in relation to State-approved grade-level standards, not abilities. This emphasis is consistent with the focus in the ESEA on the attainment of State-approved grade-level standards for all children. State-approved standards are not expressed as "norms" but represent benchmarks for all children at each grade level. The performance of classmates and peers is not an appropriate standard if most children in a class or school are not meeting State approved standards. Furthermore, using grade-based normative data to make this determination is generally not appropriate for children who have not been permitted to progress to the next academic grade or are otherwise older than their peers. Such a practice may give the illusion of average rates of learning when the child's rate of learning has been below average, resulting in retention. A focus on expectations relative to abilities or classmates simply dilutes expectations for children with disabilities.

We will modify § 300.309(a)(1) to clarify that, as a first element in determining whether a child has an SLD, the group just determine that the child does not demonstrate achievement that is adequate for the child's age or the attainment of State-approved grade-level standards, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards in one or more of the areas listed in § 300.309(a)(1). The reference to "State-approved grade-level standards" is intended to emphasize the alignment of the Act and the ESEA, as well as to cover children who have been retained in a grade, since age level expectations may not be appropriate for these children. The reference to "instruction" will be added to emphasize that children may not be identified as having SLD if there is no documentation of appropriate instruction, consistent with the Act and the ESEA. Consistent with this change, we will add a reference to "Stateapproved grade-level standards" in §§ 300.309(a)(2)(i) and (ii). We will also combine proposed § 300.311(a)(5) and (6) into § 300.311(a)(5) to ensure consistency with the requirements in § 300.309(a).

Changes: We have modified § 300.309(a)(1) and §§ 300.309(a)(2)(i) and (ii), and combined proposed § 300.311(a)(5) and (6) into § 300.311(a)(5) to ensure consistency with the requirements in § 300.309(a).

Comment: Several commenters expressed support for including reading fluency in the list of areas to be considered when determining whether a child has an SLD. However, several commenters recommended removing reading fluency from the list in § 300.309(a)(1), stating that a weakness in reading fluency, in isolation, does not indicate a reading disability.

Discussion: No assessment, in isolation, is sufficient to indicate that a child has an SLD. Including reading fluency in the list of areas to be considered when determining whether a child has an SLD makes it more likely that a child who is gifted and has an SLD would be identified. Fluency assessments are very brief and highly relevant to instruction. We, therefore, do not believe that reading fluency should be removed from § 300.309(a)(1).

Changes: None.

Comment: Many commenters stated that eligibility criteria based on RTI models will result in dramatic increases in referrals, special education placements, and legal problems. One commenter stated that the eligibility criteria in § 300.309 do not provide sufficient checks and balances to ensure that only those children who truly require special education are identified as having SLD. A few commenters stated that using an RTI model would result in incorrectly identifying underachieving children as having SLD.

Discussion: We do not believe that eligibility criteria based on RTI models will result in dramatic increases in referrals and special education placements. Well-implemented RTI models and models that identify problems early and promote intervention have reduced, not increased, the number of children identified as eligible for special education services and have helped raise achievement levels for all children in a school.⁸ We believe that the regulations do provide sufficient checks to ensure that only children who need special education and related services are identified as having SLD.

Changes: None.

Comment: Several commenters stated that the language in § 300.309(a)(2)(ii) is very confusing and should be rewritten. Many commenters stated that the word “or” instead of “and” should be used between § 300.309(a)(2)(i) and § 300.309(a)(2)(ii), because otherwise a child could be identified with an SLD because he or she failed to meet passing criteria on a State assessment, and failure to make sufficient progress on a State-approved assessment alone is not grounds for a determination that a child has an SLD. Several commenters stated that the phrase, “pattern of strengths and weaknesses in performance, achievement, or both” is a typographical error because it is repeated twice.

