

FEDERAL AND STATE REGULATORY RESOURCE BOOK

RELATING TO THE EDUCATION OF STUDENTS WITH DISABILITIES

2023-2024

Tab 1	Federal Regulations IDEA Part B 2004, Subparts A through E, 34 C.F.R. §§ 300.1-300.599 (2021)
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October 2023

Changes from 2022-2023 Version

- Tab 1** **Federal Regulations IDEA Part B 2004, Subparts A through E, 34 C.F.R. §§ 300.1 through 300.599 (2022)**
- No Changes
- Tab 2** **Federal Regulations IDEA Part B 2004, Subpart F through H, 34 C.F.R. §§ 300.600 through 300.818 and Appendices for Part 300 (2022)**
- No Changes
- Tab 3** **Children with Disabilities 6.31.2 NMAC (7/31/2023)**
- Amendments to 6.31.2.10 to strengthen the requirements for local education agencies to carry out child find, conduct timely initial evaluations of children suspected of having a disability, and render eligibility determinations shortly after completion of the evaluation.
 - Amendments to 6.31.2.11 to clarify that a diploma obtained through the modified or ability programs of study does not end a student’s right to FAPE.
 - All Gifted Education rules were removed from 6.31.2 NMAC and a new Gifted Education Rule was promulgated as 6.31.3 NMAC.
- Tab 4** **Standards for Excellence: General Provisions 6.29.1 NMAC (7/31/2023)**
- Amendments to 6.29.1.9 regarding graduation requirements for students with disabilities among the three programs of study. Clarification that a conditional certificate of transition and a diploma obtained by completing the modified or ability program of study does not end a student’s right to FAPE.
- Tab 5** **Rights and Responsibilities of the Public Schools and Public School Students 6.11.2 NMAC (8/25/2020)**
- No Changes

Tab 1

Federal Regulations IDEA Part B, Subparts A through E

34 C.F.R. §§ 300.1 through 300.599 (GPO e-CFR Last Update July 1, 2021)

Federal Regulations IDEA Part B 2020

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AUTHORITY: 20 U.S.C. 1221e-3, 1406,
1411-1419, and 3474; Pub. L. 111-256, 124 Stat.
2643; unless otherwise noted.

SOURCE: 71 FR 46753, Aug. 14, 2006,
unless otherwise noted.

Subpart A—General

PURPOSES AND APPLICABILITY

§300.1 Purposes.

The purposes of this part are—

- (a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
 - (b) To ensure that the rights of children with disabilities and their parents are protected;
 - (c) To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and
 - (d) To assess and ensure the effectiveness of efforts to educate children with disabilities.
- (Authority: 20 U.S.C. 1400(d))

§300.2 Applicability of this part to State and local agencies.

- (a) *States.* This part applies to each State that receives payments under Part B of the Act, as defined in §300.4.
- (b) *Public agencies within the State.* The provisions of this part—
 - (1) Apply to all political subdivisions of the State that are involved in the education of children with disabilities, including:
 - (i) The State educational agency (SEA).
 - (ii) Local educational agencies (LEAs), educational service agencies (ESAs), and public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA.
 - (iii) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for children with deafness or children with blindness).
 - (iv) State and local juvenile and adult correctional facilities; and
 - (2) Are binding on each public agency in the State that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B of the Act.
- (c) *Private schools and facilities.* Each public agency in the State is responsible for ensuring

that the rights and protections under Part B of the Act are given to children with disabilities—

- (1) Referred to or placed in private schools and facilities by that public agency; or
 - (2) Placed in private schools by their parents under the provisions of §300.148.
- (Authority: 20 U.S.C. 1412)

DEFINITIONS USED IN THIS PART

§300.4 Act.

Act means the Individuals with Disabilities Education Act, as amended.

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

§300.5 Assistive technology device.

Assistive technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

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

§300.6 Assistive technology service.

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

- (a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;
- (b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;
- (c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
- (d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
- (e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and
- (f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers,

or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.
(Authority: 20 U.S.C. 1401(2))

§300.7 Charter school.

Charter school has the meaning given the term in section 4310(2) of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 6301 *et seq.* (ESEA).
(Authority: 20 U.S.C. 7221i(2))
[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

§300.8 Child with a disability.

(a) *General*—(1) *Child with a disability* means a child evaluated in accordance with §§300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

(2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under §§300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with §300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

(b) *Children aged three through nine experiencing developmental delays. Child with a disability* for children aged three through nine (or any subset of that age range, including ages three through five), may, subject to the conditions described in §300.111(b), include a child—

(1) Who is experiencing developmental delays, as defined by the State and as measured by

appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(2) Who, by reason thereof, needs special education and related services.

(c) *Definitions of disability terms.* The terms used in this definition of a child with a disability are defined as follows:

(1)(i) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.

(iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

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

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

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

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

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

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

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

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

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

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

(6) *Intellectual disability* means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance. The term "intellectual disability" was formerly termed "mental retardation."

(7) *Multiple disabilities* means concomitant impairments (such as intellectual disability-blindness or intellectual disability-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness.

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

(9) *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
(ii) Adversely affects a child's educational performance.

(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 intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

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

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

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

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61306, Oct. 30, 2007; 82 FR 31912, July 11, 2017]

§300.9 Consent.

Consent means that—

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;
- (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- (c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
- (2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).
- (3) If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

(Authority: 20 U.S.C. 1414(a)(1)(D))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61306, Oct. 30, 2007; 73 FR 73027, Dec. 1, 2008]

§300.10 [Reserved]

§300.11 Day; business day; school day.

- (a) *Day* means calendar day unless otherwise indicated as business day or school day.
- (b) *Business day* means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day, as in §300.148(d)(1)(ii)).
- (c)(1) *School day* means any day, including a partial day that children are in attendance at school for instructional purposes.
- (2) *School day* has the same meaning for all children in school, including children with and without disabilities.

(Authority: 20 U.S.C. 1221e-3)

§300.12 Educational service agency.

Educational service agency means—

- (a) A regional public multiservice agency—
 - (1) Authorized by State law to develop, manage, and provide services or programs to LEAs;
 - (2) Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State;
 - (b) Includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school; and
 - (c) Includes entities that meet the definition of intermediate educational unit in section 602(23) of the Act as in effect prior to June 4, 1997.
- (Authority: 20 U.S.C. 1401(5))

§300.13 Elementary school.

Elementary school means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

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

§300.14 Equipment.

Equipment means—

- (a) Machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house the machinery, utilities, or equipment; and
- (b) All other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

(Authority: 20 U.S.C. 1401(7))

§300.15 Evaluation.

Evaluation means procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and

the nature and extent of the special education and related services that the child needs.
(Authority: 20 U.S.C. 1414(a) (c))

§300.16 Excess costs.

Excess costs means those costs that are in excess of the average annual per-student expenditure in an LEA during the preceding school year for an elementary school or secondary school student, as may be appropriate, and that must be computed after deducting—

- (a) Amounts received—
 - (1) Under Part B of the Act;
 - (2) Under Part A of title I of the ESEA; and
 - (3) Under Part A of title III of the ESEA and;
- (b) Any State or local funds expended for programs that would qualify for assistance under any of the parts described in paragraph (a) of this section, but excluding any amounts for capital outlay or debt service. (See appendix A to part 300 for an example of how excess costs must be calculated.)

(Authority: 20 U.S.C. 1401(8))
[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

§300.17 Free appropriate public education.

Free appropriate public education or *FAPE* means special education and related services that—

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

(Authority: 20 U.S.C. 1401(9))

§300.18 [Reserved]

§300.19 Homeless children.

Homeless children has the meaning given the term *homeless children and youths* in section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11431 *et seq.*

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

§300.20 Include.

Include means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1221e-3)

§300.21 Indian and Indian tribe.

(a) *Indian* means an individual who is a member of an Indian tribe.

(b) *Indian tribe* means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*).

(c) Nothing in this definition is intended to indicate that the Secretary of the Interior is required to provide services or funding to a State Indian tribe that is not listed in the FEDERAL REGISTER list of Indian entities recognized as eligible to receive services from the United States, published pursuant to Section 104 of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a-1.

(Authority: 20 U.S.C. 1401(12) and (13))

§300.22 Individualized education program.

Individualized education program or IEP means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with §§300.320 through 300.324.

(Authority: 20 U.S.C. 1401(14))

§300.23 Individualized education program team.

Individualized education program team or IEP Team means a group of individuals described in §300.321 that is responsible for developing, reviewing, or revising an IEP for a child with a disability.

(Authority: 20 U.S.C. 1414(d)(1)(B))

§300.24 Individualized family service plan.

Individualized family service plan or IFSP has the meaning given the term in section 636 of the Act.

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

§300.25 Infant or toddler with a disability.

Infant or toddler with a disability—

(a) Means an individual under three years of age who needs early intervention services because the individual—

(1) Is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the areas of cognitive development, physical development, communication development, social or emotional development, and adaptive development; or

(2) Has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay; and

(b) May also include, at a State's discretion—

(1) At-risk infants and toddlers; and

(2) Children with disabilities who are eligible for services under section 619 and who previously received services under Part C of the Act until such children enter, or are eligible under State law to enter, kindergarten or elementary school, as appropriate, provided that any programs under Part C of the Act serving such children shall include—

(i) An educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills; and

(ii) A written notification to parents of their rights and responsibilities in determining whether their child will continue to receive services under Part C of the Act or participate in preschool programs under section 619.

(Authority: 20 U.S.C. 1401(16) and 1432(5))

§300.26 Institution of higher education.

Institution of higher education—

(a) Has the meaning given the term in section 101 of the Higher Education Act of 1965, as amended, 20 U.S.C. 1021 *et seq.* (HEA); and

(b) Also includes any community college receiving funds from the Secretary of the Interior under the Tribally Controlled Community College or University Assistance Act of 1978, 25 U.S.C. 1801, *et seq.*

(Authority: 20 U.S.C. 1401(17))

§300.27 Limited English proficient.

Limited English proficient has the meaning given the term 'English learner' in section 8101 of the ESEA.

(Authority: 20 U.S.C. 1401(18))

[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

§300.28 Local educational agency.

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

(b) *Educational service agencies and other public institutions or agencies.* The term includes—

(1) An educational service agency, as defined in §300.12; and

(2) Any other public institution or agency having administrative control and direction of a public elementary school or secondary school, including a public nonprofit charter school that is established as an LEA under State law.

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

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

§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).

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

§300.30 Parent.

(a) *Parent* means—

(1) A biological or adoptive parent of a child;

(2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(5) A surrogate parent who has been appointed in accordance with §300.519 or section 639(a)(5) of the Act.

(b) (1) Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

(2) If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the “parent” of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the “parent” for purposes of this section.

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

§300.31 Parent training and information center.

Parent training and information center means a center assisted under sections 671 or 672 of the Act.

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

§300.32 Personally identifiable.

Personally identifiable means information that contains—

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1415(a))

§300.33 Public agency.

Public agency includes the SEA, LEAs, ESAs, nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

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

§300.34 Related services.

(a) *General. Related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

(b) *Exception; services that apply to children with surgically implanted devices, including cochlear implants.* (1) Related services do not include a medical device that is surgically implanted, the optimization of that device's

functioning (e.g., mapping), maintenance of that device, or the replacement of that device.

(2) Nothing in paragraph (b)(1) of this section—

(i) Limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services (as listed in paragraph (a) of this section) that are determined by the IEP Team to be necessary for the child to receive FAPE.

(ii) Limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or

(iii) Prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly, as required in §300.113(b).

(c) *Individual related services terms defined.*

The terms used in this definition are defined as follows:

(1) *Audiology* includes—

(i) Identification of children with hearing loss;

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

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

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

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

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

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

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

(4) *Interpreting services* includes—

(i) The following, when used with respect to children who are deaf or hard of hearing: Oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell; and

(ii) Special interpreting services for children who are deaf-blind.

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

(6) *Occupational therapy*—

(i) Means services provided by a qualified occupational therapist; and

(ii) Includes—

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

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

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

(7) *Orientation and mobility services*—

(i) Means services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(ii) Includes teaching children the following, as appropriate:

(A) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

(B) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision;

(C) To understand and use remaining vision and distance low vision aids; and

(D) Other concepts, techniques, and tools.

(8)(i) *Parent counseling and training* means assisting parents in understanding the special needs of their child;

(ii) Providing parents with information about child development; and

(iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

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

(10) *Psychological services* includes—

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

(ii) Interpreting assessment results;

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

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

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

(vi) Assisting in developing positive behavioral intervention strategies.

(11) *Recreation* includes—

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

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

(iv) Leisure education.

(12) *Rehabilitation counseling services* means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*

(13) *School health services and school nurse services* means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services

are services that may be provided by either a qualified school nurse or other qualified person.

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

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

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

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

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

(v) Assisting in developing positive behavioral intervention strategies.

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

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

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

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

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

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

(16) *Transportation* includes—

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

(ii) Travel in and around school buildings; and

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

(Authority: 20 U.S.C. 1401(26))

§300.35 [Reserved]

§300.36 Secondary school.

Secondary school means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

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

§300.37 Services plan.

Services plan means a written statement that describes the special education and related services the LEA will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, consistent with §300.132, and is developed and implemented in accordance with §§300.137 through 300.139.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§300.38 Secretary.

Secretary means the Secretary of Education.

(Authority: 20 U.S.C. 1401(28))

§300.39 Special education.

(a) *General.* (1) *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

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

(ii) Instruction in physical education.

(2) *Special education* includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) *Individual special education terms defined.*

The terms in this definition are defined as follows:

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

(2) *Physical education* means—

(i) The development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

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

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

(3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

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

(4) *Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

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

§300.40 State.

State means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(Authority: 20 U.S.C. 1401(31))

§300.41 State educational agency.

State educational agency or *SEA* means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(Authority: 20 U.S.C. 1401(32))

§300.42 Supplementary aids and services. *Supplementary aids and services* means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§300.114 through 300.116. (Authority: 20 U.S.C. 1401(33))

§300.43 Transition services. (a) *Transition services* means a coordinated set of activities for a child with a disability that— (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes— (i) Instruction; (ii) Related services; (iii) Community experiences; (iv) The development of employment and other post-school adult living objectives; and (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (b) *Transition services* for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education. (Authority: 20 U.S.C. 1401(34))

§300.44 Universal design. *Universal design* has the meaning given the term in section 3 of the Assistive Technology Act of 1998, as amended, 29 U.S.C. 3002. (Authority: 20 U.S.C. 1401(35))

§300.45 Ward of the State. (a) *General.* Subject to paragraph (b) of this section, *ward of the State* means a child who, as

determined by the State where the child resides, is— (1) A foster child; (2) A ward of the State; or (3) In the custody of a public child welfare agency. (b) *Exception.* Ward of the State does not include a foster child who has a foster parent who meets the definition of a *parent* in §300.30. (Authority: 20 U.S.C. 1401(36))

Subpart B—State Eligibility

GENERAL

§300.100 Eligibility for assistance. A State is eligible for assistance under Part B of the Act for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the conditions in §§300.101 through 300.176. (Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a))

FAPE REQUIREMENTS

§300.101 Free appropriate public education (FAPE). (a) *General.* A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in §300.530(d). (b) *FAPE for children beginning at age 3.* (1) Each State must ensure that— (i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and (ii) An IEP or an IFSP is in effect for the child by that date, in accordance with §300.323(b). (2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin. (c) *Children advancing from grade to grade.* (1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even

though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

(Approved by the Office of Management and Budget under control number 1820-0030)

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

§300.102 Limitation—exception to FAPE for certain ages.

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

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

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

(A) Were not actually identified as being a child with a disability under §300.8; and

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

(ii) The exception in paragraph (a)(2)(i) of this section does not apply to children with disabilities, aged 18 through 21, who—

(A) Had been identified as a child with a disability under §300.8 and had received services in accordance with an IEP, but who left school prior to their incarceration; or

(B) Did not have an IEP in their last educational setting, but who had actually been identified as a child with a disability under §300.8.

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

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

(iii) Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice in accordance with §300.503.

(iv) As used in paragraphs (a)(3)(i) through (iii) of this section, the term *regular high school diploma* means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in section 1111(b)(1)(E) of the ESEA. A regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential.

(4) Children with disabilities who are eligible under subpart H of this part, but who receive early intervention services under Part C of the Act.

(b) *Documents relating to exceptions.* The State must assure that the information it has provided to the Secretary regarding the exceptions in paragraph (a) of this section, as required by §300.700 (for purposes of making grants to States under this part), is current and accurate.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(1)(B)-(C) and 7801(43))

[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

OTHER FAPE REQUIREMENTS

§300.103 FAPE—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support that are available in the State to meet the requirements of this part. For example, if it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.

(c) Consistent with §300.323(c), the State must ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1401(8), 1412(a)(1))
[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61306, Oct. 30, 2007]

§300.104 Residential placement

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(10)(B))

§300.105 Assistive technology.

(a) Each public agency must ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§300.5 and 300.6, respectively, are made available to a child with a disability if required as a part of the child's—

- (1) Special education under §300.39;
- (2) Related services under §300.34; or
- (3) Supplementary aids and services under §§300.42 and 300.114(a)(2)(ii).

(b) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(12)(B)(i))
[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

§300.106 Extended school year services.

(a) *General.* (1) Each public agency must ensure that extended school year services are available

as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not—

- (i) Limit extended school year services to particular categories of disability; or
- (ii) Unilaterally limit the type, amount, or duration of those services.

(b) *Definition.* As used in this section, the term extended school year services means special education and related services that—

- (1) Are provided to a child with a disability—
 - (i) Beyond the normal school year of the public agency;
 - (ii) In accordance with the child's IEP; and
 - (iii) At no cost to the parents of the child; and
- (2) Meet the standards of the SEA.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(1))

§300.107 Nonacademic services.

The State must ensure the following:

(a) Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(1))

§300.108 Physical education.

The State must ensure that public agencies in the State comply with the following:

(a) *General*. Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE, unless the public agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades.

(b) *Regular physical education*. Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless—

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's IEP.

(c) *Special physical education*. If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child must provide the services directly or make arrangements for those services to be provided through other public or private programs.

(d) *Education in separate facilities*. The public agency responsible for the education of a child with a disability who is enrolled in a separate facility must ensure that the child receives appropriate physical education services in compliance with this section.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(5)(A))

§300.109 Full educational opportunity goal (FEOG).

The State must have in effect policies and procedures to demonstrate that the State has established a goal of providing full educational opportunity to all children with disabilities, aged birth through 21, and a detailed timetable for accomplishing that goal.

(Approved by the Office of Management and Budget under control number 1820-0030)

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

§300.110 Program options.

The State must ensure that each public agency takes steps to ensure that its children with disabilities have available to them the variety of

educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(2), 1413(a)(1))

§300.111 Child find.

(a) *General*. (1) The State must have in effect policies and procedures to ensure that—

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

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

(b) *Use of term developmental delay*. The following provisions apply with respect to implementing the child find requirements of this section:

(1) A State that adopts a definition of *developmental delay* under §300.8(b) determines whether the term applies to children aged three through nine, or to a subset of that age range (e.g., ages three through five).

(2) A State may not require an LEA to adopt and use the term *developmental delay* for any children within its jurisdiction.

(3) If an LEA uses the term *developmental delay* for children described in §300.8(b), the LEA must conform to both the State's definition of that term and to the age range that has been adopted by the State.

(4) If a State does not adopt the term *developmental delay*, an LEA may not independently use that term as a basis for establishing a child's eligibility under this part.

(c) *Other children in child find*. Child find also must include—

(1) Children who are suspected of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children.

(d) *Construction.* Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in §300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1401(3)); 1412(a)(3))

§300.112 Individualized education programs (IEP).

The State must ensure that an IEP, or an IFSP that meets the requirements of section 636(d) of the Act, is developed, reviewed, and revised for each child with a disability in accordance with §§300.320 through 300.324, except as provided in §300.300(b)(3)(ii).

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(4))

§300.113 Routine checking of hearing aids and external components of surgically implanted medical devices.

(a) *Hearing aids.* Each public agency must ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

(b) *External components of surgically implanted medical devices.* (1) Subject to paragraph (b)(2) of this section, each public agency must ensure that the external components of surgically implanted medical devices are functioning properly.

(2) For a child with a surgically implanted medical device who is receiving special education and related services under this part, a public agency is not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device).

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1401(1), 1401(26)(B))

Least Restrictive Environment (LRE)

§300.114 LRE requirements.

(a) *General.* (1) Except as provided in §300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§300.115 through 300.120.

(2) Each public agency must ensure that—
(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(b) *Additional requirement—State funding mechanism—*(1) *General.* (i) A State funding mechanism must not result in placements that violate the requirements of paragraph (a) of this section; and

(ii) A State must not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child, as described in the child's IEP.

(2) *Assurance.* If the State does not have policies and procedures to ensure compliance with paragraph (b)(1) of this section, the State must provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that the mechanism does not result in placements that violate that paragraph.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(5))

§300.115 Continuum of alternative placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

- (1) Include the alternative placements listed in the definition of special education under §300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
- (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(5))

[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

§300.116 Placements.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—

(a) The placement decision—

- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
- (2) Is made in conformity with the LRE provisions of this subpart, including §§300.114 through 300.118;

(b) The child's placement—

- (1) Is determined at least annually;
 - (2) Is based on the child's IEP; and
 - (3) Is as close as possible to the child's home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(5))

§300.117 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(5))

§300.118 Children in public or private institutions.

Except as provided in §300.149(d) (regarding agency responsibility for general supervision of some individuals in adult prisons), an SEA must ensure that §300.114 is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(5))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61306, Oct. 30, 2007]

§300.119 Technical assistance and training activities.

Each SEA must carry out activities to ensure that teachers and administrators in all public agencies—

- (a) Are fully informed about their responsibilities for implementing §300.114; and
- (b) Are provided with technical assistance and training necessary to assist them in this effort.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(5))

§300.120 Monitoring activities.

(a) The SEA must carry out activities to ensure that §300.114 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with §300.114, the SEA must—

(1) Review the public agency's justification for its actions; and

(2) Assist in planning and implementing any necessary corrective action.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(5))

Additional Eligibility Requirements

§300.121 Procedural safeguards.

(a) *General.* The State must have procedural safeguards in effect to ensure that each public agency in the State meets the requirements of §§300.500 through 300.536.

(b) *Procedural safeguards identified.* Children with disabilities and their parents must be afforded the procedural safeguards identified in paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(6)(A))

§300.122 Evaluation.

Children with disabilities must be evaluated in accordance with §§300.300 through 300.311 of subpart D of this part.

(Approved by the Office of Management and Budget under control number 1820-0030)

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

§300.123 Confidentiality of personally identifiable information.

The State must have policies and procedures in effect to ensure that public agencies in the State comply with §§300.610 through 300.626 related to protecting the confidentiality of any personally identifiable information collected, used, or maintained under Part B of the Act.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.124 Transition of children from the Part C program to preschool programs.

The State must have in effect policies and procedures to ensure that—

(a) Children participating in early intervention programs assisted under Part C of the Act, and who will participate in preschool programs assisted under Part B of the Act, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(9) of the Act;

(b) By the third birthday of a child described in paragraph (a) of this section, an IEP or, if consistent with §300.323(b) and section 636(d) of the Act, an IFSP, has been developed and is being implemented for the child consistent with §300.101(b); and

(c) Each affected LEA will participate in transition planning conferences arranged by the designated lead agency under section 635(a)(10) of the Act.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(9))

§§300.125-300.128 [Reserved]

Children in Private Schools

§300.129 State responsibility regarding children in private schools.

The State must have in effect policies and procedures that ensure that LEAs, and, if applicable, the SEA, meet the private school requirements in §§300.130 through 300.148.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(10))

Children With Disabilities Enrolled by Their Parents in Private Schools

§300.130 Definition of parentally-placed private school children with disabilities.

Parentally-placed private school children with disabilities means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in §300.13 or secondary school in §300.36, other than children with disabilities covered under §§300.145 through 300.147.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(10)(A))

§300.131 Child find for parentally-placed private school children with disabilities.

(a) *General.* Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with paragraphs (b) through (e) of this section, and §§300.111 and 300.201.

(b) *Child find design.* The child find process must be designed to ensure—

(1) The equitable participation of parentally-placed private school children; and

(2) An accurate count of those children.

(c) *Activities.* In carrying out the requirements of this section, the LEA, or, if applicable, the SEA, must undertake activities similar to the activities undertaken for the agency's public school children.

(d) *Cost.* The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation under §300.133.

(e) *Completion period.* The child find process must be completed in a time period comparable to that for students attending public schools in the LEA consistent with §300.301.

(f) *Out-of-State children.* Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(10)(A)(ii))

§300.132 Provision of services for parentally-placed private school children with disabilities—basic requirement.

(a) *General.* To the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, provision is made for the

participation of those children in the program assisted or carried out under Part B of the Act by providing them with special education and related services, including direct services determined in accordance with §300.137, unless the Secretary has arranged for services to those children under the by-pass provisions in §§300.190 through 300.198.

(b) *Services plan for parentally-placed private school children with disabilities.* In accordance with paragraph (a) of this section and §§300.137 through 300.139, a services plan must be developed and implemented for each private school child with a disability who has been designated by the LEA in which the private school is located to receive special education and related services under this part.

(c) *Record keeping.* Each LEA must maintain in its records, and provide to the SEA, the following information related to parentally-placed private school children covered under §§300.130 through 300.144:

(1) The number of children evaluated;

(2) The number of children determined to be children with disabilities; and

(3) The number of children served.

(Approved by the Office of Management and Budget under control numbers 1820-0030 and 1820-0600)

(Authority: 20 U.S.C. 1412(a)(10)(A)(i))

§300.133 Expenditures.

(a) *Formula.* To meet the requirement of §300.132(a), each LEA must spend the following on providing special education and related services (including direct services) to parentally-placed private school children with disabilities:

(1) For children aged 3 through 21, an amount that is the same proportion of the LEA's total subgrant under section 611(f) of the Act as the number of private school children with disabilities aged 3 through 21 who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged 3 through 21.

(2)(i) For children aged three through five, an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as

the number of parentally-placed private school children with disabilities aged three through five who are enrolled by their parents in a private, including religious, elementary school located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged three through five.

(ii) As described in paragraph (a)(2)(i) of this section, children aged three through five are considered to be parentally-placed private school children with disabilities enrolled by their parents in private, including religious, elementary schools, if they are enrolled in a private school that meets the definition of elementary school in §300.13.

(3) If an LEA has not expended for equitable services all of the funds described in paragraphs (a)(1) and (a)(2) of this section by the end of the fiscal year for which Congress appropriated the funds, the LEA must obligate the remaining funds for special education and related services (including direct services) to parentally-placed private school children with disabilities during a carry-over period of one additional year.

(b) *Calculating proportionate amount.* In calculating the proportionate amount of Federal funds to be provided for parentally-placed private school children with disabilities, the LEA, after timely and meaningful consultation with representatives of private schools under §300.134, must conduct a thorough and complete child find process to determine the number of parentally-placed children with disabilities attending private schools located in the LEA. (See appendix B for an example of how proportionate share is calculated).

(c) *Annual count of the number of parentally-placed private school children with disabilities.*

(1) Each LEA must—

(i) After timely and meaningful consultation with representatives of parentally-placed private school children with disabilities (consistent with §300.134), determine the number of parentally-placed private school children with disabilities attending private schools located in the LEA; and

(ii) Ensure that the count is conducted on any date between October 1 and December 1, inclusive, of each year.

(2) The count must be used to determine the amount that the LEA must spend on providing

special education and related services to parentally-placed private school children with disabilities in the next subsequent fiscal year.

(d) *Supplement, not supplant.* State and local funds may supplement and in no case supplant the proportionate amount of Federal funds required to be expended for parentally-placed private school children with disabilities under this part.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(10)(A))

§300.134 Consultation.

To ensure timely and meaningful consultation, an LEA, or, if appropriate, an SEA, must consult with private school representatives and representatives of parents of parentally-placed private school children with disabilities during the design and development of special education and related services for the children regarding the following:

(a) *Child find.* The child find process, including—

(1) How parentally-placed private school children suspected of having a disability can participate equitably; and

(2) How parents, teachers, and private school officials will be informed of the process.

(b) *Proportionate share of funds.* The determination of the proportionate share of Federal funds available to serve parentally-placed private school children with disabilities under §300.133(b), including the determination of how the proportionate share of those funds was calculated.

(c) *Consultation process.* The consultation process among the LEA, private school officials, and representatives of parents of parentally-placed private school children with disabilities, including how the process will operate throughout the school year to ensure that parentally-placed children with disabilities identified through the child find process can meaningfully participate in special education and related services.

(d) *Provision of special education and related services.* How, where, and by whom special education and related services will be provided for parentally-placed private school children with disabilities, including a discussion of—

- (1) The types of services, including direct services and alternate service delivery mechanisms; and
 - (2) How special education and related services will be apportioned if funds are insufficient to serve all parentally-placed private school children; and
 - (3) How and when those decisions will be made;
 - (e) *Written explanation by LEA regarding services.* How, if the LEA disagrees with the views of the private school officials on the provision of services or the types of services (whether provided directly or through a contract), the LEA will provide to the private school officials a written explanation of the reasons why the LEA chose not to provide services directly or through a contract.
- (Approved by the Office of Management and Budget under control numbers 1820-0030 and 1820-0600)
- (Authority: 20 U.S.C. 1412(a)(10)(A)(iii))

§300.135 Written affirmation.

- (a) When timely and meaningful consultation, as required by §300.134, has occurred, the LEA must obtain a written affirmation signed by the representatives of participating private schools.
 - (b) If the representatives do not provide the affirmation within a reasonable period of time, the LEA must forward the documentation of the consultation process to the SEA.
- (Approved by the Office of Management and Budget under control numbers 1820-0030 and 1820-0600)
- (Authority: 20 U.S.C. 1412(a)(10)(A)(iv))

§300.136 Compliance.

- (a) *General.* A private school official has the right to submit a complaint to the SEA that the LEA—
 - (1) Did not engage in consultation that was meaningful and timely; or
 - (2) Did not give due consideration to the views of the private school official.
- (b) *Procedure.* (1) If the private school official wishes to submit a complaint, the official must provide to the SEA the basis of the noncompliance by the LEA with the applicable private school provisions in this part; and
- (2) The LEA must forward the appropriate documentation to the SEA.

- (3)(i) If the private school official is dissatisfied with the decision of the SEA, the official may submit a complaint to the Secretary by providing the information on noncompliance described in paragraph (b)(1) of this section; and
 - (ii) The SEA must forward the appropriate documentation to the Secretary.
- (Approved by the Office of Management and Budget under control numbers 1820-0030 and 1820-0600)
- (Authority: 20 U.S.C. 1412(a)(10)(A)(v))

§300.137 Equitable services determined.

- (a) *No individual right to special education and related services.* No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.
 - (b) *Decisions.* (1) Decisions about the services that will be provided to parentally-placed private school children with disabilities under §§300.130 through 300.144 must be made in accordance with paragraph (c) of this section and §300.134(d).
 - (2) The LEA must make the final decisions with respect to the services to be provided to eligible parentally-placed private school children with disabilities.
 - (c) *Services plan for each child served under §§300.130 through 300.144.* If a child with a disability is enrolled in a religious or other private school by the child's parents and will receive special education or related services from an LEA, the LEA must—
 - (1) Initiate and conduct meetings to develop, review, and revise a services plan for the child, in accordance with §300.138(b); and
 - (2) Ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the LEA shall use other methods to ensure participation by the religious or other private school, including individual or conference telephone calls.
- (Approved by the Office of Management and Budget under control number 1820-0030)
- (Authority: 20 U.S.C. 1412(a)(10)(A))
- [71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61306, Oct. 30, 2007]

§300.138 Equitable services provided.

(a) *General.* (1) The services provided to parentally-placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools, except that private elementary school and secondary school teachers who are providing equitable services to parentally-placed private school children with disabilities do not have to meet the special education teacher qualification requirements in §300.156(c).

(2) Parentally-placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

(b) *Services provided in accordance with a services plan.* (1) Each parentally-placed private school child with a disability who has been designated to receive services under §300.132 must have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the process described in §§300.134 and 300.137, it will make available to parentally-placed private school children with disabilities.

(2) The services plan must, to the extent appropriate—

(i) Meet the requirements of §300.320, or for a child ages three through five, meet the requirements of §300.323(b) with respect to the services provided; and

(ii) Be developed, reviewed, and revised consistent with §§300.321 through 300.324.

(c) *Provision of equitable services.* (1) The provision of services pursuant to this section and §§300.139 through 300.143 must be provided:

(i) By employees of a public agency; or

(ii) Through contract by the public agency with an individual, association, agency, organization, or other entity.

(2) Special education and related services provided to parentally-placed private school children with disabilities, including materials and equipment, must be secular, neutral, and nonideological.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(10)(A)(vi))

[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

§300.139 Location of services and transportation.

(a) *Services on private school premises.* Services to parentally-placed private school children with disabilities may be provided on the premises of private, including religious, schools, to the extent consistent with law.

(b) *Transportation—*(1) *General.* (i) If necessary for the child to benefit from or participate in the services provided under this part, a parentally-placed private school child with a disability must be provided transportation—

(A) From the child's school or the child's home to a site other than the private school; and

(B) From the service site to the private school, or to the child's home, depending on the timing of the services.

(ii) LEAs are not required to provide transportation from the child's home to the private school.

(2) *Cost of transportation.* The cost of the transportation described in paragraph (b)(1)(i) of this section may be included in calculating whether the LEA has met the requirement of §300.133.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(10)(A))

§300.140 Due process complaints and State complaints.

(a) *Due process not applicable, except for child find.* (1) Except as provided in paragraph (b) of this section, the procedures in §§300.504 through 300.519 do not apply to complaints that an LEA has failed to meet the requirements of §§300.132 through 300.139, including the provision of services indicated on the child's services plan.

(b) *Child find complaints—to be filed with the LEA in which the private school is located.* (1)

The procedures in §§300.504 through 300.519 apply to complaints that an LEA has failed to meet the child find requirements in §300.131, including the requirements in §§300.300 through 300.311.

(2) Any due process complaint regarding the child find requirements (as described in paragraph (b)(1) of this section) must be filed

with the LEA in which the private school is located and a copy must be forwarded to the SEA.

(c) *State complaints.* (1) Any complaint that an SEA or LEA has failed to meet the requirements in §§300.132 through 300.135 and 300.137 through 300.144 must be filed in accordance with the procedures described in §§300.151 through 300.153.

(2) A complaint filed by a private school official under §300.136(a) must be filed with the SEA in accordance with the procedures in §300.136(b). (Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(10)(A))

§300.141 Requirement that funds not benefit a private school.

(a) An LEA may not use funds provided under section 611 or 619 of the Act to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The LEA must use funds provided under Part B of the Act to meet the special education and related services needs of parentally-placed private school children with disabilities, but not for meeting—

- (1) The needs of a private school; or
- (2) The general needs of the students enrolled in the private school.

(Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(10)(A))

§300.142 Use of personnel.

(a) *Use of public school personnel.* An LEA may use funds available under sections 611 and 619 of the Act to make public school personnel available in other than public facilities—

- (1) To the extent necessary to provide services under §§300.130 through 300.144 for parentally-placed private school children with disabilities; and
- (2) If those services are not normally provided by the private school.

(b) *Use of private school personnel.* An LEA may use funds available under sections 611 and 619 of the Act to pay for the services of an employee of a private school to provide services under §§300.130 through 300.144 if—

- (1) The employee performs the services outside of his or her regular hours of duty; and
- (2) The employee performs the services under public supervision and control.

(Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(10)(A))

§300.143 Separate classes prohibited.

An LEA may not use funds available under section 611 or 619 of the Act for classes that are organized separately on the basis of school enrollment or religion of the children if—'

- (a) The classes are at the same site; and
- (b) The classes include children enrolled in public schools and children enrolled in private schools.

(Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(10)(A))

§300.144 Property, equipment, and supplies.

(a) A public agency must control and administer the funds used to provide special education and related services under §§300.137 through 300.139, and hold title to and administer materials, equipment, and property purchased with those funds for the uses and purposes provided in the Act.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the Part B program.

(c) The public agency must ensure that the equipment and supplies placed in a private school—

- (1) Are used only for Part B purposes; and
 - (2) Can be removed from the private school without remodeling the private school facility.
- (d) The public agency must remove equipment and supplies from a private school if—
- (1) The equipment and supplies are no longer needed for Part B purposes; or
 - (2) Removal is necessary to avoid unauthorized use of the equipment and supplies for other than Part B purposes.

(e) No funds under Part B of the Act may be used for repairs, minor remodeling, or construction of private school facilities.

(Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(10)(A)(vii))

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

§300.145 Applicability of §§300.146 through 300.147.

Sections 300.146 through 300.147 apply only to children with disabilities who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services. (Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(10)(B))

§300.146 Responsibility of SEA.

Each SEA must ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency—

- (a) Is provided special education and related services—
 - (1) In conformance with an IEP that meets the requirements of §§300.320 through 300.325; and
 - (2) At no cost to the parents;
- (b) Is provided an education that meets the standards that apply to education provided by the SEA and LEAs including the requirements of this part, except for §300.156(c); and
- (c) Has all of the rights of a child with a disability who is served by a public agency.

(Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(10)(B))

[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

§300.147 Implementation by SEA.

In implementing §300.146, the SEA must—

- (a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;
- (b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a child with a disability; and
- (c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(10)(B))

Children With Disabilities Enrolled by Their Parents in Private Schools When FAPE Is at Issue

§300.148 Placement of children by parents when FAPE is at issue.

(a) *General.* This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§300.131 through 300.144.

(b) *Disagreements about FAPE.* Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§300.504 through 300.520.

(c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(d) *Limitation on reimbursement.* The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the

placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) *Exception.* Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement—

(1) Must not be reduced or denied for failure to provide the notice if—

(i) The school prevented the parents from providing the notice;

(ii) The parents had not received notice, pursuant to §300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if—

(i) The parents are not literate or cannot write in English; or

(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(10)(C))

SEA Responsibility for General Supervision and Implementation of Procedural Safeguards

§300.149 SEA responsibility for general supervision.

(a) The SEA is responsible for ensuring—

(1) That the requirements of this part are carried out; and

(2) That each educational program for children with disabilities administered within the State, including each program administered by any other State or local agency (but not including elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior)—

(i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and

(ii) Meets the educational standards of the SEA (including the requirements of this part).

(3) In carrying out this part with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 *et seq.*) are met.

(b) The State must have in effect policies and procedures to ensure that it complies with the monitoring and enforcement requirements in §§300.600 through 300.602 and §§300.606 through 300.608.

(c) Part B of the Act does not limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

(d) Notwithstanding paragraph (a) of this section, the Governor (or another individual pursuant to State law) may assign to any public agency in the State the responsibility of ensuring that the requirements of Part B of the Act are met with respect to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(11); 1416)

§300.150 SEA implementation of procedural safeguards.

The SEA (and any agency assigned responsibility pursuant to §300.149(d)) must have in effect procedures to inform each public agency of its responsibility for ensuring effective implementation of procedural

safeguards for the children with disabilities served by that public agency.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(11); 1415(a))

State Complaint Procedures

§300.151 Adoption of State complaint procedures.

(a) *General.* Each SEA must adopt written procedures for—

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of §300.153 by—

(i) Providing for the filing of a complaint with the SEA; and

(ii) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint; and

(2) Widely disseminating to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State procedures under §§300.151 through 300.153.

(b) *Remedies for denial of appropriate services.* In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address—

(1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and

(2) Appropriate future provision of services for all children with disabilities.

(Approved by the Office of Management and Budget under control numbers 1820-0030 and 1820-0600)

(Authority: 20 U.S.C. 1221e-3)

§300.152 Minimum State complaint procedures.

(a) *Time limit; minimum procedures.* Each SEA must include in its complaint procedures a time

limit of 60 days after a complaint is filed under §300.153 to—

(1) Carry out an independent on-site investigation, if the SEA determines that an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Provide the public agency with the opportunity to respond to the complaint, including, at a minimum—

(i) At the discretion of the public agency, a proposal to resolve the complaint; and

(ii) An opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation consistent with §300.506;

(4) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and

(5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the SEA's final decision.

(b) *Time extension; final decision; implementation.* The SEA's procedures described in paragraph (a) of this section also must—

(1) Permit an extension of the time limit under paragraph (a) of this section only if—

(i) Exceptional circumstances exist with respect to a particular complaint; or

(ii) The parent (or individual or organization, if mediation or other alternative means of dispute resolution is available to the individual or organization under State procedures) and the public agency involved agree to extend the time to engage in mediation pursuant to paragraph (a)(3)(ii) of this section, or to engage in other alternative means of dispute resolution, if available in the State; and

(2) Include procedures for effective implementation of the SEA's final decision, if needed, including—

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) *Complaints filed under this section and due process hearings under §300.507 and §§300.530 through 300.532.* (1) If a written

complaint is received that is also the subject of a due process hearing under §300.507 or §§300.530 through 300.532, or contains multiple issues of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section.

(2) If an issue raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties—

(i) The due process hearing decision is binding on that issue; and

(ii) The SEA must inform the complainant to that effect.

(3) A complaint alleging a public agency's failure to implement a due process hearing decision must be resolved by the SEA.

(Approved by the Office of Management and Budget under control numbers 1820-0030 and 1820-0600)

(Authority: 20 U.S.C. 1221e-3)

§300.153 Filing a complaint.

(a) An organization or individual may file a signed written complaint under the procedures described in §§300.151 through 300.152.

(b) The complaint must include—

(1) A statement that a public agency has violated a requirement of Part B of the Act or of this part;

(2) The facts on which the statement is based;

(3) The signature and contact information for the complainant; and

(4) If alleging violations with respect to a specific child—

(i) The name and address of the residence of the child;

(ii) The name of the school the child is attending;

(iii) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;

(iv) A description of the nature of the problem of the child, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(c) The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with §300.151.

(d) The party filing the complaint must forward a copy of the complaint to the LEA or public agency serving the child at the same time the party files the complaint with the SEA.

(Approved by the Office of Management and Budget under control numbers 1820-0030 and 1820-0600)

(Authority: 20 U.S.C. 1221e-3)

Methods of Ensuring Services

§300.154 Methods of ensuring services.

(a) *Establishing responsibility for services.* The Chief Executive Officer of a State or designee of that officer must ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each noneducational public agency described in paragraph (b) of this section and the SEA, in order to ensure that all services described in paragraph (b)(1) of this section that are needed to ensure FAPE are provided, including the provision of these services during the pendency of any dispute under paragraph (a)(3) of this section. The agreement or mechanism must include the following:

(1) An identification of, or a method for defining, the financial responsibility of each agency for providing services described in paragraph (b)(1) of this section to ensure FAPE to children with disabilities. The financial responsibility of each noneducational public agency described in paragraph (b) of this section, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of the LEA (or the State agency responsible for developing the child's IEP).

(2) The conditions, terms, and procedures under which an LEA must be reimbursed by other agencies.

(3) Procedures for resolving interagency disputes (including procedures under which LEAs may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(4) Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in paragraph (b)(1) of this section.

(b) *Obligation of noneducational public agencies.* (1)(i) If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy or pursuant to paragraph (a) of this section, to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in §300.5 relating to assistive technology devices, §300.6 relating to assistive technology services, §300.34 relating to related services, §300.42 relating to supplementary aids and services, and §300.43 relating to transition services) that are necessary for ensuring FAPE to children with disabilities within the State, the public agency must fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to paragraph (a) of this section or an agreement pursuant to paragraph (c) of this section.

(ii) A noneducational public agency described in paragraph (b)(1)(i) of this section may not disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context.

(2) If a public agency other than an educational agency fails to provide or pay for the special education and related services described in paragraph (b)(1) of this section, the LEA (or State agency responsible for developing the child's IEP) must provide or pay for these services to the child in a timely manner. The LEA or State agency is authorized to claim reimbursement for the services from the noneducational public agency that failed to provide or pay for these services and that agency must reimburse the LEA or State agency in

accordance with the terms of the interagency agreement or other mechanism described in paragraph (a) of this section.

(c) *Special rule.* The requirements of paragraph (a) of this section may be met through—

(1) State statute or regulation;

(2) Signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(3) Other appropriate written methods as determined by the Chief Executive Officer of the State or designee of that officer and approved by the Secretary.

(d) *Children with disabilities who are covered by public benefits or insurance.* (1) A public agency may use the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under this part, as permitted under the public benefits or insurance program, except as provided in paragraph (d)(2) of this section.

(2) With regard to services required to provide FAPE to an eligible child under this part, the public agency—

(i) May not require parents to sign up for or enroll in public benefits or insurance programs in order for their child to receive FAPE under Part B of the Act;

(ii) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2) of this section, may pay the cost that the parents otherwise would be required to pay;

(iii) May not use a child's benefits under a public benefits or insurance program if that use would—

(A) Decrease available lifetime coverage or any other insured benefit;

(B) Result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school;

(C) Increase premiums or lead to the discontinuation of benefits or insurance; or

(D) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures; and

(iv) Prior to accessing a child's or parent's public benefits or insurance for the first time, and after providing notification to the child's parents consistent with paragraph (d)(2)(v) of this section, must obtain written, parental consent that—

(A) Meets the requirements of §99.30 of this title and §300.622, which consent must specify the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular child), the purpose of the disclosure (e.g., billing for services under part 300), and the agency to which the disclosure may be made (e.g., the State's public benefits or insurance program (e.g., Medicaid)); and

(B) Specifies that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under part 300.

(v) Prior to accessing a child's or parent's public benefits or insurance for the first time, and annually thereafter, must provide written notification, consistent with §300.503(c), to the child's parents, that includes—

(A) A statement of the parental consent provisions in paragraphs (d)(2)(iv)(A) and (B) of this section;

(B) A statement of the “no cost” provisions in paragraphs (d)(2)(i) through (iii) of this section;

(C) A statement that the parents have the right under 34 CFR part 99 and part 300 to withdraw their consent to disclosure of their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) at any time; and

(D) A statement that the withdrawal of consent or refusal to provide consent under 34 CFR part 99 and part 300 to disclose personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

(e) *Children with disabilities who are covered by private insurance.* (1) With regard to services required to provide FAPE to an eligible child under this part, a public agency may access the

parents' private insurance proceeds only if the parents provide consent consistent with §300.9.

(2) Each time the public agency proposes to access the parents' private insurance proceeds, the agency must—

(i) Obtain parental consent in accordance with paragraph (e)(1) of this section; and

(ii) Inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

(f) *Use of Part B funds.* (1) If a public agency is unable to obtain parental consent to use the parents' private insurance, or public benefits or insurance when the parents would incur a cost for a specified service required under this part, to ensure FAPE the public agency may use its Part B funds to pay for the service.

(2) To avoid financial cost to parents who otherwise would consent to use private insurance, or public benefits or insurance if the parents would incur a cost, the public agency may use its Part B funds to pay the cost that the parents otherwise would have to pay to use the parents' benefits or insurance (e.g., the deductible or co-pay amounts).

(g) *Proceeds from public benefits or insurance or private insurance.* (1) Proceeds from public benefits or insurance or private insurance will not be treated as program income for purposes of 2 CFR 200.307

(2) If a public agency spends reimbursements from Federal funds (e.g., Medicaid) for services under this part, those funds will not be considered “State or local” funds for purposes of the maintenance of effort provisions in §§300.163 and 300.203.

(h) *Construction.* Nothing in this part should be construed to alter the requirements imposed on a State Medicaid agency, or any other agency administering a public benefits or insurance program by Federal statute, regulations or policy under title XIX, or title XXI of the Social Security Act, 42 U.S.C. 1396 through 1396v and 42 U.S.C. 1397aa through 1397jj, or any other public benefits or insurance program.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(12) and (e))

[71 FR 46753, Aug. 14, 2006, as amended at 78 FR 10537, Feb. 14, 2013; 79 FR 76096, Dec. 19, 2014; 82 FR 29759, June 30, 2017]

Additional Eligibility Requirements

§300.155 Hearings relating to LEA eligibility.

The SEA must not make any final determination that an LEA is not eligible for assistance under Part B of the Act without first giving the LEA reasonable notice and an opportunity for a hearing under 34 CFR 76.401(d).

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(13))

§300.156 Personnel qualifications.

(a) *General.* The SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(b) *Related services personnel and paraprofessionals.* The qualifications under paragraph (a) of this section must include qualifications for related services personnel and paraprofessionals that—

(1) Are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services; and

(2) Ensure that related services personnel who deliver services in their discipline or profession—

(i) Meet the requirements of paragraph (b)(1) of this section; and

(ii) Have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) Allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services under this part to children with disabilities.

(c) *Qualifications for special education teachers.* (1) The qualifications described in paragraph (a) of this section must ensure that each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school—

(i) Has obtained full State certification as a special education teacher (including certification obtained through an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in 34 CFR 200.56(a)(2)(ii) as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that when used with respect to any teacher teaching in a public charter school, the teacher must meet the certification or licensing requirements, if any, set forth in the State's public charter school law;

(ii) Has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) Holds at least a bachelor's degree.

(2) A teacher will be considered to meet the standard in paragraph (c)(1)(i) of this section if that teacher is participating in an alternate route to special education certification program under which—

(i) The teacher—

(A) Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;

(B) Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

(C) Assumes functions as a teacher only for a specified period of time not to exceed three years; and

(D) Demonstrates satisfactory progress toward full certification as prescribed by the State; and

(ii) The State ensures, through its certification and licensure process, that the provisions in paragraph (c)(2)(i) of this section are met.