Discussion: We do not agree that “and” should be used instead of “or” between § 300.309(a)(2)(i) and (ii), because this would subject the child to two different identification models. We agree that failing a State assessment alone is not sufficient to determine whether a child has an SLD. However, failing a State assessment may be one factor in an evaluation considered by the eligibility group. As required in § 300.304(b)(1), consistent with section 614(b)(2)(A) of the Act, the evaluation must use a variety of assessment tools and strategies to gather relevant information about the child. Further, § 300.304(b)(2), consistent with section 614(b)(2)(B) of the Act, is clear that determining eligibility for special education and related services cannot be based on any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. We agree that § 300.309(a)(2)(ii) could be stated more clearly and will rewrite it to state that the eligibility group can determine that a child has an SLD if the child meets the criteria in § 300.309(a)(1) and exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age and State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of an SLD.

Changes: We have changed § 300.309(a)(2)(ii) for clarity.

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Comment: Several commenters requested a definition of “State approved results.” One commenter stated that the language was extremely confusing and that “State-approved results” could be interpreted to mean approved results that are equivalent to proficiency on State assessments under the ESEA, and this could lead to eligibility determinations for a very large group of older children with poor reading performance for whom it would be nearly impossible to make sufficient progress to become proficient readers. This commenter recommended changing the language to refer to a child’s failure to achieve a rate of learning to make sufficient progress based on “State-defined criteria.” Another commenter recommended substituting “State achievement standards” for “State approved results.”

Discussion: The intention is to refer to State assessments approved under the ESEA. We have changed “State approved results” to “State-approved grade-level standards.” We believe this change adequately addresses the commenters concerns.

Changes: We have removed “State approved results” and inserted in its place “State-approved grade-level standards” in § 300.309 and § 300.311.

Comment: One commenter stated that including “State-approved results” in § 300.309(a)(2)(i) means that there is no Federal definition of SLD.

Discussion: States must develop criteria for determining whether a child has an SLD that are consistent with the Federal requirements in §§ 300.307 through 300.311 and the definition of SLD in § 300.8(c)(10).

Changes: None.

Comment: A few commenters stated that using the criteria in § 300.309(a)(2), a child could meet State standards and still be identified as a child with an SLD.

Discussion: We agree with the commenters. Accelerated growth toward, and mastery of, State-approved grade-level standards are goals of special education. Furthermore, as stated in § 300.101, the fact that a child is advancing from grade to grade does not make a child with a disability ineligible for special education and related services. However, consistent with § 300.8, the group making the eligibility determination must conclude both that the child has an SLD and, that, because of that disability, the child needs special education and related services.

Changes: None.

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 descriptive 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 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.

Comment: One commenter stated that, without additional clarity, eligibility criteria will vary substantially among States and that States will have definitions that are suited to their individual preferences, rather than a universal sense of what constitutes eligibility under SLD based on the research and national standards of professional practice.

Discussion: State eligibility criteria must meet the requirements in §§ 300.307 through 300.111 and LEAs must use these State-adopted criteria. We believe that, although these provisions allow States some flexibility in how children with SLD are identified, the requirements in these provisions will ensure that SLD criteria do not vary substantially across States.

Changes: None.

Comment: One commenter stated that, without more clarity in the requirements for RTI models, there would be an increase in the number of eligibility disputes between parents and school districts.

Discussion: We do not believe more clarity in the requirements for RTI models is necessary. States can avoid disputes over eligibility determinations by developing clear criteria, consistent with the regulatory parameters, and providing staff with the necessary guidance and support to implement the criteria.

Changes: None.

Comment: One commenter urged the Department to encourage States to convene a group of education, disability, and parent stakeholders to discuss and design a model approach to early identification of children with SLD.

Discussion: The Department agrees that it is important to identify children with SLD early and to provide the necessary instruction and supports to avoid referrals to special education. The extent to which States involve other interested parties (e.g., disability groups, parent groups) in the design or development of such a system is a decision that should be made by each State.

Changes: None.

Comment: A few commenters stated that professional development requirements to implement RTI models should be incorporated into the regulations so RTI models are not haphazardly implemented. One commenter stated that before RTI can be used systematically as part of the special education identification process, school districts must have administrative support at all levels, ongoing professional development for all staff, and coordination with institutions of higher education. Several commenters recommended encouraging States to develop efficient, collaborative evaluation systems. One commenter recommended requiring regular education teachers to address the needs of children with different learning styles, identify early and appropriate interventions for children with behavioral challenges, and understand and use data and assessments to improve classroom practices and learning.

Discussion: We agree that administrative support, professional development, and coordination with teacher training programs would be helpful in the effective implementation of RTI models.

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We also agree that efficient and collaborative evaluation systems should be developed, and that all teachers, including regular education teachers, should be trained to address the needs of children with different learning styles, identify early and appropriate interventions for children with behavioral challenges, and understand and use data and assessments to improve classroom practices and learning. However, professional development requirements are a State responsibility, consistent with § 300.156 and section 612(a)(14) of the Act, and it would be inappropriate for the Department to include specific professional development requirements in these regulations.

Changes: None.

Comment: One commenter stated that if a State prohibits the use of a discrepancy model, there would not be sufficient time or funds necessary to effectively train staff. Several commenters asked that there be a transition period so that personnel can be adequately trained in RTI or other forms of assessment and observation.

Discussion: It is not necessary for these regulations to require a transition period for implementing RTI models, particularly because there are many schools and districts currently implementing RTI models. Under the requirements in section 614(b)(6) of the Act, which took effect July 1, 2005, States should have developed mechanisms to permit LEAs to use RTI models. States may need to make adjustments based on these final regulations. Nothing in these regulations requires an LEA to drop current practices in favor of a new model with no transition. Obviously, a plan would need to be developed when changing to an RTI model, including strategies for implementation and professional development.

Changes: None.

Comment: Many commenters stated that the use of RTI models would be costly, requiring massive staff training and resources. Many commenters recommended ways in which the Department could support States in improving identification and interventions for children with SLD. Commenters' recommendations included the following: long-term, Statewide pilot studies on assessments and interventions for children with SLD; methods to increase the use of RTI; guidance on establishing appropriate timelines for instructional interventions; and information on new scientifically based approaches to identifying children with SLD.

Discussion: The Department recognizes the need for technical assistance and training to implement RTI models and is directing technical assistance funds under Part D of the Act, administered by the Department's Office of Special Education Programs (OSEP), toward this effort. OSEP plans to develop and disseminate an RTI resource kit and devote additional resources to technical assistance providers to assist States in implementing RTI models. OSEP will also continue to identify and develop model RTI implementation sites and evaluate SLD identification models in math and reading. In addition, the Comprehensive Center on Instruction, jointly funded by OSEP and the Office of Elementary and Secondary Education (OESE), will provide technical assistance to States on RTI implementation.

Changes: None.

Comment: Many commenters supported examining the pattern of strengths and weaknesses in determining whether a child is considered to have an SLD. A number of commenters stated that it is important that groups use a process to determine whether a child responds to scientific, research-based interventions, as well as consider relevant, empirically validated patterns of strengths and weaknesses in achievement, performance, or both, relative to intellectual development. One commenter stated that "pattern of strengths and weaknesses in performance" in § 300.309(a)(2)(ii) is insufficiently defined and without a clearer definition of "pattern," schools will continue the wait-to-fail model. One commenter recommended clarifying the meaning of "weakness," stating that weakness does not mean failure, and that there may be specific actions that could address weaknesses in performance that would result in failure if left alone.

Discussion: Patterns of strengths and weaknesses commonly refer to the examination of profiles across different tests used historically in the identification of children with SLD. We believe that the meaning of "pattern of strengths and weaknesses" is clear and does not need to be clarified in these regulations.

Changes: None.

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.

Comment: Some commenters recommended using "cognitive ability" in place of "intellectual development" because "intellectual development" could be narrowly interpreted to mean performance on an IQ test. One commenter stated that the term "cognitive ability" is preferable because it reflects the fundamental concepts underlying SLD and can be assessed with a variety of appropriate assessment tools. A few commenters stated that the reference to identifying a child's pattern of strengths and weaknesses that are not related to intellectual development should be removed because a cognitive assessment is critical and should always be used to make a determination under the category of SLD.