(d) *Policy.* In implementing this section, a State must adopt a policy that includes a requirement

that LEAs in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in paragraph (c) of this section to provide special education and related services under this part to children with disabilities.

(e) *Rule of construction.* Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a particular SEA or LEA employee to meet the applicable requirements described in paragraph (c) of this section, or to prevent a parent from filing a complaint about staff qualifications with the SEA as provided for under this part.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(14))
[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

§300.157 Performance goals and indicators.

The State must—

- (a) Have in effect established goals for the performance of children with disabilities in the State that—
- (1) Promote the purposes of this part, as stated in §300.1;
 - (2) Are the same as the State's long-term goals and measurements of interim progress for children with disabilities under section 1111(c)(4)(A)(i) of the ESEA.
 - (3) Address graduation rates and dropout rates, as well as such other factors as the State may determine; and
 - (4) Are consistent, to the extent appropriate, with any other goals and academic standards for children established by the State;
- (b) Have in effect established performance indicators the State will use to assess progress toward achieving the goals described in paragraph (a) of this section, including measurements of interim progress for children with disabilities under section 1111(c)(4)(A)(i)(cc) of the ESEA, 20 U.S.C. 6311; and
- (c) Annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward

meeting the goals established under paragraph (a) of this section, which may include elements of the reports required under section 1111(h) of the ESEA.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(15))
[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29760, June 30, 2017]

§§300.158-300.159 [Reserved]

§300.160 Participation in assessments.

(a) *General.* A State must ensure that all children with disabilities are included in all general State and district-wide assessment programs, including assessments described under section 1111 of the ESEA, 20 U.S.C. 6311, with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs.

(b) *Accommodation guidelines.* (1) A State (or, in the case of a district-wide assessment, an LEA) must develop guidelines for the provision of appropriate accommodations.

(2) The State's (or, in the case of a district-wide assessment, the LEA's) guidelines must—

- (i) Identify only those accommodations for each assessment that do not invalidate the score; and
- (ii) Instruct IEP Teams to select, for each assessment, only those accommodations that do not invalidate the score.

(c) *Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.*

(1) If a State has adopted alternate academic achievement standards for children with disabilities who are students with the most significant cognitive disabilities as permitted in section 1111(b)(1)(E) of the ESEA, the State (or, in the case of a district-wide assessment, an LEA) must develop and implement alternate assessments and guidelines for the participation in alternate assessments of those children with disabilities who cannot participate in regular assessments, even with accommodations, as indicated in their respective IEPs, as provided in paragraph (a) of this section.

(2) For assessing the academic progress of children with disabilities who are students with the most significant cognitive disabilities under

title I of the ESEA, the alternate assessments and guidelines in paragraph (c)(1) of this section must—

(i) Be aligned with the challenging State academic content standards under section 1111(b)(1) of the ESEA and alternate academic achievement standards under section 1111(b)(1)(E) of the ESEA; and

(ii) Measure the achievement of children with disabilities who are students with the most significant cognitive disabilities against those standards.

(3) Consistent with section 1111(b)(1)(E)(ii) of the ESEA and 34 CFR 200.6(c)(6), a State may not adopt modified academic achievement standards or any other alternate academic achievement standards that do not meet the requirements in section 1111(b)(1)(E) of the ESEA for any children with disabilities under section 602(3) of the IDEA.

(d) *Explanation to IEP Teams.* A State (or in the case of a district-wide assessment, an LEA) must—

(1) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on a student's education resulting from taking an alternate assessment aligned with alternate academic achievement standards, such as how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma; and

(2) Not preclude a student with the most significant cognitive disabilities who takes an alternate assessment aligned with alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma.

(e) *Inform parents.* A State (or in the case of a district-wide assessment, an LEA) must ensure that parents of students selected to be assessed using an alternate assessment aligned with alternate academic achievement standards under the State's guidelines in paragraph (c)(1) of this section are informed, consistent with 34 CFR 200.2(e), that their child's achievement will be measured based on alternate academic achievement standards, and of how participation

in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma.

(f) *Reports.* An SEA (or, in the case of a district-wide assessment, an LEA) must make available to the public, and report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(1) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations (that did not result in an invalid score) in order to participate in those assessments.

(2) The number of children with disabilities, if any, participating in alternate assessments based on grade-level academic achievement standards in school years prior to 2017-2018.

(3) The number of children with disabilities, if any, participating in alternate assessments aligned with modified academic achievement standards in school years prior to 2016-2017.

(4) The number of children with disabilities who are students with the most significant cognitive disabilities participating in alternate assessments aligned with alternate academic achievement standards.

(5) Compared with the achievement of all children, including children with disabilities, the performance results of children with disabilities on regular assessments, alternate assessments based on grade-level academic achievement standards (prior to 2017-2018), alternate assessments based on modified academic achievement standards (prior to 2016-2017), and alternate assessments aligned with alternate academic achievement standards if—

(i) The number of children participating in those assessments is sufficient to yield statistically reliable information; and

(ii) Reporting that information will not reveal personally identifiable information about an individual student on those assessments.

(g) *Universal design.* An SEA (or, in the case of a district-wide assessment, an LEA) must, to the extent possible, use universal design principles in developing and administering any assessments under this section.

(Authority: 20 U.S.C. 1412(a)(16))

[72 FR 17781, Apr. 9, 2007, as amended at 80 FR 50785, Aug. 21, 2015; 82 FR 29760, June 30, 2017]

§300.161 [Reserved]

§300.162 Supplementation of State, local, and other Federal funds.

(a) *Expenditures.* Funds paid to a State under this part must be expended in accordance with all the provisions of this part.

(b) *Prohibition against commingling.* (1) Funds paid to a State under this part must not be commingled with State funds.

(2) The requirement in paragraph (b)(1) of this section is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of funds paid to a State under this part. Separate bank accounts are not required. (See 34 CFR 76.702 (Fiscal control and fund accounting procedures).)

(c) *State-level nonsupplanting.* (1) Except as provided in §300.203, funds paid to a State under Part B of the Act must be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of the SEA or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act, and in no case to supplant those Federal, State, and local funds.

(2) If the State provides clear and convincing evidence that all children with disabilities have available to them FAPE, the Secretary may waive, in whole or in part, the requirements of paragraph (c)(1) of this section if the Secretary concurs with the evidence provided by the State under §300.164.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(17))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61306, Oct. 30, 2007]

§300.163 Maintenance of State financial support.

(a) *General.* A State must not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children,

below the amount of that support for the preceding fiscal year.

(b) *Reduction of funds for failure to maintain support.* The Secretary reduces the allocation of funds under section 611 of the Act for any fiscal year following the fiscal year in which the State fails to comply with the requirement of paragraph (a) of this section by the same amount by which the State fails to meet the requirement.

(c) *Waivers for exceptional or uncontrollable circumstances.* The Secretary may waive the requirement of paragraph (a) of this section for a State, for one fiscal year at a time, if the Secretary determines that—

(1) Granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(2) The State meets the standard in §300.164 for a waiver of the requirement to supplement, and not to supplant, funds received under Part B of the Act.

(d) *Subsequent years.* If, for any fiscal year, a State fails to meet the requirement of paragraph (a) of this section, including any year for which the State is granted a waiver under paragraph (c) of this section, the financial support required of the State in future years under paragraph (a) of this section shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(18))

§300.164 Waiver of requirement regarding supplementing and not supplanting with Part B funds.

(a) Except as provided under §§300.202 through 300.205, funds paid to a State under Part B of the Act must be used to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of SEAs or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act and in no case to supplant those Federal, State, and local funds. A State may use funds it retains under §300.704(a) and (b) without regard to the prohibition on supplanting other funds.

(b) If a State provides clear and convincing evidence that all eligible children with disabilities throughout the State have FAPE available to them, the Secretary may waive for a period of one year in whole or in part the requirement under §300.162 (regarding State-level nonsupplanting) if the Secretary concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver under this section, it must submit to the Secretary a written request that includes—

(1) An assurance that FAPE is currently available, and will remain available throughout the period that a waiver would be in effect, to all eligible children with disabilities throughout the State, regardless of the public agency that is responsible for providing FAPE to them. The assurance must be signed by an official who has the authority to provide that assurance as it applies to all eligible children with disabilities in the State;

(2) All evidence that the State wishes the Secretary to consider in determining whether all eligible children with disabilities have FAPE available to them, setting forth in detail—

(i) The basis on which the State has concluded that FAPE is available to all eligible children in the State; and

(ii) The procedures that the State will implement to ensure that FAPE remains available to all eligible children in the State, which must include—

(A) The State's procedures under §300.111 for ensuring that all eligible children are identified, located and evaluated;

(B) The State's procedures for monitoring public agencies to ensure that they comply with all requirements of this part;

(C) The State's complaint procedures under §§300.151 through 300.153; and

(D) The State's hearing procedures under §§300.511 through 300.516 and §§300.530 through 300.536;

(3) A summary of all State and Federal monitoring reports, and State complaint decisions (see §§300.151 through 300.153) and hearing decisions (see §§300.511 through 300.516 and §§300.530 through 300.536), issued within three years prior to the date of the State's request for a waiver under this section, that includes any finding that FAPE has not been

available to one or more eligible children, and evidence that FAPE is now available to all children addressed in those reports or decisions; and

(4) Evidence that the State, in determining that FAPE is currently available to all eligible children with disabilities in the State, has consulted with the State advisory panel under §300.167.

(d) If the Secretary determines that the request and supporting evidence submitted by the State makes a prima facie showing that FAPE is, and will remain, available to all eligible children with disabilities in the State, the Secretary, after notice to the public throughout the State, conducts a public hearing at which all interested persons and organizations may present evidence regarding the following issues:

(1) Whether FAPE is currently available to all eligible children with disabilities in the State.

(2) Whether the State will be able to ensure that FAPE remains available to all eligible children with disabilities in the State if the Secretary provides the requested waiver.

(e) Following the hearing, the Secretary, based on all submitted evidence, will provide a waiver, in whole or in part, for a period of one year if the Secretary finds that the State has provided clear and convincing evidence that FAPE is currently available to all eligible children with disabilities in the State, and the State will be able to ensure that FAPE remains available to all eligible children with disabilities in the State if the Secretary provides the requested waiver.

(f) A State may receive a waiver of the requirement of section 612(a)(18)(A) of the Act and §300.164 if it satisfies the requirements of paragraphs (b) through (e) of this section.

(g) The Secretary may grant subsequent waivers for a period of one year each, if the Secretary determines that the State has provided clear and convincing evidence that all eligible children with disabilities throughout the State have, and will continue to have throughout the one-year period of the waiver, FAPE available to them. (Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(17)(C), (18)(C)(ii))

§300.165 Public participation.

(a) Prior to the adoption of any policies and procedures needed to comply with Part B of the Act (including any amendments to those policies and procedures), the State must ensure that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

(b) Before submitting a State plan under this part, a State must comply with the public participation requirements in paragraph (a) of this section and those in 20 U.S.C. 1232d(b)(7). (Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(19); 20 U.S.C. 1232d(b)(7))

§300.166 Rule of construction.

In complying with §§300.162 and 300.163, a State may not use funds paid to it under this part to satisfy State-law mandated funding obligations to LEAs, including funding based on student attendance or enrollment, or inflation. (Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(20))

State Advisory Panel

§300.167 State advisory panel.

The State must establish and maintain an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State.

(Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(a)(21)(A))

§300.168 Membership.

(a) *General.* The advisory panel must consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population and be composed of individuals involved in, or concerned with the education of children with disabilities, including—

- (1) Parents of children with disabilities (ages birth through 26);
- (2) Individuals with disabilities;

(3) Teachers;

(4) Representatives of institutions of higher education that prepare special education and related services personnel;

(5) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, (42 U.S.C. 11431 *et seq.*);

(6) Administrators of programs for children with disabilities;

(7) Representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(8) Representatives of private schools and public charter schools;

(9) Not less than one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

(10) A representative from the State child welfare agency responsible for foster care; and

(11) Representatives from the State juvenile and adult corrections agencies.

(b) *Special rule.* A majority of the members of the panel must be individuals with disabilities or parents of children with disabilities (ages birth through 26).

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(a)(21)(B) and (C))

§300.169 Duties.

The advisory panel must—

(a) Advise the SEA of unmet needs within the State in the education of children with disabilities;

(b) Comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(c) Advise the SEA in developing evaluations and reporting on data to the Secretary under section 618 of the Act;

(d) Advise the SEA in developing corrective action plans to address findings identified in Federal monitoring reports under Part B of the Act; and

(e) Advise the SEA in developing and implementing policies relating to the coordination of services for children with disabilities.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(21)(D))

Other Provisions Required for State Eligibility

§300.170 Suspension and expulsion rates.

(a) *General.* The SEA must examine data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities—

- (1) Among LEAs in the State; or
- (2) Compared to the rates for nondisabled children within those agencies.

(b) *Review and revision of policies.* If the discrepancies described in paragraph (a) of this section are occurring, the SEA must review and, if appropriate, revise (or require the affected State agency or LEA to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(22))

§300.171 Annual description of use of Part B funds.

(a) In order to receive a grant in any fiscal year a State must annually describe—

- (1) How amounts retained for State administration and State-level activities under §300.704 will be used to meet the requirements of this part; and
- (2) How those amounts will be allocated among the activities described in §300.704 to meet State priorities based on input from LEAs.

(b) If a State's plans for use of its funds under §300.704 for the forthcoming year do not change from the prior year, the State may submit a letter to that effect to meet the requirement in paragraph (a) of this section.

(c) The provisions of this section do not apply to the Virgin Islands, Guam, American Samoa, the

Commonwealth of the Northern Mariana Islands, and the freely associated States.
(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1411(e)(5))

§300.172 Access to instructional materials.

(a) *General.* The State must—

- (1) Adopt the National Instructional Materials Accessibility Standard (NIMAS), published as appendix C to part 300, for the purposes of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after publication of the NIMAS in the Federal Register on July 19, 2006 (71 FR 41084); and
- (2) Establish a State definition of “timely manner” for purposes of paragraphs (b)(2) and (b)(3) of this section if the State is not coordinating with the National Instructional Materials Access Center (NIMAC) or (b)(3) and (c)(2) of this section if the State is coordinating with the NIMAC.

(b) *Rights and responsibilities of SEA.* (1) Nothing in this section shall be construed to require any SEA to coordinate with the NIMAC. (2) If an SEA chooses not to coordinate with the NIMAC, the SEA must provide an assurance to the Secretary that it will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

(3) Nothing in this section relieves an SEA of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats, but are not included under the definition of blind or other persons with print disabilities in §300.172(e)(1)(i) or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner.

(4) In order to meet its responsibility under paragraphs (b)(2), (b)(3), and (c) of this section to ensure that children with disabilities who need instructional materials in accessible formats are provided those materials in a timely manner, the SEA must ensure that all public agencies take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials.

(c) *Preparation and delivery of files.* If an SEA chooses to coordinate with the NIMAC, as of December 3, 2006, the SEA must—

(1) As part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, enter into a written contract with the publisher of the print instructional materials to—

(i) Require the publisher to prepare and, on or before delivery of the print instructional materials, provide to NIMAC electronic files containing the contents of the print instructional materials using the NIMAS; or
(ii) Purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

(2) Provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

(d) *Assistive technology.* In carrying out this section, the SEA, to the maximum extent possible, must work collaboratively with the State agency responsible for assistive technology programs.

(e) *Definitions.* (1) In this section and §300.210—

(i) *Blind persons or other persons with print disabilities* means children served under this part who may qualify to receive books and other publications produced in specialized formats in accordance with the Act entitled “An Act to provide books for adult blind,” approved March 3, 1931, 2 U.S.C. 135a;

(ii) *National Instructional Materials Access Center* or *NIMAC* means the center established pursuant to section 674(e) of the Act;

(iii) *National Instructional Materials Accessibility Standard* or *NIMAS* has the meaning given the term in section 674(e)(3)(B) of the Act;

(iv) *Specialized formats* has the meaning given the term in section 674(e)(3)(D) of the Act.

(2) The definitions in paragraph (e)(1) of this section apply to each State and LEA, whether or not the State or LEA chooses to coordinate with the NIMAC.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(23), 1474(e))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61306, Oct. 30, 2007]

§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 §300.8. (Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(24))

§300.174 Prohibition on mandatory medication.

(a) *General.* The SEA must prohibit State and LEA personnel from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a child as a condition of attending school, receiving an evaluation under §§300.300 through 300.311, or receiving services under this part.

(b) *Rule of construction.* Nothing in paragraph (a) of this section shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under §300.111 (related to child find). (Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(a)(25))

§300.175 SEA as provider of FAPE or direct services.

If the SEA provides FAPE to children with disabilities, or provides direct services to these children, the agency—

(a) Must comply with any additional requirements of §§300.201 and 300.202 and §§300.206 through 300.226 as if the agency were an LEA; and

(b) May use amounts that are otherwise available to the agency under Part B of the Act to serve those children without regard to §300.202(b) (relating to excess costs). (Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(b))

§300.176 Exception for prior State plans.

(a) *General.* If a State has on file with the Secretary policies and procedures approved by the Secretary that demonstrate that the State meets any requirement of §300.100, including any policies and procedures filed under Part B of the Act as in effect before, December 3, 2004, the Secretary considers the State to have met the requirement for purposes of receiving a grant under Part B of the Act.

(b) *Modifications made by a State.* (1) Subject to paragraph (b)(2) of this section, policies and procedures submitted by a State in accordance with this subpart remain in effect until the State submits to the Secretary the modifications that the State determines necessary.

(2) The provisions of this subpart apply to a modification to an application to the same extent and in the same manner that they apply to the original plan.

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

(1) After December 3, 2004, the provisions of the Act or the regulations in this part are amended;

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

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

(Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1412(c)(2) and (3))

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

(a) *States' sovereign immunity.* (1) A State that accepts funds under this part waives its immunity under the 11th amendment of the

Constitution of the United States from suit in Federal court for a violation of this part.

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

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

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

(Authority: 20 U.S.C. 1403, 1405) [73 FR 73027, Dec. 1, 2008]

Department Procedures

§300.178 Determination by the Secretary that a State is eligible to receive a grant.

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

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

§300.179 Notice and hearing before determining that a State is not eligible to receive a grant.

(a) *General.* (1) The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until providing the State—

(i) With reasonable notice; and

(ii) With an opportunity for a hearing.

(2) In implementing paragraph (a)(1)(i) of this section, the Secretary sends a written notice to the SEA by certified mail with return receipt requested.

(b) *Content of notice.* In the written notice described in paragraph (a)(2) of this section, the Secretary—

(1) States the basis on which the Secretary proposes to make a final determination that the State is not eligible;

- (2) May describe possible options for resolving the issues;
 - (3) Advises the SEA that it may request a hearing and that the request for a hearing must be made not later than 30 days after it receives the notice of the proposed final determination that the State is not eligible; and
 - (4) Provides the SEA with information about the hearing procedures that will be followed.
- (Authority: 20 U.S.C. 1412(d)(2))

§300.180 Hearing official or panel.

- (a) If the SEA requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.
 - (b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.
- (Authority: 20 U.S.C. 1412(d)(2))

§300.181 Hearing procedures.

- (a) As used in §§300.179 through 300.184 the term party or parties means the following:
 - (1) An SEA that requests a hearing regarding the proposed disapproval of the State's eligibility under this part.
 - (2) The Department official who administers the program of financial assistance under this part.
 - (3) A person, group or agency with an interest in and having relevant information about the case that has applied for and been granted leave to intervene by the Hearing Official or Hearing Panel.
- (b) Within 15 days after receiving a request for a hearing, the Secretary designates a Hearing Official or Hearing Panel and notifies the parties.
- (c) The Hearing Official or Hearing Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Hearing Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:
 - (1) The Hearing Official or Hearing Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the

issues or to consider other matters that may aid in the disposition of the case.

- (2) The Hearing Official or Hearing Panel may schedule a prehearing conference with the Hearing Official or Hearing Panel and the parties.
- (3) Any party may request the Hearing Official or Hearing Panel to schedule a prehearing or other conference. The Hearing Official or Hearing Panel decides whether a conference is necessary and notifies all parties.
- (4) At a prehearing or other conference, the Hearing Official or Hearing Panel and the parties may consider subjects such as—
 - (i) Narrowing and clarifying issues;
 - (ii) Assisting the parties in reaching agreements and stipulations;
 - (iii) Clarifying the positions of the parties;
 - (iv) Determining whether an evidentiary hearing or oral argument should be held; and
 - (v) Setting dates for—
 - (A) The exchange of written documents;
 - (B) The receipt of comments from the parties on the need for oral argument or evidentiary hearing;
 - (C) Further proceedings before the Hearing Official or Hearing Panel (including an evidentiary hearing or oral argument, if either is scheduled);
 - (D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimation of time for each presentation; or
 - (E) Completion of the review and the initial decision of the Hearing Official or Hearing Panel.
- (5) A prehearing or other conference held under paragraph (c)(4) of this section may be conducted by telephone conference call.
- (6) At a prehearing or other conference, the parties must be prepared to discuss the subjects listed in paragraph (b)(4) of this section.
- (7) Following a prehearing or other conference the Hearing Official or Hearing Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.
- (d) The Hearing Official or Hearing Panel may require parties to state their positions and to provide all or part of the evidence in writing.
- (e) The Hearing Official or Hearing Panel may require parties to present testimony through

affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Hearing Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Hearing Official or Panel.

(g) The Hearing Official or Hearing Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Hearing Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Hearing Panel may examine witnesses.

(j) The Hearing Official or Hearing Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Hearing Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Hearing Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m)(1) The parties must present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Hearing Panel shall determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Hearing Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Hearing Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Hearing Panel gives each party, in addition to the opportunity to be represented by counsel—

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Hearing Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p)(1) The Hearing Official or Hearing Panel—

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party must file with the Hearing Official or Hearing Panel all written motions, briefs, and other documents and must at the same time provide a copy to the other parties to the proceedings.

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

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61306, Oct. 30, 2007]

§300.182 Initial decision; final decision.

(a) The Hearing Official or Hearing Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under §300.179 including any amendments to or further clarifications of the issues, under §300.181(c)(7).

(b) The initial decision of a Hearing Panel is made by a majority of Panel members.

(c) The Hearing Official or Hearing Panel mails, by certified mail with return receipt requested, a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secretary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Hearing Panel within 15 days of the date the party receives the Panel's decision.

(e) The Hearing Official or Hearing Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Hearing Panel within seven days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Hearing Panel forwards the parties' initial and responsive

comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Hearing Panel becomes the final decision of the Secretary unless, within 25 days after the end of the time for receipt of written comments and recommendations, the Secretary informs the Hearing Official or Hearing Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary rejects or modifies the initial decision of the Hearing Official or Hearing Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the transcript of the Hearing Official's or Hearing Panel's proceedings, and written comments.

(j) The Secretary may remand the matter to the Hearing Official or Hearing Panel for further proceedings.

(k) Unless the Secretary remands the matter as provided in paragraph (j) of this section, the Secretary issues the final decision, with any necessary modifications, within 30 days after notifying the Hearing Official or Hearing Panel that the initial decision is being further reviewed.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1412(d)(2))

§300.183 Filing requirements.

(a) Any written submission by a party under §§300.179 through 300.184 must be filed by hand delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

- (1) Hand-delivered;
- (2) Mailed; or
- (3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary, the Hearing Official, or the Hearing Panel, as applicable, may require the filing of a follow-up hard copy by hand delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

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

§300.184 Judicial review.

If a State is dissatisfied with the Secretary's final decision with respect to the eligibility of the State under section 612 of the Act, the State may, not later than 60 days after notice of that decision, file with the United States Court of Appeals for the circuit in which that State is located a petition for review of that decision. A copy of the petition must be transmitted by the clerk of the court to the Secretary. The Secretary then files in the court the record of the proceedings upon which the Secretary's decision was based, as provided in 28 U.S.C. 2112.

(Authority: 20 U.S.C. 1416(e)(8))

§300.185 [Reserved]

§300.186 Assistance under other Federal programs.

Part B of the Act may not be construed to permit a State to reduce medical and other assistance available, or to alter eligibility, under titles V and XIX of the Social Security Act with respect to the provision of FAPE for children with disabilities in the State.

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

By-pass for Children in Private Schools

§300.190 By-pass—general.

(a) If, on December 2, 1983, the date of enactment of the Education of the Handicapped Act Amendments of 1983, an SEA was prohibited by law from providing for the equitable participation in special programs of children with disabilities enrolled in private elementary schools and secondary schools as required by section 612(a)(10)(A) of the Act, or if the Secretary determines that an SEA, LEA, or other public agency has substantially failed or is

unwilling to provide for such equitable participation then the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to these children through arrangements which shall be subject to the requirements of section 612(a)(10)(A) of the Act.

(b) The Secretary waives the requirement of section 612(a)(10)(A) of the Act and of §§300.131 through 300.144 if the Secretary implements a by-pass.

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

§300.191 Provisions for services under a by-pass.

(a) Before implementing a by-pass, the Secretary consults with appropriate public and private school officials, including SEA officials, in the affected State, and as appropriate, LEA or other public agency officials to consider matters such as—

- (1) Any prohibition imposed by State law that results in the need for a by-pass; and
- (2) The scope and nature of the services required by private school children with disabilities in the State, and the number of children to be served under the by-pass.

(b) After determining that a by-pass is required, the Secretary arranges for the provision of services to private school children with disabilities in the State, LEA or other public agency in a manner consistent with the requirements of section 612(a)(10)(A) of the Act and §§300.131 through 300.144 by providing services through one or more agreements with appropriate parties.

(c) For any fiscal year that a by-pass is implemented, the Secretary determines the maximum amount to be paid to the providers of services by multiplying—

- (1) A per child amount determined by dividing the total amount received by the State under Part B of the Act for the fiscal year by the number of children with disabilities served in the prior year as reported to the Secretary under section 618 of the Act; by
- (2) The number of private school children with disabilities (as defined in §§300.8(a) and 300.130) in the State, LEA or other public agency, as determined by the Secretary on the basis of the most recent satisfactory data

available, which may include an estimate of the number of those children with disabilities.

(d) The Secretary deducts from the State's allocation under Part B of the Act the amount the Secretary determines is necessary to implement a by-pass and pays that amount to the provider of services. The Secretary may withhold this amount from the State's allocation pending final resolution of any investigation or complaint that could result in a determination that a by-pass must be implemented.

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

§300.192 Notice of intent to implement a by-pass.

(a) Before taking any final action to implement a by-pass, the Secretary provides the SEA and, as appropriate, LEA or other public agency with written notice.

(b) In the written notice, the Secretary—

- (1) States the reasons for the proposed by-pass in sufficient detail to allow the SEA and, as appropriate, LEA or other public agency to respond; and
- (2) Advises the SEA and, as appropriate, LEA or other public agency that it has a specific period of time (at least 45 days) from receipt of the written notice to submit written objections to the proposed by-pass and that it may request in writing the opportunity for a hearing to show cause why a by-pass should not be implemented.

(c) The Secretary sends the notice to the SEA and, as appropriate, LEA or other public agency by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1412(f)(3)(A))

§300.193 Request to show cause.

An SEA, LEA or other public agency in receipt of a notice under §300.192 that seeks an opportunity to show cause why a by-pass should not be implemented must submit a written request for a show cause hearing to the Secretary, within the specified time period in the written notice in §300.192(b)(2).

(Authority: 20 U.S.C. 1412(f)(3))

§300.194 Show cause hearing.

(a) If a show cause hearing is requested, the Secretary—

- (1) Notifies the SEA and affected LEA or other public agency, and other appropriate public and

private school officials of the time and place for the hearing;

(2) Designates a person to conduct the show cause hearing. The designee must not have had any responsibility for the matter brought for a hearing; and

(3) Notifies the SEA, LEA or other public agency, and representatives of private schools that they may be represented by legal counsel and submit oral or written evidence and arguments at the hearing.

(b) At the show cause hearing, the designee considers matters such as—

(1) The necessity for implementing a by-pass;

(2) Possible factual errors in the written notice of intent to implement a by-pass; and

(3) The objections raised by public and private school representatives.

(c) The designee may regulate the course of the proceedings and the conduct of parties during the pendency of the proceedings. The designee takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order.

(d) The designee has no authority to require or conduct discovery.

(e) The designee may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(f) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(g) Within 10 days after the hearing, the designee—

(1) Indicates that a decision will be issued on the basis of the existing record; or

(2) Requests further information from the SEA, LEA, other public agency, representatives of private schools or Department officials.

(Authority: 20 U.S.C. 1412(f)(3))

§300.195 Decision.

(a) The designee who conducts the show cause hearing—

(1) Within 120 days after the record of a show cause hearing is closed, issues a written decision that includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 30 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies all parties to the show cause hearing of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1412(f)(3))

§300.196 Filing requirements.

(a) Any written submission under §300.194 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(f) A party must show a proof of mailing to establish the filing date under paragraph (b)(2) of this section as provided in 34 CFR 75.102(d).

(Authority: 20 U.S.C. 1412(f)(3))

§300.197 Judicial review.

If dissatisfied with the Secretary's final action, the SEA may, within 60 days after notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located. The procedures for judicial review are described in section 612(f)(3) (B) through (D) of the Act.

(Authority: 20 U.S.C. 1412(f)(3)(B)-(D))

§300.198 Continuation of a by-pass.

The Secretary continues a by-pass until the Secretary determines that the SEA, LEA or other public agency will meet the requirements for providing services to private school children. (Authority: 20 U.S.C. 1412(f)(2)(C))

State Administration

§300.199 State administration.

- (a) *Rulemaking.* Each State that receives funds under Part B of the Act must—
- (1) Ensure that any State rules, regulations, and policies relating to this part conform to the purposes of this part;
 - (2) Identify in writing to LEAs located in the State and the Secretary any such rule, regulation, or policy as a State-imposed requirement that is not required by Part B of the Act and Federal regulations; and
 - (3) Minimize the number of rules, regulations, and policies to which the LEAs and schools located in the State are subject under Part B of the Act.
- (b) *Support and facilitation.* State rules, regulations, and policies under Part B of the Act must support and facilitate LEA and school-level system improvement designed to enable children with disabilities to meet the challenging State student academic achievement standards. (Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1407)

Subpart C—Local Educational Agency Eligibility

§300.200 Condition of assistance.

An LEA is eligible for assistance under Part B of the Act for a fiscal year if the agency submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in §§300.201 through 300.213. (Authority: 20 U.S.C. 1413(a))

§300.201 Consistency with State policies.

The LEA, in providing for the education of children with disabilities within its jurisdiction, must have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under

§§300.101 through 300.163, and §§300.165 through 300.174.

(Approved by the Office of Management and Budget under control number 1820-0600) (Authority: 20 U.S.C. 1413(a)(1))

§300.202 Use of amounts.

- (a) *General.* Amounts provided to the LEA under Part B of the Act—
- (1) Must be expended in accordance with the applicable provisions of this part;
 - (2) Must be used only to pay the excess costs of providing special education and related services to children with disabilities, consistent with paragraph (b) of this section; and
 - (3) Must be used to supplement State, local, and other Federal funds and not to supplant those funds.
- (b) *Excess cost requirement—*(1) *General.* (i) The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to paragraph (b)(1)(ii) of this section. (ii) The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the ages 3, 4, 5, 18, 19, 20, or 21, if no local or State funds are available for nondisabled children of these ages. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services for these children. (2)(i) An LEA meets the excess cost requirement if it has spent at least a minimum average amount for the education of its children with disabilities before funds under Part B of the Act are used. (ii) The amount described in paragraph (b)(2)(i) of this section is determined in accordance with the definition of *excess costs* in §300.16. That amount may not include capital outlay or debt service. (3) If two or more LEAs jointly establish eligibility in accordance with §300.223, the minimum average amount is the average of the combined minimum average amounts determined in accordance with the definition of excess costs in §300.16 in those agencies for

elementary or secondary school students, as the case may be.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1413(a)(2)(A))

§300.203 Maintenance of effort.

(a) *Eligibility standard.* (1) For purposes of establishing the LEA's eligibility for an award for a fiscal year, the SEA must determine that the LEA budgets, for the education of children with disabilities, at least the same amount, from at least one of the following sources, as the LEA spent for that purpose from the same source for the most recent fiscal year for which information is available:

- (i) Local funds only;
- (ii) The combination of State and local funds;
- (iii) Local funds only on a per capita basis; or
- (iv) The combination of State and local funds on a per capita basis.

(2) When determining the amount of funds that the LEA must budget to meet the requirement in paragraph (a)(1) of this section, the LEA may take into consideration, to the extent the information is available, the exceptions and adjustment provided in §§300.204 and 300.205 that the LEA:

- (i) Took in the intervening year or years between the most recent fiscal year for which information is available and the fiscal year for which the LEA is budgeting; and
- (ii) Reasonably expects to take in the fiscal year for which the LEA is budgeting.

(3) Expenditures made from funds provided by the Federal government for which the SEA is required to account to the Federal government or for which the LEA is required to account to the Federal government directly or through the SEA may not be considered in determining whether an LEA meets the standard in paragraph (a)(1) of this section.

(b) *Compliance standard.* (1) Except as provided in §§300.204 and 300.205, funds provided to an LEA under Part B of the Act must not be used to reduce the level of expenditures for the education of children with disabilities made by the LEA from local funds below the level of those expenditures for the preceding fiscal year.

(2) An LEA meets this standard if it does not reduce the level of expenditures for the

education of children with disabilities made by the LEA from at least one of the following sources below the level of those expenditures from the same source for the preceding fiscal year, except as provided in §§300.204 and 300.205:

- (i) Local funds only;
- (ii) The combination of State and local funds;
- (iii) Local funds only on a per capita basis; or
- (iv) The combination of State and local funds on a per capita basis.

(3) Expenditures made from funds provided by the Federal government for which the SEA is required to account to the Federal government or for which the LEA is required to account to the Federal government directly or through the SEA may not be considered in determining whether an LEA meets the standard in paragraphs (b)(1) and (2) of this section.

(c) *Subsequent years.* (1) If, in the fiscal year beginning on July 1, 2013 or July 1, 2014, an LEA fails to meet the requirements of §300.203 in effect at that time, the level of expenditures required of the LEA for the fiscal year subsequent to the year of the failure is the amount that would have been required in the absence of that failure, not the LEA's reduced level of expenditures.

(2) If, in any fiscal year beginning on or after July 1, 2015, an LEA fails to meet the requirement of paragraph (b)(2)(i) or (iii) of this section and the LEA is relying on local funds only, or local funds only on a per capita basis, to meet the requirements of paragraph (a) or (b) of this section, the level of expenditures required of the LEA for the fiscal year subsequent to the year of the failure is the amount that would have been required under paragraph (b)(2)(i) or (iii) in the absence of that failure, not the LEA's reduced level of expenditures.

(3) If, in any fiscal year beginning on or after July 1, 2015, an LEA fails to meet the requirement of paragraph (b)(2)(ii) or (iv) of this section and the LEA is relying on the combination of State and local funds, or the combination of State and local funds on a per capita basis, to meet the requirements of paragraph (a) or (b) of this section, the level of expenditures required of the LEA for the fiscal year subsequent to the year of the failure is the amount that would have been required under

paragraph (b)(2)(ii) or (iv) in the absence of that failure, not the LEA's reduced level of expenditures.

(d) *Consequence of failure to maintain effort.* If an LEA fails to maintain its level of expenditures for the education of children with disabilities in accordance with paragraph (b) of this section, the SEA is liable in a recovery action under section 452 of the General Education Provisions Act (20 U.S.C. 1234a) to return to the Department, using non-Federal funds, an amount equal to the amount by which the LEA failed to maintain its level of expenditures in accordance with paragraph (b) of this section in that fiscal year, or the amount of the LEA's Part B subgrant in that fiscal year, whichever is lower.

(Approved by the Office of Management and Budget under control number 1820-0600)
(Authority: 20 U.S.C. 1413(a)(2)(A), Pub. L. 113-76, 128 Stat. 5, 394 (2014), Pub. L. 113-235, 128 Stat. 2130, 2499 (2014))
[80 FR 23666, Apr. 28, 2015]

§300.204 Exception to maintenance of effort.

Notwithstanding the restriction in §300.203(b), an LEA may reduce the level of expenditures by the LEA under Part B of the Act below the level of those expenditures for the preceding fiscal year if the reduction is attributable to any of the following:

- (a) The voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel.
- (b) A decrease in the enrollment of children with disabilities.
- (c) The termination of the obligation of the agency, consistent with this part, to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as determined by the SEA, because the child—
 - (1) Has left the jurisdiction of the agency;
 - (2) Has reached the age at which the obligation of the agency to provide FAPE to the child has terminated; or
 - (3) No longer needs the program of special education.
- (d) The termination of costly expenditures for long-term purchases, such as the acquisition of

equipment or the construction of school facilities.

(e) The assumption of cost by the high cost fund operated by the SEA under §300.704(c).
(Approved by the Office of Management and Budget under control number 1820-0600)
(Authority: 20 U.S.C. 1413(a)(2)(B))
[71 FR 46753, Aug. 14, 2006, as amended at 80 FR 23667, Apr. 28, 2015]

§300.205 Adjustment to local fiscal efforts in certain fiscal years.

(a) *Amounts in excess.* Notwithstanding §300.202(a)(2) and (b) and §300.203(b), and except as provided in paragraph (d) of this section and §300.230(e)(2), for any fiscal year for which the allocation received by an LEA under §300.705 exceeds the amount the LEA received for the previous fiscal year, the LEA may reduce the level of expenditures otherwise required by §300.203(b) by not more than 50 percent of the amount of that excess.

(b) *Use of amounts to carry out activities under ESEA.* If an LEA exercises the authority under paragraph (a) of this section, the LEA must use an amount of local funds equal to the reduction in expenditures under paragraph (a) of this section to carry out activities that could be supported with funds under the ESEA regardless of whether the LEA is using funds under the ESEA for those activities.

(c) *State prohibition.* Notwithstanding paragraph (a) of this section, if an SEA determines that an LEA is unable to establish and maintain programs of FAPE that meet the requirements of section 613(a) of the Act and this part or the SEA has taken action against the LEA under section 616 of the Act and subpart F of these regulations, the SEA must prohibit the LEA from reducing the level of expenditures under paragraph (a) of this section for that fiscal year.

(d) *Special rule.* The amount of funds expended by an LEA for early intervening services under §300.226 shall count toward the maximum amount of expenditures that the LEA may reduce under paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 1820-0600)
(Authority: 20 U.S.C. 1413(a)(2)(C))
[71 FR 46753, Aug. 14, 2006, as amended at 80 FR 23667, Apr. 28, 2015]

§300.206 Schoolwide programs under title I of the ESEA.

(a) *General.* Notwithstanding the provisions of §§300.202 and 300.203 or any other provision of Part B of the Act, an LEA may use funds received under Part B of the Act for any fiscal year to carry out a schoolwide program under section 1114 of the ESEA, except that the amount used in any schoolwide program may not exceed—

- (1)(i) The amount received by the LEA under Part B of the Act for that fiscal year; divided by
- (ii) The number of children with disabilities in the jurisdiction of the LEA; and multiplied by
- (2) The number of children with disabilities participating in the schoolwide program.

(b) *Funding conditions.* The funds described in paragraph (a) of this section are subject to the following conditions:

(1) The funds must be considered as Federal Part B funds for purposes of the calculations required by §300.202(a)(2) and (a)(3).

(2) The funds may be used without regard to the requirements of §300.202(a)(1).

(c) *Meeting other Part B requirements.* Except as provided in paragraph (b) of this section, all other requirements of Part B of the Act must be met by an LEA using Part B funds in accordance with paragraph (a) of this section, including ensuring that children with disabilities in schoolwide program schools—

- (1) Receive services in accordance with a properly developed IEP; and
- (2) Are afforded all of the rights and services guaranteed to children with disabilities under the Act.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1413(a)(2)(D))

§300.207 Personnel development.

The LEA must ensure that all personnel necessary to carry out Part B of the Act are appropriately and adequately prepared, subject to the requirements of §300.156 (related to personnel qualifications) and section 2102(b) of the ESEA.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1413(a)(3))

[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29761, June 30, 2017]

§300.208 Permissive use of funds.

(a) *Uses.* Notwithstanding §§300.202, 300.203(b), and 300.162(b), funds provided to an LEA under Part B of the Act may be used for the following activities:

(1) *Services and aids that also benefit nondisabled children.* For the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child, even if one or more nondisabled children benefit from these services.

(2) *Early intervening services.* To develop and implement coordinated, early intervening educational services in accordance with §300.226.

(3) *High cost special education and related services.* To establish and implement cost or risk sharing funds, consortia, or cooperatives for the LEA itself, or for LEAs working in a consortium of which the LEA is a part, to pay for high cost special education and related services.

(b) *Administrative case management.* An LEA may use funds received under Part B of the Act to purchase appropriate technology for recordkeeping, data collection, and related case management activities of teachers and related services personnel providing services described in the IEP of children with disabilities, that is needed for the implementation of those case management activities.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1413(a)(4))

[71 FR 46753, Aug. 14, 2006, as amended at 80 FR 23667, Apr. 28, 2015]

§300.209 Treatment of charter schools and their students.

(a) *Rights of children with disabilities.* Children with disabilities who attend public charter schools and their parents retain all rights under this part.

(b) *Charter schools that are public schools of the LEA.* (1) In carrying out Part B of the Act and these regulations with respect to charter

schools that are public schools of the LEA, the LEA must—

(i) Serve children with disabilities attending those charter schools in the same manner as the LEA serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the LEA has a policy or practice of providing such services on the site to its other public schools; and

(ii) Provide funds under Part B of the Act to those charter schools—

(A) On the same basis as the LEA provides funds to the LEA's other public schools, including proportional distribution based on relative enrollment of children with disabilities; and

(B) At the same time as the LEA distributes other Federal funds to the LEA's other public schools, consistent with the State's charter school law.

(2) If the public charter school is a school of an LEA that receives funding under §300.705 and includes other public schools—

(i) The LEA is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity; and

(ii) The LEA must meet the requirements of paragraph (b)(1) of this section.

(c) *Public charter schools that are LEAs.* If the public charter school is an LEA, consistent with §300.28, that receives funding under §300.705, that charter school is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity.

(d) *Public charter schools that are not an LEA or a school that is part of an LEA.* (1) If the public charter school is not an LEA receiving funding under §300.705, or a school that is part of an LEA receiving funding under §300.705, the SEA is responsible for ensuring that the requirements of this part are met.

(2) Paragraph (d)(1) of this section does not preclude a State from assigning initial responsibility for ensuring the requirements of this part are met to another entity. However, the SEA must maintain the ultimate responsibility for ensuring compliance with this part, consistent with §300.149.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1413(a)(5))

§300.210 Purchase of instructional materials.

(a) *General.* Not later than December 3, 2006, an LEA that chooses to coordinate with the National Instructional Materials Access Center (NIMAC), when purchasing print instructional materials, must acquire those instructional materials in the same manner, and subject to the same conditions as an SEA under §300.172.

(b) *Rights of LEA.* (1) Nothing in this section shall be construed to require an LEA to coordinate with the NIMAC.

(2) If an LEA chooses not to coordinate with the NIMAC, the LEA must provide an assurance to the SEA that the LEA will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

(3) Nothing in this section relieves an LEA of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats but are not included under the definition of blind or other persons with print disabilities in §300.172(e)(1)(i) or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1413(a)(6))

§300.211 Information for SEA.

The LEA must provide the SEA with information necessary to enable the SEA to carry out its duties under Part B of the Act, including, with respect to §§300.157 and 300.160, information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1413(a)(7))

§300.212 Public information.

The LEA must make available to parents of children with disabilities and to the general public all documents relating to the eligibility of the agency under Part B of the Act.

(Approved by the Office of Management and Budget under control number 1820-0600)
(Authority: 20 U.S.C. 1413(a)(8))

§300.213 Records regarding migratory children with disabilities.

The LEA must cooperate in the Secretary's efforts under section 1308 of the ESEA to ensure the linkage of records pertaining to migratory children with disabilities for the purpose of electronically exchanging, among the States, health and educational information regarding those children.

(Approved by the Office of Management and Budget under control number 1820-0600)
(Authority: 20 U.S.C. 1413(a)(9))

§§300.214-300.219 [Reserved]

§300.220 Exception for prior local plans.

(a) *General.* If an LEA or a State agency described in §300.228 has on file with the SEA policies and procedures that demonstrate that the LEA or State agency meets any requirement of §300.200, including any policies and procedures filed under Part B of the Act as in effect before December 3, 2004, the SEA must consider the LEA or State agency to have met that requirement for purposes of receiving assistance under Part B of the Act.

(b) *Modification made by an LEA or State agency.* Subject to paragraph (c) of this section, policies and procedures submitted by an LEA or a State agency in accordance with this subpart remain in effect until the LEA or State agency submits to the SEA the modifications that the LEA or State agency determines are necessary.

(c) *Modifications required by the SEA.* The SEA may require an LEA or a State agency to modify its policies and procedures, but only to the extent necessary to ensure the LEA's or State agency's compliance with Part B of the Act or State law, if—

- (1) After December 3, 2004, the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the applicable provisions of the Act (or the regulations developed to carry out the Act) are amended;
 - (2) There is a new interpretation of an applicable provision of the Act by Federal or State courts;
- or

(3) There is an official finding of noncompliance with Federal or State law or regulations.
(Authority: 20 U.S.C. 1413(b))

§300.221 Notification of LEA or State agency in case of ineligibility.

If the SEA determines that an LEA or State agency is not eligible under Part B of the Act, then the SEA must—

- (a) Notify the LEA or State agency of that determination; and
- (b) Provide the LEA or State agency with reasonable notice and an opportunity for a hearing.

(Authority: 20 U.S.C. 1413(c))

§300.222 LEA and State agency compliance.

(a) *General.* If the SEA, after reasonable notice and an opportunity for a hearing, finds that an LEA or State agency that has been determined to be eligible under this subpart is failing to comply with any requirement described in §§300.201 through 300.213, the SEA must reduce or must not provide any further payments to the LEA or State agency until the SEA is satisfied that the LEA or State agency is complying with that requirement.

(b) *Notice requirement.* Any State agency or LEA in receipt of a notice described in paragraph (a) of this section must, by means of public notice, take the measures necessary to bring the pendency of an action pursuant to this section to the attention of the public within the jurisdiction of the agency.

(c) *Consideration.* In carrying out its responsibilities under this section, each SEA must consider any decision resulting from a hearing held under §§300.511 through 300.533 that is adverse to the LEA or State agency involved in the decision.

(Authority: 20 U.S.C. 1413(d))

§300.223 Joint establishment of eligibility.

(a) *General.* An SEA may require an LEA to establish its eligibility jointly with another LEA if the SEA determines that the LEA will be ineligible under this subpart because the agency will not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

(b) *Charter school exception.* An SEA may not require a charter school that is an LEA to jointly establish its eligibility under paragraph (a) of this section unless the charter school is explicitly permitted to do so under the State's charter school statute.

(c) *Amount of payments.* If an SEA requires the joint establishment of eligibility under paragraph (a) of this section, the total amount of funds made available to the affected LEAs must be equal to the sum of the payments that each LEA would have received under §300.705 if the agencies were eligible for those payments. (Authority: 20 U.S.C. 1413(e)(1) and (2))

§300.224 Requirements for establishing eligibility.

(a) *Requirements for LEAs in general.* LEAs that establish joint eligibility under this section must—

- (1) Adopt policies and procedures that are consistent with the State's policies and procedures under §§300.101 through 300.163, and §§300.165 through 300.174; and
- (2) Be jointly responsible for implementing programs that receive assistance under Part B of the Act.

(b) *Requirements for educational service agencies in general.* If an educational service agency is required by State law to carry out programs under Part B of the Act, the joint responsibilities given to LEAs under Part B of the Act—

- (1) Do not apply to the administration and disbursement of any payments received by that educational service agency; and
- (2) Must be carried out only by that educational service agency.

(c) *Additional requirement.* Notwithstanding any other provision of §§300.223 through 300.224, an educational service agency must provide for the education of children with disabilities in the least restrictive environment, as required by §300.112.

(Approved by the Office of Management and Budget under control number 1820-0600)
(Authority: 20 U.S.C. 1413(e)(3) and (4))

§300.225 [Reserved]

§300.226 Early intervening services.

(a) *General.* An LEA may not use more than 15 percent of the amount the LEA receives under Part B of the Act for any fiscal year, less any amount reduced by the LEA pursuant to §300.205, if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment. (See appendix D for examples of how §300.205(d), regarding local maintenance of effort, and §300.226(a) affect one another.)

(b) *Activities.* In implementing coordinated, early intervening services under this section, an LEA may carry out activities that include—

- (1) Professional development (which may be provided by entities other than LEAs) for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and
- (2) Providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.

(c) *Construction.* Nothing in this section shall be construed to either limit or create a right to FAPE under Part B of the Act or to delay appropriate evaluation of a child suspected of having a disability.

(d) *Reporting.* Each LEA that develops and maintains coordinated, early intervening services under this section must annually report to the SEA on—

- (1) The number of children served under this section who received early intervening services; and
- (2) The number of children served under this section who received early intervening services and subsequently receive special education and related services under Part B of the Act during the preceding two year period.

(e) *Coordination with ESEA.* Funds made available to carry out this section may be used to carry out coordinated, early intervening services aligned with activities funded by, and carried out under the ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for the activities and services assisted under this section.
(Approved by the Office of Management and Budget under control number 1820-0600)
(Authority: 20 U.S.C. 1413(f))

§300.227 Direct services by the SEA.