Discussion: We believe the term "intellectual development" is the appropriate reference in this provision. Section 300.309(a)(2)(ii) permits the assessment of patterns of strengths and weakness in performance, including performance on assessments of cognitive ability. As stated previously, "intellectual development" is included as one of three methods of comparison, along with age and State-approved grade-level standards. The term "cognitive" is not the appropriate reference to performance because cognitive variation is not a reliable marker of SLD, and is not related to intervention.

Changes: None.

Comment: One commenter reviewed the list of factors in § 300.309(a)(3) that must be ruled out as primary reasons for a child's performance and asked whether children with other health impairments (OHI), traumatic brain injury (TBI), or speech impairments would overlap with the SLD definition. Several commenters noted that many children with hearing, visual, or motor disabilities; mental retardation; or emotional disturbances (ED) also have concomitant learning disabilities that go unidentified, and that these children end up with lower academic and functional achievement levels than they should because an important contributing factor to their learning problems has not been addressed.

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Several commenters recommended adding language to the regulations stating that a child with a disability other than an SLD may also be identified with an SLD.

Discussion: Children with one of the disabilities in § 300.8 should be identified as a child with a disability using the category that is most appropriate for the child. Some children may be identified under other disability

categories, such as OHI, TBI, ED, or speech impairment, and may also have low achievement and even meet SLD criteria. Services must meet the child's needs and cannot be determined by the child's eligibility category. We believe it is unnecessary to add language regarding SLD as a concomitant disability.

Changes: None.

Comment: One commenter asked what kind of assessment identifies culture as a primary cause of academic performance deficits and recommended removing the requirement in § 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 §§ 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 § 300.304(c)(1)(i) and section 614(b)(3)(A)(i) of the Act.

Changes: None.

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 § 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 § 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.

Comment: Numerous commenters supported the requirement in § 300.309(b)(1) for data demonstrating that a child suspected of having an SLD has been provided with high-quality, research-based instruction in regular education settings delivered by qualified personnel. Several commenters stated that this requirement should apply to all children and asked why this requirement is confined to only children suspected of having SLD. One commenter stated that if schools would use proven best practices, there would be fewer children in need of special education in the later grades. However, one commenter stated that it is incorrect to assume that any child who is not responding to interventions must have an SLD when there are a myriad of reasons why children may not be responding to instruction. One commenter recommended adding "to the extent practicable" to acknowledge that scientific research-based interventions are not available in many areas, particularly in mathematics. One commenter recommended decreasing the emphasis on research-based instruction.

Discussion: Sections 300.306(b)(1)(i) and (ii), consistent with section 614(b)(5)(A) and (B) of the Act, specifically state that children should not be identified for special education if the achievement problem is due to lack of appropriate instruction in reading or mathematics. This issue is especially relevant to SLD because lack of appropriate instruction in these areas most commonly leads to identifying a child as having an SLD. All children should be provided with appropriate instruction provided by qualified personnel. This is an important tenet of the Act and the ESEA. Both the Act and the ESEA focus on doing what works as evidenced by scientific research and providing children with appropriate instruction delivered by qualified teachers.

Changes: None.

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 § 300.309(b) as providing a legal entitlement to ESEA, research-based instruction and database 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. 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 § 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.

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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. 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 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.

Changes: We have revised the introductory material in § 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 § 300.309(b)(1) to refer to appropriate instruction rather than high quality, research-based instruction, and removed the cross reference to the ESEA.

Comment: One commenter stated that many reading programs claim to be research-based, but lack credible evidence of the program's effectiveness.

Discussion: Programs that claim to be research-based, but which are not based on sound scientific research, should not be considered research-based instruction by a State or LEA.

Changes: None.

Comment: One commenter asked what criteria should be used to determine that the child was provided with appropriate high quality, research based instruction, especially when the child has been home schooled or attends a private school. One commenter asked about children referred for evaluation from charter schools and expressed concern that these children would not be eligible under the category of SLD because they did not have instruction delivered by qualified personnel.