(a) *General.* (1) An SEA must use the payments that would otherwise have been available to an LEA or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that LEA, or for whom that State agency is responsible, if the SEA determines that the LEA or State agency—

- (i) Has not provided the information needed to establish the eligibility of the LEA or State agency, or elected not to apply for its Part B allotment, under Part B of the Act;
- (ii) Is unable to establish and maintain programs of FAPE that meet the requirements of this part;
- (iii) Is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain the programs; or
- (iv) Has one or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of these children.

(2) *SEA administrative procedures.* (i) In meeting the requirements in paragraph (a)(1) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

(ii) The excess cost requirements of §300.202(b) do not apply to the SEA.

(b) *Manner and location of education and services.* The SEA may provide special education and related services under paragraph (a) of this section in the manner and at the locations (including regional or State centers) as the SEA considers appropriate. The education and services must be provided in accordance with this part.

(Authority: 20 U.S.C. 1413(g))

§300.228 State agency eligibility.

Any State agency that desires to receive a subgrant for any fiscal year under §300.705 must demonstrate to the satisfaction of the SEA that—

(a) All children with disabilities who are participating in programs and projects funded under Part B of the Act receive FAPE, and that those children and their parents are provided all the rights and procedural safeguards described in this part; and

(b) The agency meets the other conditions of this subpart that apply to LEAs.

(Authority: 20 U.S.C. 1413(h))

§300.229 Disciplinary information.

(a) The State may require that a public agency include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children.

(b) The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

(c) If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action that has been taken against the child.

(Authority: 20 U.S.C. 1413(i))

§300.230 SEA flexibility.

(a) *Adjustment to State fiscal effort in certain fiscal years.* For any fiscal year for which the allotment received by a State under §300.703 exceeds the amount the State received for the previous fiscal year and if the State in school year 2003-2004 or any subsequent school year pays or reimburses all LEAs within the State from State revenue 100 percent of the non-Federal share of the costs of special education and related services, the SEA, notwithstanding §§300.162 through 300.163 (related to State-

level nonsupplanting and maintenance of effort), and §300.175 (related to direct services by the SEA) may reduce the level of expenditures from State sources for the education of children with disabilities by not more than 50 percent of the amount of such excess.

(b) *Prohibition.* Notwithstanding paragraph (a) of this section, if the Secretary determines that an SEA is unable to establish, maintain, or oversee programs of FAPE that meet the requirements of this part, or that the State needs assistance, intervention, or substantial intervention under §300.603, the Secretary prohibits the SEA from exercising the authority in paragraph (a) of this section.

(c) *Education activities.* If an SEA exercises the authority under paragraph (a) of this section, the agency must use funds from State sources, in an amount equal to the amount of the reduction under paragraph (a) of this section, to support activities authorized under the ESEA, or to support need-based student or teacher higher education programs.

(d) *Report.* For each fiscal year for which an SEA exercises the authority under paragraph (a) of this section, the SEA must report to the Secretary—

(1) The amount of expenditures reduced pursuant to that paragraph; and

(2) The activities that were funded pursuant to paragraph (c) of this section.

(e) *Limitation.* (1) Notwithstanding paragraph (a) of this section, an SEA may not reduce the level of expenditures described in paragraph (a) of this section if any LEA in the State would, as a result of such reduction, receive less than 100 percent of the amount necessary to ensure that all children with disabilities served by the LEA receive FAPE from the combination of Federal funds received under Part B of the Act and State funds received from the SEA.

(2) If an SEA exercises the authority under paragraph (a) of this section, LEAs in the State may not reduce local effort under §300.205 by more than the reduction in the State funds they receive.

(Authority: 20 U.S.C. 1413(j))

Subpart D—Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements

Parental Consent

§300.300 Parental consent.

(a) *Parental consent for initial evaluation.* (1)(i) The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under §300.8 must, after providing notice consistent with §§300.503 and 300.504, obtain informed consent, consistent with §300.9, from the parent of the child before conducting the evaluation.

(ii) Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

(iii) The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.

(2) For initial evaluations only, if the child is a ward of the State and is not residing with the child's parent, the public agency is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if—

(i) Despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child;

(ii) The rights of the parents of the child have been terminated in accordance with State law; or

(iii) The rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

(3)(i) If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures under §300.506 or the due process procedures under §§300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent.

(ii) The public agency does not violate its obligation under §300.111 and §300.301

through 300.311 if it declines to pursue the evaluation.

(b) *Parental consent for services.* (1) A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

(2) The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

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

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

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

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

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

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

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

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child

with further special education and related services; and

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

(c) *Parental consent for reevaluations.* (1) Subject to paragraph (c)(2) of this section, each public agency—

(i) Must obtain informed parental consent, in accordance with §300.300(a)(1), prior to conducting any reevaluation of a child with a disability.

(ii) If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section.

(iii) The public agency does not violate its obligation under §300.111 and §§300.301 through 300.311 if it declines to pursue the evaluation or reevaluation.

(2) The informed parental consent described in paragraph (c)(1) of this section need not be obtained if the public agency can demonstrate that—

(i) It made reasonable efforts to obtain such consent; and

(ii) The child's parent has failed to respond.

(d) Other consent requirements.

(1) Parental consent is not required before—

(i) Reviewing existing data as part of an evaluation or a reevaluation; or

(ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(2) In addition to the parental consent requirements described in paragraphs (a), (b), and (c) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(3) A public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a), (b), (c), or (d)(2) of this section to deny the parent or child any other

service, benefit, or activity of the public agency, except as required by this part.

(4)(i) If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of this section); and

(ii) The public agency is not required to consider the child as eligible for services under §§300.132 through 300.144.

(5) To meet the reasonable efforts requirement in paragraphs (a)(1)(iii), (a)(2)(i), (b)(2), and (c)(2)(i) of this section, the public agency must document its attempts to obtain parental consent using the procedures in §300.322(d).

(Authority: 20 U.S.C. 1414(a)(1)(D) and 1414(c))

[71 FR 46753, Aug. 14, 2006, as amended at 73 FR 73027, Dec. 1, 2008]

Evaluations and Reevaluations

§300.301 Initial evaluations.

(a) *General.* Each public agency must conduct a full and individual initial evaluation, in accordance with §§300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) *Request for initial evaluation.* Consistent with the consent requirements in §300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(c) *Procedures for initial evaluation.* The initial evaluation—

(1)(i) Must be conducted within 60 days of receiving parental consent for the evaluation; or

(ii) If the State establishes a timeframe within which the evaluation must be conducted, within that timeframe; and

(2) Must consist of procedures—

(i) To determine if the child is a child with a disability under §300.8; and

(ii) To determine the educational needs of the child.

(d) *Exception.* The timeframe described in paragraph (c)(1) of this section does not apply to a public agency if—

(1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation; or

(2) A child enrolls in a school of another public agency after the relevant timeframe in paragraph (c)(1) of this section has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability under §300.8.

(e) The exception in paragraph (d)(2) of this section applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.

(Authority: 20 U.S.C. 1414(a))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007]

§300.302 Screening for instructional purposes is not evaluation.

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

(Authority: 20 U.S.C. 1414(a)(1)(E))

§300.303 Reevaluations.

(a) *General.* A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§300.304 through 300.311—

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation.

(b) *Limitation.* A reevaluation conducted under paragraph (a) of this section—

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.
(Authority: 20 U.S.C. 1414(a)(2))

§300.304 Evaluation procedures.

(a) *Notice.* The public agency must provide notice to the parents of a child with a disability, in accordance with §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 §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 §300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§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.

(Authority: 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B))

§300.305 Additional requirements for evaluations and reevaluations.

(a) *Review of existing evaluation data.* As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP

Team and other qualified professionals, as appropriate, must—

(1) Review existing evaluation data on the child, including—

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

(i)(A) Whether the child is a child with a disability, as defined in §300.8, and the educational needs of the child; or

(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;

(ii) The present levels of academic achievement and related developmental needs of the child;

(iii)(A) Whether the child needs special education and related services; or

(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

(b) *Conduct of review.* The group described in paragraph (a) of this section may conduct its review without a meeting.

(c) *Source of data.* The public agency must administer such assessments and other evaluation measures as may be needed to produce the data identified under paragraph (a) of this section.

(d) *Requirements if additional data are not needed.* (1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of—

(i) That determination and the reasons for the determination; and

(ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.

(2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents.

(e) *Evaluations before change in eligibility.* (1) Except as provided in paragraph (e)(2) of this section, a public agency must evaluate a child with a disability in accordance with §§300.304 through 300.311 before determining that the child is no longer a child with a disability.

(2) The evaluation described in paragraph (e)(1) of this section is not required before the termination of a child's eligibility under this part due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under State law.

(3) For a child whose eligibility terminates under circumstances described in paragraph (e)(2) of this section, a public agency must provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

(Authority: 20 U.S.C. 1414(c))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007]

§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 (c) 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 as such section was in effect on the day before the date of enactment of the Every Student Succeeds Act (December 9, 2015));

(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)) [71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007; 82 FR 29761, June 30, 2017]

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—
 - (i) A visual, hearing, or motor disability;
 - (ii) An intellectual disability;
 - (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.

[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 31912, July 11, 2017]

§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, motor disability, or an intellectual disability; 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.

[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 31913, July 11, 2017]

Individualized Education Programs

§300.320 Definition of individualized education program.

(a) *General.* As used in this part, the term individualized education program or IEP means a written statement for each child with a

disability that is developed, reviewed, and revised in a meeting in accordance with §§300.320 through 300.324, and that must include—

- (1) A statement of the child's present levels of academic achievement and functional performance, including—
 - (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
 - (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
- (2)(i) A statement of measurable annual goals, including academic and functional goals designed to—
 - (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
 - (B) Meet each of the child's other educational needs that result from the child's disability;
- (ii) For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, a description of benchmarks or short-term objectives;
- (3) A description of—
 - (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
 - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
- (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—
 - (A) The child cannot participate in the regular assessment; and
 - (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.
- (b) *Transition services.* Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include—
 - (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
 - (2) The transition services (including courses of study) needed to assist the child in reaching those goals.
- (c) *Transfer of rights at age of majority.* Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under §300.520.
- (d) *Construction.* Nothing in this section shall be construed to require—

- (1) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act; or
 - (2) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.
- (Authority: 20 U.S.C. 1414(d)(1)(A) and (d)(6))
[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007]

§300.321 IEP Team.

- (a) *General.* The public agency must ensure that the IEP Team for each child with a disability includes—
 - (1) The parents of the child;
 - (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
 - (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
 - (4) A representative of the public agency who—
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (ii) Is knowledgeable about the general education curriculum; and
 - (iii) Is knowledgeable about the availability of resources of the public agency.
 - (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
 - (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
 - (7) Whenever appropriate, the child with a disability.
- (b) *Transition services participants.* (1) In accordance with paragraph (a)(7) of this section, the public agency must invite a child with a disability to attend the child's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals under §300.320(b).

(2) If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered.

(3) To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

(c) *Determination of knowledge and special expertise.* The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section must be made by the party (parents or public agency) who invited the individual to be a member of the IEP Team.

(d) *Designating a public agency representative.* A public agency may designate a public agency member of the IEP Team to also serve as the agency representative, if the criteria in paragraph (a)(4) of this section are satisfied.

(e) *IEP Team attendance.* (1) A member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(2) A member of the IEP Team described in paragraph (e)(1) of this section may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(i) The parent, in writing, and the public agency consent to the excusal; and

(ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(f) *Initial IEP Team meeting for child under Part C.* In the case of a child who was previously served under Part C of the Act, an invitation to the initial IEP Team meeting must, at the request of the parent, be sent to the Part C service coordinator or other representatives of

the Part C system to assist with the smooth transition of services.

(Authority: 20 U.S.C. 1414(d)(1)(B)-(d)(1)(D)) [71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007]

§300.322 Parent participation.

(a) *Public agency responsibility—general.* Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) *Information provided to parents.* (1) The notice required under paragraph (a)(1) of this section must—

(i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and

(ii) Inform the parents of the provisions in §300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and §300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).

(2) For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice also must—

(i) Indicate—

(A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with §300.320(b); and

(B) That the agency will invite the student; and

(ii) Identify any other agency that will be invited to send a representative.

(c) *Other methods to ensure parent*

participation. If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls,

consistent with §300.328 (related to alternative means of meeting participation).

(d) *Conducting an IEP Team meeting without a parent in attendance.* A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and
- (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(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.

(f) *Parent copy of child's IEP.* The public agency must give the parent a copy of the child's IEP at no cost to the parent.

(Authority: 20 U.S.C. 1414(d)(1)(B)(i))

§300.323 When IEPs must be in effect.

(a) *General.* At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in §300.320.

(b) *IEP or IFSP for children aged three through five.* (1) In the case of a child with a disability aged three through five (or, at the discretion of the SEA, a two-year-old child with a disability who will turn age three during the school year), the IEP Team must consider an IFSP that contains the IFSP content (including the natural environments statement) described in section 636(d) of the Act and its implementing regulations (including an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children with IFSPs under this section who are at least three years of age), and that is developed in accordance with the IEP procedures under this part. The IFSP may serve as the IEP of the child, if using the IFSP as the IEP is—

- (i) Consistent with State policy; and
- (ii) Agreed to by the agency and the child's parents.

(2) In implementing the requirements of paragraph (b)(1) of this section, the public agency must—

(i) Provide to the child's parents a detailed explanation of the differences between an IFSP and an IEP; and

(ii) If the parents choose an IFSP, obtain written informed consent from the parents.

(c) *Initial IEPs; provision of services.* Each public agency must ensure that—

(1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and

(2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

(d) *Accessibility of child's IEP to teachers and others.* Each public agency must ensure that—

(1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and

(2) Each teacher and provider described in paragraph (d)(1) of this section is informed of—

(i) His or her specific responsibilities related to implementing the child's IEP; and

(ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

(e) *IEPs for children who transfer public agencies in the same State.* If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either—

- (1) Adopts the child's IEP from the previous public agency; or

(2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§300.320 through 300.324.

(f) *IEPs for children who transfer from another State.* If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency—

(1) Conducts an evaluation pursuant to §§300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§300.320 through 300.324.

(g) *Transmittal of records.* To facilitate the transition for a child described in paragraphs (e) and (f) of this section—

(1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a)(2); and

(2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

(Authority: 20 U.S.C. 1414(d)(2)(A)-(C))

Development of IEP

§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.

(3) *Requirement with respect to regular education teacher.* A regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of—

(i) Appropriate positive behavioral interventions and supports and other strategies for the child; and

(ii) Supplementary aids and services, program modifications, and support for school personnel consistent with §300.320(a)(4).

(4) *Agreement.* (i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead

may develop a written document to amend or modify the child's current IEP.

(ii) If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.

(5) *Consolidation of IEP Team meetings.* To the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(6) *Amendments.* Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

(b) *Review and revision of IEPs—(1) General.* Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

(2) *Consideration of special factors.* In conducting a review of the child's IEP, the IEP Team must consider the special factors described in paragraph (a)(2) of this section.

(3) *Requirement with respect to regular education teacher.* A regular education teacher of the child, as a member of the IEP Team, must, consistent with paragraph (a)(3) of this section, participate in the review and revision of the IEP of the child.

(c) *Failure to meet transition objectives—(1) Participating agency failure.* If a participating agency, other than the public agency, fails to provide the transition services described in the

IEP in accordance with §300.320(b), the public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(2) *Construction.* Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency.

(d) *Children with disabilities in adult prisons—*

(1) *Requirements that do not apply.* The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 612(a)(16) of the Act and §300.320(a)(6) (relating to participation of children with disabilities in general assessments).

(ii) The requirements in §300.320(b) (relating to transition planning and transition services) do not apply with respect to the children whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

(2) *Modifications of IEP or placement.* (i) Subject to paragraph (d)(2)(ii) of this section, the IEP Team of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(ii) The requirements of §§300.320 (relating to IEPs), and 300.114 (relating to LRE), do not apply with respect to the modifications described in paragraph (d)(2)(i) of this section. (Authority: 20 U.S.C. 1412(a)(1), 1412(a)(12)(A)(i), 1414(d)(3), (4)(B), and (7); and 1414(e))

[71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29761, June 30, 2017]

§300.325 Private school placements by public agencies.

(a) *Developing IEPs.* (1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child in accordance with §§300.320 and 300.324.

(2) The agency must ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(b) *Reviewing and revising IEPs.* (1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency must ensure that the parents and an agency representative—

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the IEP before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

(Authority: 20 U.S.C. 1412(a)(10)(B))

§300.326 [Reserved]

§300.327 Educational placements.

Consistent with §300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

(Authority: 20 U.S.C. 1414(e))

§300.328 Alternative means of meeting participation.

When conducting IEP Team meetings and placement meetings pursuant to this subpart, and subpart E of this part, and carrying out administrative matters under section 615 of the Act (such as scheduling, exchange of witness lists, and status conferences), the parent of a

child with a disability and a public agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(Authority: 20 U.S.C. 1414(f))

Subpart E—Procedural Safeguards Due Process Procedures for Parents and Children

§300.500 Responsibility of SEA and other public agencies.

Each SEA must ensure that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of §§300.500 through 300.536.

(Authority: 20 U.S.C. 1415(a))

§300.501 Opportunity to examine records; parent participation in meetings.

(a) *Opportunity to examine records.* The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(b) *Parent participation in meetings.* (1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

(2) Each public agency must provide notice consistent with §300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.

(3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) *Parent involvement in placement decisions.*

(1) Each public agency must ensure that a parent of each child with a disability is a member of

any group that makes decisions on the educational placement of the parent's child.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency must use procedures consistent with the procedures described in §300.322(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.

(Authority: 20 U.S.C. 1414(e), 1415(b)(1))

§300.502 Independent educational evaluation.

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart—

(i) *Independent educational evaluation* means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) *Public expense* means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with §300.103.

(b) *Parent right to evaluation at public expense.*

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by

the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

(c) *Parent-initiated evaluations.* If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation—

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing on a

due process complaint, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1) and (d)(2)(A))

§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.

(Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1))

§300.504 Procedural safeguards notice.

(a) *General.* A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents—

(1) Upon initial referral or parent request for evaluation;

(2) Upon receipt of the first State complaint under §§300.151 through 300.153 and upon receipt of the first due process complaint under §300.507 in a school year;

(3) In accordance with the discipline procedures in §300.530(h); and

(4) Upon request by a parent.

(b) *Internet Web site.* A public agency may place a current copy of the procedural safeguards notice on its Internet Web site if a Web site exists.

(c) *Contents.* The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §300.148, §§300.151 through 300.153, §300.300,

§§300.502 through 300.503, §§300.505 through 300.518, §§300.530 through 300.536 and §§300.610 through 300.625 relating to—

- (1) Independent educational evaluations;
- (2) Prior written notice;
- (3) Parental consent;
- (4) Access to education records;
- (5) Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including—
 - (i) The time period in which to file a complaint;
 - (ii) The opportunity for the agency to resolve the complaint; and
 - (iii) The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;
- (6) The availability of mediation;
- (7) The child's placement during the pendency of any due process complaint;
- (8) Procedures for students who are subject to placement in an interim alternative educational setting;
- (9) Requirements for unilateral placement by parents of children in private schools at public expense;
- (10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
- (11) State-level appeals (if applicable in the State);
- (12) Civil actions, including the time period in which to file those actions; and
- (13) Attorneys' fees.

(d) *Notice in understandable language.* The notice required under paragraph (a) of this section must meet the requirements of §300.503(c).

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1415(d))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007]

§300.505 Electronic mail.

A parent of a child with a disability may elect to receive notices required by §§300.503, 300.504, and 300.508 by an electronic mail communication, if the public agency makes that option available.

(Authority: 20 U.S.C. 1415(n))

§300.506 Mediation.

(a) *General.* Each public agency must ensure that procedures are established and implemented to allow parties to disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process.

(b) *Requirements.* The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process—

- (i) Is voluntary on the part of the parties;
- (ii) Is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and
- (iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2) A public agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party—

- (i) Who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State established under section 671 or 672 of the Act; and
- (ii) Who would explain the benefits of, and encourage the use of, the mediation process to the parents.

(3)(i) The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(ii) The SEA must select mediators on a random, rotational, or other impartial basis.

(4) The State must bear the cost of the mediation process, including the costs of meetings described in paragraph (b)(2) of this section.

(5) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(6) If the parties resolve a dispute through the mediation process, the parties must execute a

legally binding agreement that sets forth that resolution and that—

(i) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and

(ii) Is signed by both the parent and a representative of the agency who has the authority to bind such agency.

(7) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(8) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part.

(c) *Impartiality of mediator.* (1) An individual who serves as a mediator under this part—

(i) May not be an employee of the SEA or the LEA that is involved in the education or care of the child; and

(ii) Must not have a personal or professional interest that conflicts with the person's objectivity.

(2) A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency described under §300.228 solely because he or she is paid by the agency to serve as a mediator.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1415(e))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007]

§300.507 Filing a due process complaint.

(a) *General.* (1) A parent or a public agency may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action

that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in §300.511(f) apply to the timeline in this section.

(b) *Information for parents.* The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if—

(1) The parent requests the information; or

(2) The parent or the agency files a due process complaint under this section.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1415(b)(6))

§300.508 Due process complaint.

(a) *General.* (1) The public agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential).

(2) The party filing a due process complaint must forward a copy of the due process complaint to the SEA.

(b) *Content of complaint.* The due process complaint required in paragraph (a)(1) of this section must include—

(1) The name of the child;

(2) The address of the residence of the child;

(3) The name of the school the child is attending;

(4) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;

(5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) *Notice required before a hearing on a due process complaint.* A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files

a due process complaint that meets the requirements of paragraph (b) of this section.

(d) *Sufficiency of complaint.* (1) The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in paragraph (b) of this section.

(2) Within five days of receipt of notification under paragraph (d)(1) of this section, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of paragraph (b) of this section, and must immediately notify the parties in writing of that determination.

(3) A party may amend its due process complaint only if—

(i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to §300.510; or
(ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(4) If a party files an amended due process complaint, the timelines for the resolution meeting in §300.510(a) and the time period to resolve in §300.510(b) begin again with the filing of the amended due process complaint.

(e) *LEA response to a due process complaint.* (1) If the LEA has not sent a prior written notice under §300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes—

(i) An explanation of why the agency proposed or refused to take the action raised in the due process complaint;
(ii) A description of other options that the IEP Team considered and the reasons why those options were rejected;
(iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(iv) A description of the other factors that are relevant to the agency's proposed or refused action.

(2) A response by an LEA under paragraph (e)(1) of this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient, where appropriate.

(f) *Other party response to a due process complaint.* Except as provided in paragraph (e) of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

(Authority: 20 U.S.C. 1415(b)(7), 1415(c)(2))

§300.509 Model forms.

(a) Each SEA must develop model forms to assist parents and public agencies in filing a due process complaint in accordance with §§300.507(a) and 300.508(a) through (c) and to assist parents and other parties in filing a State complaint under §§300.151 through 300.153. However, the SEA or LEA may not require the use of the model forms.

(b) Parents, public agencies, and other parties may use the appropriate model form described in paragraph (a) of this section, or another form or other document, so long as the form or document that is used meets, as appropriate, the content requirements in §300.508(b) for filing a due process complaint, or the requirements in §300.153(b) for filing a State complaint.

(Authority: 20 U.S.C. 1415(b)(8))

§300.510 Resolution process.

(a) *Resolution meeting.* (1) Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under §300.511, the LEA must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that—
(i) Includes a representative of the public agency who has decision-making authority on behalf of that agency; and
(ii) May not include an attorney of the LEA unless the parent is accompanied by an attorney.

(2) The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraph (a)(1) and (2) of this section need not be held if—

(i) The parent and the LEA agree in writing to waive the meeting; or

(ii) The parent and the LEA agree to use the mediation process described in §300.506.

(4) The parent and the LEA determine the relevant members of the IEP Team to attend the meeting.

(b) *Resolution period.* (1) If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under §300.515 begins at the expiration of this 30-day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(4) If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in §300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

(5) If the LEA fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

(c) *Adjustments to 30-day resolution period.* The 45-day timeline for the due process hearing in §300.515(a) starts the day after one of the following events:

(1) Both parties agree in writing to waive the resolution meeting;

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

(d) *Written settlement agreement.* If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (2) of this section, the parties must execute a legally binding agreement that is—

(1) Signed by both the parent and a representative of the agency who has the authority to bind the agency; and

(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States, or, by the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to §300.537.

(e) *Agreement review period.* If the parties execute an agreement pursuant to paragraph (d) of this section, a party may void the agreement within 3 business days of the agreement's execution.

(Authority: 20 U.S.C. 1415(f)(1)(B))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007]

§300.511 Impartial due process hearing.

(a) *General.* Whenever a due process complaint is received under §300.507 or §300.532, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in §§300.507, 300.508, and 300.510.

(b) *Agency responsible for conducting the due process hearing.* The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) *Impartial hearing officer.* (1) At a minimum, a hearing officer—

(i) Must not be—

(A) An employee of the SEA or the LEA that is involved in the education or care of the child; or
(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(3) Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(d) *Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under §300.508(b), unless the other party agrees otherwise.

(e) *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint 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 due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

(f) *Exceptions to the timeline.* The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to—

(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or

(2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)-(D))

§300.512 Hearing rights.

(a) *General.* Any party to a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530 through 300.534, or an appeal conducted pursuant to §300.514, has the right to—

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

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) *Additional disclosure of information.* (1) At least five business days prior to a hearing conducted pursuant to §300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) *Parental rights at hearings.* Parents involved in hearings must be given the right to—

(1) Have the child who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents.

(Authority: 20 U.S.C. 1415(f)(2), 1415(h))
[71 FR 46753, Aug. 14, 2006, as amended at 73
FR 73027, Dec. 1, 2008]

§300.513 Hearing decisions.

(a) *Decision of hearing officer on the provision of FAPE.* (1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

(3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§300.500 through 300.536.

(b) *Construction clause.* Nothing in §§300.507 through 300.513 shall be construed to affect the right of a parent to file an appeal of the due process hearing decision with the SEA under §300.514(b), if a State level appeal is available.

(c) *Separate request for a due process hearing.* Nothing in §§300.500 through 300.536 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(d) *Findings and decision to advisory panel and general public.* The public agency, after deleting any personally identifiable information, must—

(1) Transmit the findings and decisions referred to in §300.512(a)(5) to the State advisory panel established under §300.167; and

(2) Make those findings and decisions available to the public.

(Authority: 20 U.S.C. 1415(f)(3)(E) and (F),
1415(h)(4), 1415(o))

§300.514 Finality of decision; appeal; impartial review.

(a) *Finality of hearing decision.* A decision made in a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530

through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and §300.516.

(b) *Appeal of decisions; impartial review.* (1) If the hearing required by §300.511 is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(2) If there is an appeal, the SEA must conduct an impartial review of the findings and decision appealed. The official conducting the review must—

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in §300.512 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties.

(c) *Findings and decision to advisory panel and general public.* The SEA, after deleting any personally identifiable information, must—

(1) Transmit the findings and decisions referred to in paragraph (b)(2)(vi) of this section to the State advisory panel established under §300.167; and

(2) Make those findings and decisions available to the public.

(d) *Finality of review decision.* The decision made by the reviewing official is final unless a party brings a civil action under §300.516.

(Authority: 20 U.S.C. 1415(g) and (h)(4),
1415(i)(1)(A), 1415(i)(2))

§300.515 Timelines and convenience of hearings and reviews.

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under §300.510(b), or the adjusted time periods described in §300.510(c)—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA must ensure that not later than 30 days after the receipt of a request for a review—
(1) A final decision is reached in the review; and
(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1))

§300.516 Civil action.

(a) *General.* Any party aggrieved by the findings and decision made under §§300.507 through 300.513 or §§300.530 through 300.534 who does not have the right to an appeal under §300.514(b), and any party aggrieved by the findings and decision under §300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under §300.507 or §§300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) *Time limitation.* The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.

(c) *Additional requirements.* In any action brought under paragraph (a) of this section, the court—

- (1) Receives the records of the administrative proceedings;
- (2) Hears additional evidence at the request of a party; and
- (3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) *Jurisdiction of district courts.* The district courts of the United States have jurisdiction of

actions brought under section 615 of the Act without regard to the amount in controversy.

(e) *Rule of construction.* Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under §§300.507 and 300.514 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(2) and (3)(A), 1415(l))

§300.517 Attorneys' fees.

(a) *In general.* (1) In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to—

(i) The prevailing party who is the parent of a child with a disability;

(ii) To a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(iii) To a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(2) Nothing in this subsection shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(b) *Prohibition on use of funds.* (1) Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of this part.

(2) Paragraph (b)(1) of this section does not preclude a public agency from using funds under

Part B of the Act for conducting an action or proceeding under section 615 of the Act.

(c) *Award of fees.* A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:

(1) Fees awarded under section 615(i)(3) of the Act must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.

(2)(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if—

(A) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(B) The offer is not accepted within 10 days; and

(C) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in §300.506.

(iii) A meeting conducted pursuant to §300.510 shall not be considered—

(A) A meeting convened as a result of an administrative hearing or judicial action; or

(B) An administrative hearing or judicial action for purposes of this section.

(3) Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(4) Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that—

(i) The parent, or the parent's attorney, during the course of the action or proceeding,

unreasonably protracted the final resolution of the controversy;

(ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with §300.508.

(5) The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(3)(B)-(G))

§300.518 Child's status during proceedings.

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under §300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

(d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section. (Authority: 20 U.S.C. 1415(j))

§300.519 Surrogate parents.

(a) *General.* Each public agency must ensure that the rights of a child are protected when—

- (1) No parent (as defined in §300.30) can be identified;
- (2) The public agency, after reasonable efforts, cannot locate a parent;
- (3) The child is a ward of the State under the laws of that State; or
- (4) The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).

(b) *Duties of public agency.* The duties of a public agency under paragraph (a) of this section include the assignment of an individual to act as a surrogate for the parents. This must include a method—

- (1) For determining whether a child needs a surrogate parent; and
 - (2) For assigning a surrogate parent to the child.
- (c) *Wards of the State.* In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the child's case, provided that the surrogate meets the requirements in paragraphs (d)(2)(i) and (e) of this section.

(d) *Criteria for selection of surrogate parents.*

- (1) The public agency may select a surrogate parent in any way permitted under State law.
 - (2) Public agencies must ensure that a person selected as a surrogate parent—
 - (i) Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;
 - (ii) Has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and
 - (iii) Has knowledge and skills that ensure adequate representation of the child.
- (e) *Non-employee requirement; compensation.* A person otherwise qualified to be a surrogate

parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(f) *Unaccompanied homeless youth.* In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to paragraph (d)(2)(i) of this section, until a surrogate parent can be appointed that meets all of the requirements of paragraph (d) of this section.

(g) *Surrogate parent responsibilities.* The surrogate parent may represent the child in all matters relating to—

- (1) The identification, evaluation, and educational placement of the child; and
- (2) The provision of FAPE to the child.

(h) *SEA responsibility.* The SEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent.

(Authority: 20 U.S.C. 1415(b)(2))

§300.520 Transfer of parental rights at age of majority.

(a) *General.* A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)—

- (1)(i) The public agency must provide any notice required by this part to both the child and the parents; and
- (ii) All rights accorded to parents under Part B of the Act transfer to the child;
- (2) All rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution; and
- (3) Whenever a State provides for the transfer of rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency must notify the child and the parents of the transfer of rights.

(b) *Special rule.* A State must establish procedures for appointing the parent of a child

with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.

(Authority: 20 U.S.C. 1415(m))

§§300.521-300.529 [Reserved]

Discipline Procedures

§300.530 Authority of school personnel.

(a) *Case-by-case determination.* School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) *General.* (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under §300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) *Additional authority.* For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of

this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) *Services.* (1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must—

(i) Continue to receive educational services, as provided in §300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under §300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in §300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(5) If the removal is a change of placement under §300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

(e) *Manifestation determination.* (1) Within 10 school days of any decision to change the

placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.
(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

(f) *Determination that behavior was a manifestation.* If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—

(1) Either—
(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) *Special circumstances.* School personnel may remove a student to an interim alternative educational setting for not more than 45 school

days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) *Notification.* On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in §300.504.

(i) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Controlled substance* means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) *Illegal drug* means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) *Serious bodily injury* has the meaning given the term “serious bodily injury” under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) *Weapon* has the meaning given the term “dangerous weapon” under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(Authority: 20 U.S.C. 1415(k)(1) and (7))

§300.531 Determination of setting.

The child's IEP Team determines the interim alternative educational setting for services under §300.530(c), (d)(5), and (g).

(Authority: 20 U.S.C. 1415(k)(2))

§300.532 Appeal.

(a) *General.* The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§300.507 and 300.508(a) and (b).

(b) *Authority of hearing officer.* (1) A hearing officer under §300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

(c) *Expedited due process hearing.* (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§300.507 and 300.508(a) through (c) and §§300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.

(2) The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The

hearing officer must make a determination within 10 school days after the hearing.

(3) Unless the parents and LEA agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in §300.506—

(i) A resolution meeting must occur within seven days of receiving notice of the due process complaint; and

(ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

(4) A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in §§300.510 through 300.514 are met.

(5) The decisions on expedited due process hearings are appealable consistent with §300.514.

(Authority: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A))

§300.533 Placement during appeals.

When an appeal under §300.532 has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in §300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

(Authority: 20 U.S.C. 1415(k)(4)(A))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007]

§300.534 Protections for children not determined eligible for special education and related services.

(a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in

accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) *Basis of knowledge.* A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to §§300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

(c) *Exception.* A public agency would not be deemed to have knowledge under paragraph (b) of this section if—

(1) The parent of the child—

(i) Has not allowed an evaluation of the child pursuant to §§300.300 through 300.311; or

(ii) Has refused services under this part; or

(2) The child has been evaluated in accordance with §§300.300 through 300.311 and determined to not be a child with a disability under this part.

(d) *Conditions that apply if no basis of knowledge.* (1) If a public agency does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with paragraph (d)(2) of this section.

(2)(i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under §300.530, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include

suspension or expulsion without educational services.

(iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with this part, including the requirements of §§300.530 through 300.536 and section 612(a)(1)(A) of the Act.

(Authority: 20 U.S.C. 1415(k)(5))

§300.535 Referral to and action by law enforcement and judicial authorities.

(a) *Rule of construction.* Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(b) *Transmittal of records.* (1) An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

(Authority: 20 U.S.C. 1415(k)(6))

§300.536 Change of placement because of disciplinary removals.

(a) For purposes of removals of a child with a disability from the child's current educational placement under §§300.530 through 300.535, a change of placement occurs if—

(1) The removal is for more than 10 consecutive school days; or

(2) The child has been subjected to a series of removals that constitute a pattern—

(i) Because the series of removals total more than 10 school days in a school year;

(ii) Because the child's behavior is substantially similar to the child's behavior in previous

incidents that resulted in the series of removals;
and

(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(b)(1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

(2) This determination is subject to review through due process and judicial proceedings.
(Authority: 20 U.S.C. 1415(k))

§300.537 State enforcement mechanisms.

Notwithstanding §§300.506(b)(7) and 300.510(d)(2), which provide for judicial enforcement of a written agreement reached as a result of mediation or a resolution meeting, there is nothing in this part that would prevent the SEA from using other mechanisms to seek enforcement of that agreement, provided that use of those mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

(Authority: 20 U.S.C. 1415(e)(2)(F), 1415(f)(1)(B))

§§300.538-300.599 [Reserved]

Tab 2

Federal Regulations IDEA Part B, Subparts F through H And Appendices

34 C.F.R. §§ 300.600 through 300.818 (GPO e-CFR Last Update July 1, 2021)

Indicators

Subpart F—Monitoring, Enforcement, Confidentiality, and Program Information

Monitoring, Technical Assistance, and Enforcement

§300.600 State monitoring and enforcement.

(a) The State must—

- (1) Monitor the implementation of this part;
- (2) Make determinations annually about the performance of each LEA using the categories in §300.603(b)(1);
- (3) Enforce this part, consistent with §300.604, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in §300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA), (b)(2)(i) (a corrective action plan or improvement plan), (b)(2)(v) (withholding funds, in whole or in part, by the SEA), and (c)(2) (withholding funds, in whole or in part, by the SEA); and
- (4) Report annually on the performance of the State and of each LEA under this part, as provided in §300.602(b)(1)(i)(A) and (b)(2).

(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 §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.

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

(Approved by the Office of Management and Budget under control number 1820-0624)

(Authority: 20 U.S.C. 1416(a))

[71 FR 46753, Aug. 14, 2006, as amended at 73 FR 73027, Dec. 1, 2008]

§300.601 State performance plans and data collection.

(a) *General.* Not later than December 3, 2005, each State must have in place a performance plan that evaluates the State's efforts to implement the requirements and purposes of Part B of the Act, and describes how the State will improve such implementation.

(1) Each State must submit the State's performance plan to the Secretary for approval in accordance with the approval process described in section 616(c) of the Act.

(2) Each State must review its State performance plan at least once every six years, and submit any amendments to the Secretary.

(3) As part of the State performance plan, each State must establish measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in §300.600(d).

(b) *Data collection.* (1) Each State must collect valid and reliable information as needed to report annually to the Secretary on the indicators established by the Secretary for the State performance plans.

(2) If the Secretary permits States to collect data on specific indicators through State monitoring or sampling, and the State collects the data

through State monitoring or sampling, the State must collect data on those indicators for each LEA at least once during the period of the State performance plan.

(3) Nothing in Part B of the Act shall be construed to authorize the development of a nationwide database of personally identifiable information on individuals involved in studies or other collections of data under Part B of the Act. (Approved by the Office of Management and Budget under control number 1820-0624) (Authority: 20 U.S.C. 1416(b))

§300.602 State use of targets and reporting.

(a) *General.* Each State must use the targets established in the State's performance plan under §300.601 and the priority areas described in §300.600(d) to analyze the performance of each LEA.

(b) *Public reporting and privacy—(1) Public report.*

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

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

(B) Make each of the following items available through public means: the State's performance plan, under §300.601(a); annual performance reports, under paragraph (b)(2) of this section; and the State's annual reports on the performance of each LEA located in the State, under paragraph (b)(1)(i)(A) of this section. In doing so, the State must, at a minimum, post the plan and reports on the SEA's Web site, and distribute the plan and reports to the media and through public agencies.

(ii) If the State, in meeting the requirements of paragraph (b)(1)(i) of this section, collects performance data through State monitoring or sampling, the State must include in its report under paragraph (b)(1)(i)(A) of this section the most recently available performance data on each LEA, and the date the data were obtained.

(2) *State performance report.* The State must report annually to the Secretary on the

performance of the State under the State's performance plan.

(3) *Privacy.* The State must not report to the public or the Secretary any information on performance that would result in the disclosure of personally identifiable information about individual children, or where the available data are insufficient to yield statistically reliable information.

(Approved by the Office of Management and Budget under control number 1820-0624)

(Authority: 20 U.S.C. 1416(b)(2)(C))

[71 FR 46753, Aug. 14, 2006, as amended at 73 FR 73027, Dec. 1, 2008]

§300.603 Secretary's review and determination regarding State performance.

(a) *Review.* The Secretary annually reviews the State's performance report submitted pursuant to §300.602(b)(2).

(b) *Determination—(1) General.* Based on the information provided by the State in the State's annual performance report, information obtained through monitoring visits, and any other public information made available, the Secretary determines if the State—

(i) Meets the requirements and purposes of Part B of the Act;

(ii) Needs assistance in implementing the requirements of Part B of the Act;

(iii) Needs intervention in implementing the requirements of Part B of the Act; or

(iv) Needs substantial intervention in implementing the requirements of Part B of the Act.

(2) *Notice and opportunity for a hearing.* (i) For determinations made under paragraphs (b)(1)(iii) and (b)(1)(iv) of this section, the Secretary provides reasonable notice and an opportunity for a hearing on those determinations.

(ii) The hearing described in paragraph (b)(2) of this section consists of an opportunity to meet with the Assistant Secretary for Special Education and Rehabilitative Services to demonstrate why the Department should not make the determination described in paragraph (b)(1) of this section.

(Authority: 20 U.S.C. 1416(d))

§300.604 Enforcement.

(a) *Needs assistance.* If the Secretary determines, for two consecutive years, that a State needs assistance under §300.603(b)(1)(ii) in implementing the requirements of Part B of the Act, the Secretary takes one or more of the following actions:

(1) Advises the State of available sources of technical assistance that may help the State address the areas in which the State needs assistance, which may include assistance from the Office of Special Education Programs, other offices of the Department of Education, other Federal agencies, technical assistance providers approved by the Secretary, and other federally funded nonprofit agencies, and requires the State to work with appropriate entities. Such technical assistance may include—

(i) The provision of advice by experts to address the areas in which the State needs assistance, including explicit plans for addressing the area for concern within a specified period of time;

(ii) Assistance in identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research;

(iii) Designating and using distinguished superintendents, principals, special education administrators, special education teachers, and other teachers to provide advice, technical assistance, and support; and

(iv) Devising additional approaches to providing technical assistance, such as collaborating with institutions of higher education, educational service agencies, national centers of technical assistance supported under Part D of the Act, and private providers of scientifically based technical assistance.

(2) Directs the use of State-level funds under section 611(e) of the Act on the area or areas in which the State needs assistance.

(3) Identifies the State as a high-risk grantee and imposes special conditions on the State's grant under Part B of the Act.

(b) *Needs intervention.* If the Secretary determines, for three or more consecutive years, that a State needs intervention under §300.603(b)(1)(iii) in implementing the requirements of Part B of the Act, the following shall apply:

(1) The Secretary may take any of the actions described in paragraph (a) of this section.

(2) The Secretary takes one or more of the following actions:

(i) Requires the State to prepare a corrective action plan or improvement plan if the Secretary determines that the State should be able to correct the problem within one year.

(ii) Requires the State to enter into a compliance agreement under section 457 of the General Education Provisions Act, as amended, 20 U.S.C. 1221 *et seq.* (GEPA), if the Secretary has reason to believe that the State cannot correct the problem within one year.

(iii) For each year of the determination, withholds not less than 20 percent and not more than 50 percent of the State's funds under section 611(e) of the Act, until the Secretary determines the State has sufficiently addressed the areas in which the State needs intervention.

(iv) Seeks to recover funds under section 452 of GEPA.

(v) Withholds, in whole or in part, any further payments to the State under Part B of the Act.

(vi) Refers the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(c) *Needs substantial intervention.*

Notwithstanding paragraph (a) or (b) of this section, at any time that the Secretary determines that a State needs substantial intervention in implementing the requirements of Part B of the Act or that there is a substantial failure to comply with any condition of an SEA's or LEA's eligibility under Part B of the Act, the Secretary takes one or more of the following actions:

(1) Recovers funds under section 452 of GEPA.

(2) Withholds, in whole or in part, any further payments to the State under Part B of the Act.

(3) Refers the case to the Office of the Inspector General at the Department of Education.

(4) Refers the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(d) *Report to Congress.* The Secretary reports to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate within 30 days of taking enforcement action pursuant to paragraph (a), (b), or (c) of this section, on the specific action

taken and the reasons why enforcement action was taken.

(Authority: 20 U.S.C. 1416(e)(1)-(e)(3), (e)(5))

§300.605 Withholding funds.

(a) *Opportunity for hearing.* Prior to withholding any funds under Part B of the Act, the Secretary provides reasonable notice and an opportunity for a hearing to the SEA involved, pursuant to the procedures in §§300.180 through 300.183.

(b) *Suspension.* Pending the outcome of any hearing to withhold payments under paragraph (a) of this section, the Secretary may suspend payments to a recipient, suspend the authority of the recipient to obligate funds under Part B of the Act, or both, after the recipient has been given reasonable notice and an opportunity to show cause why future payments or authority to obligate funds under Part B of the Act should not be suspended.

(c) *Nature of withholding.* (1) If the Secretary determines that it is appropriate to withhold further payments under §300.604(b)(2) or (c)(2), the Secretary may determine—

(i) That the withholding will be limited to programs or projects, or portions of programs or projects, that affected the Secretary's determination under §300.603(b)(1); or

(ii) That the SEA must not make further payments under Part B of the Act to specified State agencies or LEAs that caused or were involved in the Secretary's determination under §300.603(b)(1).

(2) Until the Secretary is satisfied that the condition that caused the initial withholding has been substantially rectified—

(i) Payments to the State under Part B of the Act must be withheld in whole or in part; and

(ii) Payments by the SEA under Part B of the Act must be limited to State agencies and LEAs whose actions did not cause or were not involved in the Secretary's determination under §300.603(b)(1), as the case may be.

(Authority: 20 U.S.C. 1416(e)(4), (e)(6))

§300.606 Public attention.

Whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action pursuant to §300.604, the State must, by means of a public notice, take

such actions as may be necessary to notify the public within the State of the pendency of an action pursuant to §300.604, including, at a minimum, by posting the notice on the SEA's Web site and distributing the notice to the media and through public agencies.

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

[73 FR 73028, Dec. 1, 2008]

§300.607 Divided State agency responsibility.

For purposes of this subpart, if responsibility for ensuring that the requirements of Part B of the Act are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons is assigned to a public agency other than the SEA pursuant to §300.149(d), and if the Secretary finds that the failure to comply substantially with the provisions of Part B of the Act are related to a failure by the public agency, the Secretary takes appropriate corrective action to ensure compliance with Part B of the Act, except that—

(a) Any reduction or withholding of payments to the State under §300.604 must be proportionate to the total funds allotted under section 611 of the Act to the State as the number of eligible children with disabilities in adult prisons under the supervision of the other public agency is proportionate to the number of eligible individuals with disabilities in the State under the supervision of the SEA; and

(b) Any withholding of funds under §300.604 must be limited to the specific agency responsible for the failure to comply with Part B of the Act.

(Authority: 20 U.S.C. 1416(h))

§300.608 State enforcement.

(a) If an SEA determines that an LEA is not meeting the requirements of Part B of the Act, including the targets in the State's performance plan, the SEA must prohibit the LEA from reducing the LEA's maintenance of effort under §300.203 for any fiscal year.

(b) Nothing in this subpart shall be construed to restrict a State from utilizing any other authority available to it to monitor and enforce the requirements of Part B of the Act.

(Authority: 20 U.S.C. 1416(f); 20 U.S.C. 1412(a)(11))

§300.609 Rule of construction.

Nothing in this subpart shall be construed to restrict the Secretary from utilizing any authority under GEPA, including the provisions in 34 CFR parts 76, 77, and 81 and 2 CFR part 200 to monitor and enforce the requirements of the Act, including the imposition of special or high-risk conditions under 2 CFR 200.207 and 3474.10.

(Authority: 20 U.S.C. 1416(g))

[79 FR 76097, Dec. 19, 2014]

Confidentiality of Information

§300.610 Confidentiality.

The Secretary takes appropriate action, in accordance with section 444 of GEPA, to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by SEAs and LEAs pursuant to Part B of the Act, and consistent with §§300.611 through 300.627.

(Authority: 20 U.S.C. 1417(c))

§300.611 Definitions.

As used in §§300.611 through 300.625—

(a) *Destruction* means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

(b) *Education records* means the type of records covered under the definition of “education records” in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA)).

(c) *Participating agency* means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the Act.

(Authority: 20 U.S.C. 1221e-3, 1412(a)(8), 1417(c))

§300.612 Notice to parents.

(a) The SEA must give notice that is adequate to fully inform parents about the requirements of §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.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.613 Access rights.

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to §300.507 or §§300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.614 Record of access.

Each participating agency must keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the Act (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.615 Records on more than one child.

If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.616 List of types and locations of information.

Each participating agency must provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.617 Fees.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.618 Amendment of records at parent's request.

(a) A parent who believes that information in the education records collected, maintained, or used

under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency must decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it must inform the parent of the refusal and advise the parent of the right to a hearing under §300.619.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.619 Opportunity for a hearing.

The agency must, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.620 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it must amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it must inform the parent of the parent's right to place in the records the agency maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must—

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.621 Hearing procedures.

A hearing held under §300.619 must be conducted according to the procedures in 34 CFR 99.22.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.622 Consent.

(a) Parental consent must be obtained before personally identifiable information is disclosed to parties, other than officials of participating agencies in accordance with paragraph (b)(1) of this section, unless the information is contained in education records, and the disclosure is authorized without parental consent under 34 CFR part 99.

(b)(1) Except as provided in paragraphs (b)(2) and (b)(3) of this section, parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of this part.

(2) Parental consent, or the consent of an eligible child who has reached the age of majority under State law, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services in accordance with §300.321(b)(3).

(3) If a child is enrolled, or is going to enroll in a private school that is not located in the LEA of the parent's residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.623 Safeguards.

(a) Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or

instruction regarding the State's policies and procedures under §300.123 and 34 CFR part 99.

(d) Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.624 Destruction of information.

(a) The public agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.625 Children's rights.

(a) The SEA must have in effect policies and procedures regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(b) Under the regulations for FERPA in 34 CFR 99.5(a), the rights of parents regarding education records are transferred to the student at age 18.

(c) If the rights accorded to parents under Part B of the Act are transferred to a student who reaches the age of majority, consistent with §300.520, the rights regarding educational records in §§300.613 through 300.624 must also be transferred to the student. However, the public agency must provide any notice required under section 615 of the Act to the student and the parents.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.626 Enforcement.

The SEA must have in effect the policies and procedures, including sanctions that the State uses, to ensure that its policies and procedures consistent with §§300.611 through 300.625 are

followed and that the requirements of the Act and the regulations in this part are met.
(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§300.627 Department use of personally identifiable information.

If the Department or its authorized representatives collect any personally identifiable information regarding children with disabilities that is not subject to the Privacy Act of 1974, 5 U.S.C. 552a, the Secretary applies the requirements of 5 U.S.C. 552a(b)(1) and (b)(2), 552a(b)(4) through (b)(11); 552a(c) through 552a(e)(3)(B); 552a(e)(3)(D); 552a(e)(5) through (e)(10); 552a(h); 552a(m); and 552a(n); and the regulations implementing those provisions in 34 CFR part 5b.
(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

Reports—Program Information

§300.640 Annual report of children served—report requirement.

(a) The SEA must annually report to the Secretary on the information required by section 618 of the Act at the times specified by the Secretary.

(b) The SEA must submit the report on forms provided by the Secretary.
(Approved by the Office of Management and Budget under control numbers 1820-0030, 1820-0043, 1820-0659, 1820-0621, 1820-0518, 1820-0521, 1820-0517, and 1820-0677)
(Authority: 20 U.S.C. 1418(a))

§300.641 Annual report of children served—information required in the report.

(a) For purposes of the annual report required by section 618 of the Act and §300.640, the State and the Secretary of the Interior must count and report the number of children with disabilities receiving special education and related services on any date between October 1 and December 1 of each year.

(b) For the purpose of this reporting provision, a child's age is the child's actual age on the date of the child count.

(c) The SEA may not report a child under more than one disability category.

(d) If a child with a disability has more than one disability, the SEA must report that child in accordance with the following procedure:

(1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness."

(2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities."

(Approved by the Office of Management and Budget under control numbers 1820-0030, 1820-0043, 1820-0621, 1820-0521, and 1820-0517)
(Authority: 20 U.S.C. 1418(a), (b))

§300.642 Data reporting.

(a) *Protection of personally identifiable data.*
The data described in section 618(a) of the Act and in §300.641 must be publicly reported by each State in a manner that does not result in disclosure of data identifiable to individual children.

(b) *Sampling.* The Secretary may permit States and the Secretary of the Interior to obtain data in section 618(a) of the Act through sampling.
(Approved by the Office of Management and Budget under control numbers 1820-0030, 1820-0043, 1820-0518, 1820-0521, and 1820-0517)
(Authority: 20 U.S.C. 1418(b))

§300.643 Annual report of children served—certification.

The SEA must include in its report a certification signed by an authorized official of the agency that the information provided under §300.640 is an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question.

(Approved by the Office of Management and Budget under control numbers 1820-0030 and 1820-0043)

(Authority: 20 U.S.C. 1418(a)(3))

§300.644 Annual report of children served—criteria for counting children.

The SEA may include in its report children with disabilities who are enrolled in a school or

program that is operated or supported by a public agency, and that—

- (a) Provides them with both special education and related services that meet State standards;
- (b) Provides them only with special education, if a related service is not required, that meets State standards; or
- (c) In the case of children with disabilities enrolled by their parents in private schools, counts those children who are eligible under the Act and receive special education or related services or both that meet State standards under §§300.132 through 300.144.

(Approved by the Office of Management and Budget under control numbers 1820-0030, 1820-0043, 1820-0659, 1820-0621, 1820-0521, and 1820-0517)

(Authority: 20 U.S.C. 1418(a))

§300.645 Annual report of children served—other responsibilities of the SEA.

In addition to meeting the other requirements of §§300.640 through 300.644, the SEA must—

- (a) Establish procedures to be used by LEAs and other educational institutions in counting the number of children with disabilities receiving special education and related services;
- (b) Set dates by which those agencies and institutions must report to the SEA to ensure that the State complies with §300.640(a);
- (c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;
- (d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under §§300.640 through 300.644; and
- (e) Ensure that documentation is maintained that enables the State and the Secretary to audit the accuracy of the count.

(Approved by the Office of Management and Budget under control numbers 1820-0030, 1820-0043, 1820-0659, 1820-0621, 1820-0518, 1820-0521, and 1820-0517)

(Authority: 20 U.S.C. 1418(a))

§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 removals from placement, including suspensions and expulsions.

(b) *Methodology.* The State must apply the methods in §300.647 to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State under paragraph (a) of this section.

(c) *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, including disciplinary removals of such children, in accordance with paragraphs (a) and (b) of this section, the State or the Secretary of the Interior must—

- (1) Provide for the annual review and, if appropriate, revision of the policies, practices, and procedures used in identification or placement in particular education settings, including disciplinary removals, to ensure that the policies, practices, and procedures comply with the requirements of the Act.
- (2) Require the LEA to publicly report on the revision of policies, practices, and procedures described under paragraph (c)(1) of this section consistent with the requirements of the Family Educational Rights and Privacy Act, its implementing regulations in 34 CFR part 99, and Section 618(b)(1) of the Act.

(d) *Comprehensive coordinated early intervening services.* Except as provided in paragraph (e) of this section, the State or the Secretary of the Interior shall require any LEA identified under paragraphs (a) and (b) 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 address factors contributing to the significant disproportionality.

(1) In implementing comprehensive coordinated early intervening services an LEA—

(i) May carry out activities that include professional development and educational and behavioral evaluations, services, and supports.
(ii) Must identify and address the factors contributing to the significant disproportionality, which may include, among other identified factors, a lack of access to scientifically based instruction; economic, cultural, or linguistic barriers to appropriate identification or placement in particular educational settings; inappropriate use of disciplinary removals; lack of access to appropriate diagnostic screenings; differences in academic achievement levels; and policies, practices, or procedures that contribute to the significant disproportionality.
(iii) Must address a policy, practice, or procedure it identifies as contributing to the significant disproportionality, including a policy, practice or procedure that results in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups).

(2) An LEA may use funds reserved for comprehensive coordinated early intervening services to serve children from age 3 through grade 12, particularly, but not exclusively, children in those groups that were significantly overidentified under paragraph (a) or (b) of this section, including—

(i) Children who are not currently identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment; and

(ii) Children with disabilities.

(3) An LEA may not limit the provision of comprehensive coordinated early intervening services under this paragraph to children with disabilities.

(e) *Exception to comprehensive coordinated early intervening services.* The State or the Secretary of the Interior shall not require any LEA that serves only children with disabilities identified under paragraphs (a) and (b) of this section to reserve funds to provide comprehensive coordinated early intervening services.

(f) *Rule of construction.* Nothing in this section authorizes a State or an LEA to develop or implement policies, practices, or procedures that

result in actions that violate the requirements of this part, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

(Authority: 20 U.S.C. 1413(f); 20 U.S.C. 1418(d))

[81 FR 92463, Dec. 19, 2016]

§ 300.647 Determining significant disproportionality.

(a) *Definitions.* (1) *Alternate risk ratio* is a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA by the risk of that outcome for children in all other racial or ethnic groups in the State.

(2) *Comparison group* consists of the children in all other racial or ethnic groups within an LEA or within the State, when reviewing a particular racial or ethnic group within an LEA for significant disproportionality.

(3) *Minimum cell size* is the minimum number of children experiencing a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

(4) *Minimum n-size* is the minimum number of children enrolled in an LEA with respect to identification, and the minimum number of children with disabilities enrolled in an LEA with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

(5) *Risk* is the likelihood of a particular outcome (identification, placement, or disciplinary removal) for a specified racial or ethnic group (or groups), calculated by dividing the number of children from a specified racial or ethnic group (or groups) experiencing that outcome by the total number of children from that racial or ethnic group or groups enrolled in the LEA.

(6) *Risk ratio* is a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA by the risk for children in all other racial and ethnic groups within the LEA.

(7) *Risk ratio threshold* is a threshold, determined by the State, over which disproportionality based on race or ethnicity is significant under §300.646(a) and (b).

(b) *Significant disproportionality determinations.* In determining whether significant disproportionality exists in a State or LEA under §300.646(a) and (b)—

(1)(i) The State must set a:

(A) Reasonable risk ratio threshold;

(B) Reasonable minimum cell size;

(C) Reasonable minimum n-size; and

(D) Standard for measuring reasonable progress if a State uses the flexibility described in paragraph (d)(2) of this section.

(ii) The State may, but is not required to, set the standards set forth in paragraph (b)(1)(i) of this section at different levels for each of the categories described in paragraphs (b)(3) and (4) of this section.

(iii) The standards set forth in paragraph (b)(1)(i) of this section:

(A) Must be based on advice from stakeholders, including State Advisory Panels, as provided under section 612(a)(21)(D)(iii) of the Act; and

(B) Are subject to monitoring and enforcement for reasonableness by the Secretary consistent with section 616 of the Act.

(iv) When monitoring for reasonableness under paragraph (b)(1)(iii)(B) of this section, the Department finds that the following are presumptively reasonable:

(A) A minimum cell size under paragraph (b)(1)(i)(B) of this section no greater than 10; and

(B) A minimum n-size under paragraph (b)(1)(i)(C) of this section no greater than 30.

(2) The State must apply the risk ratio threshold or thresholds determined in paragraph (b)(1) of this section to risk ratios or alternate risk ratios, as appropriate, in each category described in paragraphs (b)(3) and (4) of this section and the following racial and ethnic groups:

(i) Hispanic/Latino of any race; and, for individuals who are non-Hispanic/Latino only;

(ii) American Indian or Alaska Native;

(iii) Asian;

(iv) Black or African American;

(v) Native Hawaiian or Other Pacific Islander;

(vi) White; and

(vii) Two or more races.

(3) Except as provided in paragraphs (b)(5) and (c) of this section, the State must calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section with respect to:

(i) The identification of children ages 3 through 21 as children with disabilities; and

(ii) The identification of children ages 3 through 21 as children with the following impairments:

(A) Intellectual disabilities;

(B) Specific learning disabilities;

(C) Emotional disturbance;

(D) Speech or language impairments;

(E) Other health impairments; and

(F) Autism.

(4) Except as provided in paragraphs (b)(5) and (c) of this section, the State must calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section with respect to the following placements into particular educational settings, including disciplinary removals:

(i) For children with disabilities ages 6 through 21, inside a regular class less than 40 percent of the day;

(ii) For children with disabilities ages 6 through 21, inside separate schools and residential facilities, not including homebound or hospital settings, correctional facilities, or private schools;

(iii) For children with disabilities ages 3 through 21, out-of-school suspensions and expulsions of 10 days or fewer;

(iv) For children with disabilities ages 3 through 21, out-of-school suspensions and expulsions of more than 10 days;

(v) For children with disabilities ages 3 through 21, in-school suspensions of 10 days or fewer;

(vi) For children with disabilities ages 3 through 21, in-school suspensions of more than 10 days; and

(vii) For children with disabilities ages 3 through 21, disciplinary removals in total, including in-school and out-of-school suspensions, expulsions, removals by school personnel to an interim alternative education setting, and removals by a hearing officer.

(5) The State must calculate an alternate risk ratio with respect to the categories described in paragraphs (b)(3) and (4) of this section if the

comparison group in the LEA does not meet the minimum cell size or the minimum n-size.

(6) Except as provided in paragraph (d) of this section, the State must identify as having significant disproportionality based on race or ethnicity under §300.646(a) and (b) any LEA that has a risk ratio or alternate risk ratio for any racial or ethnic group in any of the categories described in paragraphs (b)(3) and (4) of this section that exceeds the risk ratio threshold set by the State for that category.

(7) The State must report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, and standards for measuring reasonable progress selected under paragraphs (b)(1)(i)(A) through (D) of this section, and the rationales for each, to the Department at a time and in a manner determined by the Secretary. Rationales for minimum cell sizes and minimum n-sizes not presumptively reasonable under paragraph (b)(1)(iv) of this section must include a detailed explanation of why the numbers chosen are reasonable and how they ensure that the State is appropriately analyzing and identifying LEAs with significant disparities, based on race and ethnicity, in the identification, placement, or discipline of children with disabilities.

(c) *Exception.* A State is not required to calculate a risk ratio or alternate risk ratio, as outlined in paragraphs (b)(3), (4), and (5) of this section, to determine significant disproportionality if:

(1) The particular racial or ethnic group being analyzed does not meet the minimum cell size or minimum n-size; or

(2) In calculating the alternate risk ratio under paragraph (b)(5) of this section, the comparison group in the State does not meet the minimum cell size or minimum n-size.

(d) *Flexibility.* A State is not required to identify an LEA as having significant disproportionality based on race or ethnicity under §300.646(a) and (b) until—

(1) The LEA has exceeded a risk ratio threshold set by the State for a racial or ethnic group in a category described in paragraph (b)(3) or (4) of this section for up to three prior consecutive years preceding the identification; and

(2) The LEA has exceeded the risk ratio threshold and has failed to demonstrate reasonable progress, as determined by the State,

in lowering the risk ratio or alternate risk ratio for the group and category in each of the two prior consecutive years.

(Authority: 20 U.S.C. 1418(d).)

[81 FR 92463, Dec. 19, 2016]

Subpart G—Authorization, Allotment, Use of Funds, and Authorization of Appropriations

Allotments, Grants, and Use of Funds

§300.700 Grants to States.

(a) *Purpose of grants.* The Secretary makes grants to States, outlying areas, and freely associated States (as defined in §300.717), and provides funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with Part B of the Act.

(b) *Maximum amount.* The maximum amount of the grant a State may receive under section 611 of the Act is—

(1) For fiscal years 2005 and 2006—

(i) The number of children with disabilities in the State who are receiving special education and related services—

(A) Aged three through five, if the State is eligible for a grant under section 619 of the Act; and

(B) Aged 6 through 21; multiplied by—

(ii) Forty (40) percent of the average per-pupil expenditure in public elementary schools and secondary schools in the United States (as defined in §300.717); and

(2) For fiscal year 2007 and subsequent fiscal years—

(i) The number of children with disabilities in the 2004-2005 school year in the State who received special education and related services—

(A) Aged three through five if the State is eligible for a grant under section 619 of the Act; and

(B) Aged 6 through 21; multiplied by

(ii) Forty (40) percent of the average per-pupil expenditure in public elementary schools and secondary schools in the United States (as defined in §300.717);

(iii) Adjusted by the rate of annual change in the sum of—

- (A) Eighty-five (85) percent of the State's population of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of FAPE under Part B of the Act; and
 - (B) Fifteen (15) percent of the State's population of children described in paragraph (b)(2)(iii)(A) of this section who are living in poverty.
- (Authority: 20 U.S.C. 1411(a) and (d))

§300.701 Outlying areas, freely associated States, and the Secretary of the Interior.

- (a) *Outlying areas and freely associated States*—(1) *Funds reserved.* From the amount appropriated for any fiscal year under section 611(i) of the Act, the Secretary reserves not more than one percent, which must be used—
- (i) To provide assistance to the outlying areas in accordance with their respective populations of individuals aged 3 through 21; and
 - (ii) To provide each freely associated State a grant in the amount that the freely associated State received for fiscal year 2003 under Part B of the Act, but only if the freely associated State—
 - (A) Meets the applicable requirements of Part B of the Act that apply to States.
 - (B) Meets the requirements in paragraph (a)(2) of this section.
- (2) *Application.* Any freely associated State that wishes to receive funds under Part B of the Act must include, in its application for assistance—
- (i) Information demonstrating that it will meet all conditions that apply to States under Part B of the Act.
 - (ii) An assurance that, notwithstanding any other provision of Part B of the Act, it will use those funds only for the direct provision of special education and related services to children with disabilities and to enhance its capacity to make FAPE available to all children with disabilities;
 - (iii) The identity of the source and amount of funds, in addition to funds under Part B of the Act, that it will make available to ensure that FAPE is available to all children with disabilities within its jurisdiction; and
 - (iv) Such other information and assurances as the Secretary may require.
- (3) *Special rule.* The provisions of Public Law 95-134, permitting the consolidation of grants by the outlying areas, do not apply to funds

provided to the outlying areas or to the freely associated States under Part B of the Act.

- (b) *Secretary of the Interior.* From the amount appropriated for any fiscal year under section 611(i) of the Act, the Secretary reserves 1.226 percent to provide assistance to the Secretary of the Interior in accordance with §§300.707 through 300.716.
- (Authority: 20 U.S.C. 1411(b))

§300.702 Technical assistance.

- (a) *In general.* The Secretary may reserve not more than one-half of one percent of the amounts appropriated under Part B of the Act for each fiscal year to support technical assistance activities authorized under section 616(i) of the Act.
- (b) *Maximum amount.* The maximum amount the Secretary may reserve under paragraph (a) of this section for any fiscal year is \$25,000,000, cumulatively adjusted by the rate of inflation as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.
- (Authority: 20 U.S.C. 1411(c))

§300.703 Allocations to States.

- (a) *General.* After reserving funds for technical assistance under §300.702, and for payments to the outlying areas, the freely associated States, and the Secretary of the Interior under §300.701 (a) and (b) for a fiscal year, the Secretary allocates the remaining amount among the States in accordance with paragraphs (b), (c), and (d) of this section.
- (b) *Special rule for use of fiscal year 1999 amount.* If a State received any funds under section 611 of the Act for fiscal year 1999 on the basis of children aged three through five, but does not make FAPE available to all children with disabilities aged three through five in the State in any subsequent fiscal year, the Secretary computes the State's amount for fiscal year 1999, solely for the purpose of calculating the State's allocation in that subsequent year under paragraph (c) or (d) of this section, by subtracting the amount allocated to the State for fiscal year 1999 on the basis of those children.

(c) *Increase in funds.* If the amount available for allocations to States under paragraph (a) of this section for a fiscal year is equal to or greater than the amount allocated to the States under section 611 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(1) *Allocation of increase*—(i) *General.* Except as provided in paragraph (c)(2) of this section, the Secretary allocates for the fiscal year—

(A) To each State the amount the State received under this section for fiscal year 1999;

(B) Eighty-five (85) percent of any remaining funds to States on the basis of the States' relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of FAPE under Part B of the Act; and

(C) Fifteen (15) percent of those remaining funds to States on the basis of the States' relative populations of children described in paragraph (c)(1)(i)(B) of this section who are living in poverty.

(ii) *Data.* For the purpose of making grants under this section, the Secretary uses the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

(2) *Limitations.* Notwithstanding paragraph (c)(1) of this section, allocations under this section are subject to the following:

(i) *Preceding year allocation.* No State's allocation may be less than its allocation under section 611 of the Act for the preceding fiscal year.

(ii) *Minimum.* No State's allocation may be less than the greatest of—

(A) The sum of—

(1) The amount the State received under section 611 of the Act for fiscal year 1999; and

(2) One third of one percent of the amount by which the amount appropriated under section 611(i) of the Act for the fiscal year exceeds the amount appropriated for section 611 of the Act for fiscal year 1999;

(B) The sum of—

(1) The amount the State received under section 611 of the Act for the preceding fiscal year; and

(2) That amount multiplied by the percentage by which the increase in the funds appropriated for section 611 of the Act from the preceding fiscal year exceeds 1.5 percent; or

(C) The sum of—

(1) The amount the State received under section 611 of the Act for the preceding fiscal year; and

(2) That amount multiplied by 90 percent of the percentage increase in the amount appropriated for section 611 of the Act from the preceding fiscal year.

(iii) *Maximum.* Notwithstanding paragraph (c)(2)(ii) of this section, no State's allocation under paragraph (a) of this section may exceed the sum of—

(A) The amount the State received under section 611 of the Act for the preceding fiscal year; and

(B) That amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated under section 611 of the Act from the preceding fiscal year.

(3) *Ratable reduction.* If the amount available for allocations to States under paragraph (c) of this section is insufficient to pay those allocations in full, those allocations are ratably reduced, subject to paragraph (c)(2)(i) of this section.

(d) *Decrease in funds.* If the amount available for allocations to States under paragraph (a) of this section for a fiscal year is less than the amount allocated to the States under section 611 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(1) *Amounts greater than fiscal year 1999 allocations.* If the amount available for allocations under paragraph (a) of this section is greater than the amount allocated to the States for fiscal year 1999, each State is allocated the sum of—

(i) *1999 amount.* The amount the State received under section 611 of the Act for fiscal year 1999; and

(ii) *Remaining funds.* An amount that bears the same relation to any remaining funds as the increase the State received under section 611 of the Act for the preceding fiscal year over fiscal year 1999 bears to the total of all such increases for all States.

(2) *Amounts equal to or less than fiscal year 1999 allocations*—(i) *General.* If the amount available for allocations under paragraph (a) of this section is equal to or less than the amount allocated to the States for fiscal year 1999, each State is allocated the amount it received for fiscal year 1999.

(ii) *Ratable reduction.* If the amount available for allocations under paragraph (d) of this section is insufficient to make the allocations described in paragraph (d)(2)(i) of this section, those allocations are ratably reduced. (Authority: 20 U.S.C. 1411(d))

§300.704 State-level activities.

(a) *State administration.* (1) For the purpose of administering Part B of the Act, including paragraph (c) of this section, section 619 of the Act, and the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children with disabilities—

(i) Each State may reserve for each fiscal year not more than the maximum amount the State was eligible to reserve for State administration under section 611 of the Act for fiscal year 2004 or \$800,000 (adjusted in accordance with paragraph (a)(2) of this section), whichever is greater; and

(ii) Each outlying area may reserve for each fiscal year not more than five percent of the amount the outlying area receives under §300.701(a) for the fiscal year or \$35,000, whichever is greater.

(2) For each fiscal year, beginning with fiscal year 2005, the Secretary cumulatively adjusts—

(i) The maximum amount the State was eligible to reserve for State administration under section 611 of the Act for fiscal year 2004; and

(ii) \$800,000, by the rate of inflation as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(3) Prior to expenditure of funds under paragraph (a) of this section, the State must certify to the Secretary that the arrangements to establish responsibility for services pursuant to section 612(a)(12)(A) of the Act are current.

(4) Funds reserved under paragraph (a)(1) of this section may be used for the administration of Part C of the Act, if the SEA is the lead agency for the State under that Part.

(b) *Other State-level activities.* (1) States may reserve a portion of their allocations for other State-level activities. The maximum amount that

a State may reserve for other State-level activities is as follows:

(i) If the amount that the State sets aside for State administration under paragraph (a) of this section is greater than \$850,000 and the State opts to finance a high cost fund under paragraph (c) of this section:

(A) For fiscal years 2005 and 2006, 10 percent of the State's allocation under §300.703.

(B) For fiscal year 2007 and subsequent fiscal years, an amount equal to 10 percent of the State's allocation for fiscal year 2006 under §300.703 adjusted cumulatively for inflation.

(ii) If the amount that the State sets aside for State administration under paragraph (a) of this section is greater than \$850,000 and the State opts not to finance a high cost fund under paragraph (c) of this section—

(A) For fiscal years 2005 and 2006, nine percent of the State's allocation under §300.703.

(B) For fiscal year 2007 and subsequent fiscal years, an amount equal to nine percent of the State's allocation for fiscal year 2006 adjusted cumulatively for inflation.

(iii) If the amount that the State sets aside for State administration under paragraph (a) of this section is less than or equal to \$850,000 and the State opts to finance a high cost fund under paragraph (c) of this section:

(A) For fiscal years 2005 and 2006, 10.5 percent of the State's allocation under §300.703.

(B) For fiscal year 2007 and subsequent fiscal years, an amount equal to 10.5 percent of the State's allocation for fiscal year 2006 under §300.703 adjusted cumulatively for inflation.

(iv) If the amount that the State sets aside for State administration under paragraph (a) of this section is equal to or less than \$850,000 and the State opts not to finance a high cost fund under paragraph (c) of this section:

(A) For fiscal years 2005 and 2006, nine and one-half percent of the State's allocation under §300.703.

(B) For fiscal year 2007 and subsequent fiscal years, an amount equal to nine and one-half percent of the State's allocation for fiscal year 2006 under §300.703 adjusted cumulatively for inflation.

(2) The adjustment for inflation is the rate of inflation as measured by the percentage of increase, if any, from the preceding fiscal year in

the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(3) Some portion of the funds reserved under paragraph (b)(1) of this section must be used to carry out the following activities:

(i) For monitoring, enforcement, and complaint investigation; and

(ii) To establish and implement the mediation process required by section 615(e) of the Act, including providing for the costs of mediators and support personnel;

(4) Funds reserved under paragraph (b)(1) of this section also may be used to carry out the following activities:

(i) For support and direct services, including technical assistance, personnel preparation, and professional development and training;

(ii) To support paperwork reduction activities, including expanding the use of technology in the IEP process;

(iii) To assist LEAs in providing positive behavioral interventions and supports and mental health services for children with disabilities;

(iv) To improve the use of technology in the classroom by children with disabilities to enhance learning;

(v) To support the use of technology, including technology with universal design principles and assistive technology devices, to maximize accessibility to the general education curriculum for children with disabilities;

(vi) Development and implementation of transition programs, including coordination of services with agencies involved in supporting the transition of students with disabilities to postsecondary activities;

(vii) To assist LEAs in meeting personnel shortages;

(viii) To support capacity building activities and improve the delivery of services by LEAs to improve results for children with disabilities;

(ix) Alternative programming for children with disabilities who have been expelled from school, and services for children with disabilities in correctional facilities, children enrolled in State-operated or State-supported schools, and children with disabilities in charter schools;

(x) To support the development and provision of appropriate accommodations for children with

disabilities, or the development and provision of alternate assessments that are valid and reliable for assessing the performance of children with disabilities, in accordance with sections 1111(b) and 1201 of the ESEA; and

(xi) To provide technical assistance to schools and LEAs, and direct services, including direct student services described in section 1003A(c)(3) of the ESEA, to children with disabilities, in schools or LEAs implementing comprehensive support and improvement activities or targeted support and improvement activities under section 1111(d) of the ESEA on the basis of consistent underperformance of the disaggregated subgroup of children with disabilities, including providing professional development to special and regular education teachers who teach children with disabilities, based on scientifically based research to improve educational instruction, in order to improve academic achievement based on the challenging academic standards described in section 1111(b)(1) of the ESEA.

(c) *Local educational agency high cost fund.* (1) In general—

(i) For the purpose of assisting LEAs (including a charter school that is an LEA or a consortium of LEAs) in addressing the needs of high need children with disabilities, each State has the option to reserve for each fiscal year 10 percent of the amount of funds the State reserves for other State-level activities under paragraph (b)(1) of this section—

(A) To finance and make disbursements from the high cost fund to LEAs in accordance with paragraph (c) of this section during the first and succeeding fiscal years of the high cost fund; and

(B) To support innovative and effective ways of cost sharing by the State, by an LEA, or among a consortium of LEAs, as determined by the State in coordination with representatives from LEAs, subject to paragraph (c)(2)(ii) of this section.

(ii) For purposes of paragraph (c) of this section, *local educational agency* includes a charter school that is an LEA, or a consortium of LEAs. (2)(i) A State must not use any of the funds the State reserves pursuant to paragraph (c)(1)(i) of this section, which are solely for disbursement to LEAs, for costs associated with establishing,

supporting, and otherwise administering the fund. The State may use funds the State reserves under paragraph (a) of this section for those administrative costs.

(ii) A State must not use more than 5 percent of the funds the State reserves pursuant to paragraph (c)(1)(i) of this section for each fiscal year to support innovative and effective ways of cost sharing among consortia of LEAs.

(3)(i) The SEA must develop, not later than 90 days after the State reserves funds under paragraph (c)(1)(i) of this section, annually review, and amend as necessary, a State plan for the high cost fund. Such State plan must—

(A) Establish, in consultation and coordination with representatives from LEAs, a definition of a high need child with a disability that, at a minimum—

(1) Addresses the financial impact a high need child with a disability has on the budget of the child's LEA; and

(2) Ensures that the cost of the high need child with a disability is greater than 3 times the average per pupil expenditure (as defined in section 8101 of the ESEA) in that State;

(B) Establish eligibility criteria for the participation of an LEA that, at a minimum, take into account the number and percentage of high need children with disabilities served by an LEA;

(C) Establish criteria to ensure that placements supported by the fund are consistent with the requirements of §§300.114 through 300.118;

(D) Develop a funding mechanism that provides distributions each fiscal year to LEAs that meet the criteria developed by the State under paragraph (c)(3)(i)(B) of this section;

(E) Establish an annual schedule by which the SEA must make its distributions from the high cost fund each fiscal year; and

(F) If the State elects to reserve funds for supporting innovative and effective ways of cost sharing under paragraph (c)(1)(i)(B) of this section, describe how these funds will be used.

(ii) The State must make its final State plan available to the public not less than 30 days before the beginning of the school year, including dissemination of such information on the State Web site.

(4)(i) Each SEA must make all annual disbursements from the high cost fund

established under paragraph (c)(1)(i) of this section in accordance with the State plan published pursuant to paragraph (c)(3) of this section.

(ii) The costs associated with educating a high need child with a disability, as defined under paragraph (c)(3)(i)(A) of this section, are only those costs associated with providing direct special education and related services to the child that are identified in that child's IEP, including the cost of room and board for a residential placement determined necessary, consistent with §300.114, to implement a child's IEP.

(iii) The funds in the high cost fund remain under the control of the State until disbursed to an LEA to support a specific child who qualifies under the State plan for the high cost funds or distributed to LEAs, consistent with paragraph (c)(9) of this section.

(5) The disbursements under paragraph (c)(4) of this section must not be used to support legal fees, court costs, or other costs associated with a cause of action brought on behalf of a child with a disability to ensure FAPE for such child.

(6) Nothing in paragraph (c) of this section—

(i) Limits or conditions the right of a child with a disability who is assisted under Part B of the Act to receive FAPE pursuant to section 612(a)(1) of the Act in the least restrictive environment pursuant to section 612(a)(5) of the Act; or

(ii) Authorizes an SEA or LEA to establish a limit on what may be spent on the education of a child with a disability.

(7) Notwithstanding the provisions of paragraphs (c)(1) through (6) of this section, a State may use funds reserved pursuant to paragraph (c)(1)(i) of this section for implementing a placement neutral cost sharing and reimbursement program of high need, low incidence, catastrophic, or extraordinary aid to LEAs that provides services to high need children based on eligibility criteria for such programs that were created not later than January 1, 2004, and are currently in operation, if such program serves children that meet the requirement of the definition of a high need child with a disability as described in paragraph (c)(3)(i)(A) of this section.

(8) Disbursements provided under paragraph (c) of this section must not be used to pay costs that otherwise would be reimbursed as medical assistance for a child with a disability under the State Medicaid program under Title XIX of the Social Security Act.

(9) Funds reserved under paragraph (c)(1)(i) of this section from the appropriation for any fiscal year, but not expended pursuant to paragraph (c)(4) of this section before the beginning of their last year of availability for obligation, must be allocated to LEAs in the same manner as other funds from the appropriation for that fiscal year are allocated to LEAs under §300.705 during their final year of availability.

(d) *Inapplicability of certain prohibitions.* A State may use funds the State reserves under paragraphs (a) and (b) of this section without regard to—

(1) The prohibition on commingling of funds in §300.162(b).

(2) The prohibition on supplanting other funds in §300.162(c).

(e) *Special rule for increasing funds.* A State may use funds the State reserves under paragraph (a)(1) of this section as a result of inflationary increases under paragraph (a)(2) of this section to carry out activities authorized under paragraph (b)(4)(i), (iii), (vii), or (viii) of this section.

(f) *Flexibility in using funds for Part C.* Any State eligible to receive a grant under section 619 of the Act may use funds made available under paragraph (a)(1) of this section, §300.705(c), or §300.814(e) to develop and implement a State policy jointly with the lead agency under Part C of the Act and the SEA to provide early intervention services (which must include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills) in accordance with Part C of the Act to children with disabilities who are eligible for services under section 619 of the Act and who previously received services under Part C of the Act until the children enter, or are eligible under State law to enter, kindergarten, or elementary school as appropriate.

(Approved by the Office of Management and Budget under control number 1820-0600)
(Authority: 20 U.S.C. 1411(e))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007; 82 FR 29761, June 30, 2017]

§300.705 Subgrants to LEAs.

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

(b) *Allocations to LEAs.* For each fiscal year for which funds are allocated to States under §300.703, each State shall allocate funds as follows:

(1) *Base payments.* The State first must award each LEA described in paragraph (a) of this section the amount the LEA would have received under section 611 of the Act for fiscal year 1999, if the State had distributed 75 percent of its grant for that year under section 611(d) of the Act, as that section was then in effect.

(2) *Base payment adjustments.* For any fiscal year after 1999—

(i) If a new LEA is created, the State must divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 if a State has had its payment reduced under §300.703(b), currently provided special education by each of the LEAs;

(ii) If one or more LEAs are combined into a single new LEA, the State must combine the base allocations of the merged LEAs;

(iii) If, for two or more LEAs, geographic boundaries or administrative responsibility for providing services to children with disabilities ages 3 through 21 change, the base allocations of affected LEAs must be redistributed among affected LEAs based on the relative numbers of

children with disabilities ages 3 through 21, or ages 6 through 21 if a State has had its payment reduced under §300.703(b), currently provided special education by each affected LEA; and (iv) If an LEA received a base payment of zero in its first year of operation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities. The State must divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on July 1, 2009.

(3) *Allocation of remaining funds.* After making allocations under paragraph (b)(1) of this section, as adjusted by paragraph (b)(2) of this section, the State must—

(i) Allocate 85 percent of any remaining funds to those LEAs on the basis of the relative numbers of children enrolled in public and private elementary schools and secondary schools within the LEA's jurisdiction; and

(ii) Allocate 15 percent of those remaining funds to those LEAs in accordance with their relative numbers of children living in poverty, as determined by the SEA.

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

(2) After an SEA distributes funds under this part to an eligible LEA that is not serving any children with disabilities, as provided in

paragraph (a) of this section, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those funds not obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to §300.704. (Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20 U.S.C. 1411(f)) [71 FR 46753, Aug. 14, 2006, as amended at 73 FR 73028, Dec. 1, 2008]

§300.706 [Reserved]

Secretary of the Interior

§300.707 Use of amounts by Secretary of the Interior.

(a) *Definitions.* For purposes of §§300.707 through 300.716, the following definitions apply:

(1) *Reservation* means Indian Country as defined in 18 U.S.C. 1151.

(2) *Tribal governing body* has the definition given that term in 25 U.S.C. 2021(19).

(b) *Provision of amounts for assistance.* The Secretary provides amounts to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. The amount of the payment for any fiscal year is equal to 80 percent of the amount allotted under section 611(b)(2) of the Act for that fiscal year. Of the amount described in the preceding sentence, after the Secretary of the Interior reserves funds for administration under §300.710, 80 percent must be allocated to such schools by July 1 of that fiscal year and 20 percent must be allocated to such schools by September 30 of that fiscal year.

(c) *Additional requirement.* With respect to all other children aged 3 to 21, inclusive, on reservations, the SEA of the State in which the reservation is located must ensure that all of the requirements of Part B of the Act are implemented.

(Authority: 20 U.S.C. 1411(h)(1))

§300.708 Submission of information.

The Secretary may provide the Secretary of the Interior amounts under §300.707 for a fiscal year only if the Secretary of the Interior submits to the Secretary information that—

- (a) Meets the requirements of section 612(a)(1), (3) through (9), (10)(B) through (C), (11) through (12), (14) through (16), (19), and (21) through (25) of the Act (including monitoring and evaluation activities);
- (b) Meets the requirements of section 612(b) and (e) of the Act;
- (c) Meets the requirements of section 613(a)(1), (2)(A)(i), (7) through (9) and section 613(i) of the Act (references to LEAs in these sections must be read as references to elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior);
- (d) Meets the requirements of section 616 of the Act that apply to States (references to LEAs in section 616 of the Act must be read as references to elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior).
- (e) Meets the requirements of this part that implement the sections of the Act listed in paragraphs (a) through (d) of this section;
- (f) Includes a description of how the Secretary of the Interior will coordinate the provision of services under Part B of the Act with LEAs, tribes and tribal organizations, and other private and Federal service providers;
- (g) Includes an assurance that there are public hearings, adequate notice of the hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and affected local school boards before the adoption of the policies, programs, and procedures related to the requirements described in paragraphs (a) through (d) of this section;
- (h) Includes an assurance that the Secretary of the Interior provides the information that the

Secretary may require to comply with section 618 of the Act;

(i)(1) Includes an assurance that the Secretary of the Interior and the Secretary of Health and Human Services have entered into a memorandum of agreement, to be provided to the Secretary, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with the SEAs and LEAs and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations.

(2) The agreement must provide for the apportionment of responsibilities and costs, including child find, evaluation, diagnosis, remediation or therapeutic measures, and (where appropriate) equipment and medical or personal supplies, as needed for a child with a disability to remain in a school or program; and

(j) Includes an assurance that the Department of the Interior will cooperate with the Department in its exercise of monitoring and oversight of the requirements in this section and §§300.709 through 300.711 and §§300.713 through 300.716, and any agreements entered into between the Secretary of the Interior and other entities under Part B of the Act, and will fulfill its duties under Part B of the Act. The Secretary withholds payments under §300.707 with respect to the requirements described in this section in the same manner as the Secretary withholds payments under section 616(e)(6) of the Act.

(Authority: 20 U.S.C. 1411(h)(2) and (3))

§300.709 Public participation.

In fulfilling the requirements of §300.708 the Secretary of the Interior must provide for public participation consistent with §300.165.

(Authority: 20 U.S.C. 1411(h))

§300.710 Use of funds under Part B of the Act.

(a) The Secretary of the Interior may reserve five percent of its payment under §300.707(b) in any fiscal year, or \$500,000, whichever is greater, for administrative costs in carrying out the provisions of §§300.707 through 300.709, 300.711, and 300.713 through 300.716.

(b) Payments to the Secretary of the Interior under §300.712 must be used in accordance with that section.

(Authority: 20 U.S.C. 1411(h)(1)(A))

§300.711 Early intervening services.

(a) The Secretary of the Interior may allow each elementary school and secondary school for Indian children operated or funded by the Secretary of the Interior to use not more than 15 percent of the amount the school receives under §300.707(b) for any fiscal year, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early intervening services, which may include interagency financing structures, for children in kindergarten through grade 12 (with a particular emphasis on children in kindergarten through grade three) 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, in accordance with section 613(f) of the Act.

(b) Each elementary school and secondary school for Indian children operated or funded by the Secretary of the Interior that develops and maintains coordinated early intervening services in accordance with section 613(f) of the Act and §300.226 must annually report to the Secretary of the Interior in accordance with section 613(f) of the Act.

(Authority: 20 U.S.C. 1411(h) and 1413(f))

§300.712 Payments for education and services for Indian children with disabilities aged three through five.

(a) *General.* With funds appropriated under section 611(i) of the Act, the Secretary makes payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act) or consortia of tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities aged three through five on reservations served by elementary schools and secondary schools for Indian children operated or funded by the Department of the Interior. The amount of the payments under

paragraph (b) of this section for any fiscal year is equal to 20 percent of the amount allotted under §300.701(b).

(b) *Distribution of funds.* The Secretary of the Interior must distribute the total amount of the payment under paragraph (a) of this section by allocating to each tribe, tribal organization, or consortium an amount based on the number of children with disabilities aged three through five residing on reservations as reported annually, divided by the total of those children served by all tribes or tribal organizations.

(c) *Submission of information.* To receive a payment under this section, the tribe or tribal organization must submit the figures to the Secretary of the Interior as required to determine the amounts to be allocated under paragraph (b) of this section. This information must be compiled and submitted to the Secretary.

(d) *Use of funds.* (1) The funds received by a tribe or tribal organization must be used to assist in child find, screening, and other procedures for the early identification of children aged three through five, parent training, and the provision of direct services. These activities may be carried out directly or through contracts or cooperative agreements with the BIA, LEAs, and other public or private nonprofit organizations. The tribe or tribal organization is encouraged to involve Indian parents in the development and implementation of these activities.

(2) The tribe or tribal organization, as appropriate, must make referrals to local, State, or Federal entities for the provision of services or further diagnosis.

(e) *Biennial report.* To be eligible to receive a grant pursuant to paragraph (a) of this section, the tribe or tribal organization must provide to the Secretary of the Interior a biennial report of activities undertaken under this section, including the number of contracts and cooperative agreements entered into, the number of children contacted and receiving services for each year, and the estimated number of children needing services during the two years following the year in which the report is made. The Secretary of the Interior must include a summary of this information on a biennial basis in the report to the Secretary required under section 611(h) of the Act. The Secretary may require

any additional information from the Secretary of the Interior.

(f) *Prohibitions.* None of the funds allocated under this section may be used by the Secretary of the Interior for administrative purposes, including child count and the provision of technical assistance.

(Authority: 20 U.S.C. 1411(h)(4))

§300.713 Plan for coordination of services.

(a) The Secretary of the Interior must develop and implement a plan for the coordination of services for all Indian children with disabilities residing on reservations served by elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior.

(b) The plan must provide for the coordination of services benefiting those children from whatever source, including tribes, the Indian Health Service, other BIA divisions, other Federal agencies, State educational agencies, and State, local, and tribal juvenile and adult correctional facilities.

(c) In developing the plan, the Secretary of the Interior must consult with all interested and involved parties.

(d) The plan must be based on the needs of the children and the system best suited for meeting those needs, and may involve the establishment of cooperative agreements between the BIA, other Federal agencies, and other entities.

(e) The plan also must be distributed upon request to States; to SEAs, LEAs, and other agencies providing services to infants, toddlers, and children with disabilities; to tribes; and to other interested parties.

(Authority: 20 U.S.C. 1411(h)(5))

§300.714 Establishment of advisory board.

(a) To meet the requirements of section 612(a)(21) of the Act, the Secretary of the Interior must establish, under the BIA, an advisory board composed of individuals involved in or concerned with the education and provision of services to Indian infants, toddlers, children, and youth with disabilities, including Indians with disabilities, Indian parents or guardians of such children, teachers, service providers, State and local educational officials, representatives of tribes or tribal organizations,

representatives from State Interagency Coordinating Councils under section 641 of the Act in States having reservations, and other members representing the various divisions and entities of the BIA. The chairperson must be selected by the Secretary of the Interior.

(b) The advisory board must—

(1) Assist in the coordination of services within the BIA and with other local, State, and Federal agencies in the provision of education for infants, toddlers, and children with disabilities;

(2) Advise and assist the Secretary of the Interior in the performance of the Secretary of the Interior's responsibilities described in section 611(h) of the Act;

(3) Develop and recommend policies concerning effective inter- and intra-agency collaboration, including modifications to regulations, and the elimination of barriers to inter- and intra-agency programs and activities;

(4) Provide assistance and disseminate information on best practices, effective program coordination strategies, and recommendations for improved early intervention services or educational programming for Indian infants, toddlers, and children with disabilities; and

(5) Provide assistance in the preparation of information required under §300.708(h).

(Authority: 20 U.S.C. 1411(h)(6))

§300.715 Annual reports.

(a) *In general.* The advisory board established under §300.714 must prepare and submit to the Secretary of the Interior and to Congress an annual report containing a description of the activities of the advisory board for the preceding year.

(b) *Availability.* The Secretary of the Interior must make available to the Secretary the report described in paragraph (a) of this section.

(Authority: 20 U.S.C. 1411(h)(7))

§300.716 Applicable regulations.

The Secretary of the Interior must comply with the requirements of §§300.103 through 300.108, 300.110 through 300.124, 300.145 through 300.154, 300.156 through 300.160, 300.165, 300.170 through 300.186, 300.226, 300.300 through 300.606, 300.610 through 300.646, and 300.707 through 300.716.

(Authority: 20 U.S.C. 1411(h)(2)(A))

Definitions that Apply to this Subpart

§300.717 Definitions applicable to allotments, grants, and use of funds.

As used in this subpart—

- (a) *Freely associated States* means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau;
- (b) *Outlying areas* means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands;
- (c) *State* means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico; and
- (d) *Average per-pupil expenditure in public elementary schools and secondary schools in the United States* means—
 - (1) Without regard to the source of funds—
 - (i) The aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the determination is made (or, if satisfactory data for that year are not available, during the most recent preceding fiscal year for which satisfactory data are available) of all LEAs in the 50 States and the District of Columbia; plus
 - (ii) Any direct expenditures by the State for the operation of those agencies; divided by (2) The aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year. (Authority: 20 U.S.C. 1401(22), 1411(b)(1) (C) and (g))

Acquisition of Equipment and Construction or Alteration of Facilities

§300.718 Acquisition of equipment and construction or alteration of facilities.

- (a) *General.* If the Secretary determines that a program authorized under Part B of the Act will be improved by permitting program funds to be used to acquire appropriate equipment, or to construct new facilities or alter existing facilities, the Secretary may allow the use of those funds for those purposes.
- (b) *Compliance with certain regulations.* Any construction of new facilities or alteration of

existing facilities under paragraph (a) of this section must comply with the requirements of—
(1) Appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the “Americans with Disabilities Accessibility Standards for Buildings and Facilities”); or
(2) Appendix A of subpart 101-19.6 of title 41, Code of Federal Regulations (commonly known as the “Uniform Federal Accessibility Standards”).
(Authority: 20 U.S.C. 1404)

Subpart H—Preschool Grants for Children with Disabilities

§300.800 In general.

The Secretary provides grants under section 619 of the Act to assist States to provide special education and related services in accordance with Part B of the Act—

- (a) To children with disabilities aged three through five years; and
- (b) At a State's discretion, to two-year-old children with disabilities who will turn three during the school year.

(Authority: 20 U.S.C. 1419(a))

§§300.801-300.802 [Reserved]

§300.803 Definition of State.

As used in this subpart, State means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.
(Authority: 20 U.S.C. 1419(i))

§300.804 Eligibility.

A State is eligible for a grant under section 619 of the Act if the State—

- (a) Is eligible under section 612 of the Act to receive a grant under Part B of the Act; and
- (b) Makes FAPE available to all children with disabilities, aged three through five, residing in the State.

(Approved by the Office of Management and Budget under control number 1820-0030)
(Authority: 20 U.S.C. 1419(b))

§300.805 [Reserved]

§300.806 Eligibility for financial assistance.

No State or LEA, or other public institution or agency, may receive a grant or enter into a contract or cooperative agreement under subpart 2 or 3 of Part D of the Act that relates exclusively to programs, projects, and activities pertaining to children aged three through five years, unless the State is eligible to receive a grant under section 619(b) of the Act. (Authority: 20 U.S.C. 1481(e))

§300.807 Allocations to States.

The Secretary allocates the amount made available to carry out section 619 of the Act for a fiscal year among the States in accordance with §§300.808 through 300.810. (Authority: 20 U.S.C. 1419(c)(1))

§300.808 Increase in funds.

If the amount available for allocation to States under §300.807 for a fiscal year is equal to or greater than the amount allocated to the States under section 619 of the Act for the preceding fiscal year, those allocations are calculated as follows:

- (a) Except as provided in §300.809, the Secretary—
 - (1) Allocates to each State the amount the State received under section 619 of the Act for fiscal year 1997;
 - (2) Allocates 85 percent of any remaining funds to States on the basis of the States' relative populations of children aged three through five; and
 - (3) Allocates 15 percent of those remaining funds to States on the basis of the States' relative populations of all children aged three through five who are living in poverty.
- (b) For the purpose of making grants under this section, the Secretary uses the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary. (Authority: 20 U.S.C. 1419(c)(2)(A))

§300.809 Limitations.

- (a) Notwithstanding §300.808, allocations under that section are subject to the following:
 - (1) No State's allocation may be less than its allocation under section 619 of the Act for the preceding fiscal year.

(2) No State's allocation may be less than the greatest of—

- (i) The sum of—
 - (A) The amount the State received under section 619 of the Act for fiscal year 1997; and
 - (B) One-third of one percent of the amount by which the amount appropriated under section 619(j) of the Act for the fiscal year exceeds the amount appropriated for section 619 of the Act for fiscal year 1997;
 - (ii) The sum of—
 - (A) The amount the State received under section 619 of the Act for the preceding fiscal year; and
 - (B) That amount multiplied by the percentage by which the increase in the funds appropriated under section 619 of the Act from the preceding fiscal year exceeds 1.5 percent; or
 - (iii) The sum of—
 - (A) The amount the State received under section 619 of the Act for the preceding fiscal year; and
 - (B) That amount multiplied by 90 percent of the percentage increase in the amount appropriated under section 619 of the Act from the preceding fiscal year.
- (b) Notwithstanding paragraph (a)(2) of this section, no State's allocation under §300.808 may exceed the sum of—
- (1) The amount the State received under section 619 of the Act for the preceding fiscal year; and
 - (2) That amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated under section 619 of the Act from the preceding fiscal year.
- (c) If the amount available for allocation to States under §300.808 and paragraphs (a) and (b) of this section is insufficient to pay those allocations in full, those allocations are ratably reduced, subject to paragraph (a)(1) of this section. (Authority: 20 U.S.C. 1419(c)(2)(B) and (c)(2)(C))

§300.810 Decrease in funds.

If the amount available for allocations to States under §300.807 for a fiscal year is less than the amount allocated to the States under section 619 of the Act for the preceding fiscal year, those allocations are calculated as follows:

- (a) If the amount available for allocations is greater than the amount allocated to the States

for fiscal year 1997, each State is allocated the sum of—

(1) The amount the State received under section 619 of the Act for fiscal year 1997; and

(2) An amount that bears the same relation to any remaining funds as the increase the State received under section 619 of the Act for the preceding fiscal year over fiscal year 1997 bears to the total of all such increases for all States.