Discussion: As part of the evaluation, the eligibility group must consider whether the child received appropriate instruction from qualified personnel. For children who attend private schools or charter schools or who are homeschooled, it may be necessary to obtain information from parents and teachers about the curricula used and the child's progress with various teaching strategies. The eligibility group also may need to use information from current classroom-based assessments or classroom observations. On the basis of the available information, the eligibility group may identify other information that is needed to determine whether the child's low achievement is due to a disability, and not primarily the result of lack of appropriate instruction. The requirements for special education eligibility or the expectations for the quality of teachers or instructional programs are not affected, and do not differ, by the location or venue of a child's instruction.

Changes: None.

Comment: Many commenters requested a definition of "qualified personnel." One commenter stated that teachers should be trained to deliver the program of instruction and simply saying they should be highly qualified is not sufficient. One commenter recommended removing the phrase "qualified personnel" in § 300.309(b)(1), because it is likely to be interpreted to mean that instruction must be delivered by highly qualified teachers, as defined in the ESEA.

Discussion: Section 300.156 and section 614(a)(14) of the Act are clear that each State is responsible for establishing and maintaining personnel qualifications to ensure that personnel are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. Consistent with § 300.18 and section 602(10) of the Act, a public school teacher, including a special education teacher,

who teaches core academic subjects must meet the highly qualified teacher standards under the Act. The term that is used in § 300.309(b)(1), “qualified personnel,” does not, and should not be interpreted to, require that private school teachers be “highly qualified” to deliver the instruction discussed in § 300.309(b)(1).

Changes: None.

Comment: One commenter asked whether the regulations require an LEA to provide high-quality, research-based instruction in the regular education setting prior to, or as part of, the referral process before the group can determine whether a child has an SLD. One commenter recommended that research based interventions occur prior to a referral to special education. Several commenters stated that an evaluation to assess all areas of suspected disability should follow an assessment of a child’s response to instruction.

Discussion: What is important is that the group making the eligibility decision has the information that it needs to rule out that the child’s underachievement is a result of a lack of appropriate instruction. That could include evidence that the child was provided appropriate instruction either before, or as a part of, the referral process. Evidence of appropriate instruction, including instruction delivered in an RTI model, is not a substitute for a complete assessment of all of the areas of suspected need. As discussed earlier in this section, we have revised § 300.309(b) to make this clear.

Changes: As discussed previously, we have revised § 300.309(b).

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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.

Changes: None.

Comment: Many commenters recommended reinforcing the role of parents in determining whether a child has an SLD by adding language to § 300.309(b) stating that the child’s parents and the group of qualified professionals must consider whether the child is a child with a disability.

Discussion: Section 300.306(a)(1), consistent with section 614(b)(4)(A) of the Act, is clear that the parent of the child is included in eligibility determinations. Section 300.309(a) cross-references the group in § 300.306, which includes the parent. We believe this adequately addresses the role of the parent and that no changes are necessary.

Changes: None.

Comment: One commenter requested a definition of “data-based documentation.”

Discussion: Data-based documentation refers to an objective and systematic process of documenting a child’s progress. This type of assessment is a feature of strong instruction in reading and math and is consistent with § 300.306(b)(1)(i) and (ii) and section 614(b)(5)(A) and (B) of the Act, that children cannot be identified for special education if an achievement problem is due to lack of appropriate instruction in reading or math.

Changes: None.

Comment: Numerous commenters supported requiring data-based documentation of repeated assessments of achievement at reasonable intervals to be provided to parents during the time the child is receiving instruction. One commenter emphasized the importance of documenting that the interventions used are data based and implemented with fidelity. One commenter stated that data-based documentation should be provided to all parents of children with disabilities, not just children suspected of having SLD. However, several commenters stated that requiring data-based documentation of repeated assessments is an additional bureaucratic requirement that is overly prescriptive and costly, and will require additional paperwork.

Discussion: We believe that one of the most important aspects of good teaching is the ability to determine when a child is learning and then to tailor instruction to meet the child’s individual needs. Effective teachers use data to make informed decisions about the effectiveness of a particular instructional strategy or program. A critical hallmark of appropriate instruction is that data documenting a child’s progress are systematically collected and analyzed and that parents are kept informed of the child’s progress. Assessments of a child’s progress are not bureaucratic, but an essential component of good instruction.