(b) If the amount available for allocations is equal to or less than the amount allocated to the States for fiscal year 1997, each State is allocated the amount the State received for fiscal year 1997, ratably reduced, if necessary.

(Authority: 20 U.S.C. 1419(c)(3))

§300.811 [Reserved]

§300.812 Reservation for State activities.

(a) Each State may reserve not more than the amount described in paragraph (b) of this section for administration and other State-level activities in accordance with §§300.813 and 300.814.

(b) For each fiscal year, the Secretary determines and reports to the SEA an amount that is 25 percent of the amount the State received under section 619 of the Act for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—

(1) The percentage increase, if any, from the preceding fiscal year in the State's allocation under section 619 of the Act; or

(2) The rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(Authority: 20 U.S.C. 1419(d))

[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007]

§300.813 State administration.

(a) For the purpose of administering section 619 of the Act (including the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children with disabilities), a State may use not more than 20 percent of the maximum amount the State may reserve under §300.812 for any fiscal year.

(b) Funds described in paragraph (a) of this section may also be used for the administration of Part C of the Act.

(Authority: 20 U.S.C. 1419(e))

§300.814 Other State-level activities.

Each State must use any funds the State reserves under §300.812 and does not use for administration under §300.813—

(a) For support services (including establishing and implementing the mediation process required by section 615(e) of the Act), which may benefit children with disabilities younger than three or older than five as long as those services also benefit children with disabilities aged three through five;

(b) For direct services for children eligible for services under section 619 of the Act;

(c) For activities at the State and local levels to meet the performance goals established by the State under section 612(a)(15) of the Act;

(d) To supplement other funds used to develop and implement a statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not more than one percent of the amount received by the State under section 619 of the Act for a fiscal year;

(e) To provide early intervention services (which must include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills) in accordance with Part C of the Act to children with disabilities who are eligible for services under section 619 of the Act and who previously received services under Part C of the Act until such children enter, or are eligible under State law to enter, kindergarten; or

(f) At the State's discretion, to continue service coordination or case management for families who receive services under Part C of the Act, consistent with §300.814(e).

(Authority: 20 U.S.C. 1419(f))

§300.815 Subgrants to LEAs.

Each State that receives a grant under section 619 of the Act for any fiscal year must distribute all of the grant funds the State does not reserve under §300.812 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under

section 613 of the Act. Effective with funds that become available on July 1, 2009, each State must distribute funds to eligible LEAs that are responsible for providing education to children aged three through five years, including public charter schools that operate as LEAs, even if the LEA is not serving any preschool children with disabilities.

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

[73 FR 73028, Dec. 1, 2008]

§300.816 Allocations to LEAs.

(a) *Base payments.* The State must first award each LEA described in §300.815 the amount that agency would have received under section 619 of the Act for fiscal year 1997 if the State had distributed 75 percent of its grant for that year under section 619(c)(3), as such section was then in effect.

(b) *Base payment adjustments.* For fiscal year 1998 and beyond—

(1) If a new LEA is created, the State must divide the base allocation determined under paragraph (a) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs based on the relative numbers of children with disabilities ages three through five currently provided special education by each of the LEAs;

(2) If one or more LEAs are combined into a single new LEA, the State must combine the base allocations of the merged LEAs;

(3) If for two or more LEAs, geographic boundaries or administrative responsibility for providing services to children with disabilities ages three through five changes, the base allocations of affected LEAs must be redistributed among affected LEAs based on the relative numbers of children with disabilities ages three through five currently provided special education by each affected LEA; and

(4) If an LEA received a base payment of zero in its first year of operation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities aged three through five years. The State must divide the base allocation determined under paragraph (a) of this section for the LEAs

that would have been responsible for serving children with disabilities aged three through five years now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities aged three through five years currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on July 1, 2009.

(c) *Allocation of remaining funds.* After making allocations under paragraph (a) of this section, the State must—

(1) Allocate 85 percent of any remaining funds to those LEAs on the basis of the relative numbers of children enrolled in public and private elementary schools and secondary schools within the LEA's jurisdiction; and
(2) Allocate 15 percent of those remaining funds to those LEAs in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(d) *Use of best data.* For the purpose of making grants under this section, States must apply on a uniform basis across all LEAs the best data that are available to them on the numbers of children enrolled in public and private elementary and secondary schools and the numbers of children living in poverty.

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

[71 FR 46753, Aug. 14, 2006, as amended at 73 FR 73028, Dec. 1, 2008]

§300.817 Reallocation of LEA funds.

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

(b) After an SEA distributes section 619 funds to an eligible LEA that is not serving any children with disabilities aged three through five years, as provided in §300.815, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those funds not obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to §300.812.

(Authority: 20 U.S.C. 1419(g)(2))
[73 FR 73028, Dec. 1, 2008]

§300.818 Part C of the Act inapplicable.

Part C of the Act does not apply to any child with a disability receiving FAPE, in accordance with Part B of the Act, with funds received under section 619 of the Act.

(Authority: 20 U.S.C. 1419(h))

Appendix A to Part 300—Excess Costs Calculation

Except as otherwise provided, amounts provided to an LEA under Part B of the Act may be used only to pay the excess costs of providing special education and related services to children with disabilities. Excess costs are those costs for the education of an elementary school or secondary school student with a disability that are in excess of the average annual per student expenditure in an LEA during the preceding school year for an elementary school or secondary school student, as may be appropriate. An LEA must spend at least the average annual per student expenditure on the education of an elementary school or secondary school child with a disability before funds under Part B of the Act are used to pay the excess costs of providing special education and related services.

Section 602(8) of the Act and §300.16 require the LEA to compute the minimum average amount separately for children with disabilities in its elementary schools and for children with disabilities in its secondary schools. LEAs may not compute the minimum average amount it must spend on the education of children with disabilities based on a combination of the enrollments in its elementary schools and secondary schools.

The following example shows how to compute the minimum average amount an LEA must spend for the education of each of its elementary school children with disabilities under section 602(3) of the Act before it may use funds under Part B of the Act.

- a. First the LEA must determine the total amount of its expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt services are excluded.

Example: The following is an example of a computation for children with disabilities enrolled in an LEA's elementary schools. In this example, the LEA had an average elementary school enrollment for the preceding school year of 800 (including 100 children with disabilities). The LEA spent the following amounts last year for elementary school students (including its elementary school children with disabilities):

(1)	From State and local tax funds	\$6,500,000
(2)	From Federal funds	600,000
	Total expenditures	7,100,000

Of this total, \$60,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures.

(1)	Total Expenditures	\$7,100,000
(2)	Less capital outlay and debt	-60,000
	Total expenditures for elementary school students less capital outlay and debt	\$7,040,000

- b. Next, the LEA must subtract from the total expenditures amounts spent for:

- (1) IDEA, Part B allocation,
- (2) ESEA, Title I, Part A allocation,
- (3) ESEA, Title III, Parts A and B allocation,

- (4) State and local funds for children with disabilities, and
- (5) State or local funds for programs under ESEA, Title I, Part A, and Title III, Parts A and B.

These are funds that the LEA actually spent, not funds received last year but carried over for the current school year.

Example: The LEA spent the following amounts for elementary school students last year:

(1)	From funds under IDEA, Part B allocation	\$ 200,000
(2)	From funds under ESEA, Title I, Part A allocation	250,000
(3)	From funds under ESEA, Title III, Parts A and B allocation	50,000
(4)	From State funds and local funds for children with disabilities	500,000
(5)	From State and local funds for programs under ESEA, Title I, Part A, and Title III, Parts A and B	150,000
	Total	1,150,000
(1)	Total expenditures less capital outlay and debt	7,040,000
(2)	Other deductions	-1,150,000
	Total	\$5,890,000

- c. Except as otherwise provided, the LEA next must determine the average annual per student expenditure for its elementary schools dividing the average number of students enrolled in the elementary schools of the agency during the preceding year (including its children with disabilities) into the amount computed under the above paragraph. The amount obtained through this computation is the minimum amount the LEA must spend (on the average) for the education of each of its elementary school children with disabilities. Funds under Part B of the Act may be used only for costs over and above this minimum.

(1)	Amount from Step b	\$5,890,000
(2)	Average number of students enrolled	800
(3)	$\$5,890,000/800$ Average annual per student expenditure	\$ 7,362

- d. Except as otherwise provided, to determine the total minimum amount of funds the LEA must spend for the education of its elementary school children with disabilities in the LEA (not including capital outlay and debt service), the LEA must multiply the number of elementary school children with disabilities in the LEA times the average annual per student expenditure obtained in paragraph c above. Funds under Part B of the Act can only be used for excess costs over and above this minimum.

(1)	Number of children with disabilities in the LEA's elementary schools	100
(2)	Average annual per student expenditure	\$ 7,362
(3)	$\$7,362 \times 100$	

Total minimum amount of funds the LEA must spend for the education of children with disabilities enrolled in the LEA's elementary schools before using Part B funds	\$ 736,200
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Appendix B to Part 300—Proportionate Share Calculation

Each LEA must expend, during the grant period, on the provision of special education and related services for the parentally-placed private school children with disabilities enrolled in private elementary schools and secondary schools located in the LEA an amount that is equal to—

- (1) A proportionate share of the LEA's subgrant under section 611(f) of the Act for children with disabilities aged 3 through 21. This is an amount that is the same proportion of the LEA's total subgrant under section 611(f) of the Act as the number of parentally-placed private school children with disabilities aged 3 through 21 enrolled in private elementary schools and secondary schools located in the LEA is to the total number of children with disabilities enrolled in public and private elementary schools and secondary schools located in the LEA aged 3 through 21; and
- (2) A proportionate share of the LEA's subgrant under section 619(g) of the Act for children with disabilities aged 3 through 5. This is an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as the total number of parentally-placed private school children with disabilities aged 3 through 5 enrolled in private elementary schools located in the LEA is to the total number of children with disabilities enrolled in public and private elementary schools located in the LEA aged 3 through 5.

Consistent with section 612(a)(10)(A)(i) of the Act and §300.133 of these regulations, annual expenditures for parentally-placed private school children with disabilities are calculated based on the total number of children with disabilities enrolled in public and private elementary schools and secondary schools located in the LEA eligible to receive special education and related services under Part B, as compared with the total number of eligible parentally-placed private school children with disabilities enrolled in private elementary schools located in the LEA. This ratio is used to determine the proportion of the LEA's total Part B subgrants under section 611(f) of the Act for children aged 3 through 21, and under section 619(g) of the Act for children aged 3 through 5, that is to be expended on services for parentally-placed private school children with disabilities enrolled in private elementary schools and secondary schools located in the LEA.

The following is an example of how the proportionate share is calculated:

There are 300 eligible children with disabilities enrolled in the Flintstone School District and 20 eligible parentally-placed private school children with disabilities enrolled in private elementary schools and secondary schools located in the LEA for a total of 320 eligible public and private school children with disabilities (note: proportionate share for parentally-placed private school children is based on total children eligible, not children served). The number of eligible parentally-placed private school children with disabilities (20) divided by the total number of eligible public and private school children with disabilities (320) indicates that 6.25 percent of the LEA's subgrant must be spent for the group of eligible parentally-placed children with disabilities enrolled in private elementary schools and secondary schools located in the LEA. Flintstone School District receives \$152,500 in Federal flow through funds. Therefore, the LEA must spend \$9,531.25 on special education or related services to the group of parentally-placed private school children with disabilities enrolled in private elementary schools and secondary schools located in the LEA. (Note: The LEA must calculate the proportionate share of IDEA funds before earmarking funds for any early intervening activities in §300.226).

The following outlines the calculations for the example of how the proportionate share is calculated.

Proportionate Share Calculation for Parentally-Placed Private School Children with Disabilities For Flintstone School District:	
Number of eligible children with disabilities in public schools in the LEA	300
Number of parentally-placed eligible children with disabilities in private elementary schools and secondary schools located in the LEA	20
Total number of eligible children	320
Federal Flow-Through Funds to Flintstone School District	
Total allocation to Flintstone	\$152,500
Calculating Proportionate Share:	
Total allocation to Flintstone	152,500
Divided by total number of eligible children	320
Average allocation per eligible child	476.5625
Multiplied by the number of parentally-placed children with disabilities	20
Amount to be expended for parentally-placed children with disabilities	9,531.25

Appendix C to Part 300—National Instructional Materials Accessibility Standard (NIMAS)

Under sections 612(a)(23)(A) and 674(e)(4) of the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004, the Secretary of Education establishes the NIMAS. Under section 674(e)(4) of the Act, the NIMAS applies to print instructional materials published after July 19, 2006. The purpose of the NIMAS is to help increase the availability and timely delivery of print instructional materials in accessible formats to blind or other persons with print disabilities in elementary and secondary schools.

Technical Specifications—The Baseline Element Set

The Baseline Element Set details the minimum requirement that must be delivered to fulfill the NIMAS. It is the responsibility of publishers to provide this NIMAS-conformant XML content file, a package file (OPF), a PDF-format copy of the title page (or whichever page(s) contain(s) ISBN and copyright information), and a full set of the content's images. All of the images included within a work must be provided in a folder and placeholders entered in the relevant XML document indicating their location (all images must be included). The preferred image type is SVG, next is either PNG or JPG format. Images should be rendered in the same size/proportion as their originals at 300 dpi. Images should be named with relative path filenames in XML files (example: `img id="staricon4" src="/images/U10C02/staricon4.jpg" alt="star icon"`).

NIMAS-conformant content must be valid to the NIMAS 1.1 [see ANSI/NISO Z39.86 2005 or subsequent revisions]. In addition, files are required to use the tags from the Baseline Element Set when such tags are appropriate. Publishers are encouraged to augment the required Baseline Element Set with tags from the Optional Element Set (elements not included in the Standard) as applicable. For the purposes of NIMAS, appropriate usage of elements, both baseline and optional, is defined by the DAISY

Structure Guidelines. Files that do not follow these guidelines in the selection and application of tags are not conformant to this Standard. Both optional elements and appropriate structure guidelines may be located within Z39.86-2002 and Z39.86-2005 available from <http://www.daisy.org/z3986/>. Use of the most current standard is recommended.

The Baseline Element Set

Element	Description
a. Document-level tags	
dtbook	The root element in the Digital Talking Book DTD. <dtbook>contains metadata in <head>and the contents itself in <book>.
head	Contains metainformation about the book but no actual content of the book itself, which is placed in <book>.
book	Surrounds the actual content of the document, which is divided into <frontmatter>, <bodymatter>, and <rearmatter>. <head>, which contains metadata, precedes <book>.
meta	Indicates metadata about the book. It is an empty element that may appear repeatedly only in <head>. For the most current usage guidelines, please refer to http://www.daisy.org/z3986/
b. Structure and Hierarchy	
frontmatter	Usually contains <doctitle>and <docauthor>, as well as preliminary material that is often enclosed in appropriate <level>or <level1>etc. Content may include a copyright notice, a foreword, an acknowledgements section, a table of contents, etc. <frontmatter>erves as a guide to the content and nature of a <book>.
bodymatter	Consists of the text proper of a book, as contrasted with preliminary material <frontmatter>or supplementary information in <rearmatter>.
rearmatter	Contains supplementary material such as appendices, glossaries, bibliographies, and indices. It follows the <bodymatter>of the book.
level1	The highest-level container of major divisions of a book. Used in <frontmatter>, <bodymatter>, and <rearmatter>to mark the largest divisions of the book (usually parts or chapters), inside which <level2>subdivisions (often sections) may nest. The class attribute identifies the actual name (e.g., part, chapter) of the structure it marks. Contrast with <level>.
level2	Contains subdivisions that nest within <level1>divisions. The class attribute identifies the actual name (e.g., subpart, chapter, subsection) of the structure it marks.
level3	Contains sub-subdivisions that nest within <level2>subdivisions (e.g., sub-subsections within subsections). The class attribute identifies the actual name (e.g., section, subpart, subsubsection) of the subordinate structure it marks.
level4	Contains further subdivisions that nest within <level3>subdivisions. The class attribute identifies the actual name of the subordinate structure it marks.
level5	Contains further subdivisions that nest within <level4>subdivisions. The class attribute identifies the actual name of the subordinate structure it marks.

level6	Contains further subdivisions that nest within <level5>subdivisions. The class attribute identifies the actual name of the subordinate structure it marks.
h1	Contains the text of the heading for a <level1>structure.
h2	Contains the text of the heading for a <level2>structure.
h3	Contains the text of the heading for a <level3>structure.
h4	Contains the text of the heading for a <level4>structure.
h5	Contains the text of the heading for a <level5>structure.
h6	Contains the text of the heading for a <level6>structure. For the most current usage guidelines, please refer to http://www.daisy.org/z3986/
c. Block elements	
author	Identifies the writer of a work other than this one. Contrast with <docauthor>, which identifies the author of this work. <author>typically occurs within <blockquote>and <cite>.
blockquote	Indicates a block of quoted content that is set off from the surrounding text by paragraph breaks. Compare with <q>, which marks short, inline quotations.
list	Contains some form of list, ordered or unordered. The list may have an intermixed heading <hd>(generally only one, possibly with <prodnote>), and an intermixture of list items and <pagenum>. If bullets and outline enumerations are part of the print content, they are expected to prefix those list items in content, rather than be implicitly generated.
li	Marks each list item in a <list>. content may be either inline or block and may include other nested lists. Alternatively it may contain a sequence of list item components, <lic>, that identify regularly occurring content, such as the heading and page number of each entry in a table of contents.
hd	Marks the text of a heading in a <list>or <sidebar>.
note	Marks a footnote, endnote, etc. Any local reference to <note id="yyy">is by <noteref idref="#yyy">. [Attribute id]
p	Contains a paragraph, which may contain subsidiary <list>or <dl>.
sidebar	Contains information supplementary to the main text and/or narrative flow and is often boxed and printed apart from the main text block on a page. It may have a heading <hd>.
cite	Marks a reference (or citation) to another document.
dd	Marks a definition of the preceding term <dt>within a definition list <dl>. A definition without a preceding <dt>has no semantic interpretation, but is visually presented aligned with other <dd>.
dl	Contains a definition list, usually consisting of pairs of terms <dt>and definitions <dd>. Any definition can contain another definition list.
dt	Marks a term in a definition list <dl>for which a definition <dd>follows. For the most current usage guidelines, please refer to http://www.daisy.org/z3986/
d. Inline Elements	
em	Indicates emphasis. Usually is rendered in italics. Compare with .

q	Contains a short, inline quotation. Compare with <blockquote>, which marks a longer quotation set off from the surrounding text.
strong	Marks stronger emphasis than . Visually is usually rendered bold.
sub	Indicates a subscript character (printed below a character's normal baseline). Can be used recursively and/or intermixed with <sup>.
sup	Marks a superscript character (printed above a character's normal baseline). Can be used recursively and/or intermixed with <sub>.
br	Marks a forced line break.
line	Marks a single logical line of text. Often used in conjunction with <linenum>in documents with numbered lines. [Use only when line breaks must be preserved to capture meaning (e.g., poems, legal texts).]
linenum	Contains a line number, for example in legal text. [Use only when <line>is used, and only for lines numbered in print book.]
pagenum	Contains one page number as it appears from the print document, usually inserted at the point within the file immediately preceding the first item of content on a new page. [NB: Only valid when it includes an id attribute].
noteref	Marks one or more characters that reference a footnote or endnote <note>. Contrast with <annoref>. <noteref>and <note>are independently skippable. For the most current usage guidelines, please refer to http://www.daisy.org/z3986/
e. Tables	
table	Contains cells of tabular data arranged in rows and columns. A <table>may have a <caption>. It may have descriptions of the columns in <col>s or groupings of several <col>in <colgroup>. A simple <table>may be made up of just rows <tr>. A long table crossing several pages of the print book should have separate <pagenum>values for each of the pages containing that <table>indicated on the page where it starts. Note the logical order of optional <thead>, optional <tfoot>, then one or more of either <tbody>or just rows <tr>. This order accommodates simple or large, complex tables. The <thead>and <tfoot>information usually helps identify content of the <tbody>rows. For a multiple-page print <table>the <thead>and <tfoot>are repeated on each page, but not redundantly tagged.
td	Indicates a table cell containing data.
tr	Marks one row of a <table>containing <th>or <td>cells. For the most current usage guidelines, please refer to http://www.daisy.org/z3986/
f. Images	
imggroup	Provides a container for one or more and associated <caption>(s) and <prodnote>(s). A <prodnote>may contain a description of the image. The content model allows: 1) multiple if they share a caption, with the ids of each in the <caption imgref="id1 id2 ...">, 2) multiple <caption>if several captions refer to a single where each caption has the same <caption imgref="xxx">, 3) multiple <prodnote>if different versions are needed for different media (e.g., large print, braille, or print). If several <prodnote>refer to a single , each prodnote has the same <prodnote imgref="xxx">.

img	Points to the image to be rendered. An may stand alone or be grouped using <imggroup>. Note that providing extracted images is not a requirement of the NIMAS. If they are included, it is best to refer to them using within the <imggroup> container.
caption	Describes a <table> or . If used with <table> it must follow immediately after the <table> start tag. If used with <imggroup> it is not so constrained. For the most current usage guidelines, please refer to http://www.daisy.org/z3986/

1. The Optional Elements and Guidelines for Use

Publishers are encouraged to apply markup beyond the baseline (required) elements. The complete DTBook Element Set reflects the tags necessary to create the six types of Digital Talking Books and Braille output. Because of the present necessity to subdivide the creation of alternate format materials into distinct phases, the Panel determined that baseline elements would be provided by publishers, and optional elements would be added to the NIMAS-conformant files by third party conversion entities. In both circumstances the protocols for tagging digital files should conform to the most current ANSI/NISO Z39.86 specification. Content converters are directed to the most current DAISY Structure Guidelines (<http://www.daisy.org/z3986/>) for guidance on their use.

Since the publication of the original National File Format report from which the NIMAS technical specifications were derived, ANSI/NISO Z39.86-2002 was updated and is now ANSI/NISO Z39.86-2005. It may be best to avoid using the following optional elements which are no longer included in ANSI/NISO Z39.86-2005: style, notice, hr, and levelhd.

Also, the following new elements were introduced by ANSI/NISO Z39.86-2005 and should be considered optional elements for the NIMAS: bridgehead, byline, covertitle, dateline, epigraph, linegroup, and poem. Please refer to ANSI/NISO Z39.86-2005 for additional information regarding these elements. To access the ANSI/NISO Z39.86-2005 specification, go to <http://www.daisy.org/z3986/>.

2. Package File

A package file describes a publication. It identifies all other files in the publication and provides descriptive and access information about them. A publication must include a package file conforming to the NIMAS. The package file is based on the Open eBook Publication Structure 1.2 package file specification (For most recent detail please see <http://www.openebook.org/oebps/oebps1.2/download/ueb12-xhtml.htm#sec2>). A NIMAS package file must be an XML-valid OeB PS 1.2 package file instance and must meet the following additional standards:

The NIMAS Package File must include the following Dublin Core (dc:)metadata:

- dc:Title.
- dc:Creator (if applicable).
- dc:Publisher.
- dc:Date (Date of NIMAS-compliant file creation—yyyy-mm-dd).
- dc:Format (=“NIMAS 1.0”).
- dc:Identifier (a unique identifier for the NIMAS-compliant digital publication, e.g., print ISBN + “-NIMAS”—exact format to be determined).
- dc:Language (one instance, or multiple in the case of a foreign language textbook, etc.).
- dc:Rights (details to be determined).

dc:Source (ISBN of print version of textbook).

And the following x-metadata items:

nimas-SourceEdition (the edition of the print textbook).

nimas-SourceDate (date of publication of the print textbook).

The following metadata were proposed also as a means of facilitating recordkeeping, storage and file retrieval:

dc:Subject (Lang Arts, Soc Studies, etc.).

nimas-grade (specific grade level of the print textbook, *e.g.*; Grade 6).

nimas gradeRange (specific grade range of the print textbook, *e.g.*; Grades 4-5).

An additional suggestion references the use of:

dc:audience:educationLevel (for the grade and gradeRange identifiers, noting that Dublin Core recommends using educationLevel with an appropriate controlled vocabulary for context, and

recommends the U.S. Department of Education's Level of Education vocabulary online at

<http://www.ed.gov/admin/reference/index.jsp>. Using educationLevel obviates the need for a separate field for gradeRange since dc elements can repeat more than once. A book used in more than one grade would therefore have two elements, one with value "Grade 4" and another with value "Grade 5."

A final determination as to which of these specific metadata elements to use needs to be clarified in practice. The package manifest must list all provided files (text, images, etc.).

(Note: For purposes of continuity and to minimize errors in transformation and processing, the NIMAS-compliant digital text should be provided as a single document.)

3. Modular Extensions

The most current DAISY/NISO standard, formally the *ANSI/NISO Z39.86, Specifications for the Digital Talking Book* defines a comprehensive system for creating Digital Talking Books. A part of this standard is DTBook, an XML vocabulary that provides a core set of elements needed to produce most types of books. However, DTBook is not intended to be an exhaustive vocabulary for all types of books. Guidelines for the correct approach to extend the DAISY/NISO standard have been established. Mathematics, video support, testing, workbooks, music, dictionaries, chemistry, and searching are some of the extensions that have been discussed. Visit <http://www.daisy.org/z3986/> to learn more about modular extensions.

End

Appendix D to Part 300—Maintenance of Effort and Early Intervening Services

LEAs that seek to reduce their local maintenance of effort in accordance with §300.205(d) and use some of their Part B funds for early intervening services under §300.226 must do so with caution because the local maintenance of effort reduction provision and the authority to use Part B funds for early intervening services are interconnected. The decisions that an LEA makes about the amount of funds that it uses for one purpose affect the amount that it may use for the other. Below are examples that illustrate how §§300.205(d) and 300.226(a) affect one another.

Example 1: In this example, the amount that is 15 percent of the LEA's total grant (see §300.226(a)), which is the maximum amount that the LEA may use for early intervening services (EIS), is greater than the amount that may be used for local maintenance of effort (MOE) reduction (50 percent of the increase in the LEA's grant from the prior year's grant) (see §300.205(a)).

Prior Year's Allocation	\$900,000.
Current Year's Allocation	1,000,000.

Increase	100,000.
Maximum Available for MOE Reduction	50,000.
Maximum Available for EIS	150,000.

If the LEA chooses to set aside \$150,000 for EIS, it may not reduce its MOE (MOE maximum \$50,000 less \$150,000 for EIS means \$0 can be used for MOE).

If the LEA chooses to set aside \$100,000 for EIS, it may not reduce its MOE (MOE maximum \$50,000 less \$100,000 for EIS means \$0 can be used for MOE).

If the LEA chooses to set aside \$50,000 for EIS, it may not reduce its MOE (MOE maximum \$50,000 less \$50,000 for EIS means \$0 can be used for MOE).

If the LEA chooses to set aside \$30,000 for EIS, it may reduce its MOE by \$20,000 (MOE maximum \$50,000 less \$30,000 for EIS means \$20,000 can be used for MOE).

If the LEA chooses to set aside \$0 for EIS, it may reduce its MOE by \$50,000 (MOE maximum \$50,000 less \$0 for EIS means \$50,000 can be used for MOE).

Example 2: In this example, the amount that is 15 percent of the LEA's total grant (see §300.226(a)), which is the maximum amount that the LEA may use for EIS, is less than the amount that may be used for MOE reduction (50 percent of the increase in the LEA's grant from the prior year's grant) (see §300.205(a)).

Prior Year's Allocation	\$1,000,000.
Current Year's Allocation	2,000,000.
Increase	1,000,000.
Maximum Available for MOE Reduction	500,000.
Maximum Available for EIS	300,000.

If the LEA chooses to use no funds for MOE, it may set aside \$300,000 for EIS (EIS maximum \$300,000 less \$0 means \$300,000 for EIS).

If the LEA chooses to use \$100,000 for MOE, it may set aside \$200,000 for EIS (EIS maximum \$300,000 less \$100,000 means \$200,000 for EIS).

If the LEA chooses to use \$150,000 for MOE, it may set aside \$150,000 for EIS (EIS maximum \$300,000 less \$150,000 means \$150,000 for EIS).

If the LEA chooses to use \$300,000 for MOE, it may not set aside anything for EIS (EIS maximum \$300,000 less \$300,000 means \$0 for EIS).

If the LEA chooses to use \$500,000 for MOE, it may not set aside anything for EIS (EIS maximum \$300,000 less \$500,000 means \$0 for EIS).

Appendix E to Part 300—Local Educational Agency Maintenance of Effort Calculation Examples

The following tables provide examples of calculating LEA MOE. Figures are in \$10,000s. All references to a “fiscal year” in these tables refer to the fiscal year covering that school year, unless otherwise noted.

Tables 1 through 4 provide examples of how an LEA complies with the Subsequent Years rule. In Table 1, for example, an LEA spent \$1 million in Fiscal Year (FY) 2012-2013 on the education of children with disabilities. In the following year, the LEA was required to spend at least \$1 million but spent only \$900,000. In FY 2014-2015, therefore, the LEA was required to spend \$1 million, the amount it was required to spend in FY 2013-2014, not the \$900,000 it actually spent.

Table 1—Example of Level of Effort Required To Meet MOE Compliance Standard in Year Following a Year in Which LEA Failed To Meet MOE Compliance Standard

Fiscal year	Actual level of effort	Required level of effort	Notes
2012-2013	\$100	\$100	LEA met MOE.
2013-2014	90	100	LEA did not meet MOE.
2014-2015		100	Required level of effort is \$100 despite LEA's failure in 2013-2014.

Table 2 shows how to calculate the required amount of effort when there are consecutive fiscal years in which an LEA does not meet MOE.

Table 2—Example of Level of Effort Required To Meet MOE Compliance Standard in Year Following Consecutive Years in Which LEA Failed To Meet MOE Compliance Standard

Fiscal year	Actual level of effort	Required level of effort	Notes
2012-2013	\$100	\$100	LEA met MOE.
2013-2014	90	100	LEA did not meet MOE.
2014-2015	90	100	LEA did not meet MOE. Required level of effort is \$100 despite LEA's failure in 2013-2014.
2015-2016		100	Required level of effort is \$100 despite LEA's failure in 2013-2014 and 2014-2015.

Table 3 shows how to calculate the required level of effort in a fiscal year after the year in which an LEA spent more than the required amount on the education of children with disabilities. This LEA spent \$1.1 million in FY 2015-2016 though only \$1 million was required. The required level of effort in FY 2016-2017, therefore, is \$1.1 million.

Table 3—Example of Level of Effort Required To Meet MOE Compliance Standard in Year Following Year in Which LEA Met MOE Compliance Standard

Fiscal year	Actual level of effort	Required level of effort	Notes
2012-2013	\$100	\$100	LEA met MOE.

2013-2014	90	100	LEA did not meet MOE.
2014-2015	90	100	LEA did not meet MOE. Required level of effort is \$100 despite LEA's failure in 2013-2014.
2015-2016	110	100	LEA met MOE.
2016-2017		110	Required level of effort is \$110 because LEA expended \$110, and met MOE, in 2015-2016.

Table 4 shows the same calculation when, in an intervening fiscal year, 2016-2017, the LEA did not maintain effort.

Table 4—Example of Level of Effort Required To Meet MOE Compliance Standard in Year Following Year in Which LEA Did Not Meet MOE Compliance Standard

Fiscal year	Actual level of effort	Required level of effort	Notes
2012-2013	\$100	\$100	LEA met MOE.
2013-2014	90	100	LEA did not meet MOE.
2014-2015	90	100	LEA did not meet MOE. Required level of effort is \$100 despite LEA's failure in 2013-2014.
2015-2016	110	100	LEA met MOE.
2016-2017	100	110	LEA did not meet MOE. Required level of effort is \$110 because LEA expended \$110, and met MOE, in 2015-2016.
2017-2018		110	Required level of effort is \$110, despite LEA's failure in 2016-2017.

Table 5 provides an example of how an LEA may meet the compliance standard using alternate methods from year to year without using the exceptions or adjustment in §§300.204 and 300.205, and provides information on the following scenario. In FY 2015-2016, the LEA meets the compliance standard using all four methods. As a result, in order to demonstrate that it met the compliance standard using any one of the four methods in FY 2016-2017, the LEA must expend at least as much as it did in FY 2015-2016 using that same method. Because the LEA spent the same amount in FY 2016-2017 as it did in FY 2015-2016, calculated using a combination of State and local funds and a combination of State and local funds on a per capita basis, the LEA met the compliance standard using both of those methods in FY 2016-2017. However, the LEA did not meet the compliance standard in FY 2016-2017 using the other two methods—local funds only or local funds only on a per capita basis—because it did not spend at least the same amount in FY 2016-2017 as it did in FY 2015-2016 using the same methods.

Table 5—Example of How an LEA May Meet the Compliance Standard Using Alternate Methods From Year to Year

Fiscal year	Local funds only	Combination of State and local funds	Local funds only on a per capita basis	Combination of State and local funds on a per capita basis	Child count
2015-2016	*\$500	*\$950	*\$50	*\$95	10
2016-2017	400	*950	40	*95	10
2017-2018	*500	900	*50	90	10

*LEA met compliance standard using this method.

Table 6 provides an example of how an LEA may meet the compliance standard using alternate methods from year to year in years in which the LEA used the exceptions or adjustment in §§300.204 and 300.205, including using the per capita methods.

Table 6—Example of How an LEA May Meet the Compliance Standard Using Alternate Methods From Year to Year and Using Exceptions or Adjustment Under §§300.204 and 300.205

Fiscal year	Local funds only	Combination of State and local funds	Local funds only on a per capita basis	Combination of State and local funds on a per capita basis	Child count
2015-2016	\$500*	\$950*	\$50*	\$95*	10
2016-2017	400	950*	40	95*	10
2017-2018	450*	1,000*	45*	100*	10
	In 2017-2018, the LEA was required to spend at least the same amount in local funds only that it spent in the preceding fiscal year, subject to the Subsequent Years rule. Therefore, prior to taking any exceptions or adjustment in §§300.204 and 300.205, the LEA was required to spend at least \$500 in local funds only In 2017-2018, the LEA		In 2017-2018, the LEA was required to spend at least the same amount in local funds only on a per capita basis that it spent in the preceding fiscal year, subject to the Subsequent Years rule. Therefore, prior to taking any exceptions or adjustment in §§300.204 and 300.205, the LEA was required to spend at least \$50 in local funds only on a per capita basis		

	properly reduced its expenditures, per an exception in §300.204, by \$50, and therefore, was required to spend at least \$450 in local funds only (\$500) from 2015-2016 per Subsequent Years rule – \$50 allowable reduction per an exception under §300.204)		In 2017-2018, the LEA properly reduced its aggregate expenditures, per an exception in §300.204, by \$50 \$50/10 children with disabilities in the comparison year (2015-2016) = \$5 per capita allowable reduction per an exception under §300.204 \$50 local funds only on a per capita basis (from 2015-2016 per Subsequent Years rule) – \$5 allowable reduction per an exception under §300.204 = \$45 local funds only on a per capita basis to meet MOE		
2018-2019	405	1,000*	45*	111.11*	9
	In 2018-2019, the LEA was required to spend at least the same amount in local funds only that it spent in the preceding fiscal year, subject to the Subsequent Years rule. Therefore, prior to taking any exceptions or adjustment in §§300.204 and 300.205, the LEA was required to spend at least \$450 in local funds only In 2018-2019, the LEA properly reduced its expenditures, per an exception in §300.204 by \$10 and the adjustment in §300.205 by \$10 Therefore, the LEA was required to spend at least \$430 in local funds only. (\$450 from 2017-2018 – \$20 allowable	Because the LEA did not reduce its expenditures from the comparison year (2017-2018) using a combination of State and local funds, the LEA met MOE	In 2018-2019, the LEA was required to spend at least the same amount in local funds only on a per capita basis that it spent in the preceding fiscal year, subject to the Subsequent Years rule. Therefore, prior to taking any exceptions or adjustment in §§300.204 and 300.205, the LEA was required to spend at least \$45 in local funds only on a per capita basis In 2018-2019, the LEA properly reduced its aggregate expenditures, per an exception in §300.204 by \$10 and the adjustment in §300.205 by \$10 \$20/10 children with disabilities in the comparison year (2017-2018) = \$2 per capita	Because the LEA did not reduce its expenditures from the comparison year (2017-2018) using a combination of State and local funds on a per capita basis (\$1,000/9 = \$111.11 and \$111.11 > \$100), the LEA met MOE	

	reduction per an exception and the adjustment under §§300.204 and 300.205)		allowable reduction per an exception and the adjustment under §§300.204 and 300.205 \$45 local funds only on a per capita basis (from 2017-2018) – \$2 allowable reduction per an exception and the adjustment under §§300.204 and 300.205 = \$43 local funds only on a per capita basis required to meet MOE. Actual level of effort is \$405/9 (the current year child count)		
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*LEA met MOE using this method.

Note: When calculating any exception(s) and/or adjustment on a per capita basis for the purpose of determining the required level of effort, the LEA must use the child count from the comparison year, and not the child count of the year in which the LEA took the exception(s) and/or adjustment. When determining the actual level of effort on a per capita basis, the LEA must use the child count for the current year. For example, in 2018-2019, the LEA uses a child count of 9, not the child count of 10 in the comparison year, to determine the actual level of effort.

Tables 7 and 8 demonstrate how an LEA could meet the eligibility standard over a period of years using different methods from year to year. These tables assume that the LEA did not take any of the exceptions or adjustment in §§300.204 and 300.205. Numbers are in \$10,000s budgeted and spent for the education of children with disabilities.

Table 7—Example of How an LEA May Meet the Eligibility Standard in 2016-2017 Using Different Methods

Fiscal year	Local funds only	Combination of State and local funds	Local funds only on a per capita basis	Combination of State and local funds on a per capita basis	Child count	Notes
2014-2015	*\$500	*\$1,000	*\$50	*\$100	10	The LEA met the compliance standard using all 4 methods.*
2015-2016						Final information not available at time of budgeting for 2016-2017.
How much must the LEA	500	1,000	50	100		When the LEA submits a budget for 2016-2017, the most recent fiscal year

budget for 2016-2017 to meet the eligibility standard in 2016-2017?						for which the LEA has information is 2014-2015. It is not necessary for the LEA to consider information on expenditures for a fiscal year prior to 2014-2015 because the LEA maintained effort in 2014-2015. Therefore, the Subsequent Years rule in §300.203(c) is not applicable.
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*The LEA met the compliance standard using all 4 methods.

Table 8—Example of How an LEA May Meet the Eligibility Standard in 2017-2018 Using Different Methods and the Application of the Subsequent Years Rule

Fiscal year	Local funds only	Combination of State and local funds	Local funds only on a per capita basis	Combination of State and local funds on a per capita basis	Child count	Notes
2014-2015	*\$500	*\$1,000	*\$50	*\$100	10	
2015-2016	450	*1,000	45	*100	10	
2016-2017						Final information not available at time of budgeting for 2017-2018.
How much must the LEA budget for 2017-2018 to meet the eligibility standard in 2017-2018?	500	1,000	50	100		If the LEA seeks to use a combination of State and local funds, or a combination of State and local funds on a per capita basis, to meet the eligibility standard, the LEA does not consider information on expenditures for a fiscal year prior to 2015-2016 because the LEA maintained effort in 2015-2016 using those methods.
						However, if the LEA seeks to use local funds only, or local funds only on a per capita basis, to meet the eligibility standard, the LEA must use information on expenditures for a fiscal year prior to 2015-2016 because the LEA did not maintain effort in 2015-2016 using either of those methods, per the Subsequent Years rule. That is, the LEA must determine what it should have spent in 2015-2016 using either of those methods,

						and that is the amount that the LEA must budget in 2017-2018.
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*LEA met MOE using this method.

Table 9 provides an example of how an LEA may consider the exceptions and adjustment in §§300.204 and 300.205 when budgeting for the expenditures for the education of children with disabilities.

Table 9—Example of How an LEA May Meet the Eligibility Standard Using Exceptions and Adjustment in §§300.204 and 300.205, 2016-2017

Fiscal year	Local funds only	Combination of State and local funds	Local funds only on a per capita basis	Combination of State and local funds on a per capita basis	Child count	Notes
Actual 2014-2015 expenditures	*\$500	*\$1,000	*\$50	*\$100	10	The LEA met the compliance standard using all 4 methods.*
Exceptions and adjustment taken in 2015-2016	-50	-50	-5	-5		LEA uses the child count number from the comparison year (2014-2015).
Exceptions and adjustment the LEA reasonably expects to take in 2016-2017	-25	-25	-2.50	-2.50		LEA uses the child count number from the comparison year (2014-2015).
How much must the LEA budget to meet the eligibility standard in 2016-2017?	425	925	42.50	92.50		When the LEA submits a budget for 2016-2017, the most recent fiscal year for which the LEA has information is 2014-2015. However, if the LEA has information on exceptions and adjustment taken in 2015-2016, the LEA may use that information when budgeting for 2016-2017. The LEA may also use information that it has on any exceptions and adjustment it reasonably expects to take in 2016-2017 when budgeting for that year.

Table 10 provides examples both of how to calculate the amount by which an LEA failed to maintain its level of expenditures and of the amount of non-Federal funds that an SEA must return to the Department on account of that failure.

Table 10—Example of How To Calculate the Amount of an LEA's Failure to Meet the Compliance Standard in 2016-2017 and the Amount That an SEA Must Return to the Department

Fiscal year	Local funds only	Combination of State and local funds	Local funds only on a per capita basis	Combination of State and local funds on a per capita basis	Child B count	Amount of IDEA Part B subgrant
2015-2016	*\$500	*\$950	\$50*	\$95*		Not relevant.
2016-2017	400	750	40	75	10	\$50
Amount by which an LEA failed to maintain its level of expenditures in 2016-2017	100	200	100 (the amount of the failure equals the amount of the per capita shortfall (\$10) times the number of children with disabilities in 2016-2017 (10))	200 (the amount of the failure equals the amount of the per capita shortfall (\$20) times the number of children with disabilities in 2016-2017 (10))		

The SEA determines that the amount of the LEA's failure is \$100 using the calculation method that results in the lowest amount of a failure. The SEA's liability is the lesser of the four calculated shortfalls and the amount of the LEA's Part B subgrant in the fiscal year in which the LEA failed to meet the compliance standard. In this case, the SEA must return \$50 to the Department because the LEA's IDEA Part B subgrant was \$50, and that is the lower amount.

*LEA met MOE using this method.

[80 FR 23667, Apr. 28, 2015]

Appendix F to Part 300—Index for IDEA—Part B Regulations (34 CFR Part 300)

ACCESS TO	
• Access rights (Parents)	300.613.
• Assistive technology devices in child's home	300.105(b).
• Disciplinary records	300.229.
• Education records (Procedural safeguards notice)	300.504(c)(4).
• General curriculum (Ensure access to)	300.39(b)(3)(ii).
• Instructional materials (see §§300.172, 300.210).	
• List of employees who may have access to records	300.623(d).
• Parent's private insurance proceeds	300.154(e).

• Record of access (Confidentiality)	300.614.
ACCESSIBILITY STANDARDS (Regarding construction)	
• Americans with Disabilities Accessibility Standards for Buildings and Facilities	300.718(b)(1).
• Uniform Federal Accessibility Standards	300.718(b)(2).
ACCOMMODATIONS	
• In assessments	300.320(a)(6)(i).
• State level activities in support of	300.704(b)(4)(x).
ACT (Definition)	300.4.
ADD AND ADHD (See “Attention deficit disorder” and “Attention deficit hyperactivity disorder”)	
ADDITIONAL DISCLOSURE OF INFORMATION REQUIREMENT	300.512(b).
ADULT CORRECTIONAL FACILITIES (See “Correctional facilities”)	
ADULT PRISONS (Children with disabilities in)	
• Divided State agency responsibility	300.607.
• FAPE requirements:	
O Exception to FAPE	300.102(a)(2).
O Modifications of IEP or placement	300.324(d)(2).
O Requirements that do not apply	300.324(d)(1).
• Governor	300.149(d).
• Other public agency responsibility	300.149(d).
ADVERSELY AFFECTS EDUCATIONAL PERFORMANCE (See “Child with a disability,” §300.8(c)(1)(i), (c)(3), (c)(4)(i), (c)(5), (c)(6), (c)(8), (c)(9)(ii), (c)(11), (c)(12))	
ADVISORY BOARD	
(Secretary of the Interior)	300.714.
ADVISORY PANEL (See “State advisory panel”)	
AGE-APPROPRIATE CLASSROOM	300.116(e).
ALLOCATION(S)	
• By-pass for private school children (see §300.191(d)).	
• To LEAs (see §§300.705(b), 300.816)	
• To Outlying areas	300.701(a).
• To Secretary of the Interior	300.707.
• To States (see §§300.703, 300.807 through 300.810)	

ALLOWABLE COSTS	
(By SEA for State administration)	300.704(a).
ALTERATION OF FACILITIES	300.718(b).
ALTERNATE ASSESSMENTS	
• Aligned with alternate academic achievement standards	300.320(a)(2)(ii).
• Development and provision of in accordance with ESEA	300.704(b)(4)(x).
• Participation determined by IEP Team	300.320(a)(6)(ii).
ALTERNATIVE PLACEMENTS (Continuum)	300.115.
ALTERNATIVE STRATEGIES to meet transition objectives	300.324(c)(1).
AMENDMENTS	
• To LEA policies and procedures	300.220(b).
• To State policies and procedures:	
O Made by State	300.176(b).
O Required by the Secretary	300.176(c).
ANNUAL GOALS (IEPs)	
• FAPE for children suspended or expelled (see §§300.101(a), 300.530(d))	
• IEP content:	
O How progress will be measured	300.320(a)(3).
O Special education and related services	300.320(a)(4).
O Statement of measurable annual goals	300.320(a)(2)(i).
• Review and revision of IEP	300.324(b)(1).
• Review of existing evaluation data	300.305(a).
ANNUAL REPORT	
Of children served (see §§300.640 through 300.646)	
On education of Indian children	300.715.
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Excess Costs Calculation (see appendix A)	
Proportionate Share Calculation (see appendix B)	
National Instructional Materials Accessibility Standard (NIMAS) (see appendix C)	
Maintenance of Effort and Early Intervening Services (see appendix D)	
Index for IDEA—Part B Regulations (This appendix E)	
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• Initial admission to public school	300.518(b).
• Initial services	300.518(c).
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• For specific learning disability (see §300.309(a)(2)(ii), (b)(2))	
• Functional behavioral assessment (see §300.530(d)(1)(ii), (f)(1)(i))	
• In evaluation (see §§300.304(b), (c), 300.305(a)(1)(ii), (c), (d))	
• Of leisure function (in “Recreation”)	300.34(c)(11)(i).
ASSESSMENTS—STATE and DISTRICT-WIDE	
Alternate assessments (see §300.320 (a)(2)(ii), (a)(6)(ii))	
Performance indicators	300.157.
ASSISTANCE UNDER OTHER FEDERAL PROGRAMS	300.186.
ASSISTIVE TECHNOLOGY (AT)	
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• AT services	300.6.
• Consideration of special factors	300.324(a)(2)(v).
• Hearing aids	300.113.
• Requirement:	
O Ensure availability of	300.105(a).
O Use of AT in child's home	300.105(b).
• Surgically implanted medical devices (see §§300.5, 300.34(b), 300.113(b))	
ASTHMA	300.8(c)(9).
ATTENTION DEFICIT DISORDER (ADD)	300.8(c)(9).
ATTENTION DEFICIT HYPERACTIVITY DISORDER (ADHD)	300.8(c)(9).
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• Prohibition on use of funds for	300.517(b).
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• Of hearing officer (Discipline)	300.532(b).

• Of school personnel (Discipline)	300.530.
• Of Secretary to monitor and enforce	300.609.
AUTHORITY (P-Z)	
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• State complaint procedures	300.151(b).
• Waiver request (Signed by person with authority)	300.164(c)(1).
AUTISM	300.8(c)(1).
AVERAGE PER-PUPIL EXPENDITURE	
(Definition)	300.717(d).
BASE PAYMENTS (to LEAs) (See §300.705(b)(1), (b)(2))	
BASIS OF KNOWLEDGE: Protection for children not yet eligible	300.534(b).
BEHAVIORAL ASSESSMENT (See “Functional behavioral assessment”)	
BEHAVIORAL INTERVENTION(S)	300.530(f).
• Assist in developing	300.34(c)(10)(vi).
• Behavioral intervention plan	300.530(f).
• Consideration of by IEP Team	300.324(a)(2)(i).
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• Regular education teacher (Determination of)	300.324(a)(3).
• Suspension and expulsion rates	300.170(b).
BENCHMARKS OR SHORT TERM OBJECTIVES	300.320(a)(2)(ii).
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• BIA funded schools	300.28(c).
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• Use of funds	300.712(d).

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• Definition	300.11(b).
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• Applicability of this part to	300.2(b)(1)(ii).
• Definition	300.7.
• Exception: joint establishment of eligibility	300.223(b).
• In definition of “Elementary school”	300.13.
• In definition of “LEA”	300.28(b)(2).
• In definition of “Public agency”	300.33.
• In definition of “Secondary school”	300.36.
• State-level activities regarding charter schools	300.704(b)(4)(ix).
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CHIEF EXECUTIVE OFFICER (CEO)	
• Adult prisons (Assigned by Governor)	300.149(d).
• Methods of ensuring services (see §300.154(a), (c))	
CHILD COUNT	
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• Criteria for	300.644.
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• LEA records of private school children	300.132(c).
• Procedures for counting children served	300.645(a).

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• Children advancing from grade to grade	300.111(c)(1).
• Developmental delay	300.111(b).
• Highly mobile children	300.111(c)(2).
• Homeless children	300.111(a)(1)(i).
• Indian children aged 3 through 5	300.712(d)(1).
• Migrant children	300.111(c)(2).
• Private school children	300.131(b).
• Protections for children not determined eligible	300.534.
• Secretaries of the Interior and Health and Human Services (Memo of agreement)	300.708(i)(2).
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• Adversely affects educational performance (see §300.8(c)(1)(i), (c)(3), (c)(4)(i), (c)(5), (c)(6), (c)(8), (c)(9)(ii), (c)(11), (c)(12), (c)(13))	
• Children experiencing developmental delay(s)	300.8(b)(1).
• Children who need only a related service	300.8(a)(2).
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• Requirement	300.111(b).
• See “Developmental delay(s)”	
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• Child find	300.111(c)(1).
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COCHLEAR IMPLANT (See “Surgically implanted medical device”)	300.34(b).
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• Case-by-case determination	300.530(a).
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• Complaint investigations (SEA allocations for)	300.704(b)(3)(i).
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• Provisions for services under by-pass	300.191(d).
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• Waiver of nonsupplanting requirement	300.163(c)(2).
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• Child find requirements	300.111(a).
• Department procedures (If failure to comply)	300.604(c).
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• LEA and State agency compliance	300.222(a).
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O SEA (Monitor compliance)	300.147(a)
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• SEA responsibility if LEA does not comply	300.227(a).
• State funding mechanism (LRE)	300.114(b).
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• LEA eligibility	300.200.
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• Department use of personally identifiable information	300.627.
• Disciplinary information	300.229.
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CONFIDENTIALITY (F-Z)	
• Family Educational Rights and Privacy Act:	
O Children's rights	300.625.
O Disciplinary records	300.535(b)(2).
O In definition of "Education records"	300.611(b).
O Notice to parents	300.612(a)(3).
• Fees	300.617.
• Hearing procedures	300.621.
• List of types and location of information	300.616.
• Notice to parents	300.612(a).
• Opportunity for a hearing	300.619.
• Parental authority to inspect and review records	300.613(b).
• Record of access	300.614.
• Records on more than one child	300.615.
• Result of hearing	300.620.
• Safeguards	300.623.
• State eligibility requirement	300.123.
CONSENT (A-I)	
• Confidentiality (Records to non-agency officials)	300.622(a).
• Definition	300.9.
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• Initial evaluations	300.300(a).
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O Before administering a test or other evaluation to all children	300.300(d)(1)(ii).
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O When screening for instructional purposes	300.302.
• Private insurance (Accessing)	300.154(e)(1).
• Reasonable efforts to obtain consent:	
O For initial evaluation	300.300(a)(1)(iii).
O For initial evaluations for wards of the State	300.300(a)(2).

O For initial provision of services	300.300(b)(2).
O Reasonable efforts requirements	300.300(d)(5).
• Reevaluations	300.300(c)(2).
• Release of information from education records	300.622.
CONSIDERATION OF SPECIAL FACTORS (by IEP Team)	300.324(a)(2).
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• Accessibility standards	300.718(b).
• Exception to maintenance of effort (Termination of costly expenditures for construction)	300.204(d).
• Private schools (No funds may be used for)	300.144(e).
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• Child find (Nothing requires classifying children by disability)	300.111(d).
• Civil action (Exhaust administrative remedies under Part B before filing a civil action)	300.516(e).
• Early intervening services	300.226(c).
• Funding mandated by State law	300.166.
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[71 FR 46753, Aug. 14, 2006, as amended at 72 FR 61307, Oct. 30, 2007. Redesignated at 80 FR 23667, Apr. 28, 2015, as amended at 82 FR 31913, July 11, 2017]

Tab 3

New Mexico Administrative Code

Children with Disabilities

6.31.2 NMAC (7/31/2023)

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 31 SPECIAL EDUCATION
PART 2 CHILDREN WITH DISABILITIES

6.31.2.1 ISSUING AGENCY: Public Education Department, hereinafter the department.
[6.31.2.1 NMAC - Rp, 6.31.2.1 NMAC, 7/14/2020]

6.31.2.2 SCOPE: The requirements of these rules are binding on each New Mexico public agency that has direct or delegated authority to provide special education and related services, regardless of whether that public agency is receiving funds under the federal Individuals with Disabilities Education Improvement Act of 2004 and regardless of whether it provides special education and related services directly, by contract, or through other arrangements such as referrals by the public agency to private schools or facilities. Each public agency is responsible for ensuring that all rights and protections under these rules are afforded to children referred to or placed in private schools or facilities, including residential treatment centers, day treatment centers, hospitals, or mental health institutions by that public agency.
[6.31.2.2 NMAC - Rp, 6.31.2.2 NMAC, 7/14/2020]

6.31.2.3 STATUTORY AUTHORITY: This rule is being promulgated pursuant to Sections 22-2-1, 22-2-2, 22-13-5 and 22-13-6.1 NMSA 1978.
[6.31.2.3 NMAC - Rp, 6.31.2.3 NMAC, 7/14/2020]

6.31.2.4 DURATION: Permanent.
[6.31.2.4 NMAC - Rp, 6.31.2.4 NMAC, 7/14/2020]

6.31.2.5 EFFECTIVE DATE: July 1, 2020, unless a later date is specified at the end of a section.
[6.31.2.5 NMAC - Rp, 6.31.2.5 NMAC, 7/14/2020]

6.31.2.6 OBJECTIVE: The following rule is promulgated to assist New Mexico public agencies in appropriately identifying and providing educational services for children with disabilities. The purposes of this rule are to ensure that all children with disabilities have available a free appropriate public education which includes special education and related services to meet their unique needs; to ensure that the rights of children with disabilities and their parents are protected; to assist public agencies to provide for the education of all children with disabilities; and to evaluate and ensure the effectiveness of efforts to educate those children.
[6.31.2.6 NMAC - Rp, 6.31.2.6 NMAC, 7/14/2020; A, 7/31/2023]

6.31.2.7 DEFINITIONS:

A. Terms defined by federal laws and rules. All terms defined in the following federal laws and rules and any other federally defined terms that are incorporated there by reference are incorporated here for purposes of these rules.

(1) The federal Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 USC Sec. 1400 et seq.

(2) The IDEA rules, 34 CFR Parts 300 and 301.

(3) Pursuant to the paperwork reduction provisions of IDEA, 20 USC Sec. 1408, all definitions, with the exception of those found in Subsection B of 6.31.2.7 NMAC, contained in IDEA Parts 300 and 301 at 34 CFR Secs. 300.1 through 300.45, will be adopted by reference.

B. The following terms shall have the following meanings for purposes of these rules.

(1) “CFR” means the code of federal regulations, including future amendments.

(2) “Child with a disability” means a child who meets all requirements of 34 CFR Sec.

300.8 and:

(a) is age three through 21 or who will turn age three at any time during the school

year;

(b) has been evaluated in accordance with 34 CFR Secs. 300.304 through 300.311

and any additional requirements of these or other department rules and standards and as having one or more of the disabilities specified in 34 CFR Sec. 300.8 including an intellectual disability; a hearing impairment, including deafness, speech or language impairment; a visual impairment, including blindness; emotional disturbance; orthopedic impairment; autism; traumatic brain injury; other health impairment; a specific learning disability; deaf-

blindness; or being developmentally delayed as defined in Paragraph (4) of Subsection B of 6.31.2.7 NMAC; and who has not received a high school diploma; and

(c) at the discretion of each local educational agency and subject to the additional requirements of Paragraph (2) of Subsection F of 6.31.2.10 NMAC, may include a child age three through nine who is evaluated as being developmentally delayed and who, because of that condition, needs special education and related services.

(3) **“Developmentally delayed”** means a child age three through nine or who will turn age three at any time during the school year with documented delays in development which are at least two standard deviations below the mean on a standardized test instrument or thirty percent below chronological age and who in the professional judgment of the IEP team and one or more qualified evaluators needs special education and related services in at least one of the following areas: communication development, cognitive development, physical development, social or emotional development, or adaptive development. Use of the developmentally delayed option by individual local educational agencies is subject to the further requirements of Paragraph (2) of Subsection F of 6.31.2.10 NMAC. Local educational agencies shall use appropriate diagnostic instruments and procedures to ensure that the child qualifies as a child with a developmental delay in accordance with the definition in this paragraph.

(4) **“Dual discrepancy”** means the child does not achieve adequately for the child's age or to meet grade-level standards established in New Mexico standards for excellence, 6.29.1 through 6.29.17 NMAC; and

(a) does not make sufficient progress to meet age or grade-level standards; or

(b) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, grade level standards, or intellectual development.

(5) **“Dyslexia”** means a condition of neurological origin that is characterized by difficulty with accurate or fluent word recognition and by poor spelling and decoding abilities, which characteristics typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction and may result in problems in reading comprehension and reduced reading experience that may impede the growth of vocabulary and background knowledge.

(6) The **“educational jurisdiction”** of a public agency includes the geographic area, age range, and all facilities including residential treatment centers, day treatment centers, hospitals, mental health institutions, juvenile justice facilities, state supported schools, or programs within which the public agency is obligated under state laws, rules, or by enforceable agreements including joint powers agreements (JPAs) or memoranda of understanding (MOUs) to provide educational services for children with disabilities. In situations such as transitions, transfers, and special placements, the educational jurisdiction of two or more public agencies may overlap and result in a shared obligation to ensure that a particular child receives all the services to which the child is entitled.

(7) A **“free appropriate public education”** or **“FAPE”** means special education and related services which meet all requirements of 34 CFR Sec. 300.17 and which, pursuant to 34 CFR Sec. 300.17(b), meet all applicable department rules and standards, including but not limited to these rules; the New Mexico standards for excellence; and department rules governing school personnel preparation, licensure, and performance; student rights and responsibilities; and student transportation.

(8) The **“general education curriculum,”** pursuant to 34 CFR Sec. 300.320, means the same curriculum that a public agency offers for nondisabled children. For New Mexico public agencies whose non-special education programs are subject to department rules, the general curriculum includes the content standards, benchmarks, and all other applicable requirements of the New Mexico standards for excellence and any other department rules defining curricular requirements.

(9) **“LEA”** means a local educational agency as defined in 34 CFR Sec. 300.28.

(10) **“Individualized education program”** or **“IEP”** means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with 34 CFR Secs. 300.320 through 300.324.

(11) **“IEP team”** means, pursuant to 34 CFR Sec. 300.321, the public agency shall ensure that the IEP team for each child with a disability includes:

(a) the parents of the child;

(b) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(c) not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;

(d) a representative of the public agency who:
(i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
(ii) is knowledgeable about the general education curriculum; and
(iii) is knowledgeable about the availability of resources of the public agency;

(e) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in Subparagraphs (b) through (e) of Paragraph (11) of Subsection B of 6.31.2.7 NMAC;

(f) at the discretion of the parent or public agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(g) whenever appropriate, the child with a disability.

(12) **“Individuals with Disabilities Education Improvement Act” or “IDEA”** means the federal Individuals with Disabilities Education Improvement Act of 2004, 20 USC Secs. 1401 et seq., including future amendments.

(13) **“NMAC”** means the New Mexico administrative code, including future amendments.

(14) **“NMSA 1978”** means the 1978 compilation of New Mexico statutes annotated, including future amendments.

(15) **“Parent”** includes, in addition to the persons specified in 34 CFR Sec. 300.30, a child with a disability who has reached age 18 and for whom there is no court-appointed general guardian, limited guardian, or other court-appointed person who has legal custody or has otherwise been authorized by a court to make educational decisions on the child’s behalf as provided in Subsection K of 6.31.2.13 NMAC. Pursuant to 34 CFR Sec. 300.519 and department policy, a foster parent of a child with a disability may act as a parent under Part B of IDEA if: (i) the foster parent or the state children, youth, and families department (CYFD) provides appropriate documentation to establish that CYFD has legal custody and has designated the person in question as the child’s foster parent; and (ii) the foster parent is willing to make the educational decisions required of parents under IDEA, and has no interest that would conflict with the interests of the child. A foster parent who does not qualify under the requirements but who meets all requirements for a surrogate parent under 34 CFR Sec. 300.519 may be appointed as a surrogate if the public agency responsible for making the appointment deems such action appropriate.

(16) **“Public agency”** means the state educational agency, local educational agencies (LEAs), educational services agencies (ESAs), or nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA and any other political subdivisions of the state that are responsible for providing education to children with disabilities pursuant to 34 CFR Sec. 300.33.

(17) **“Puente para los niños fund”** means a risk pool fund in New Mexico to support high cost students with disabilities identified by LEAs pursuant to 34 CFR Sec. 300.704(c)(3)(i).

(18) **“SAT”** means the student assistance team, which is a school-based group of people whose purpose is to provide additional educational support to students who are experiencing difficulties that are preventing them from benefiting from general education.

(19) **“SED”** means the special education division of the department.

(20) **“Special education”** means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education.

(a) As authorized by 34 CFR Secs. 300.8(a)(2)(ii) and 300.39(a)(2)(i), “special education” in New Mexico may include speech-language pathology services.

(b) Speech-language pathology services shall meet the following standards to be considered special education:

(i) the service is provided to a child who has received appropriate tier I universal screening under Subsection D of 6.29.1.9 NMAC as it may be amended from time to time, before being properly evaluated under 34 CFR Secs. 300.301 through 300.306 and Subsection E of 6.31.2.10 NMAC;

(ii) the IEP team that makes the eligibility determination finds that the child has a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child’s educational performance;

(iii) the speech language pathology service consists of specially designed instruction that is provided to enable the child to have access to the general curriculum and meet the educational standards of the public agency that apply to all children; and

(iv) the service is provided at no cost to the parents under a properly developed IEP that meets the requirements of Subsection B of 6.31.2.11 NMAC.

(c) If all of the standards are met, the service shall be considered as special education rather than a related service.

(d) Student/staff caseloads for special education shall meet the requirements of Paragraphs (1) and (2) of Subsection H of 6.29.1.9 NMAC.

(21) A **“state-supported educational program”** means a publicly-funded program that:

(a) provides special education and related services to children with disabilities who come within the program’s educational jurisdiction;

(b) is operated by, or under contractual arrangements for, a state school, state educational institution, other state institution, state hospital, or state agency; and

(c) is primarily funded through direct legislative appropriations or other direct state support to a public agency other than a local school district.

(22) **“USC”** means the United States code, including future amendments.

C. Definitions related to dispute resolution. The following terms are listed in the order that reflects a continuum of dispute resolution options and shall have the following meanings for the purposes of these rules.

(1) **“Facilitated IEP meeting”** or **“FIEP meeting”** or **“FIEP”** means an IEP meeting that utilizes an independent, state-approved, state-funded, trained facilitator as an IEP facilitator to assist the IEP team to communicate openly and effectively, in order to resolve conflicts related to a student's IEP.

(2) **“Mediation”** means a meeting or series of meetings that utilizes an independent, state-approved, state-funded, trained mediator to assist parties to reconcile disputed matters related to a student's IEP or other educational, non-IEP-related issues.

D. The definitions in Subsection D of 6.31.2.7 NMAC apply only to Subsection I of 6.31.2.13 NMAC.

(1) **“Expedited hearing”** means a hearing that is available on request by a parent or a public agency under 34 CFR Sec. 300.532(c) and is subject to the requirements of 34 CFR Sec. 300.532(c).

(2) **“Transmit”** means to mail, send by electronic mail (email) or telecopier (facsimile machine), or hand deliver a written notice or other document and obtain written proof of delivery by one of the following means:

(a) an email system's confirmation of a completed transmission to an email address that is shown to be valid for the individual to whom the transmission was sent;

(b) a telecopier machine's confirmation of a completed transmission to a number which is shown to be valid for the individual to whom the transmission was sent;

(c) a receipt from a commercial or government carrier showing to whom the article was delivered and the date of delivery;

(d) a written receipt signed by the secretary of education or designee showing to whom the article was hand-delivered and the date delivered; or

(e) a final decision to any party not represented by counsel for a due process hearing by the U.S. postal service, certified mail, return receipt requested, showing to whom the articles was delivered and the date of delivery.

E. The definitions in Subsection E of 6.31.2.7 NMAC apply only to Subsection B of 6.31.2.9 NMAC and Subsection L of 6.31.2.11 NMAC:

(1) **“Qualified student”** means, pursuant to Paragraph (1) of Subsection A of Section 22-13-8 NMSA 1978, a public school student who:

(a) has not graduated from high school;

(b) is regularly enrolled in one-half or more of the minimum course requirements approved by the department for public school students; and

(c) in terms of age:

(i) is at least five years of age prior to 12:01 a.m. on September 1 of the school year or will be five years of age prior to 12:01 a.m. on September 1 of the school year if the student is enrolled in a public school extended-year kindergarten program that begins prior to the start of the regular school year;

(ii) is at least three years of age at any time during the school year and is receiving special education pursuant to rules of the department; or

(iii) has not reached the student's 22nd birthday on the first day of the school year and is receiving special education in accordance with federal law.

(2) **"School-age person"** means, pursuant to Paragraph (2) of Subsection A of Section 22-13-8 NMSA 1978, a person who is not a qualified student but who meets the federal requirements for special education and who:

- (a) will be at least three years old at any time during the school year;
- (b) is not more than 21 years of age; and
- (c) has not received a high school diploma or its equivalent.

[6.31.2.7 NMAC - Rp, 6.31.2.7 NMAC, 7/14/2020; A, 7/31/2023]

6.31.2.8 RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION (FAPE):

A. All children with disabilities aged three through 21 or who will turn three at any time during the school year who reside in New Mexico, including children with disabilities who have been suspended or expelled from school, have the right to a FAPE that is made available by one or more public agencies in compliance with all applicable requirements of 34 CFR Secs. 300.101 and 300.120 and these or other department rules and standards. Children with disabilities who are enrolled in private schools have the rights provided by 34 CFR Secs. 300.129-300.148 and Subsection L of 6.31.2.11 NMAC.

B. Only children who meet the criteria in these rules may be included in calculating special education program units for state funding and counted as eligible children for federal flow-through funds under Part B of IDEA.

[6.31.2.8 NMAC - Rp, 6.31.2.8 NMAC, 7/14/2020]

6.31.2.9 PUBLIC AGENCY RESPONSIBILITIES:

A. Compliance with applicable laws and rules. Each New Mexico public agency, within the scope of its authority, shall develop and implement appropriate policies, procedures, programs, and services to ensure that all children with disabilities who reside within the public agency's educational jurisdiction, including children who are enrolled in private schools or facilities such as residential treatment centers, day treatment centers, hospitals, mental health institutions, or are schooled at home, are identified and evaluated and have access to a free appropriate public education (FAPE) in compliance with all applicable requirements of state and federal laws and rules. This obligation applies to all New Mexico public agencies that are responsible under laws, rules, rules, or written agreements for providing educational services for children with disabilities, regardless of whether that public agency receives funds under IDEA and regardless of whether it provides special education and related services directly, by contract, by referrals to private schools or facilities including residential treatment centers, day treatment centers, hospitals, mental health institutions, or through other arrangements.

B. Public agency funding and staffing.

(1) Each public agency that provides special education or related services to children with disabilities shall allocate sufficient funds, staff, facilities and equipment to ensure that the requirements of IDEA and all department rules and standards that apply to programs for children with disabilities are met.

(2) The public agency with primary responsibility for ensuring that FAPE is available to a child with a disability on the date set by the department for a child count or other report shall include that child in its report for that date. Public agencies with shared or successive responsibilities for serving a particular child during a single fiscal year are required to negotiate equitable arrangements through joint powers agreements or memorandums of understanding or interstate agreements for sharing the funding and other resources available for that child. Such agreements shall include provisions with regard to resolving disputes between the parties to the agreement.

(3) Placement of students in private residential treatment centers, or other out of home treatment or habilitation programs, by the IEP team, or by a due process decision. In no event shall a child with an IEP be allowed to remain in an out of home treatment or habilitation program for more than 10 days without receiving special education and related services. The school district in which the qualified student or school-age person lives, whether in-state or out-of-state, is responsible for the educational, nonmedical care and room and board costs of that placement. The sending school shall be responsible for the provision of special education and related services.

(a) Agreements between the resident school district of the qualified student or school-age person and a private residential treatment center shall be on the form posted on the department's website or on a form otherwise approved by the department and shall be reviewed and approved by the secretary of public education.

(b) Agreements shall provide for:

- (i) student evaluations and eligibility;

(ii) an educational program for each qualified student or school-age person that meets state standards for such programs, except that teachers employed by private schools are not required to be highly qualified;

(iii) the provision of special education and related services in conformance with an IEP that meets the requirements of federal and state law and applicable rules;

(iv) adequate classroom or other physical space that allows the school district to provide an appropriate education;

(v) a detailed description of the costs for the placement; and

(vi) an acknowledgement of the authority of the local school board and the department to conduct on-site evaluations of programs and student progress to ensure that state standards are met.

(4) Educational agencies may seek payment or reimbursement from noneducational agencies or public or private insurance for services or devices covered by those agencies that are necessary to ensure FAPE to children with disabilities. Claims for payment or reimbursement shall be subject to the procedures and limitations established in 34 CFR Secs. 300.154(b) and 300.154(d) through (g), Section 22-13-8 NMSA 1978 and any laws, rules, executive orders, contractual arrangements, or other requirements governing the noneducational payor's obligations.

(5) Risk pool fund. (Puente para los niños fund.)

(a) Local educational agency high cost fund.

(i) In compliance with 34 CFR Sec. 300.704(c), the department may maintain a risk pool fund to support high cost children with disabilities identified by LEAs.

(ii) Funds distributed under this program will be on a reimbursable basis.

(b) Application for funds. LEAs desiring to be reimbursed for the cost of children with disabilities with high needs shall file an application in accordance with the department's puente para los niños fund as described on the department's website.

(6) Children with disabilities who are covered by public benefits or insurance. Pursuant to 34 CFR Sec. 300.154(d), a public agency may use the medicaid or other public benefits or insurance in which a child participates to provide or pay for services required under IDEA-Part B rules, as permitted under the public insurance program, except as provided in Subparagraph (a) of Paragraph (6) of Section B of 6.31.2.9 NMAC.

(a) With regard to services required to provide FAPE to an eligible child, the public agency:

(i) may not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of IDEA;

(ii) may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to IDEA-Part B rules, but pursuant to 34 CFR Sec. 300.154(f)(2), may pay the cost that the parent otherwise would be required to pay; and

(iii) may not use a child's benefits under a public benefits or insurance program if that use would: (A) decrease available lifetime coverage or any other insured benefit; (B) result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school; (C) increase premiums or lead to the discontinuation of benefits or insurance; or (D) risk loss of eligibility for home- and community-based waivers, based on aggregate health-related expenditures.

(b) Prior to obtaining the parental consent described in Subparagraph (c) of this paragraph, and prior to accessing the parent's or child's public benefits, the public agency shall provide written notice to the child's parents, consistent with 34 CFR Sec. 300.503(c). The written notice shall be provided annually thereafter.

(i) The notice shall include a statement of the parental consent provisions in 34 CFR Secs. 99.30 and 300.622 and shall specify: (A) the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to the child; (B) the purpose of the disclosure (e.g., billing for services under 34 CFR Part 300; (C) the public agency to which the disclosure may be made (e.g., New Mexico medicaid program); and (D) that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under 34 CFR Part 300.

(ii) The notice shall further include: (A) a statement of the "no cost" provisions in 34 CFR Secs. 300.154(d)(2)(i) through 300.154(d)(2)(iii); (B) a statement that the parents have the right under 34 CFR Parts 99 and 300 to withdraw their consent to disclosure of their child's personally identifiable information to the New Mexico medicaid program at any time; and (C) a statement that the withdrawal of consent or

refusal to provide consent under 34 CFR Parts 99 and 300 to disclose personally identifiable information to the New Mexico medicaid program does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

(c) Prior to accessing a child's or parent's public benefits or insurance for the first time, and after providing notice to the child's parents consistent with Subparagraph (b) of this paragraph, the public agency shall obtain written parental consent as defined by 34 CFR Sec. 300.9. The written consent, consistent with the requirements of 34 CFR Sec. 300.154(d)(2)(iv), shall:

(i) meet the requirements of 34 CFR Secs. 99.30 and 300.622 and shall specify: (A) the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to the child; (B) the purpose of the disclosure (e.g., billing for services under 34 CFR Part 300; (C) the public agency to which the disclosure may be made (e.g., New Mexico medicaid program); and

(ii) shall specify that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under 34 CFR Part 300.

(d) The public agency is not required to obtain a new parental consent if the following conditions are present:

(i) there is no change in any of the following: (A) the type of services to be provided to the child; (B) the amount of services to be provided to the child; or (C) the cost of the services to be charged to the public benefits or insurance program; and

(ii) the public agency has on file a parental consent meeting the requirements of 34 CFR Secs. 300.9, 99.30, and 300.622.

(e) Once the public agency obtains the one-time consent consistent with 34 CFR Sec. 300.154(d)(2)(iv), the public agency is not required to obtain parental consent before it accesses the child's or parent's public benefits or insurance in the future, regardless of whether there is a change in the type or amount of services to be provided to the child or a change in the cost of the services to be charged to the public benefits or insurance program.

(f) If a child transfers to a new public agency, the new public agency shall provide the written notification described in 34 CFR Sec. 300.154(d)(2)(v) and Subparagraph (b) of this paragraph, and shall then obtain parental consent meeting the requirements of 34 CFR Sec. 300.154(d)(2)(iv).

(7) Children with disabilities who are covered by private insurance benefits. Pursuant to 34 CFR Sec. 300.154(e), an educational agency shall obtain a parent's informed written consent for each proposed use of private insurance benefits and shall inform parents that their refusal to permit the use of their private insurance will not relieve the educational agency of its responsibility to ensure that all required services are provided at no cost to the parents. The public agency may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to IDEA-Part B rules.

(8) Pursuant to 34 CFR Sec. 300.154(f):

(a) if a public agency is unable to obtain parental consent to use the parent's private insurance, or public benefits or insurance when the parent would incur a cost for a specified service required under IDEA-Part B rules, to ensure FAPE the public agency may use its Part B funds to pay for the service; and

(b) to avoid financial cost to parents who otherwise would consent to use private insurance, or public benefits or insurance if the parent would incur a cost, the public agency may use its Part B funds to pay the cost the parents otherwise would have to pay to use the parent's insurance (e.g., the deductible or co-pay amounts).

(9) Staff training and qualifications.

(a) Each public agency is responsible for ensuring that personnel serving children with disabilities are qualified under state licensure requirements and are adequately prepared for their assigned responsibilities, pursuant to 34 CFR Sec. 300.156. Paraprofessionals and assistants who are appropriately trained and supervised in accordance with applicable department licensure rules or written department policy may be used to assist in the provision of special education and related services to children with disabilities under Part B of IDEA.

(b) Each public agency and charter school shall train their school administrators and teachers who teach reading to implement appropriate research-based reading interventions prior to referring the student for a special education evaluation and shall train their special education teachers to provide appropriate specialized reading instruction for students with dyslexia who have been identified as eligible for special education services.

C. IDEA applications and assurances. Each New Mexico public agency that desires to receive IDEA flow-through funds shall file an annual application with the department in the form prescribed by the department. Each application shall:

- (1) provide all information requested by the department;
- (2) demonstrate to the department's satisfaction that the public agency is in compliance with all applicable requirements of 34 CFR Secs. 300.200 through 300.230 and these or other department rules and standards;
- (3) include an agreement that the public agency upon request will provide any further information the department requires to determine the public agency's initial or continued compliance with all applicable requirements;
- (4) include assurances satisfactory to the department that the public agency does and will continue to operate its programs in compliance with all applicable federal and state programmatic, fiscal and procedural requirements including the development of joint powers agreements, memoranda of understanding or other interagency agreements to address shared or successive responsibilities to meet the educational needs of a particular child during a single fiscal year; and
- (5) pursuant to Subsection C of Section 22-8-11 NMSA 1978, the department shall not approve and certify an operating budget of any school district or state-chartered charter school that fails to demonstrate that parental involvement in the process was solicited.

D. Early intervening services set aside funds. Fifteen percent set aside.

- (1) Pursuant to 34 CFR Secs. 300.208(a)(2) and 300.226, LEAs may use up to fifteen percent of the amount the LEA receives under Part B of IDEA to implement early intervening services for children with or without disabilities in kindergarten through grade 12 with particular emphasis on children in kindergarten through grade three.
- (2) Prior to the implementation or use of these set aside funds, the LEA shall have on record with the department an approved plan for use of these funds as described by 34 CFR Sec. 300.226(b) and how such activities will be coordinated with regional education cooperatives as described in 34 CFR Sec. 300.226(e), if applicable.
- (3) The LEA plan for use of set aside funds shall be submitted as an addendum to its annual application for Part B funding. If the LEA determines to implement a set aside plan after the initial application, a request for implementation of a set aside plan shall be submitted for approval 60 days before the implementation of the plan.
- (4) Each LEA that develops and maintains coordinated, early intervening services shall report annually to the department as provided in 34 CFR Sec. 300.226(d).

E. Significant disproportionality.

- (1) Pursuant to CFR 34 Sec. 300.646, LEAs shall provide for the collection and examination of data to determine if significant disproportionality, based on race and ethnicity, is occurring with respect to:
 - (a) the identification of children as children with disabilities including the identification of children as children with disabilities in accordance with a particular impairment as defined by 34 CFR Sec. 300.8;
 - (b) the placement in particular educational settings of these children; and
 - (c) the incidence, duration, and type of disciplinary actions, including suspensions and expulsions.
- (2) Each public agency shall reserve the fifteen percent early intervening funds if they are identified for having data that is significantly disproportionate in any one of the following categories:
 - (a) suspension of students with disabilities;
 - (b) over identification of students with disabilities;
 - (c) over identification of students in accordance with a particular impairment as defined by 34 CFR Sec. 300.8; and
 - (d) placement of students with disabilities in a particular setting.
- (3) 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 (1) of this subsection, the LEA shall:
 - (a) 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 IDEA; and
 - (b) require any LEA identified under Paragraph (1) of this subsection to reserve the maximum amount of funds under 34 CFR Sec. 300.226 to provide comprehensive coordinated early intervening

services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly over-identified under Paragraph (1) of this subsection; and

(c) require the LEA to publicly report on the revision of policies, practices, and procedures described under Subparagraph (b) of this paragraph.

F. Annual determinations. Each local educational agency and other public agencies when applicable shall be assigned an annual determination. The determinations shall be consistent with those provided in 34 CFR Sec. 300.603(b) based on the local educational agency's performance on the targets established in the department's state performance plan.

(1) For determinations of needs intervention and needs substantial intervention, the local educational agency may request an opportunity for an informal hearing. The request for hearing shall be made in writing to the secretary of public education within 30 days of the date of the determination.

(2) The hearing will afford the local educational agency the opportunity to demonstrate why the department should not make the determination of needs intervention or needs substantial intervention. The hearing shall be conducted by the secretary or the secretary's designee. Formal rules of evidence shall not apply to the hearing.

G. Notification of public agency in case of ineligibility. Pursuant to 34 CFR Sec. 300.221, if the department determines that a public agency is not eligible under Part B of IDEA, the department shall notify the affected public agency of that determination and provide the public agency with reasonable notice and an opportunity for a hearing under 34 CFR Sec. 76.401(d).

H. Withholding of funds for noncompliance. Pursuant to 34 CFR Sec. 300.222, if the department, after reasonable notice and an opportunity for a hearing under 34 CFR Sec. 76.401(d), finds that a public agency that has previously been determined to be eligible is failing to comply with any requirement described in 34 CFR Secs. 300.201 through 300.213 and 300.608, the department shall reduce or may not provide any further Part B payments to the public agency until the department is satisfied that the public agency is in compliance with that requirement.

I. Reallocation of funds. If a new LEA is created, the base payment portion of IDEA subgrant of the LEA that would have served children with disabilities now being served by the new LEA will be adjusted pursuant to 34 CFR Sec. 300.705(b)(2). IDEA funds to new charter schools that are LEAs will be allocated pursuant to 34 CFR Secs. 76.785 through 76.799 and 300.705(b). Pursuant to 34 CFR Sec. 300.705(c), if the department determines that a public agency is adequately providing FAPE to all children with disabilities residing in the area served by that public agency with state and local funds, the department may reallocate any portion of the funds under this part that are not needed by that public agency to provide FAPE to other LEAs in the state that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs or the department may also retain those funds for use at the state level as provided by 34 CFR Sec. 300.705(c).

J. Prohibition on mandatory medication. Each LEA and other public agencies serving students with disabilities are prohibited from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the federal Controlled Substances Act (21 USC 812(c)) for a student as a condition of attending school, receiving an evaluation under 34 CFR Secs. 300.300 through 300.311, or receiving services under Part B of IDEA. This prohibition shall be construed as provided in 34 CFR Sec. 300.174(b). [6.31.2.9 NMAC - Rp, 6.31.2.9 NMAC, 7/14/2020]

6.31.2.10 IDENTIFICATION, EVALUATIONS, AND ELIGIBILITY DETERMINATIONS:

A. Child find. Each public agency shall adopt and implement policies and procedures to ensure that all children with disabilities who reside within the public agency's educational jurisdiction, including children with disabilities attending private schools or facilities such as residential treatment centers, day treatment centers, hospitals, mental health institutions, detention and correctional facilities, children who are schooled at home, highly mobile children, children who reside on Indian reservations, and children who are advancing from grade to grade, regardless of the severity of their disability, and who are in need of special education and related services, are located, evaluated, and identified in compliance with all applicable requirements of 34 CFR Secs. 300.111, 300.131, 300.301 through 300.306, and these or other department rules and standards. For preschool children, child find screenings shall serve as interventions under Subsection B of 6.31.2.10 NMAC.

B. The public agency shall follow the multi-layered system of supports as a proactive system for early intervention for students who demonstrate a need for educational support for learning as set forth in Subsection D of 6.29.1.9 NMAC. This support shall be provided regardless of whether a student has been referred for a full and individual evaluation for special education and related services or has been identified as eligible for special education.

(1) A student's participation in the multi-layered system of supports does not prevent the full and individual evaluation for special education of the student.

(2) A student may receive a full and individual evaluation for special education and related services at any time before, during, or after the implementation of the multi-layered system of supports. A parent may request a full and individual evaluation for special education and related services at any time.

(3) If the student is suspected of having a disability and demonstrates an obvious need for special education or related services by reason thereof, then the student shall be referred for a full and individual evaluation for special education without undue delay.

C. Evaluations and reevaluations.

(1) Initial evaluations.

(a) Each public agency shall conduct a full and individual initial evaluation, at no cost to the parent, and in compliance with requirements of 34 CFR Secs. 300.305 and 300.306 and other department rules and standards before the initial provision of special education and related services to a child with a disability.

(b) Each public agency shall follow evaluation procedures in compliance with applicable requirements of 34 CFR Secs. 300.301, 300.304, and 300.305, and other department rules and standards to determine:

- (i) if the child is a child with a disability under 34 CFR Sec. 300.8; and
- (ii) the educational needs of the child.

(2) Reevaluations.

(a) Each public agency shall ensure that a reevaluation of each child is conducted at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary.

(b) Reevaluations shall be conducted more often than every three years if:

(i) the public agency determines the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(ii) the child's parent or teacher requests a reevaluation.

(c) Reevaluations may not occur more than once a year, unless the parent and public agency agree otherwise.

(d) Each public agency shall follow evaluation procedures in compliance with applicable requirements of 34 CFR Secs. 300.304 and 300.305 and other department rules or standards.

(3) Evaluation before termination of eligibility.

(a) Pursuant to 34 CFR Sec. 300.305(e)(1), each public agency shall evaluate a child with a disability in accordance with 34 CFR Secs. 300.304 through 300.311 before determining that the child is no longer a child with a disability.

(b) Pursuant to 34 CFR Sec. 300.305(e)(2), evaluation before termination of eligibility is not required when a child graduates from secondary school with a regular high school diploma or the termination is due to the child exceeding the age of eligibility for special education upon turning 22 years old. In these circumstances, the public agency must provide the child with a summary of the child's academic achievement and functional performance, including recommendations on how to assist the child in meeting postsecondary goals as required by 34 CFR Sec. 300.305(e)(3).

D. Evaluation requests and referrals.

(1) Either a parent of a child or a public agency may initiate a request for a full and individual evaluation to determine if the child is a child with a disability or may request a reevaluation to determine if the child's educational needs have changed.

(2) The request for initial evaluation or reevaluation by a parent may be made in writing or orally to any licensed personnel of the school in which the student attends. A parental request for a full and individual evaluation shall be forwarded or communicated to the school or district special education director or a school or district administrator as soon as possible after it is received.

(3) The public agency shall respond to a parental request for initial evaluation or reevaluation to the public agency no later than 15 school days from the receipt of the request. If a parent request for an evaluation or reevaluation is received within 15 school days before the start of a scheduled period in which student attendance is not required for at least 14 calendar days, the public agency shall respond no later than 30 calendar days from the date of the request.

(4) The public agency shall respond to a parental request for initial evaluation or reevaluation by:

(a) providing prior written notice consistent with 34 CFR Sec. 300.503 that proposes to conduct the requested evaluation or reevaluation, providing a copy of the procedural safeguards notice to parents required by 34 CFR Sec. 300.504, and seeking parental consent for the evaluation; or

(b) providing prior written notice consistent with 34 CFR Sec. 300.503 of the public agency's refusal to conduct the evaluation or reevaluation and a copy of the procedural safeguards notice required by 34 CFR Sec. 300.504.

(5) When the public agency makes a referral for an evaluation without a parental request, the public agency shall provide prior written notice consistent with 34 CFR Sec. 300.503 that proposes to conduct the requested evaluation or reevaluation, providing a copy of the procedural safeguards notice to parents required by 34 CFR Sec. 300.504, and seek parental consent for the evaluation no later than 15 school days from the referral. If a referral for an evaluation or reevaluation is made within 15 school days before the start of a scheduled period in which student attendance is not required for at least 14 calendar days, the public agency shall request parental consent no later than 30 calendar days from the date of the referral.

(6) The parent may use the IDEA procedural safeguards of mediation, state complaint, or due process hearing as set forth in 6.31.12.13 NMAC to challenge the public agency's response to a request for evaluation or reevaluation, or the failure to respond to a parent's request for evaluation or reevaluation.

E. Consent for evaluation.

(1) The public agency shall provide notice to the parents of a child with a disability that describes any evaluation procedures the public agency proposes to conduct in compliance with 34 CFR Sec. 300.503.

(2) The public agency shall obtain written informed parental consent for the initial evaluation or reevaluation in accordance with the requirements of 34 CFR Sec. 300.300 and subsection of F of 6.31.2.13 NMAC prior to conducting any evaluation.

(3) The public agency may pursue an evaluation or reevaluation by using the consent override procedures described in 34 CFR Sec. 300.300(a)(3).

(4) The public agency shall document its attempts to obtain parental consent.

F. Timelines for evaluations.

(1) Each public agency shall maintain a record of the receipt, processing, and disposition of any request or referral for an initial evaluation or reevaluation. All appropriate evaluation data, including complete Student Assistance Team file documentation, multi-layered system of supports data, and summary reports from all individuals evaluating the child shall be reported in writing for presentation to the eligibility determination team.

(2) The initial evaluation and written evaluation report shall be completed within 60 calendar days of receiving parental consent for evaluation.

(3) Exception to the 60-day time frame. The requirements of this subsection do not apply if:

(a) the parent of a child repeatedly fails or refuses to produce the child for the evaluation; or

(b) the child enrolls in a school of another public agency after the 60-day time frame in this subsection has begun and prior to a determination by the child's previous public agency as to whether the child is a child with a disability under 34 CFR Sec. 300.8. This applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.

G. Procedures for conducting evaluations and reevaluations.

(1) Each public agency shall ensure that the child is evaluated in all areas related to the suspected disability and shall ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, regardless of whether they are commonly linked to the disability category in which the child has been classified. The public agency shall follow the procedures for evaluations and reevaluations established by 34 CFR Secs. 300.304 and 300.305, department rules, and standards for evaluations and reevaluations set forth in the New Mexico technical evaluation and assessment manual (New Mexico T.E.A.M.).

(2) The initial evaluation, if appropriate, and any reevaluations shall begin with a review of existing information by a group that includes the parents, the other members of a child's IEP team and other qualified professionals, as appropriate, to determine what further evaluations and information are needed to address the question in 34 CFR Sec. 300.305(a)(2). Pursuant to 34 CFR Sec. 300.305(b), the group may conduct its review without a meeting.

(3) In conducting an evaluation, the public agency shall:

(a) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the child's family that may assist:

(i) in determining if the child is a child with a disability; and
(ii) the content of the child's IEP, including information related to assisting the child to be involved and progress in the general education curriculum or for a preschool child to participate in appropriate activities.

(b) 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

(c) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(4) The public agency shall provide the parents with a written report of the evaluation or reevaluation at least two calendar days before the eligibility determination team meeting.

H. Procedural requirements for the assessment and evaluation of culturally and linguistically diverse children.

(1) Each public agency shall ensure that tests and other evaluation materials used to assess children are selected, provided, and administered so as not to be discriminatory on a racial or cultural basis and are provided and administered in the child's native language or other mode of communication, such as American sign language, 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 select, provide, or administer pursuant to 34 CFR Sec. 300.304(c)(1).

(2) Each public agency shall consider information about a child's language proficiency in determining how to conduct the evaluation of the child to prevent misidentification. A child may not be determined to be a child with a disability if the determinant factor for that eligibility determination is limited English proficiency. Comparing academic achievement results with grade level peers in the public agency with similar cultural and linguistic backgrounds should guide this determination process and ensure that the child is exhibiting the characteristics of a disability and not merely language difference in accordance with 34 CFR Sec. 300.306(b)(1).

(3) Public agencies in New Mexico shall devote particular attention to the foregoing requirements in light of the state's cultural and linguistic diversity. Persons assessing culturally or linguistically diverse children shall consult appropriate professional standards to ensure that their evaluations are not discriminatory and shall include appropriate references to such standards and concerns in their written reports.

(4) Policies for public agency selection of assessment instruments include:

(a) assessment and evaluation materials and methods that are tailored to assess specific areas of educational need; and

(b) assessments that are selected to ensure that results accurately reflect the child's aptitude or achievement level.

I. Independent education evaluations.

(1) The parent of a child who disagrees with an evaluation or reevaluation of their child obtained by the public agency has the right to obtain an independent educational evaluation of the child at public expense pursuant to 34 CFR Sec. 300.502 and this subsection. A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

(2) If a parent requests an independent educational evaluation at public expense, the public agency shall, without unnecessary delay:

(a) file a due process complaint to show its evaluation is appropriate; or

(b) ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing the evaluation obtained by the parent did not meet agency criteria.

(3) If a parent requests an independent educational evaluation at public expense, the public agency may ask for the parent's reasons why he or she objects to the public agency evaluation, but may not require that parent to provide an explanation. The public agency may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public agency evaluation.

(4) If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense and the evaluation meets agency criteria, the public agency must consider the evaluation in any decision made with respect to the provision of FAPE to the child and the evaluation may be presented as evidence at a due process hearing regarding the child.

J. Eligibility determinations.

(1) Upon completing the full and individual evaluation and written evaluation report, the public agency shall convene a meeting of the eligibility determination team, which shall include the parent and a group of qualified professionals, within 15 school days to determine whether the child is a child with a disability and requires special education and related services, as defined in 34 CFR Sec. 300.8 and Paragraph (2) of Subsection B of 6.31.2.7 NMAC. If an individual evaluation is completed during a scheduled period in which student attendance is not required for at least 14 calendar days, the public agency shall convene both a meeting of the eligibility determination team and (if the child is determined eligible) a meeting of the IEP team to develop or revise the child's IEP no later than 15 school days from the first day when student attendance resumes. The determination shall be made in compliance with all applicable requirements of 34 CFR Sec. 300.306 and these or other department rules and standards and, for a child suspected of having a specific learning disability, in compliance with the additional procedures of 34 CFR Secs. 300.307 through 300.311, and these or other department rules, policies, and standards. The eligibility determination team meeting includes a review of the full and individual evaluation to determine:

(a) the educational needs of the child;
(b) if the child is a child with a disability; and
(c) if the child requires special education and related services as a result of the disability.

(2) Optional use of developmentally delayed classification for children aged three through nine.

(a) The developmentally delayed classification may be used at the option of individual local educational agencies but may only be used for children who are not eligible for special education under any other disability category.

(b) Children who are eligible as children with developmental delay shall be reevaluated during the school year in which they turn nine and will no longer be eligible in this category when they become 10. A student who is not eligible for special education and related services under any other eligibility category at age 10 will no longer be eligible for special education and related services.

K. Criteria for identifying children with suspected specific learning disabilities.

(1) Each public agency shall use the multi-layered system of supports for students suspected of having a specific learning disability, consistent with the department rules, policies, and standards for children who are being referred for evaluation due to a suspected disability under the specific learning disability category in compliance with 34 CFR Sec. 300.307.

(a) The public agency shall, subject to Subparagraph (d) of this Paragraph, require that the group established under 34 CFR Secs. 300.306(a)(1) and 300.308 for the purpose of determining eligibility of students suspected of having a specific learning disability, consider data obtained during implementation of the multi-layered system of supports in making an eligibility determination.

(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 shall consider, as part of the evaluation required in 34 CFR Secs. 300.304 through 300.306:

(i) 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
(ii) 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 documentation of the determination of eligibility, as required by 34 CFR Sec. 300.306(c)(1), shall meet the requirements of 34 CFR Sec. 300.311, including:

(i) a statement of the basis for making the determination and an assurance that the determination has been made in accordance with 34 CFR Sec. 300.306(c)(1);

(ii) a statement whether the child does not achieve adequately for the child's age or to meet state-approved grade-level standards consistent with 34 CFR Sec. 300.309(a)(1);

(iii) a statement whether the child does not make sufficient progress to meet age or grade-level standards consistent with 34 CFR Sec. 300.309(a)(2)(i), or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, grade level standards, or intellectual development consistent with 34 CFR Sec. 300.309(a)(2)(ii); and

(iv) if the child has participated in a process that assesses the child's response to scientific, research-based intervention: a statement of the instructional strategies used and the student-

centered data collected; documentation that the child's parents were notified about 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; strategies for increasing the child's rate of learning; and the parents' right to request an evaluation.

(d) A parent may request a full and individual evaluation for eligibility for special education at any time during the public agency's implementation of the multi-layered system of supports. If the public agency agrees with the parent that the child may be a child who is eligible for special education services, the public agency shall evaluate the child. If the public agency declines the parent's request for an evaluation, the public agency shall issue prior written notice in accordance with 34 CFR Sec. 300.503 and Subsection D of this section. The parent may challenge the decision to decline a request for evaluation by requesting mediation or a due process hearing or by submitting a state complaint.

(2) Preschool children suspected of having a specific learning disability shall be evaluated in accordance with Subparagraph (f) of Paragraph (5) of Subsection A of 6.31.2.11 NMAC and 34 CFR Secs. 300.300 through 300.305.

(3) Public agencies shall use the dual discrepancy model to identify children with specific learning disabilities in kindergarten through grade 12 as described in the New Mexico technical evaluation and assessment manual. When using this model, public agencies shall utilize information provided, in part, by the student assistance team, as well as data and information obtained through the use of the multi-layered system of supports.

[6.31.2.10 NMAC - Rp, 6.31.2.10 NMAC, 7/14/2020]

6.31.2.11 EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES:

A. Preschool programs for children aged three through five.

(1) Each public agency shall ensure that a free appropriate public education is available for each preschool child with a disability within its educational jurisdiction no later than the child's third birthday and that an individualized education program (IEP) under Part B or an individual family services plan (IFSP) under Part C of IDEA is in effect by that date in compliance with 34 CFR Secs. 300.101, 300.124, and 300.323(b).

(2) Eligibility to enroll in Part B preschool program. If a child turns three at any time during the school year and is determined to be eligible under Part B, the child may enroll in a Part B preschool program when the child turns three if the parent so chooses, whether or not the child has previously been receiving Part C services.

(3) To ensure effective transitioning from IDEA-Part C programs to IDEA-Part B programs, each public agency shall conduct a full and individual initial comprehensive evaluation, at no cost to the parent, and in compliance with requirements of 34 CFR Secs. 300.300, 300.301, 300.302, 300.304, and 300.305, and other department rules and standards before the initial provision of Part B special education and related services to a child with a disability.

(a) The initial comprehensive evaluation process shall be conducted in all areas of suspected disability.

(b) The Part B eligibility determination team shall review current assessments and shall determine the additional data and assessments needed for the comprehensive evaluation. Current assessments are defined as assessments, other than medical assessments, conducted no more than six months prior to the date of the meeting of the Part B eligibility determination team.

(c) The Part B eligibility determination team shall consider educationally relevant medical assessments as part of the review of existing evaluation data. The determination of eligibility may not be made solely on the basis of medical assessments. If the team considers medical assessments conducted more than six months prior to the date of the meeting, the team shall document the appropriateness of considering such medical assessments.

(4) Each public agency shall develop and implement appropriate policies and procedures to ensure a smooth and effective transition from Part C to Part B programs for preschool children with disabilities within the public agency's educational jurisdiction, in compliance with 34 CFR Sec. 300.124. Each LEA and other public agencies as appropriate shall make reasonable efforts to establish productive working relations with local Part C programs and when given reasonable notice shall participate in the transition planning conferences arranged by local Part C providers.