Changes: None.

Comment: Several commenters requested definitions for “repeated assessments” and “reasonable intervals.”

Discussion: Instructional models vary in terms of the frequency and number of repeated assessments that are required to determine a child’s progress. It would be inappropriate for the Department to stipulate requirements in Federal regulations that would make it difficult for districts and States to implement instructional models they determine appropriate to their specific jurisdictions.

Changes: None.

Comment: One commenter recommended removing the requirement for data-based documentation of repeated assessments of achievement at reasonable intervals because it would make it impossible to determine eligibility if a child is new to a school district and district personnel do not have a child’s records with such information.

Discussion: We do not believe removing the requirement is the appropriate solution to the commenter’s problem. States will need to adopt criteria for determining how to provide such data for children new to a district. Children should not be identified as having SLD if there is no evidence of appropriate instruction.

Changes: None.

Comment: One commenter expressed concern that § 300.309(b)(2), requiring parents to be informed of their child's repeated failure to perform well on assessments, could be interpreted to refer to the assessments under the ESEA and that this would mean that a child must perform poorly over a period of several school years to be considered for eligibility under the category of SLD.

Discussion: While the results of a child's performance on assessments under the ESEA may be included as data documenting a child's progress, relying exclusively on data from Statewide assessments under the ESEA would likely not meet the requirement for repeated assessments at "reasonable intervals," as required by these regulations. It is possible that a State could develop other assessments tied to the State approved test that would meet these requirements.

Changes: None.

Comment: Numerous commenters asked how long an intervention should continue before determining a child has not made adequate progress and a referral for an evaluation to determine eligibility for special education is made. Several commenters recommended that if a child is not making progress within 45 days, an evaluation should take place. Other commenters recommended a time limit of 90 days. One commenter recommended the regulations include a range of active intervention days, not just a waiting period, within which the IEP Team expects to notice a change, and recommended between 45–75 school days. One commenter suggested 6–10 weeks as an appropriate period of time. A few commenters recommended requiring States to establish reasonable time limits for decision making. Several commenters recommended requiring the IEP Team and the parents to agree on an appropriate period of time. Several commenters stated that unless a timeline is specified in the regulations, there would be different standards occurring throughout the country. A few commenters expressed concern that if time limits were not clarified, school districts and parents would interpret the timelines differently, which would result in contentious situations and litigation. One commenter stated that a parent could sue for compensatory services if, after requesting an evaluation, the LEA requires an assessment of how the child responds to high quality research-based instruction. Several commenters stated that the lack of a specific timeline means that an evaluation could be indefinitely delayed and children denied services. Several commenters recommended adding language to the regulations to ensure that RTI models could not be used to delay an evaluation of a child suspected of having a disability, access to special education and related services, or protections under the Act. In addition to requesting a definition of an "appropriate period of time," a few commenters requested a definition of "adequate progress" and recommended adding language to require States to define "adequate progress."

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One commenter stated that a child's rate of learning needs to be examined carefully. One commenter offered a definition of a "developmentally appropriate rate" as the time or the number of repetitions required to have at least 85 percent of children at the same age or grade level acquire and retain the particular skill or academic levels, as established by research or by experience with the delivery of that curriculum or program.

Discussion: Instructional models vary in terms of the length of time required for the intervention to have the intended effect on a child's progress. It would not be appropriate for the Department to establish timelines and the other requirements proposed by the commenters in Federal regulations, because doing so would make it difficult for LEAs to implement models specific to their local school districts. These decisions are best left to State and local professionals who have knowledge of the instructional methods used in their schools. The Department believes that good instruction depends on repeated assessments of a child's progress. This allows teachers to make informed decisions about the need to change their instruction to meet the needs of the child, and also provides parents with information about their child's progress so that they can support instruction and learning at home. Parents should be informed if there are concerns about their child's progress and should be aware of the strategies being used to improve and monitor their child's progress. We understand the commenters' requests for more specific details on timelines and measures of adequate progress. However, as noted above, these decisions are best left to professionals who have knowledge about the instructional models and strategies used in their States and districts. We also understand the commenters' concerns that the requirements in § 300.309(b) may result in untimely evaluations or services and that parents must be fully informed about the school's concerns about their child's progress and interventions provided by the school. Therefore, we will combine proposed § 300.309(c) and (d), and revise the new § 300.309(c) to ensure that the public agency promptly requests parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided with appropriate instruction, which could include instruction in an RTI model, and whenever a child is referred for an evaluation. We will also add a new § 300.311(a)(7)(ii) to ensure that the parents of a child suspected of having an SLD who has participated in a process that evaluates the child's response to scientific, research-based intervention, are notified about the State's policies regarding collection of child performance data and the general education services that will be provided; strategies to increase their child's rate of learning; and their right to request an evaluation at any time. If parents request an evaluation and provide consent, the timeframe for evaluation begins and the information required in § 300.309(b) must be collected (if it does not already exist) before the end of that period.

Changes: We have combined proposed § 300.309(c) and (d), and revised the new paragraph (c) in § 300.309 to require the public agency to promptly request parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided appropriate instruction, and whenever a child is referred for an evaluation. We also have added a new § 300.311(a)(7)(ii) to require that the eligibility report include evidence that when a child has participated in an RTI process, the parents were informed of State policies regarding child performance data that would

be collected and the general education services that would be provided; strategies to support the child's rate of learning; and a parent's right to request an evaluation at any time.

Comment: Many commenters recommended clarifying when parental consent for evaluation should be obtained and when the 60-day timeline to complete an evaluation begins. Several commenters recommended ensuring that the 60-day timeline for evaluation applies regardless of the evaluation model used. One commenter asked how scientific research-based interventions could be completed within a 60-day evaluation timeline. One commenter stated that 60 days may not be enough time to appropriately determine whether a child responds to instruction, particularly for children who have not had exposure to such interventions (e.g., children entering the public school system for the first time). One commenter asked if the intent of the regulations is to allow a determination that a child has an SLD to take place outside the timeline for an initial evaluation, and stated that without clarification of the intersection between an RTI process (that may, by definition, require additional time beyond that which is permitted for an evaluation) and the required period of time for an initial assessment, the regulations would cause confusion and result in improper evaluations and eligibility determinations. Several commenters recommended that the regulations address the need for an extension of the timeline and allow States to set an alternative timeline without a written agreement. Several commenters requested adding a provision for an extended timeline, with parental consent, in exceptional circumstances. Several commenters stated that the language regarding an extension of timelines is confusing.

Discussion: Section 300.309(c), as revised, clarifies that if a child has not made adequate progress after an appropriate period of time, a referral for an evaluation must be made. As required in § 300.301(c), the initial evaluation must be conducted within 60 days of receiving consent for an evaluation (or if the State establishes a timeframe within which the evaluation must be completed, within that timeframe). Models based on RTI typically evaluate the child's response to instruction prior to the onset of the 60-day period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on the child's achievement, including observation data. RTI models provide the data the group must consider on the child's progress when provided with appropriate instruction by qualified professionals as part of the evaluation. Section 300.309(b)(1) requires that the eligibility group consider data on the child's progress when provided with appropriate instruction by qualified professionals as part of this evaluation. These data, along with other relevant information, will assist the eligibility group in determining whether the child's low achievement is attributable to a lack of appropriate instruction. As required in § 300.306(b)(1)(i) and (ii), consistent with section 614(b)(5)(A) and (B) of the Act, a child cannot be identified as a child with a disability if the determinant factor for that determination is lack of appropriate instruction in reading or math. Based on their review of the existing data, and input from the child's parents, the eligibility group must decide, on a case-by-case basis, depending on the needs of the child and the information available regarding the child, what additional data, if any, are needed to determine whether the child is a child with a disability, and the educational needs of the child. If the eligibility group determines that additional data are needed and that these data cannot be obtained within the 60-day timeframe (or the timeframe established by the State), new § 300.309 (c) (proposed § 300.309 (d)) allows the extension of the timeframe with mutual written agreement of the child's parent and the eligibility group.