(5) In particular:

(a) Each LEA shall survey Part C programs within its educational jurisdiction in its child find efforts to identify children who will be eligible to enter the LEA's Part B preschool program in future

years.

(b) Each LEA shall promote parent and family involvement in transition planning with Part C programs, community programs, and related services providers at least six months before the child is eligible to enter the LEA's Part B preschool program.

(c) Each LEA shall establish and implement procedures to support successful transitions including parent training, professional development for special educators and general educators, and student and parent self-advocacy training and education.

(d) Each LEA shall assist parents in becoming their child's advocates as the child makes the transition through systems.

(e) Each LEA shall participate in transition planning conferences arranged by the designated Part C lead agency no less than 90 days prior to the anticipated transition or the child's third birthday, whichever occurs first, to facilitate informed choices for all families.

(f) Each LEA shall designate a team including parents and qualified professionals to review existing evaluation data for each child entering the LEA's preschool program in compliance with 34 CFR Sec. 300.305, and based on that review to identify what additional data, if any, are needed to determine the child's eligibility for Part B services or develop an appropriate program in a manner that is consistent with Paragraph (3) of Subsection A of this section. The notice of procedural safeguards shall be given to the parents as provided in Paragraph (3) of Subsection D of 6.31.2.13 NMAC.

(g) Development of IFSP, IEP or IFSP-IEP.

(i) The IFSP, IEP, or IFSP-IEP will be developed by a team constituted in compliance with 34 CFR Sec. 300.321, including parents. For children transitioning from Part C programs to Part B programs, the team shall also include one or more early intervention providers who are knowledgeable about the child. "Early intervention providers" are defined as Part C service coordinators or other representatives of the Part C system.

(ii) For each child transitioning from a Part C program to a Part B preschool program, the LEA shall initiate a meeting to develop the eligible child's IFSP, IEP, or IFSP-IEP, in accordance with 34 CFR Sec. 300.124. The IFSP, IEP or IFSP shall be developed and implemented no later than the child's third birthday, consistent with 34 CFR Sec. 300.101(b).

(h) In compliance with 34 CFR Sec. 300.101(b)(2), if a child's birthday occurs during the summer, the child's IEP team shall determine the date when services under the IEP or IFSP will begin. Each public agency shall engage in appropriate planning with the Part C lead agency so that the eligible child will be prepared to receive Part B special education and related services when the IEP team determines that the services under the IEP or IFSP will begin.

(i) Each public agency shall develop policies and procedures to ensure a successful transition from Part B preschool for children with disabilities who are eligible for continued services in pre-kindergarten and kindergarten.

B. Individualized education programs (IEPs).

(1) Except as provided in 34 CFR Secs. 300.130 through 300.144 for children enrolled by their parents in private schools, each public agency shall: (1) develop, implement, review, and revise an IEP in compliance with all applicable requirements of 34 CFR Secs. 300.320 through 300.328, and these or other department rules and standards for each child with a disability within its educational jurisdiction; and (2) shall ensure that an IEP is developed, implemented, reviewed, and revised in compliance with all applicable requirements of 34 CFR Sec. 300.320 through 300.328, and these or other department rules and standards for each child with a disability who is placed in or referred to a private school or facility by the public agency.

(2) Each IEP or amendment shall be developed at a properly convened IEP meeting for which the public agency has provided the parent and, as appropriate, the child, with proper advance notice pursuant to 34 CFR Sec. 300.322 and Paragraph (1) of Subsection D of 6.31.2.13 NMAC and at which the parent and, as appropriate, the child have been afforded the opportunity to participate as members of the IEP team pursuant to 34 CFR Secs. 300.321, 300.322, and 300.501(b) and (c) and Subsection C of 6.31.2.13 NMAC.

(3) Except as provided in 34 CFR Sec. 300.324(a)(4), each IEP shall include the signature and position of each member of the IEP team and other participants in the IEP meeting to document their attendance. Written notice of actions proposed or refused by the public agency shall also be provided in compliance with 34 CFR Sec. 300.503 and Paragraph (2) of Subsection D of 6.31.2.13 NMAC and shall be provided at the close of the IEP meeting. Informed written parental consent shall also be obtained for actions for which consent is required under 34 CFR Sec. 300.300 and Subsection F of 6.31.2.13 NMAC. An amended IEP does not take the

place of the annual IEP conducted pursuant to CFR Sec. 300.324(a)(4), which requires that members of a child's IEP team shall be informed of any changes made to the IEP without a meeting.

(4) Agreement to modify IEP meeting requirement.

(a) In making changes to a child's IEP after the annual IEP team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP team meeting for the purposes of making those changes and instead may develop a written document to amend or modify the child's current IEP.

(b) If changes are made to the child's IEP in accordance with Subparagraph (a) of this paragraph, the public agency shall ensure that the child's IEP team is informed of those changes.

(5) For students with autism spectrum disorders (ASD) eligible for special education services under 34 CFR Sec. 300.8(c)(1), the strategies described in Subparagraphs (a) through (k) of this paragraph shall be considered by the IEP team in developing the IEP for the student. The IEP team shall document consideration of the strategies. The strategies shall be based on peer-reviewed, research-based educational programming practices to the extent practicable and, when needed to provide FAPE, addressed in the IEP:

(a) extended educational programming, including extended day or extended school year services that consider the duration of programs or settings based on assessment of behavior, social skills, communication, academics, and self-help skills;

(b) daily schedules reflecting minimal unstructured time and reflecting active engagement in learning activities, including lunch, snack, and recess periods that provide flexibility within routines, adapt to individual skill levels, and assist with schedule changes, such as changes involving substitute teachers and other in-school extracurricular activities;

(c) in-home and community-based training or viable alternatives to such training that assist the student with acquisition of social or behavioral skills, including strategies that facilitate maintenance and generalization of such skills from home to school, school to home, home to community, and school to community;

(d) positive behavior support strategies based on relevant information including:
(i) antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions; and

(ii) a behavioral intervention plan focusing on positive behavior supports and developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral programming across home, school, and community-based settings;

(e) futures planning for integrated living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments;

(f) parent or family training and support, provided by qualified personnel with experience in ASD, that:

(i) provides a family with skills necessary for a child to succeed in the home or community setting;

(ii) includes information regarding resources such as parent support groups, workshops, videos, conferences, and materials designed to increase parent knowledge of specific teaching and management techniques related to the child's curriculum; and

(iii) facilitates parental carryover of in-home training, including, for example, strategies for behavior management and developing structured home environments or communication training so that parents are active participants in promoting the continuity of interventions across all settings;

(g) suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social or behavioral progress based on the child's developmental and learning level and that encourages work towards individual independence as determined by:

(i) adaptive behavior evaluation results;

(ii) behavioral accommodation needs across settings; and

(iii) transitions within the school day;

(h) communication interventions, including communication modes and functions that enhance effective communication across settings such as augmentative, incidental, and naturalistic teaching;

(i) social skills supports and strategies based on social skills assessment or curriculum and provided across settings, including trained peer facilitators, video modeling, social stories, and role playing;

(j) professional educator and staff support, including training provided to personnel who work with the student to assure the correct implementation of techniques and strategies described in the IEP; and

(k) teaching strategies based on peer reviewed, research-based practices for students with ASD, including those associated with discrete-trial training, visual supports, applied behavior analysis, structured learning, augmentative communication, and social skills training.

(6) Each local education agency in the state shall provide the parents of a student who is diagnosed as hearing impaired, deaf, blind, visually impaired, or deafblind with information about the educational programs offered by the New Mexico school for the deaf (NMSD) or New Mexico school for the blind and visually impaired (NMSBVI) prior to and at each IEP. NMSD and NMSBVI shall provide LEAs relevant information as described in this paragraph. At the parent's or public agency's request, NMSD, NMSBVI, or both shall be invited to the IEP meeting so that the full continuum of services is represented at the IEP meeting pursuant to 34 CFR Secs. 300.115 and 300.321(a)(6).

C. Least restrictive environment.

(1) Except as provided in 34 CFR Sec. 300.324(d) and Subsection K of 6.31.2.11 NMAC for children with disabilities who are convicted as adults under state law and incarcerated in adult prisons, all educational placements and services for children with disabilities shall be provided in the least restrictive environment that is appropriate to each child's needs in compliance with 34 CFR Secs. 300.114 through 300.120.

(2) In determining the least restrictive environment for each child's needs, public agencies and their IEP teams shall ensure that the following requirements are met.

(a) The requirements of 34 CFR Sec. 300.114(a)(2) for each public agency to ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled, and that special classes, separate schooling, or other removal of children with disabilities from the general educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(b) The required continuum of alternative placements as specified in 34 CFR Sec. 300.115.

(c) The requirement of 34 CFR Sec. 300.116(c) that each child with a disability be educated in the school that he or she would attend if nondisabled unless the child's IEP requires some other arrangement.

(d) The requirement of 34 CFR Sec. 300.116(e) that a child with a disability not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

(e) The requirements of 34 CFR Sec. 300.320(a)(4) that the IEP for each child with a disability include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities with nondisabled children.

(f) The requirement of 34 CFR Sec. 300.324(a)(3) that the regular education teacher of a child with a disability, as a member of the IEP team, shall assist in determining the supplementary aids and services, program modifications or supports for school personnel that will be provided for the child in compliance with 34 CFR Sec. 300.320(a)(4).

(g) The requirement of 34 CFR Sec. 300.320(a)(5) that the IEP include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and the activities described in 34 CFR Secs. 300.320(a)(4) and 300.117.

(h) The requirements of 34 CFR Sec. 300.503 that a public agency give the parents written notice a reasonable time before the public agency proposes or refuses to initiate or change the educational placement of the child or the provision of FAPE to the child and that the notice include a description of any other options considered and the reasons why those options were rejected.

(i) The requirement of 34 CFR Sec. 300.120 that the department carry out activities to ensure that Sec. 300.114 is implemented by each public agency and that, if there is evidence that a public agency makes placements that are inconsistent with Sec. 300.114, the department shall review the public agency's justification for its actions and assist in planning and implementing any necessary corrective action.

D. Performance goals and indicators.

(1) Pursuant to the requirements of 34 CFR Sec. 300.157(a), the content standards and benchmarks from the department's standards for excellence (Chapter 29 of Title 6 of NMAC) for all children attending public schools and state-supported educational programs in New Mexico shall provide the basic performance goals and indicators for children with disabilities in the general education curriculum.

(2) The IEP academic goals shall align with the New Mexico content standards and benchmarks, including the expanded performance standards for students with significant cognitive disabilities, however, functional goals do not have to align with the standards and benchmarks.

(a) Beginning in the 2012-2013 school year, IEP academic goals in English language arts and mathematics for students in kindergarten through grade three shall align with the English Language Arts Common Core Standards (6.29.13 NMAC) and the Mathematics Common Core Standards (6.29.14 NMAC).

(b) Beginning in the 2013-2014 school year, IEP academic goals in English language arts and mathematics for students in grades four through 12 shall align with the English Language Arts Common Core Standards (6.29.13 NMAC) and the Mathematics Common Core Standards (6.29.14 NMAC).

(3) Unless waivers or modifications covering individual public agencies' programs have been allowed by the department or the secretary of education, the general education curriculum and the content standards and benchmarks shall only be adapted to the extent necessary to meet the needs of individual children with disabilities as determined by IEP teams in individual cases.

E. Participation in statewide and district-wide assessments. Each local educational agency and other public agencies when applicable shall include all children with disabilities in all statewide and district-wide assessment programs. Each public agency shall collect and report performance results in compliance with the requirements of 34 CFR Secs. 300.157 and 300.160(f) and Sec. 1111(h) of the Elementary and Secondary Education Act, and any additional requirements established by the department. Students with disabilities may participate:

(1) in the appropriate general assessment in the same manner as their nondisabled peers; this may include the use of adaptations that are deemed appropriate for all students by the department; or

(2) in the appropriate general assessment with appropriate accommodations in administration if necessary; public agencies shall use the current guidance from the department about accommodations as specified in the student's IEP; or

(3) in alternate assessments for the small number of students for whom alternate assessments are appropriate under the department's established participation criteria; the IEP team shall agree and document that the student is eligible for participation in an alternate assessment based on alternate achievement standards according to 34 CFR Sec. 300.320(a)(6).

F. Behavioral management and discipline.

(1) Behavioral planning in the IEP. Pursuant to 34 CFR Sec. 324(a)(2)(i), the IEP team for a child with a disability whose behavior impedes his or her learning or that of others shall consider, if appropriate, strategies to address that behavior, including the development of behavioral goals and objectives and the use of positive behavioral interventions, strategies, and supports to be used in pursuit of those goals and objectives. Public agencies are strongly encouraged to conduct functional behavioral assessments (FBAs) and integrate behavioral intervention plans (BIPs) into the IEPs for students who exhibit problem behaviors well before the behaviors result in proposed disciplinary actions for which FBAs and BIPs are required under the federal rules.

(2) Suspensions, expulsions, and disciplinary changes of placement. Suspensions, expulsions and other disciplinary changes of placement for children with disabilities shall be carried out in compliance with all applicable requirements of 34 CFR Secs. 300.530 through 300.536, and these or other department rules and standards, including particularly 6.11.2.11 NMAC, governing interim disciplinary placements and long-term suspensions or expulsions of students with disabilities.

(3) FAPE for children removed from current placement for more than 10 school days in a school year. FAPE shall be provided in compliance with all applicable requirements of 34 CFR Sec. 300.530(d) and these or other department rules and standards for all children with disabilities who have been removed from their current educational placements for disciplinary reasons for more than 10 school days during a school year, as defined in 34 CFR Sec. 300.536.

(4) LEAs shall keep an accurate accounting of suspension and expulsion rates for children with disabilities as compared to children without disabilities to ensure that children with disabilities are not being expelled or suspended at a significantly higher rate than children without disabilities.

G. Graduation planning and post-secondary transitions.

(1) The IEP for each child with a disability in grades 8 through 12 is developed, implemented, and monitored in compliance with all applicable requirements of the department's standards for

excellence, (Chapter 29 of Title 6 of the NMAC), and these or other department rules and standards. The graduation plan shall be integrated into the transition planning and services provided in compliance with 34 CFR Secs. 300.320(b) and 300.324(c).

(a) Graduation plans shall include the course of study, projected date of graduation, and if the child is not on target for the graduation plan, the strategies and responsibilities of the public agency, child, and family shall be identified in the IEP.

(b) Graduation options for children with disabilities at Paragraph (13) of Subsection J of 6.29.1.9 NMAC shall align with state standards with benchmarks when appropriate. In accordance with Paragraph (13) of Subsection J of 6.29.1.9 NMAC, alternative programs of study to obtain a diploma may be utilized when appropriate.

(c) An alternative degree that does not fully align with the state's academic standards, such as a certificate high school equivalency credential, or diploma obtained through the modified and ability programs of study, does not end a child's right to FAPE pursuant to 34 CFR Sec. 300.102(a)(3)(ii).

(d) Prior to the student's receipt of a conditional certificate of transition or graduation with a diploma obtained through the modified or ability programs of study, a public agency must issue a prior written notice indicating that the student continues to be entitled to receive FAPE until either student meets the requirements to obtain a diploma through the standard program of study or until the end of the academic year in which the student becomes 22 years of age.

(2) Appropriate post-secondary transition planning for children with disabilities is essential. Public agencies shall integrate transition planning into the IEP process pursuant to 34 CFR Secs. 300.320(b) and 300.324(c) and shall establish and implement appropriate policies, procedures, programs and services to promote successful post-secondary transitions for children with disabilities. Transition services for students 14-21 include the following.

(a) Transition services are a coordinated set of activities for a child with a disability that emphasizes special education and related services designed to meet unique needs and prepare them for future education, employment, and independent living.

(b) Transition services are designed to be within a results oriented process that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

(c) Transition services shall be based on the individual child's needs, taking into account the child's strengths, preferences, and interests and includes:

- (i) instruction;
- (ii) related services;
- (iii) community experiences;
- (iv) the development of employment and other post-school adult living

objectives; and

(v) when appropriate, acquisition of daily living skills and the provision of a functional vocational evaluation.

(d) Transition services for children with disabilities may be considered special education, if provided as individually designed instruction, aligned with the state standards with benchmarks, or related service, if required to assist a child with a disability to benefit from special education as provided in 34 CFR Sec. 300.43.

(3) State rules require the development of measurable post-school goals beginning not later than the first IEP to be in effect when the child turns 14, or younger, if determined appropriate by the IEP team, and updated annually thereafter. Pursuant to 34 CFR Sec. 300.320(b), the IEP shall include:

(a) appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills;

(b) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(c) a statement that the child has been informed of the child's rights under this title, if any, that will transfer to the child on reaching the age of majority.

(4) Measurable post school goals refer to goals the child seeks to achieve after high school graduation. The goals shall be measurable while the child is still in high school. In addition, the nature of these goals will be different depending on the needs, abilities, and wishes of each individual child.

(5) For a child whose eligibility terminates due to graduation from secondary school with a regular high school diploma obtained through the standard program of study or due to reaching the child's twenty-second birthday, the public agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's post-secondary goals pursuant to 34 CFR Sec. 300.305(e)(3).

(6) Students eligible for special education services are entitled to a FAPE through age 21. If a student turns 22 during the school year, that student shall be allowed to complete the school year and shall continue to receive special education and related services during that school year. If the student turns 22 prior to the first day of the school year, the student is no longer eligible to receive special education and related services.

H. Transfers and transmittals. When IEPs shall be in effect.

(1) IEPs for children who transfer public agencies in the same state. If a child with a disability (who had an IEP that was in effect in a previous public agency in New Mexico) transfers to a new public agency in New Mexico, and enrolls in a new school within the same school year the new public agency shall provide FAPE to the child. The IEP shall include services comparable to those described in the child's IEP from the previous public agency, until the new public agency either:

(a) adopts and implements the child's IEP from the previous public agency; or

(b) develops and implements a new IEP that meets the applicable requirements in 34 CFR Secs. 300.320 through 300.324.

(2) IEPs for children who transfer from another state. If a child with a disability (who had an IEP that was in effect in a previous public agency in another state) transfers to a public agency in New Mexico, and enrolls in a new school within the same school year, the new public agency shall provide the child with FAPE. The IEP shall include services comparable to those described in the child's IEP from the previous agency, until the new public agency:

(a) conducts an evaluation pursuant to 34 CFR Secs. 300.304 through 300.306 (if determined to be necessary by the new public agency); and

(b) develops and implements a new IEP, if appropriate, that meets the applicable requirements in 34 CFR Secs. 300.320 through 300.324.

(3) Transmittal records. To facilitate the transition for a child described in Paragraphs (1) and (2) of this section:

(a) the new public agency in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled; and

(b) the previous public agency in which the child was enrolled shall take reasonable steps to promptly respond to the request from the new public agency.

I. Children in charter schools.

(1) Pursuant to 34 CFR Sec. 300.209, children with disabilities who attend public charter schools and their parents retain all rights under Part B of IDEA.

(2) Charter schools that are public schools of the LEA:

(a) the LEA shall serve children with disabilities attending those charter schools in the same manner as the LEA serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the LEA has a policy or practice of providing such services on the site to its other public schools; and

(b) the LEA shall provide funds under Part B of IDEA to those charter schools on the same basis as the LEA provides funds to the LEA's other public schools, including proportional distribution based on relative enrollment of children with disabilities, and at the same time as the LEA distributes other federal funds to the LEA's other public schools, consistent with the state's charter school law; and

(c) if the public charter school is a school of an LEA that receives funding under 34 CFR Sec. 300.705 and includes other public schools:

(i) the LEA is responsible for ensuring that the requirements of this part are met, unless state law assigns that responsibility to some other entity; and

(ii) the LEA shall meet the requirements of Paragraph (2) of this subsection.

(3) Public charter schools that are LEAs. If the public charter school is an LEA, consistent with 34 CFR Sec. 300.28, that receives funding under 34 CFR Sec. 300.705, that charter school is responsible for ensuring that the requirements of this part are met, unless state law assigns that responsibility to some other entity.

Charter schools who are LEAs authorized under the public education commission shall satisfy child find requirements for children enrolled in the charter school.

(4) Public charter schools that are not an LEA or a school that is part of an LEA.

(a) If the public charter school is not an LEA receiving funding under 34 CFR Sec. 300.705, or a school that is part of an LEA receiving funding under 34 CFR Sec. 300.705, the department is responsible for ensuring that the requirements of this part are met.

(b) Subparagraph (a) of this paragraph does not preclude the governor from assigning initial responsibility for ensuring the requirements of this part are met to another entity, however, the department shall maintain the ultimate responsibility for ensuring compliance with this part, consistent with 34 CFR Sec. 300.149.

J. Children in state-supported educational programs.

(1) Children placed or referred by other public agencies.

(a) Applicability. The rules in this Paragraph (1) of Subsection J of 6.31.2.11 NMAC apply to children with disabilities who are being considered for placement in a state-supported educational program or facility by another public agency as a means of providing special education and related services.

(b) Responsibility. Each public agency shall ensure that a child with a disability who is being considered for placement in a state-supported educational program by another public agency has all the rights of a child with a disability who is served by any other public agency, including being provided special education and related services:

(i) in conformance with an IEP;

(ii) at no cost to the child's parents; and

(iii) at a school or facility that is accredited by the department or licensed by the New Mexico department of health.

(c) Service delivery. With informed parent consent pursuant to 34 CFR Sec. 300.300 and Subsection F of 6.31.2.13 NMAC, and pursuant to the procedures in 34 CFR Sec. 300.304 and Subsection E of 6.31.2.10 NMAC, the state-supported program may conduct such additional evaluations and gather such additional information as it considers necessary to assist the IEP team in making the placement decision. The referring public agency and the receiving state-supported educational program shall be jointly responsible for developing IEPs and ensuring that the child receives a free appropriate public education.

(d) Joint IEPs and interagency agreements. Responsibility for services for children placed in or referred to state-supported educational programs shall be defined by a jointly agreed upon IEP or other written agreement between the referring public agency and the state-supported program.

(e) Annual review. At least annually, the referring public agency, the state-supported educational program, and the parent shall jointly review the child's IEP and revise it as the joint IEP team deems appropriate.

(2) Children enrolled in state-supported educational programs by parents or other public authorities. A state-supported educational program that accepts a child with a disability at the request of a parent or upon the request or order of a noneducational public authority, and without inviting the public agency that has primary responsibility for serving the child to participate in the IEP process, assumes all responsibility for ensuring the provision of FAPE. The child's LEA or another public agency with educational jurisdiction may agree to share the responsibility pursuant to a joint IEP or other written agreement between the state-supported program, the other public agency and, if appropriate, the parent.

K. Children at the New Mexico School for the Deaf (NMSD).

(1) NMSD is a state educational agency established to provide educational services to persons who are 21 years of age or younger on the first day of school, who are deaf or hard of hearing, and who may have one or more other disabilities. The school serves as a special school on the continuum of placement options. The school serves students who require specialized or intensive educational services or services related to hearing impairment or deafness. NMSD provides a variety of services to the students and school districts around the state, including outreach, consultation, and training services. NMSD also provides comprehensive services on a day or residential basis. The comprehensive day and residential programs are not intended to serve students whose needs are appropriately addressed in a group home or hospital setting or in a residential treatment facility.

(2) To be eligible to receive free services from NMSD, a student shall be deaf or hearing impaired as determined by an audiological evaluation and be a resident of New Mexico.

(3) The student's resident school district shall conduct child find, pursuant to 34 CFR Sec. 300.111 and Subsection A of 6.31.2.10 NMAC.

(4) In addition to the requirements of identification, evaluations, and eligibility determinations of students with disabilities pursuant to 6.31.2.10 NMAC and 34 CFR Secs. 300.100 through 300.230 and 300.300 through 300.328, if a student's resident school district finds, has reason to know, or receives documentation that a student is deaf, has a hearing impairment, or is deafblind, the following criteria shall apply

- (a)** the resident school district shall convene the initial IEP team meeting;
- (b)** the IEP team shall include members specified in Paragraph (11) of Subsection B of 6.31.2.7 NMAC, including staff from the NMSD if invited by the parent or the resident school district pursuant 34 CFR Sec. 300.321(a)(6);

(c) the resident school district shall provide the parents of the student with information on the continuum of alternative placements, including the alternative placements listed in the definition of special education under 34 CFR Sec. 300.39 (instruction in regular classrooms, special classes, special schools, home instruction, and instruction in hospitals and institutions); and supplementary services, such as resource room or itinerant instruction, to be provided in conjunction with regular class placement;

(d) in addition to the requirements of Subsection B of 6.31.2.11 NMAC, the IEP team shall be tasked with:

- (i)** determining if the student has a hearing disability, which impacts the student's ability to access education, ability to develop language or communication, social emotional development, and/or overall development; and
- (ii)** determining the student's placement in the least restrictive environment, in compliance with 34 CFR Secs. 300.114 through 300.120 and Subsection C of 6.31.2.11 NMAC, which for the student may be an environment specifically designed for deaf and hard of hearing children, and whether this is the most appropriate setting in providing educational services and supports to meet the student's IEP.

(e) the student's placement, whether in the resident school district, NMSD, or other educational entity, is the entity that shall have full responsibility for FAPE and all services defined in the student's IEP unless the resident school district and NMSD agree to share services, responsibilities, and costs pursuant to 34 CFR Sec. 300.103; and

(f) the composition of the IEP team after a student's placement and service determinations shall:

- (i)** include a representative from the resident school district at the request of the parent, NMSD, or the resident school district if the final placement for the student is at NMSD; and
- (ii)** include a representative from NMSD at the request of the parent, the resident school district, or NMSD if the final placement for the student is at the resident school district or other educational entity.

L. Children at the New Mexico school for the blind and visually impaired (NMSBVI).

(1) NMSBVI is a state educational agency established to provide educational services for students who are 21 years of age or younger on the first day of school and who have a diagnosed visual impairment and who may have one or more other disabilities. The school serves as a special school on the continuum of placement options. The school serves students who require specialized or intensive educational services or services related to the visual impairment or blindness and those who need extensive training related to the expanded core curriculum for blind and visually impaired students. NMSBVI provides a variety of services to the students and school districts around the state, including outreach, consultation, and training services. NMSBVI also provides comprehensive services on a day or residential basis. The comprehensive day and residential programs are not intended to serve students whose needs are appropriately addressed in a group home or hospital setting or in a residential treatment facility.

(2) To be eligible to receive free services from the NMSBVI, a student shall have a visual impairment or blindness as determined by a medical eye exam and be a resident of New Mexico.

(3) The student's resident school district shall conduct child find, pursuant to 34 CFR Sec. 300.111 and Subsection A of 6.31.2.10 NMAC.

(4) In addition to the requirements of identification, evaluations, and eligibility determinations of students with disabilities pursuant to 6.31.2.10 NMAC and 34 CFR Secs. 300.100 through 300.230 and 300.300 through 300.328, if a student's resident school district finds, has reason to know, or receives documentation that a student is blind, has a visual impairment, or is deafblind, the following criteria shall apply:

- (a)** the resident school district shall convene the initial IEP team meeting;
- (b)** the IEP team shall include members specified in Paragraph (11) of Subsection B of 6.31.2.7 NMAC, including staff from NMSBVI if invited by the parent or the resident school district pursuant 34 CFR Sec. 300.321(a)(6);

(c) the resident school district shall provide the parents of the student with information on the continuum of alternative placements, including the alternative placements listed in the definition of special education under 34 CFR Sec. 300.39 (instruction in regular classrooms, special classes, special schools, home instruction, and instruction in hospitals and institutions); and supplementary services, such as resource room or itinerant instruction, to be provided in conjunction with regular class placement;

(d) in addition to the requirements of Subsection B of 6.31.2.11 NMAC, the IEP team shall be tasked with:

(i) determining if the student has a visual disability, which impacts the student's ability to access education, ability to develop language or communication, social emotional development, and/or overall development; and

(ii) determining the student's placement in the least restrictive environment, in compliance with 34 CFR Secs. 300.114 through 300.120 and Subsection C of 6.31.2.11 NMAC, which for the student may be an environment specifically designed for blind or visually impaired children, and whether this is the most appropriate setting in providing educational services and supports to meet the student's IEP.

(e) the student's placement, whether in the resident school district, NMSBVI, or other educational entity, is the entity that shall have full responsibility for FAPE and all services defined in the student's IEP unless the resident school district and NMSBVI agree to share services, responsibilities, and costs pursuant to 34 CFR Sec. 300.103; and

(f) the composition of the IEP team after a student's placement and service determinations shall:

(i) include a representative from the resident school district at the request of the parent, NMSBVI, or the resident school district if the final placement for the student is at NMSBVI; and

(ii) include a representative from NMSBVI at the request of the parent, the resident school district, or NMSBVI if the final placement for the student is at the resident school district or other educational entity.

M. Children in detention and correctional facilities.

(1) If a child with a disability is placed in a juvenile or adult detention or correctional facility, the facility shall provide the child with FAPE after the facility learns that the child had been eligible for special education and related services in the last educational placement prior to incarceration or otherwise determines that the child is eligible.

(2) Juvenile or adult detention or correctional facilities shall take reasonable steps to obtain needed educational records from a child's last known school or educational facility within two business days, as required under Section 22-13-33 NMSA 1978, of the child arriving at the juvenile or correctional facility. Record requests and transfers are subject to the rules under the Family Educational Rights and Privacy Act (FERPA) at 34 CFR Part 99 and the provisions of Paragraph (3) of Subsection L of 6.31.2.13 NMAC. The educational program of a juvenile or adult detention or correctional facility is an educational agency for purposes of FERPA.

(a) The previous public agency in which the child was enrolled shall take reasonable steps to promptly respond to the records request from the juvenile correctional facilities.

(b) To assist juvenile correctional facilities in providing FAPE for children entering the facility during the summer months, school districts shall provide summer emergency contact information of a person who has access to special education records, to the state's directors in the juvenile justice services division of the children, youth, and family department.

(3) A detention or correctional facility that is unable to obtain adequate records from other public agencies, the child or the parents within the required two business days, as required under Section 22-13-33 NMSA 1978, after the child arrives at the facility, shall evaluate the child who is known or suspected to be a child with a disability as provided in Subsection F of 6.31.2.10 NMAC and develop an IEP for an eligible child without undue delay.

(4) FAPE for eligible students in juvenile or adult detention or correctional facilities shall be made available in programs that are suited to the security requirements of each facility and eligible student. The provisions of 34 CFR Sec. 300.324(d) apply to IEPs for students with disabilities who are convicted as adults under state law and incarcerated in adult prisons.

(5) A state-supported educational program that serves a juvenile or adult detention or correctional facility shall be responsible for ensuring that FAPE is provided to eligible children in that facility.

(6) The local school district in which a detention or correctional facility is located (that is not served by a state-supported educational program) shall be responsible for ensuring that FAPE is made available to eligible children in that facility. A child's LEA of residence or another public agency with educational jurisdiction

may agree to share the responsibility pursuant to a written agreement between or among the public agencies involved.

(7) Children with disabilities who are detained or incarcerated in detention or correctional facilities are wards of the state and may have surrogate parents appointed pursuant to 34 CFR Sec. 300.519 and Subsection J of 6.31.2.13 NMAC to protect their rights under IDEA while in state custody.

(8) The public agency that administers the educational program in a juvenile or adult detention or correctional facility shall ensure that surrogate parents are appointed in cases where no parent as defined in 34 CFR Sec. 300.30(a) and Paragraph (14) of Subsection B of 6.31.2.7 NMAC is reasonably available or willing to make the educational decisions required for children with disabilities who are housed in that facility.

(9) Children placed in juvenile or adult detention or correctional facilities shall be provided learning opportunities and instruction that meet the state standards with benchmarks.

N. Children in private schools or facilities.

(1) Children enrolled by parents in private schools or facilities.

(a) Parentally placed private school children with disabilities means children with disabilities enrolled by their parents in private schools, including religious schools or facilities, such as residential treatment centers, day treatment centers, hospitals, and mental health institutions, that include other children with disabilities who are covered under 34 CFR Secs. 300.145 through 300.147.

(b) A school district in which a private school or facility is located shall not be considered the resident school district of a school-age person if residency is based solely on the school-age person's enrollment at the facility and the school-age person would not otherwise be considered a resident of the state.

(c) Each LEA shall locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private schools, including religious elementary schools and secondary schools located in the education jurisdiction of the LEA, in accordance with 34 CFR Secs. 300.131 and 300.111.

(d) Each public agency shall develop a "service plan" that describes the special education and related services the LEA will provide to a parentally placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, consistent with 34 CFR Sec. 300.132 and that is developed and implemented in accordance with 34 CFR Secs. 300.137 through 300.139. The provision applies only to private schools and not to private facilities where an IEP shall be in place.

(e) Pursuant to 34 CFR Sec. 300.133, each LEA is obligated to spend a proportionate amount of its federal IDEA-Part B funds to assist private school children with disabilities placed in a private school or private facility by a parent who assumes responsibility for such placement. In doing so, LEAs shall use the formula for calculating proportionate amount and annual count of parentally placed private school children with disabilities in accordance with 34 CFR Sec. 300.133. The public agency shall not use IDEA funds to benefit private schools as provided in 34 CFR Sec. 300.141. The state is not required to distribute state funds for such school-age persons. Furthermore, the constitution and laws of New Mexico prohibit public agencies from spending state funds to assist private schools or facilities or their students.

(f) No parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. Pursuant to 34 CFR Sec. 300.137, the LEA shall make the final decisions with respect to the services to be provided to eligible parentally placed private school children with disabilities.

(g) Pursuant to 34 CFR Secs. 300.134 and 300.135, LEAs shall ensure timely and meaningful consultation with private school representatives and representatives of parents of parentally placed private school children with disabilities. If the LEA fails to engage in meaningful and timely consultation or did not give due consideration to a request from private school officials, private school officials have the right to submit a complaint to the department. The private school official and the LEA shall follow the procedures outlined in 34 CFR Sec. 300.136.

(h) Pursuant to 34 CFR Secs. 300.140, the due process provisions of Subsection I of 6.31.2.13 NMAC are not applicable except for child find complaints which shall be filed in compliance with 34 CFR Sec. 300.140(b). Any complaint that the department or any LEA has failed to meet the requirements in 34 CFR Secs. 300.132 through 300.135 and 300.137 through 300.144 shall be filed in accordance with the provisions described in Subsection H of 6.31.2.13 NMAC.

(2) Children placed in or referred to private schools or facilities by New Mexico public agencies. Each public agency shall ensure that a child with a disability who is placed in or referred to a private school or facility by the public agency as a means of providing special education and related services is provided

services in compliance with the requirements of 34 CFR Secs. 300.146 and 300.147. Such a child has all the rights of a child with a disability who is served by a public agency.

(3) Children placed in or referred to private schools or facilities by New Mexico public non-educational agencies. For a qualified student or school-age person in need of special education placed in a private school or facility by a New Mexico public noneducational agency with custody or control of the qualified student or school-age person or by a New Mexico court of competent jurisdiction, the school district in which the facility is located shall be responsible for the planning and delivery of special education and related services, unless the qualified student's or school-age person's resident school district has an agreement with the facility to provide such services. The school district shall make reasonable efforts to involve the qualified student or school-age person's resident school district in the IEP process.

(4) Children placed in or referred to private schools or facilities by public noneducational agencies other than New Mexico public agencies. A school district in which a private school or facility is located shall not be considered the resident school district of a school-age person if residency is based solely on the school-age person's enrollment at the facility and the school-age person would not otherwise be considered a resident of the state.

(5) Children placed in private schools or facilities by parents when FAPE is at issue. The responsibility of a local educational agency to pay for the cost of education for a child with a disability who is placed in a private school or facility such as residential treatment centers, day treatment centers, hospitals or mental health institutions, by parents who allege that the LEA failed to offer FAPE is governed by the requirements of 34 CFR Sec. 300.148. Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of Subsection I of 6.31.2.13 NMAC.

(6) If not otherwise governed by this rule, the department will determine which school district is responsible for the cost of educating a qualified student in need of special education who has been placed in a private school or facility outside the qualified student's resident school district in accordance with the following procedures.

(a) The receiving school district shall notify the SED of the department in writing no later than 30 days after the receiving school district receives notice of the placement. The notice, as described on the department's website, shall include: name of student, date of birth of student, date of placement, information regarding the qualified student's resident school district, documentation of placement, including student's IEP, cost of placement, and any other information deemed relevant by the SED. The receiving school district shall provide a copy of the notice to the school district identified as the student's resident school district.

(b) The school district identified as the student's resident school district may provide any additional information it deems relevant. Such additional information shall be provided no later than 15 days after the resident school district receives its copy of the notice described in Subparagraph (a) of this paragraph.

(c) No later than 60 days after its receipt of the notice described in Subparagraph (a) of this paragraph, the SED will issue its determination as to which school district is responsible for the cost of educating the student, together with the amount of any reasonable reimbursement owed to the receiving school district. The SED may extend the 60 day timeline for good cause.

(7) The department shall assign a unique student identifier for school-age persons who have service plans, including those who are not residents of the state but who are attending private residential treatment facilities in the state.

(8) Children schooled at home. Each LEA shall locate, evaluate, and determine the eligibility of children with disabilities who are schooled at home pursuant to Subsection H of Section 22-2-2 NMSA 1978.

[6.31.2.11 NMAC - Rp, 6.31.2.11 NMAC, 7/14/2020; A, 7/31/2023]

6.31.2.12 [RESERVED]

[6.31.2.12 NMAC - Rp, 6.31.2.12 NMAC, 7/14/2020; Repealed, 7/31/2023]

6.31.2.13 ADDITIONAL RIGHTS OF PARENTS, STUDENTS, AND PUBLIC AGENCIES:

A. General responsibilities of public agencies. Each public agency shall establish, implement, and maintain procedural safeguards that meet the requirements of 34 CFR Secs. 300.500 through 300.536, and all other applicable requirements of these or other department rules and standards.

B. Examination of records. Each public agency shall afford the parents of a child with a disability an opportunity to inspect and review all education records related to the child in compliance with 34 CFR Secs.

300.501(a), 300.613 through 300.620, 34 CFR Part 99, and any other applicable requirements of these or other department rules and standards.

C. Parent and student participation in meetings. Each public agency shall afford the parents of a child with a disability and, as appropriate, the child, an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement or the provision of FAPE to the child, in compliance with 34 CFR Secs. 300.322, 300.501(b), 300.501(c), and any other applicable requirements of these or other department rules and standards.

D. Notice requirements.

(1) Notice of meetings. Each public agency shall provide the parents of a child with a disability with advance written notice that complies with 34 CFR Sec. 300.322 for IEP meetings and any other meetings in which the parent has a right to participate pursuant to 34 CFR Sec. 300.501.

(2) Notice of agency actions proposed or refused. A public agency shall give written notice that meets the requirements of 34 CFR Sec. 300.503 to the parents of a child with a disability a reasonable time before the 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. If the notice relates to a proposed action that also requires parental consent under 34 CFR Sec. 300.300, the public agency may give notice at the same time it requests parental consent.

(3) Notice of procedural safeguards. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, only one time a school year, except that a copy shall be given to the parents: (a) upon initial referral for evaluation; (b) upon receipt of the first state complaint under 34 CFR Secs. 300.151 through 300.153; (c) upon receipt of the first due process complaint under 34 CFR Sec. 300.507 of the school year; (d) in accordance with the discipline procedures in 34 CFR Sec. 300.530(h); and (e) upon request of the parents. The notice shall meet all requirements of 34 CFR Sec. 300.504, including the requirement to inform the parents of their obligation under 34 CFR Sec. 300.148 to notify the public agency if they intend to enroll the child in a private school or facility and seek reimbursement from the public agency. A public agency may place a current copy of the procedural safeguards notice on its internet website if a website exists.

E. Communications in understandable language. Pursuant to 34 CFR Secs. 300.9(a), 300.322(e), 300.503(c), and 300.504(d), each public agency shall communicate with parents in understandable language, including the parent's native language or other mode of communication, unless it is clearly not feasible to do so, if necessary for understanding, in IEP meetings, in written notices, and in obtaining consent where consent is required.

F. Parental consent.

(1) Informed parental consent as defined in 34 CFR Sec. 300.9 shall be obtained in compliance with 34 CFR Sec. 300.300 before: (a) conducting an initial evaluation or reevaluation; and (b) initial provision of special education and related services to a child with a disability. Consent for initial evaluation shall not be construed as consent for initial provision of special education and related services. If parental consent is not provided for the initial evaluation or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC.

(2) Pursuant to 34 CFR Sec. 300.300(d)(1), parental consent is not required before: (a) reviewing existing data as part of an evaluation or a reevaluation; or (b) administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(3) Pursuant to 34 CFR Sec. 300.300(b), if the parents of a child with a disability refuse consent for the initial provision of special education and related services, the public agency may not use the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC in order to obtain agreement or a ruling that the services may be provided to the child. If the parent refuses consent or fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency will not be considered to be in violation of the requirement to make FAPE available to the child and is not required to convene an IEP team meeting or develop an IEP under 34 CFR Secs. 300.320 and 300.324. All provisions of 34 CFR Sec. 300.300 shall be followed with respect to parental consent.

(4) Pursuant to 34 CFR Sec. 300.300(c)(2), informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent by using procedures consistent with those in 34 CFR Sec. 300.322(d) and the child's parent has failed to respond.

(5) Pursuant to 34 CFR Sec. 300.300(d)(3), a public agency may not use a parent's refusal to consent to one service or activity for which consent is required to deny the parent or child any other service, benefit, or activity of the public agency, except as required by 34 CFR Part 300.

(6) Pursuant to 34 CFR Sec. 300.300(b)(4), parents may revoke consent for the continued provision of all special education and related services for their child. The revocation of consent shall be in writing. After providing prior written notice in accordance with 34 CFR Sec. 300.503, the public agency shall cease the provision of special education and related services for that child. The public agency may not use the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC in order to obtain agreement or a ruling that services may be provided to the child. The public agency will not be considered to be in violation of the requirement to make FAPE available to the child once consent has been revoked. The public agency will also not be required to convene an IEP team meeting or develop an IEP for the child for further provision of special education and related services.

G. Conflict management and resolution.

(1) Each public agency shall seek to establish and maintain productive working relationships with the parents of each child the public agency serves and to deal constructively with disagreements. Each public agency is strongly encouraged to provide appropriate training for staff and parents in skills and techniques of conflict prevention and management and dispute resolution and to utilize an informal dispute resolution method as set forth under Subparagraph (a) of Paragraph (2) of Subsection G of 6.31.2.13 NMAC to resolve disagreements at the local level whenever practicable.

(2) Spectrum of dispute resolution options. To facilitate dispute prevention as well as swift, early conflict resolution whenever possible, the department and the public agency shall ensure that the following range of dispute resolution options is available to parents and public agency personnel.

(a) Informal dispute resolution option. If a disagreement arises between parents and a public agency over a student's IEP or educational program, either the parents or the public agency may convene a new IEP meeting at any time to attempt to resolve their differences at the local level without state-level intervention.

(b) Third-party assisted intervention. The special education division (SED) of the department will ensure that mediation is available to parents and public agencies who request such third-party assisted intervention before filing a state-level complaint or a request for a due process hearing. The SED will honor a request for mediation that:

- (i)** is in writing;
- (ii)** is submitted to the SED;
- (iii)** is a mutual request signed by both parties or their designated

representatives;

(iv) includes a statement of the matter(s) in dispute and a description of any previous attempts to resolve these matters at the local level; and

(v) any request that does not contain all of these elements will be declined, with an explanation for the SED's decision and further guidance, as appropriate.

(c) Formal dispute resolution.

(i) A state-level complaint may be filed with the SED of the department by the parents of a child, or by another individual or organization on behalf of a child, as described under Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC. Once a complaint has been filed, the parties may agree to convene a FIEP meeting or mediation as described under Paragraph (3) of Subsection H of 6.31.2.13 NMAC.

(ii) A request for a due process hearing may be filed by parents or their authorized representative, or by a public agency, as described under Paragraph (5) of Subsection I of 6.31.2.13 NMAC. A resolution session between the parties shall be convened by the public agency following a request for a due process hearing, unless the parties agree in writing to waive that option or to convene a mediation instead, as described under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

(d) The Mediation Procedures Act, Section 44-7B-1 et seq. NMSA 1978, does not apply to mediations conducted under 6.31.2 NMAC.

H. State complaint procedures.

(1) Scope and dissemination.

(a) Subsection H of 6.31.2.13 NMAC prescribes procedures to be used in filing and processing complaints alleging the failure of the department or a public agency to comply with state or federal laws or rules governing programs for children with disabilities under IDEA.

(b) The SED shall disseminate information regarding state complaint procedures to parents and other interested individuals and organizations, as identified by the SED, including parent centers, information centers, advocacy agencies, independent living centers, and other appropriate entities throughout the state.

(i) The SED shall place documents regarding state complaint procedures in English and Spanish, including state complaint forms, in an easily accessible location on the SED website.

(ii) The SED shall, on a yearly basis, send an email to the organizations and individuals identified in Subparagraph (b) of Paragraph (1) of Subsection H of 6.31.2.13 NMAC providing information regarding state complaint procedures and encouraging these organizations and individuals to post a link to the SED website on their website.

(iii) Upon request by any individual or organization, the SED shall provide the information regarding state complaint procedures, as posted on the SED's website, in print or electronic form.

(2) Requirements for complaints.

(a) The SED of the department shall accept and investigate complaints from organizations or individuals that raise issues within the scope of this procedure as defined in the preceding Paragraph (1) of Subsection H of 6.31.2.13 NMAC. The complaint shall: (i) be in writing; (ii) be submitted to the SED (or to the secretary of education, in the case of a complaint against the department); (iii) be signed by the complainant or a designated representative and have the complainant's contact information; (iv) if alleging violations with respect to a specific child, include the name and address of the child and the school the child is attending; (v) include a statement that the department or a public agency has violated a requirement of an applicable state or federal law or rules; (vi) contain a statement of the facts on which the allegation of violation is based; and (vii) include a description of a proposed resolution of the problem to the extent known. Any complaint that does not contain each of these elements will be declined, with an explanation for the SED's decision and further guidance, as appropriate.

(b) If the complaint alleges violations with respect to a specific child, the complaint shall include the information required by 34 CFR 300.153(b)(4).

(c) The party filing the complaint shall forward a copy of the complaint to the public agency serving the child at the same time the party files the complaint with the SED of the department.

(d) Pursuant to 34 CFR Sec. 300.153(c), the complaint shall allege a violation that occurred not more than one year before the date the complaint is received by the SED in accordance with Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC.

(3) Preliminary meeting.

(a) FIEP meeting: mediation. Parties to a state-level complaint may choose to convene a FIEP meeting or mediation. To do so, the public agency shall (and the parent may) notify the SED of the department in writing within one business day of reaching their decision to jointly request one of these ADR options. A FIEP meeting or mediation shall be completed not later than 14 days after the assignment of the IEP facilitator or mediator by the SED, unless a brief extension is granted by the SED based on exceptional circumstances. Each session in the FIEP or mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the complaint.

(b) Mediation requirements. If the parties choose to use mediation, the following requirements apply.

(i) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings.

(ii) Any mediated agreement shall state that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Any such agreement shall also be signed by both the parent and a representative of the public agency who has the authority to bind such public agency, and shall be enforceable in any state court of competent jurisdiction or in a district court of the United States.

(iii) If a mediated agreement involves IEP-related issues, the agreement shall state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly.

(iv) The mediator shall transmit a copy of the written mediation agreement to each party within seven days of the meeting at which the agreement was concluded. A mediation agreement involving a claim or issue that later goes to a due process hearing may be received in evidence if the hearing officer rules that part or all of the agreement is relevant to one or more IDEA issues that are properly before the hearing officer for decision.

(v) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(vi) Any other requirement provided in 34 CFR 300.506(b) that is not otherwise provided herein.

(4) Complaints and due process hearings on the same issues, which are pursuant to 34 CFR Sec. 300.152(c).

(a) The SED of the department shall set aside any part of a written complaint that is also the subject of a due process hearing under Subsection I of 6.31.2.13 NMAC until the conclusion of the hearing and any civil action. Any issue in the complaint that is not a part of the due process hearing or civil action will be resolved by the SED as provided in Subsection H of 6.31.2.13 NMAC.

(b) If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the SED shall inform the complainant to that effect.

(c) A complaint alleging a public agency's failure to implement a due process decision will be resolved by the SED as provided in this Subsection H of 6.31.2.13 NMAC.

(5) Complaints against public agencies.

(a) Impartial review. Upon receipt of a complaint that meets the requirements of Paragraph (2) of Subsection H of 6.31.2.13 NMAC, the SED of the department shall:

(i) undertake an impartial investigation which shall include complete review of all documentation presented and may include an independent on-site investigation, if determined necessary by the SED;

(ii) give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(iii) provide the public agency with the opportunity to respond to the allegations in the complaint; and

(iv) review all relevant information and make an independent determination as to whether the public agency is violating a requirement of an applicable state or federal law or rule.

(b) Decision. A written decision which includes findings of fact, conclusions, and the reasons for the decision and which addresses each allegation in the complaint shall be issued by the SED and mailed to the parties within 60 days of receipt of the written complaint, regardless of whether or not the parties agree to convene a FIEP meeting or mediation. Such decision shall further include procedures for effective implementation of the final decision, if needed, including technical assistance, negotiations, and if corrective action is required, such action shall be designated and shall include the timeline for correction and the possible consequences for continued noncompliance.

(c) Failure or refusal to comply. If the public agency fails or refuses to comply with the applicable law or rules, and if the noncompliance or refusal to comply cannot be corrected or avoided by informal means, compliance may be effected by the department by any means authorized by state or federal laws or rules. The department shall retain jurisdiction over the issue of noncompliance with the law or rules and shall retain jurisdiction over the implementation of any corrective action required.

(6) Complaints against the department. If the complaint concerns a violation by the department and: is submitted in writing to the secretary of education; is signed by the complainant or a designated representative; includes a statement that the department has violated a requirement of an applicable state or federal law or rule; contains a statement of facts on which the allegation of violation is based, and otherwise meets the requirements of Paragraph (2) of Subsection H of 6.31.2.13 NMAC, the secretary of education or designee shall appoint an impartial person or impartial persons to conduct an investigation.

(a) Investigation. The person or persons appointed shall: acknowledge receipt of the complaint in writing; undertake an impartial investigation which shall include a complete review of all documentation presented and may include an independent onsite investigation, if necessary; give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; provide the department with the opportunity to respond to the complaint; and review all relevant information and make an independent determination as to whether the department is violating a requirement of an applicable state or federal law or rule.

(b) Decision. A written decision, including findings of fact, conclusions, recommendations for corrective action, and the reasons for the decision and addressing each allegation in the complaint, shall be issued by the person or people appointed pursuant to this paragraph and mailed to the parties within 60 days of receipt of the written complaint. The person or people appointed pursuant to this paragraph has no authority to order rulemaking by the department.

(7) Extension of time limit. An extension of the time limit under Subparagraph (b) of Paragraph (5) or Subparagraph (b) of Paragraph (6) of this Subsection H of 6.31.2.13 NMAC shall be permitted by the SED of the department only if exceptional circumstances exist with respect to a particular complaint or if the

parent or any other party filing a complaint and the public agency involved agree to extend the time to engage in mediation or a FIEP meeting.

(8) Conflicts with federal laws or rules. If any federal law or rule governing any federal program subject to this rule affords procedural rights to a complainant which exceed those set forth in Subsection H of 6.31.2.13 NMAC for complaints within the scope of these rules, such statutory or regulatory right(s) shall be afforded to the complainant. In acknowledging receipt of such a complaint, the SED shall set forth the procedures applicable to that complaint.

I. Due process hearings.

(1) Scope. Subsection I of 6.31.2.13 NMAC establishes procedures governing impartial due process hearings for requests for due process in IDEA cases governed by 34 CFR Secs. 300.506 through 300.518 and 300.530 through 300.532

(2) Bases for requesting hearing. A parent or public agency may initiate an impartial due process hearing on the following matters:

(a) the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child;

(b) the public agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(3) Bases for requesting expedited hearing.

(a) Pursuant to 34 CFR Sec. 300.532 and 20 USC Sec. 1415(k)(3), a parent may request an expedited hearing to review any decision regarding placement or a manifestation determination under 34 CFR Secs. 300.530 through 300.531.

(b) Pursuant to 34 CFR Sec. 300.532(c) and 20 USC Sec. 1415(k)(3), a public agency may request an expedited hearing if it believes that maintaining the current placement of a child is substantially likely to result in injury to the child or others.

(4) Request for hearing. A parent requesting a due process hearing shall transmit written notice of the request to the public agency whose actions are in question and to the SED of the department. A public agency requesting a due process hearing shall transmit written notice of the request to the parent(s) and to the SED of the department. The written request shall state with specificity the nature of the dispute and shall include:

(a) the name of the child;

(b) the address of the residence of the child (or available contact information in the case of a homeless child);

(c) the name of the school the child is attending;

(d) the name of the public agency, if known;

(e) the name and address of the party making the request (or available contact information in the case of a homeless party);

(f) a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem;

(g) a proposed resolution of the problem to the extent known and available to the party requesting the hearing at the time;

(h) a request for an expedited hearing shall also include a statement of facts sufficient to show that a requesting parent or public agency is entitled to an expedited hearing under 34 CFR Secs. 300.532(c) or 20 USC Sec. 1415(k)(3);

(i) a request for a hearing shall be in writing and signed and dated by the parent or the authorized public agency representative; an oral request made by a parent who is unable to communicate by writing shall be reduced to writing by the public agency and signed by the parent;

(j) a request for hearing filed by or on behalf of a party who is represented by an attorney shall include a sufficient statement authorizing the representation; a written statement on a client's behalf that is signed by an attorney who is subject to discipline by the New Mexico supreme court for a misrepresentation shall constitute a sufficient authorization; and

(k) a party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of this paragraph.

(5) Response to request for hearing.

(a) A request for a hearing shall be deemed to be sufficient unless the party receiving the notice of request notifies the hearing officer and the other party in writing that the receiving party believes the request has not met the requirements of Paragraph (5) of Subsection I of 6.31.2.13 NMAC.

(b) Public agency response.

(i) In general. If the public agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process hearing request, such public agency shall, within 10 days of its receipt of the request, send to the parent a response that meets the requirements of 34 CFR Sec. 300.508(e) and 20 USC Sec. 1415(c)(2)(B)(i). This requirement presents an additional opportunity for parties to clarify and potentially resolve their dispute(s).

(ii) Sufficiency. A response filed by a public agency pursuant to Item (i) of Subparagraph (b) of Paragraph (6) shall not be construed to preclude such public agency from asserting that the parent's due process hearing request was insufficient where appropriate.

(c) Other party response. Except as provided in Subparagraph (b) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC, the non-complaining party shall, within 10 days of its receipt of the request for due process, send to the requesting party a response that specifically addresses the issues raised in the hearing request. This requirement also presents an opportunity to clarify and potentially resolve disputed issues between the parties.

(d) A party against whom a due process hearing request is filed shall have a maximum of 15 days after receiving the request to provide written notification to the hearing officer of insufficiency under Subparagraph (a) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC. The 15-day timeline for the public agency to convene a resolution session under Paragraph (8) of Subsection I of 6.31.2.13 NMAC runs at the same time as the 15-day timeline for filing notice of insufficiency.

(e) Determination. Within five days of receipt of a notice of insufficiency under Subparagraph (d) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC, the hearing officer shall make a determination on the face of the due process request of whether it meets the requirements of Paragraph (5) of Subsection I of 6.31.2.13 NMAC and shall immediately notify the parties in writing of such determination.

(f) Amended due process request. A party may amend its due process request only if:

(i) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to Paragraph (8) of Subsection I of 6.31.2.13 NMAC; or

(ii) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than five days before a due process hearing occurs.

(g) Applicable timeline. The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

(6) Duties of the SED of the department. Upon receipt of a written request for due process, the SED shall:

(a) appoint a qualified and impartial hearing officer who meets the requirements of 34 CFR Sec. 300.511(c) and 20 USC Sec. 1415(f)(3)(A);

(b) arrange for the appointment of a qualified and impartial mediator or IEP facilitator pursuant to 34 CFR Sec. 300.506 to offer ADR services to the parties;

(c) inform the parent in writing of any free or low-cost legal and other relevant services available in the area; the SED shall also make this information available whenever requested by a parent; and

(d) inform the parent that in any action or proceeding brought under 20 USC Sec. 1415, a state or federal court, in its discretion and subject to the further provisions of 20 USC Sec. 1415(g)(3)(b) and 34 CFR Sec. 300.517, may award reasonable attorneys' fees as part of the costs to a prevailing party;

(e) the SED shall also:

(i) keep a list of the persons who serve as hearing officers and a statement of their qualifications;

(ii) appoint another hearing officer if the initially appointed hearing officer excuses himself or herself from service;

(iii) ensure that mediation and FIEP meetings are considered as voluntary and are not used to deny or delay a parent's right to a hearing; and

(iv) ensure that within 45 days of commencement of the timeline for a due process hearing, a final written decision is reached and a copy transmitted to the parties, unless one or more specific extensions of time have been granted by the hearing officer at the request of either party (or at the joint request of the parties, where the reason for the request is to allow the parties to pursue an ADR option); and

(f) following the decision, the SED shall, after deleting any personally identifiable information, transmit the findings and decision to the state IDEA advisory panel and make them available to the public upon request.

(7) Preliminary meeting.

(a) Resolution session. Before the opportunity for an impartial due process hearing under Paragraphs (3) or (4) of Subsection I of 6.31.2.13 NMAC, the public agency shall convene a resolution session with the parents and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process request, unless the parents and the public agency agree in writing to waive such a meeting, or agree to use the mediation process instead. The resolution session:

(i) shall occur within 15 days of the respondent's receipt of a request for due process;

(ii) shall include a representative of the public agency who has decision-making authority on behalf of that public agency;

(iii) may not include an attorney of the public agency unless the parent is accompanied by an attorney; and

(iv) shall provide an opportunity for the parents of the child and the public agency to discuss the disputed issue(s) and the facts that form the basis of the dispute, in order to attempt to resolve the dispute;

(v) if the parties desire to have their discussions in the resolution session remain confidential, they may agree in writing to maintain the confidentiality of all discussions and that such discussions cannot later be used as evidence in the due process hearing or any other proceeding; and

(vi) if an agreement is reached following a resolution session, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the public agency who has the authority to bind that public agency, and which is enforceable in any state court of competent jurisdiction or in a district court of the United States; if the parties execute an agreement pursuant to a resolution session, a party may void this agreement within three business days of the agreement's execution; further, if the resolution session participants reach agreement on any IEP-related matters, the binding agreement shall state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement and revise the student's IEP accordingly.

(b) FIEP meeting; mediation. Parties to a due process hearing may choose to convene a FIEP meeting or mediation instead of a resolution session. To do so, the party filing the request for the hearing shall (and the responding party may) notify the hearing officer in writing within one business day of the parties' decision to jointly request one of these options. A FIEP meeting or mediation shall be completed not later than 14 days after the assignment of the IEP facilitator or mediator by the SED, unless, upon joint request by the parties, an extension is granted by the hearing officer. Each session in the FIEP or mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the hearing. The requirements for mediation, as set forth at Subparagraph (c) of Paragraph (3) of Subsection H of 6.31.2.13 NMAC apply to mediation in this context as well.

(c) Applicable timelines.

(i) If the parties agree to convene a resolution session, the applicable timelines for the due process hearing shall be suspended for up to 30 days from the date the due process request was received by the SED (except in the case of an expedited hearing), and the meeting shall proceed according to the requirements set forth under Subparagraph (a) of Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

(ii) If the parties agree to convene a FIEP meeting or mediation, the public agency shall contact the person or entity identified by the SED to arrange for mediation or a FIEP meeting, as appropriate. Except for expedited hearings, the parties to the FIEP meeting or mediation process may jointly request that the hearing officer grant a specific extension of time for the prehearing conference and for completion of the hearing beyond the 45 day period for issuance of the hearing decision. The hearing officer may grant such extensions in a regular case but may not exceed the 20 school day deadline in an expedited case.

(iii) If the parties agree to waive all preliminary meeting options and proceed with the due process hearing, the hearing officer shall send written notification to the parties that the applicable timelines for the due process hearing procedure shall commence as of the date of that notice. The hearing officer shall thereafter proceed with the prehearing procedures, as set forth under Paragraph (12) of Subsection I of 6.31.2.13 NMAC.

(d) Resolution. Upon resolution of the dispute, the party who requested the due process hearing shall transmit a written notice informing the hearing officer and the SED that the matter has been

resolved and withdraw the request for hearing. The hearing officer shall transmit an appropriate order of dismissal to the parties and the SED.

(e) Hearing. If the parties convene a resolution session and they have not resolved the disputed issue(s) within 30 days of the receipt of the due process request by the SED in a non-expedited case, the public agency shall (and the parents may) notify the hearing officer in writing within one business day of reaching this outcome. The hearing officer shall then promptly notify the parties in writing that the due process hearing shall proceed and all applicable timelines for a hearing under this part shall commence as of the date of such notice.

(f) Further adjustments to the timelines may be made as provided in 34 CFR Secs. 300.510(b) and 300.510(c).

(g) The resolution of disputes by mutual agreement is strongly encouraged and nothing in these rules shall be interpreted as prohibiting the parties from engaging in settlement discussions at any time before, during, or after an ADR meeting, a due process hearing, or a civil action.

(8) Hearing officer responsibility and authority. Hearing officers shall conduct proceedings under these rules with due regard for the costs and other burdens of due process proceedings for public agencies, parents, and students. In that regard, hearing officers shall strive to maintain a reasonable balance between affording parties a fair opportunity to vindicate their IDEA rights and the financial and human costs of the proceedings to all concerned. Accordingly, each hearing officer shall exercise such control over the parties, proceedings, and the hearing officer's own practices as the hearing officer deems appropriate to further those ends under the circumstances of each case. In particular, and without limiting the generality of the foregoing, the hearing officer, at the request of a party or upon the hearing officer's own initiative and after the parties have had a reasonable opportunity to express their views on disputed issues:

(a) shall ensure by appropriate orders that parents and their duly authorized representatives have timely access to records and information under the public agency's control which are reasonably necessary for a fair assessment of the IDEA issues raised by the requesting party;

(b) shall limit the issues for hearing to those permitted by IDEA which the hearing officer deems necessary for the protection of the rights that have been asserted by the requesting party in each case;

(c) may issue orders directing the timely production of relevant witnesses, documents, or other information within a party's control, protective orders, or administrative orders to appear for hearings, and may address a party's unjustified failure or refusal to comply by appropriate limitations on the claims, defenses, or evidence to be considered;

(d) shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in federal courts or the courts of New Mexico;

(e) may issue such other orders and make such other rulings, not inconsistent with express provisions of these rules or IDEA, as the hearing officer deems appropriate to control the course, scope, and length of the proceedings while ensuring that the parties have a fair opportunity to present and support all allowable claims and defenses that have been asserted; and

(f) shall not permit non-attorneys to represent parties at due process hearings.

(9) Duties of the hearing officer. The hearing officer shall excuse himself or herself from serving in a hearing in which he or she believes a personal or professional bias or interest exists which conflicts with his or her objectivity. The hearing officer shall:

(a) make a determination regarding the sufficiency of a request for due process within five days of receipt of any notice of insufficiency and notify the parties of this determination in writing;

(b) schedule an initial prehearing conference within 14 days of commencement of the timeline for a due process hearing or as soon as reasonably practicable in an expedited case pursuant to Paragraph (12) of Subsection I of 6.31.2.13 NMAC;

(c) reach a decision, which shall include written findings of fact, conclusions of law, and reasons for these findings and conclusions and shall be based solely on evidence presented at the hearing;

(d) transmit the decision to the parties and to the SED within 45 days of the commencement of the timeline for the hearing, unless a specific extension of time has been granted by the hearing officer at the request of a party to the hearing, or at the joint request of the parties where the reason for the request is to permit the parties to pursue an ADR option; for an expedited hearing, no extensions or exceptions beyond the time frame provided in Subparagraph (a) of Paragraph (19) of Subsection I of 6.31.2.13 NMAC;

(e) the hearing officer may reopen the record for further proceedings at any time before reaching a final decision after transmitting appropriate notice to the parties; the hearing is considered closed and final when the written decision is transmitted to the parties and to the SED; and

(f) the decision of the hearing officer is final, unless a party brings a civil action as set forth in Paragraph (24) of Subsection I of 6.31.2.13 NMAC.

(10) Withdrawal of request for hearing. A party may unilaterally withdraw a request for due process at any time before a decision is issued. A written withdrawal that is transmitted to the hearing officer, and the other party at least two business days before a scheduled hearing, shall be without prejudice to the party's right to file a later request on the same claims, which shall ordinarily be assigned to the same hearing officer. A withdrawal that is transmitted or communicated within two business days of the scheduled hearing shall ordinarily be with prejudice to the party's right to file a later request on the same claims unless the hearing officer orders otherwise for good cause shown. A withdrawal that is entered during or after the hearing but before a decision is issued shall be with prejudice. In any event, the hearing officer shall enter an appropriate order of dismissal.

(11) Prehearing procedures. Unless extended by the hearing officer at the request of a party, within 14 days of the commencement of the timeline for a due process hearing and as soon as is reasonably practicable in an expedited case, the hearing officer shall conduct an initial prehearing conference with the parent and the public agency to:

- (a) identify the issues (disputed claims and defenses) to be decided at the hearing and the relief sought;
- (b) establish the hearing officer's jurisdiction over IDEA;
- (c) determine the status of the resolution session, FIEP meeting, or mediation between the parties and determine whether an additional prehearing conference will be necessary as a result;
- (d) review the hearing rights of both parties, as set forth in Paragraphs (15) and (16) of Subsection I of 6.31.2.13 NMAC, including reasonable accommodations to address an individual's need for an interpreter at public expense;
- (e) review the procedures for conducting the hearing;
- (f) set a date, time, and place for the hearing that is reasonably convenient to the parents and child involved; the hearing officer shall have discretion to determine the length of the hearing, taking into consideration the issues presented;
- (g) determine whether the child who is the subject of the hearing will be present and whether the hearing will be open to the public;
- (h) set the date by which any documentary evidence intended to be used at the hearing by the parties shall be exchanged; the hearing officer shall further inform the parties that, not less than five business days before a regular hearing or, if the hearing officer so directs, not less than two business days before an expedited hearing, each party shall disclose to the other party all evaluations completed by that date and recommendations based on the evaluations that the party intends to use at the hearing; the hearing officer may bar any party that fails to disclose such documentary evidence, evaluation(s), or recommendation(s) by the deadline from introducing the evidence at the hearing without the consent of the other party;
- (i) as appropriate, determine the current educational placement of the child pursuant to Paragraph (25) of this subsection;
- (j) exchange lists of witnesses and, as appropriate, entertain a request from a party to issue an administrative order compelling the attendance of a witness or witnesses at the hearing;
- (k) address other relevant issues and motions; and
- (l) determine the method for having a written, or at the option of the parent, electronic verbatim record of the hearing; the public agency shall be responsible for arranging for the verbatim record of the hearing; and
- (m) the hearing officer shall transmit to the parties and the SED of the department a written summary of the prehearing conference; the summary shall include, but not be limited to, the date, time, and place of the hearing, any prehearing decisions, and any orders from the hearing officer.

(12) Each hearing involving oral arguments shall be conducted at a time and place that is reasonably convenient to the parents and child involved.

(13) In order to limit testimony at the hearing to only those factual matters which remain in dispute between the parties, on or before 10 days before the date of the hearing, each party shall submit a statement of proposed stipulated facts to the opposing party. On or before five days before the date of the hearing, the parties shall submit a joint statement of stipulated facts to the hearing officer. All agreed-upon stipulated facts shall be deemed admitted, and evidence shall not be permitted for the purpose of establishing these facts.

(14) Any party to a hearing has the right to:

- (a) be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

witnesses;

- (b) present evidence and confront, cross-examine, and compel the attendance of
- (c) prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before a regular hearing or, if the hearing officer so directs in the prehearing summary, at least two business days before an expedited hearing;
- (d) obtain a written, or, at the option of the parents, electronic verbatim record of the hearing; and
- (e) obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(15) Parents involved in hearings also have the right to:

- (a) have the child who is the subject of the hearing present; and
- (b) open the hearing to the public.

(16) The record of the hearing and the findings of fact and decisions shall be provided at no cost to the parents.

(17) Limitations on the hearing.

(a) The party requesting the due process hearing shall not be allowed to raise issues at the hearing that were not raised in the request for a due process hearing (including an amended request, if such amendment was previously permitted) filed under Paragraph (5) of Subsection I of 6.31.2.13 NMAC, unless the other party agrees otherwise.

(b) Timeline for requesting hearing. A parent or public agency shall request an impartial due process hearing within two years of the date that the parent or public agency knew or should have known about the alleged action that forms the basis of the due process request.

(c) Exceptions to the timeline. The timeline described in Subparagraph (b) of Paragraph (18) of Subsection I of 6.31.2.13 NMAC shall not apply to a parent if the parent was prevented from requesting the hearing due to:

(i) specific misrepresentations by the public agency that it had resolved the problem that forms the basis of the due process request; or

(ii) the public agency's withholding of information from the parent that was required under this part to be provided to the parent.

(18) Rules for expedited hearings. The rules in Paragraphs (4) through (18) of Subsection I of 6.31.2.13 NMAC shall apply to expedited due process hearings with the following exceptions.

(a) The SED of the department and the hearing officer shall ensure that a hearing is held within 20 school days of the date the request for hearing is received by the SED, and a written decision is reached within 10 school days of the completion of the hearing, without exceptions or extensions, and thereafter mailed to the parties.

(b) The hearing officer shall seek to hold the hearing and issue a decision as soon as is reasonably practicable within the time limit described in Subparagraph (a) of Paragraph (19) of Subsection I of 6.31.2.13 NMAC, and shall expedite the proceedings with due regard for any progress in a resolution session, FIEP meeting, or mediation, the parties' need for adequate time to prepare and the hearing officer's need for time to review the evidence and prepare a decision after the hearing.

(c) The parties shall decide whether to convene a resolution session, FIEP meeting, or mediation before the commencement of an expedited hearing in accordance with Paragraph (8) of Subsection I of 6.31.2.13 NMAC and are encouraged to utilize one of these preliminary meeting options. However, in the case of an expedited hearing, agreement by the parties to convene a resolution session, FIEP meeting, or mediation shall not result in the suspension or extension of the timeline for the hearing stated under Subparagraph (a) of Paragraph (19) of Subsection I of 6.31.2.13 NMAC. The timeline for resolution sessions provided in 34 CFR Sec. 300.532(c)(3) shall be observed.

(d) Subparagraph (a) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC relating to sufficiency of the request for the expedited due process hearing does not apply to expedited hearings.

(e) The hearing officer may shorten the timeline for the exchange of proposed stipulated facts between the parties as the hearing officer deems necessary and appropriate given the circumstances of a particular case. The hearing officer may also shorten the timeline for providing agreed-upon stipulated facts to the hearing officer to two school days before the hearing.

(f) Decisions in expedited due process hearings are final, unless a party brings a civil action as provided in Paragraph (24) of Subsection I of 6.31.2.13 NMAC.

(19) Decision of the hearing officer.

(a) In general. Subject to Subparagraph (b) of Paragraph (20) of Subsection I of 6.31.2.13 NMAC, a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

(b) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies:

- (i)** impeded the child's right to a FAPE;
- (ii)** significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or
- (iii)** caused a deprivation of educational benefits.

(c) Rule of construction. Nothing in this paragraph shall be construed to preclude a hearing officer from ordering a public agency to comply with procedural requirements under this section.

(20) Rule of construction. Nothing in this Subsection I shall be construed to affect the right of a parent to file a complaint with the SED of the department, as described under Subsection H of 6.31.2.13 NMAC.

(21) Modification of final decision. Clerical mistakes in final decisions, orders, or parts of the record and errors therein arising from oversight or omission may be corrected by the hearing officer at any time on the hearing officer's own initiative or on the request of any party and after such notice, if any, as the hearing officer orders. Such mistakes may be corrected after a civil action has been brought pursuant to Paragraph (24) of Subsection I of 6.31.2.13 NMAC only with leave of the state or federal district court presiding over the civil action.

(22) Expenses of the hearing. The public agency shall be responsible for paying administrative costs associated with a hearing, including the hearing officer's fees and expenses and expenses related to the preparation and copying of the verbatim record, its transmission to the SED, and any further expenses for preparing the complete record of the proceedings for filing with a reviewing federal or state court in a civil action. Each party to a hearing shall be responsible for its own legal fees or other costs, subject to Paragraph (25) of Subsection I of 6.31.2.13 NMAC.

(23) Civil action. Any party aggrieved by the decision of a hearing officer in an IDEA matter has the right to bring a civil action in a state or federal district court pursuant to 20 USC Sec. 1415(i) and 34 CFR Sec. 300.516. Any civil action shall be filed within 30 days of the receipt of the hearing officer's decision by the appealing party.

(24) Attorney fees.

(a) In any action or proceeding brought under 20 USC Sec. 1415, the court, in its discretion and subject to the further provisions of 20 USC Sec. 1415(i) and 34 CFR Sec. 300.517, may award reasonable attorney fees as part of the costs to:

- (i)** the parent of a child with a disability who is a prevailing party;
- (ii)** a prevailing public agency against the attorney of a parent who files a request for due process or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
- (iii)** a prevailing public agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(b) Any action for attorney fees shall be filed within 30 days of the receipt of the last administrative decision.

(c) Opportunity to resolve due process complaints. A meeting conducted pursuant to Subparagraph (a) of Paragraph (8) of Subsection I of 6.31.2.13 NMAC shall not be considered:

- (i)** a meeting convened as a result of an administrative hearing or judicial action; or
- (ii)** an administrative hearing or judicial action for purposes of this paragraph.

(d) Hearing officers are not authorized to award attorney fees.

(e) Attorney fees are not recoverable for actions or proceedings involving claims based solely on state law.

(25) Child's status during proceedings.

(a) Except as provided in 34 CFR Sec. 300.533 and Paragraph (4) of Subsection I of 6.31.2.13 NMAC, and unless the public agency and the parents of the child agree otherwise, during the pendency of any administrative or judicial proceeding regarding an IDEA due process request, the child involved shall remain in

his or her current educational placement. Disagreements over the identification of the current educational placement which the parties cannot resolve by agreement shall be resolved by the hearing officer as necessary.

(b) If the case involves an application for initial admission to public school, the child, with the consent of the parents, shall be placed in the public school until the completion of all the proceedings.

(c) If a hearing officer agrees with the child's parents that a change of placement is appropriate, that placement shall be treated as an agreement between the public agency and the parents for purposes of Subparagraph (a) of this paragraph.

J. Surrogate parents and foster parents.

(1) Each public agency shall ensure that a qualified surrogate parent is appointed in compliance with 34 CFR Sec. 300.519 when needed to protect the rights of a child with a disability who is within the public agency's educational jurisdiction. A surrogate parent need not be appointed if a person who qualifies as a parent under 34 CFR Sec. 300.30(b) and Paragraph (13) of Subsection B of 6.31.2.7 NMAC can be identified.

(2) A foster parent who meets all requirements of 34 CFR Sec. 300.30 may be treated as the child's parent pursuant to that rule. A foster parent who does not meet those requirements but meets all requirements of 34 CFR Sec. 300.519 may be appointed as a surrogate parent if the public agency that is responsible for the appointment deems such action appropriate.

(3) Pursuant to 34 CFR Sec. 300.519, a surrogate parent may represent the child in all matters relating to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.

K. Transfer of parental rights to students at age 18.

(1) Pursuant to Secs. 12-2A-3 and 28-6-1 NMSA 1978, a person's age of majority begins on the first instant of his or her 18th birthday and a person who has reached the age of majority is an adult for all purposes not otherwise limited by state law. A guardianship proceeding under the probate code is the only way an adult in New Mexico can legally be determined to be incompetent and have the right to make his or her own decisions taken away. Public agencies and their IEP teams are not empowered to make such determinations under New Mexico law. Accordingly, pursuant to 34 CFR Sec. 300.520, when a child with a disability reaches age 18 and does not have a court-appointed general guardian, limited guardian, or other person who has been authorized by a court to make educational decisions on the student's behalf or who has not signed a power of attorney as provided under New Mexico law:

(a) a public agency shall provide any notices required by 34 CFR Part 300 to the child and the parents;

(b) all other rights accorded to parents under Part B of IDEA, New Mexico law, or department rules and standards transfer to the child; and

(c) the public agency shall notify the individual and the parents of the transfer of rights.

(2) Pursuant to 34 CFR Sec. 300.320(c), each annual IEP review for a child who is age 14 or older shall include a discussion of the rights that will transfer when the child turns age 18 and, as appropriate, a discussion of the parents' plans for obtaining a guardian before that time. The IEP of a child who is age 14 or older shall include a statement that the child and the parent have been informed of the rights that will transfer to the child at age 18.

L. Confidentiality of information.

(1) Confidentiality requirements. Each public agency collecting, using, or maintaining any personally identifiable information on children under Part B of IDEA shall comply with all applicable requirements of 34 CFR Secs. 300.610 through 300.626, and the federal Family Educational Rights and Privacy Act, 34 CFR Part 99.

(2) Parental rights to inspect, review, and request amendment of education records. Each public agency shall permit parents or their authorized representatives to inspect and review any education records relating to their children that are collected, maintained, or used by the public agency under Part B of IDEA pursuant to 34 CFR Sec. 300.613. A parent who believes that information in the education records is inaccurate or misleading or violates the privacy or other rights of the child may request the public agency that maintains the information to amend the information pursuant to 34 CFR Sec. 300.618 and shall have the opportunity for a hearing on that request pursuant to 34 CFR Secs. 300.619 through 300.621 and 99.22.

(3) Transfer of student records.

(a) Pursuant to 34 CFR Sec. 99.31(a)(2), an educational agency may transfer child records without parental consent when requested by another educational agency in which a child seeks or intends to enroll as long as the sending educational agency has included the proper notification that it will do so in its required

annual FERPA notice to children and parents. In view of the importance of uninterrupted educational services to children with disabilities, each New Mexico public agency is hereby directed to include such language in its annual FERPA notice and to ensure that it promptly honors each proper request for records from an educational agency that has become responsible for serving a child with a disability.

(b) State-supported educational programs and the educational programs of juvenile or adult detention or correctional facilities are educational agencies for purposes of the Family Educational Rights and Privacy Act (FERPA) and are entitled to request and receive educational records on children with disabilities on the same basis as local school districts. Public agencies shall promptly honor requests for records to assist such programs in providing appropriate services to children within their educational jurisdiction.

(c) Pursuant to 34 CFR Sec. 99.34(b), an educational agency that is authorized to transfer student records to another educational agency without parental consent under Sec. 99.31(a)(2) may properly transfer to the receiving educational agency all educational records the sending educational agency maintains on a child, including medical, psychological and other types of diagnostic and service information which the educational agency obtained from outside sources and used in making or implementing educational programming decisions for the child.

(d) Pursuant to Paragraph (3) of Subsection E of 6.29.1.9 NMAC, 34 CFR Sec. 300.229 and the federal Elementary and Secondary Education Act of 1965 at 20 USC 7221(g), any transfer of educational records to a private or public elementary or secondary school in which a child with disabilities seeks, intends, or is instructed to enroll shall include the following:

(i) transcripts and copies of all pertinent records as normally transferred for all students;

(ii) the child's current individualized education program with all supporting documentation, including the most recent multidisciplinary evaluations and any related medical, psychological, or other diagnostic or service information that was consulted in developing the IEP; and

(iii) disciplinary records with respect to current or previous suspensions or expulsions of the child.

(4) Parental refusals of consent for release of information. If parental consent is required for a particular release of information regarding a child with a disability and the parent refuses consent, the sending or receiving public agency may use the impartial due process hearing procedures specified in Subsection I of 6.31.2.13 NMAC to determine if the information may be released without parental consent. If the hearing officer determines that the proposed release of information is reasonably necessary to enable one or more public agencies to fulfill their educational responsibilities toward the child, the information may be released without the parent's consent. The hearing officer's decision in such a case shall be final and not subject to further administrative review.

(5) Destruction of information.

(a) Pursuant to 34 CFR Sec. 300.624, each public agency shall inform parents when personally identifiable information collected, maintained, or used under 34 CFR Part 300 is no longer needed to provide educational services to the child. As at other times, the parents shall have the right to inspect and review all educational records pertaining to their child pursuant to 34 CFR Sec. 300.613. The information shall be destroyed at the request of the parents or, at their option, the records shall be given to the parents. When informing parents about their rights to destruction of personally identifiable records under these rules, the public agency should advise them that the records may be needed by the child or the parents for social security benefits and other purposes.

(b) If the parents do not request the destruction of personally identifiable information about their children, the public agency may retain that information permanently. In either event, a permanent record of a student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation. Additional information that is not related to the student's IDEA services may be maintained if allowed under 34 CFR Part 99.

(6) Educational records retention and disposition schedules.

(a) Definitions as used in this paragraph:

(i) "destruction" means physical destruction or removal of personal identifiers from educational records so that the information is no longer personally identifiable; and

(ii) "educational records" means the type of records covered under the definition of "educational records" in 34 CFR Part 99 of the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 USC 1232g (FERPA).

(b) Pursuant to 1.20.2.102 NMAC, the public agency shall notify the parents that the public agency shall retain specific information for five years to include:

(i) most recent IEP;

- (ii) most recent 2 years of child progress reports or referral form;
- (iii) related services reports;
- (iv) summary of academic achievement and functional performance;
- (v) parent communication;
- (vi) public agency community action;
- (vii) writing sample; and
- (viii) staff reports on behavior.

(c) Pursuant to 34 CFR Sec. 300.624 and Paragraph (5) of this subsection, federal rules and department rules require public agencies to inform parents of proposed destruction of special education records.

(d) Pursuant to 34 CFR Sec. 300.624, the information shall be destroyed at the request of the parents. However, a permanent record of a child's name, address, phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limit. Notice of destruction of child records shall include:

- (i) informing parents at the last IEP meeting of personally identifiable information that is no longer needed to provide special education and related service and information that shall be retained according to the state for five years under 1.20.1.102 NMAC;
- (ii) documentation at the last IEP meeting and prior written notice of the information that is required to be maintained indefinitely;
- (iii) documentation at the last IEP meeting and the prior written notice that the parent accepted or rejected the proposed action to maintain records;
- (iv) if the parent requests that the public agency destroy information not required indefinitely, the public agency shall maintain the last IEP and prior written notice that states the parent required the public agency to destroy allowable information that shall be maintained for five years; and
- (v) the public agency shall inform the parents of the proposed date of destruction of records at the last IEP meeting and document on the prior written notice of action the proposed date of destruction of records.

M. Computation of time.

(1) In computing any period of time prescribed or allowed by 6.31.2.13 NMAC, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday in which case the last day shall be the next business day. As used in this rule, "legal holiday" includes any day designated as a state holiday.

(2) Notwithstanding Paragraph (1) of this subsection, if the due date of a decision referenced in Subsection H of 6.31.2.13 NMAC falls on a Saturday, a Sunday, or a legal holiday, the decision will be due on the previous business day.

(3) Notwithstanding Paragraph (1) of this subsection, if the due date of a decision referenced in Subsection I of 6.31.2.13 NMAC falls on a Saturday, a Sunday, or a legal holiday, the decision shall be mailed no later than the actual due date. A decision is considered "mailed" when addressed, stamped, and placed in a United States postal service mailbox. If a parent exercises the option of receiving the decision electronically, the decision is "mailed" when transmitted electronically.

[6.31.2.13 NMAC - Rp, 6.31.2.13 NMAC, 7/14/2020; A, 7/1/2023; A, 7/31/2023]

6.31.2.14 RULES OF CONSTRUCTION:

A. U.S. department of education interpretations. The U.S. department of education's (USDE) interpretations of the provisions of 34 CFR Part 300 as set forth in its Analysis of Comments and Changes to Part 300 at 71 Federal Register 46547-46753 (August 14, 2006), and other interpretations that are published or announced by the USDE in the federal register are recognized as the federal government's official positions regarding the requirements of IDEA. Such interpretations shall be followed by the department to the extent that they do not conflict with express provisions of IDEA or case law from the federal courts.

B. Uniform Statute and Rule Construction Act. The Uniform Statute and Rule Construction Act, Sections 12-2A-1 through 12-2A-20 NMSA 1978, applies to the interpretation of 6.31.2 NMAC except to the extent that these rules incorporate permissible variations under the New Mexico version of the Uniform Statute and Rule Construction Act. References in 6.31.2 NMAC to state or federal laws or rules are intended to incorporate future amendments unless a provision in these rules is irreconcilable with a future amendment under the standards of the Uniform Statute and Rule Construction Act.

C. Conflicts with state or federal laws or rules. If any state law or a state rule adopted by the department or a federal law or regulation grants greater rights to an individual or public agency than these rules provide, the provision(s) granting greater rights shall control to the extent necessary to avoid a conflict. [6.31.2.14 NMAC - Rp, 6.31.2.14 NMAC, 7/14/2020]

HISTORY OF 6.31.2 NMAC:

Pre-NMAC History:

Material in this Part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives:

SBE Regulation 85-4, Educational Standards for New Mexico Schools Basic, Special Education, Vocational Programs, 10/21/1985

SBE Regulation 86-7, Educational Standards for New Mexico Schools, 9/2/1986

SBE Regulation 87-8, Educational Standards For New Mexico Schools, 2/2/1988

SBE Regulation 88-9, Educational Standards For New Mexico Schools, 10/28/1988

SBE Regulation 89-8, Educational Standards For New Mexico Schools, 11/22/1989

SBE Regulation 90-2, Educational Standards For New Mexico Schools, 9/7/1990

History of Repealed Material:

6 NMAC 5.2, Children with Disabilities/Gifted Children, filed 9/17/1997 - Repealed, 8/14/2000

6.31.2 NMAC, Children with Disabilities/Gifted Children, filed 8/1/2000 - Repealed, 6/29/2007

6.31.2.12 NMAC, Educational Services for Gifted Children, filed 7/14/2020 – Repealed, 7/31/2023

Other history:

6.31.2 NMAC, Children with Disabilities/Gifted Children, filed 6/29/2007 was repealed and replaced with 6.31.2 NMAC, Children with Disabilities/Gifted Children, effective 7/14/2020.

6.31.2 NMAC, Part name changed to Children with Disabilities, effective 7/31/2023.

Tab 4
New Mexico Administrative
Code

Standards for Excellence:
General Provisions

6.29.1 NMAC (7/31/2023)

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 29 STANDARDS FOR EXCELLENCE
PART 1 GENERAL PROVISIONS

6.29.1.1 ISSUING AGENCY: Public Education Department hereinafter referred to as the department.
[6.29.1.1 NMAC - Rp, 6.30.2.1 NMAC, 6/30/2009]

6.29.1.2 SCOPE: All public schools, state educational institutions and educational programs conducted in state institutions other than New Mexico military institute.
[6.29.1.2 NMAC - Rp, 6.30.2.2 NMAC, 6/30/2009]

6.29.1.3 STATUTORY AUTHORITY: This rule is being promulgated pursuant to Sections 9-24-8, 22-2-1, 22-2-2, 22-2C-3, 22-2C-4, 22-5-13, 22-13-1.1, and 22-13-14 NMSA 1978.
[6.29.1.3 NMAC - Rp, 6.30.2.3 NMAC, 6/30/2009; A, 12/15/2020; A 7/31/2023]

6.29.1.4 DURATION: Permanent.
[6.29.1.4 NMAC - Rp, 6.30.2.4 NMAC, 6/30/2009]

6.29.1.5 EFFECTIVE DATE: June 30, 2009, unless a later date is cited at the end of a section.
[6.29.1.5 NMAC - Rp, 6.30.2.5 NMAC, 6/30/2009]

6.29.1.6 OBJECTIVE: This rule provides for the implementation of educational standards and expectations for all students who attend public schools in the state.
[6.29.1.6 NMAC - Rp, 6.30.2.6 NMAC, 6/30/2009; A, 12/15/2020; A, 7/31/2023]

6.29.1.7 DEFINITIONS:

A. “Accreditation” means the official recognition that a school or school district meets required standards. Schools are accredited by voluntary regional accrediting associations or by state government. Accreditation also refers to the process of certifying that institutions of higher education meet certain standards in relation to such matters as the qualifications of their faculty, the condition of their facilities, and the appropriateness of their curriculum.

B. “Advanced placement (AP)” means a course taught by high school teachers trained in advanced placement course delivery provided through the college board. These courses are more difficult and involve more work than a standard class. AP courses are considered college-level courses and may allow a student to earn college credit, depending on college or university policies.

C. “Bilingual multicultural education” means a program of instruction using two languages, including English and the home or heritage language, as a medium of instruction in the teaching and learning process.

D. “Career and technical education” means organized programs offering a sequence of courses, including technical education and applied technology education, which are directly related to the preparation of individuals for paid or unpaid employment in current or emerging occupations requiring an industry-recognized credential, certificate, or degree. This phrase is also referred to as “vocational education” at Section 22-14-1 NMSA 1978.

E. “Career cluster” means a grouping of occupations in industry sectors based on recognized commonalities. Career clusters provide an organizing tool for developing instruction within the educational system.

F. “Career pathways” means a sub-grouping used as an organizing tool for curriculum design and instruction of occupations or career specialties that share a set of common knowledge and skills for career success.

G. “Caseload” means the total number of students receiving special education and speech-only services as special education, for whom a special education teacher or speech language pathologist has responsibility for developing and monitoring the students' IEPs. “Caseload” may also mean the number of students for which individual support services staff members are responsible.

H. “Certified district reviewer” means an LEA employee who is certified to review and approve an LEA's NM School DASH plans.

I. “Chartering authority” means a local school board or the commission that approves and oversees a charter school.

J. “Commission” means the public education commission.

- K.** “**Class load**” means the number of students for whom a teacher structures activities at a given time.
- L.** “**Content standard**” means a statement about performance that describes what students should know and be able to do in content areas at each grade level.
- M.** “**Correspondence course**” means a form of distance learning conducted via traditional mail. A correspondence course is used to teach non-resident students by mailing them lessons and exercises, which upon completion, are returned to the correspondence school for grading.
- N.** “**Dual credit program**” means a program that allows high school students to enroll in college-level courses offered by a post-secondary educational institution that may be academic or career-technical but not be remedial or developmental, and simultaneously to earn credit toward high school graduation and a post-secondary degree or certificate.
- O.** “**Education plan**” is the strategic plan written by all school districts, locally chartered and state-chartered charter schools to improve student performance.
- P.** “**English language learner**” means a student whose first or heritage language is not English and who is unable to read, write, speak, or understand English at a level comparable to grade-level English proficient peers and native English speakers.
- Q.** “**Free appropriate public education (FAPE)**” means special education and related services that are provided at public expense, under public supervision and direction without charge, which meet the standards of the department in providing appropriate preschool, elementary or secondary education in New Mexico; and which are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 CFR Sections 300.320 through 300.324.
- R.** “**Family Educational Rights and Privacy Act (FERPA)**” means rights, pursuant to 20 U.S. Code 1232(g) and 34 CFR Part 99, afforded to parents and students over 18 years of age with respect to the student's education records, that include: the right to inspect and review the student's education records within 45 days, the right to request amendment to the student's education records for various reasons, the right to consent or refuse to consent to disclosures of personally identifiable information in the student's records (except for those records that FERPA authorizes for disclosure without consent) and the right to file a complaint with the U.S. department of education concerning non-compliance with FERPA.
- S.** “**Heritage language**” means a language other than English that is inherited from a family, tribe, community, or country of origin.
- T.** “**Home language**” means a language other than English that is the primary or heritage language spoken at home or in the community.
- U.** “**Individuals with Disabilities Education Improvement Act of 2004 (IDEA)**” means the federal Individuals with Disabilities Education Improvement Act of 2004, 20 U.S. Code Secs. 1401 et seq., including future amendments.
- V.** “**Individualized education program (IEP)**” means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with 34 CFR Secs. 300.320 through 300.324.
- W.** “**Laboratory component**” means an experience in the laboratory, classroom or the field that provides students with opportunities to interact directly with natural phenomena or with data collected by others using tools, materials, data collection techniques and models. Throughout the process, students should have opportunities to design investigations, engage in scientific reasoning, manipulate equipment, record data, analyze results, and discuss their findings.
- X.** “**Local educational agency (LEA)**” means a local educational agency as defined in 34 CFR Sec. 300.28. The LEA may be a public school district, a state-chartered charter school, or a state educational institution.
- Y.** “**MLSS Self-assessment**” means analysis of MLSS implementation that each school shall submit in a form and by a due date determined by the department. The MLSS Self-assessment shall contribute to a school's NM School DASH, but it shall not be a component in the evaluation of a school by the department.
- Z.** “**Multi-layered system of supports (MLSS)**” means a coordinated and comprehensive framework that uses increasingly intensive evidence-based academic and behavioral supports that address student needs as evidenced by student data. It is a model for holistic school improvement that provides progress measures for additional supports such as school-based team structures, professional development, health and wellness, and family and community engagement. MLSS satisfies the definition of “multi-tiered system of supports” contained within the ESSA.
- AA.** “**NM School DASH**” means the strategic plan written by schools to improve student outcomes. It contains the annual plan, both 90-day plans, and functions as a school site improvement plan.

AB. “Performance standard” means the statement of a standard that describes the specific level of mastery expected in achieving the New Mexico content standards with benchmarks.

AC. “Prior written notice (PWN)” means the written notice that goes to parents from the school district, informing them the district proposes or refuses to initiate or change the identification, evaluation or educational placement of their child, or the provision of FAPE to the child, and which meets the requirements of 34 CFR Sections 300.503 and 300.504.

AD. “Short-cycle assessment” is a formative assessment that is regularly used to assess student performance over a short time period.

AE. “Small group setting” means a planned intervention group containing no more than 15 students.

AF. “Socioeconomic status” means the stratification of groups of people by status ascribed through social constructs such as race, gender, ethnicity, educational attainment, economic resources, language, and national origin.

AG. “State educational institution” means a school that is under the direction of a state agency other than the department or a separate board of regents.

AH. “Student assistance team (SAT)” means a school-based group of people whose purpose is to provide additional educational support to students experiencing difficulties preventing them from benefitting from general education.

AI. “System of assessments” means the collection of instruments that assess student academic performance annually and the students’ progress toward meeting the New Mexico content standards with benchmarks and performance standards.

AJ. “Transition plan” means a coordinated set of activities for a student with a disability, which specifies special education and related services designed to meet a student's unique needs and to prepare the student for future education, employment, and independent living. The use of individualized educational program (IEP) transition planning, graduation planning and post-secondary transitions is described in Subparagraph (a) of Paragraph (13) of Subsection J of 6.29.1.9 NMAC.

[6.29.1.7 NMAC - Rp, 6.30.2.7 NMAC, 6/30/2009; A, 10/31/2011; A, 12/15/2020; A, 7/31/2023]

6.29.1.8 IMPLEMENTATION: This regulation shall assist in the implementation of standards for excellence through the use of the Education Plan for all school districts and charter schools. At the school site level this regulation shall assist in the implementation of standards for excellence through the use of the NM School DASH, content standards with benchmarks and performance standards, and additional program and procedural requirements specified in this regulation.

A. District and charter school responsibilities for the Education Plan and NM School DASH. The Education Plan and NM School DASH are strategic improvement plans that are written or revised based on trend data and the academic achievement of the school and district. Each district and each charter school is required to develop, implement, monitor and evaluate the Education Plan on an annual basis. Additionally, the district shall ensure that a site-level NM School DASH is developed and implemented by each school within the district and by each charter school for which the district is the chartering agency. LEAs shall have each NM School DASH evaluated and approved by a certified district reviewer. State-chartered charter schools shall develop a site-level NM School DASH. Districts with fewer than 200 students may write only one NM School DASH for the entire district; however, a district with a school in or receiving a school improvement status classification is not eligible for this option.

B. The Education Plan and NM School DASH shall be guided by questions determined by the department.

[6.29.1.8 NMAC - Rp, 6.30.2.9 NMAC, 6/30/2009; A, 10/31/2011; A, 12/15/2020; A, 7/31/2023]

6.29.1.9 PROCEDURAL REQUIREMENTS:

A. Duties and powers of the local board of education or charter school governing body. The local board of education or charter school governing body shall:

(1) review, approve, and support each school site-level department-approved NM School DASH and *MLSS Self-assessment* for each school site in improvement status;

(2) employ and evaluate the local superintendent or charter school administrator;

(3) develop a planned program of training annually, in which each member of the board participates, to assist in the performance of specified duties; this planned program shall align with the LEA’s Education Plan; training shall include the following requirements and procedures.

(a) All local school board members shall receive a total of five hours of annual training provided by the New Mexico school boards association (NMSBA) and shall include a minimum of one hour of training during each term in office on equity and culturally and linguistically responsive practices.

(b) Newly elected or appointed local school board members, who are in office for less than a year, shall receive three of the five hours from attending a training course developed by the department and sponsored by the NMSBA. The additional two hours of annual training for new board members shall consist of sessions sponsored by the NMSBA and approved by the department.

(c) All local school board members who have been in office for one or more years shall attend five hours of annual training sponsored by the NMSBA and approved by the department.

(d) In order to be credited with attendance at these courses, each attendee shall comply with written attendance procedures established by the department. Prior to September 1 of each year, the NMSBA shall provide each local superintendent with a list of training hours earned annually by each local school board member. The school district's accountability report shall include the names of those local school board members who failed to attend annual mandatory training (see Subsection E of Section 22-2C-11 NMSA 1978);

(4) delegate administrative and supervisory functions to the local superintendent or charter school administrator;

(5) refrain from involvement in delegated administrative functions;

(6) review district or charter school policies on an annual basis and revise as needed;

(7) award high school graduation diplomas to students who have successfully completed graduation requirements;

(8) ensure the alignment of district or charter school curricula with New Mexico content standards with benchmarks and performance standards;

(9) ensure that district or charter school funds are appropriately managed and disbursed in accordance with laws, regulations and terms of grants;

(10) approve the annual district or charter school budget;

(11) be responsible for oversight of revenue and expenditures within the district or charter school budget; and

(12) coordinate with the district's superintendent to establish the procedures for discharging and terminating school employees pursuant to Section 22-5-4 NMSA 1978 and the School Personnel Act (Chapter 22, Article 10-A NMSA 1978).

B. Duties and powers of the governing body of a charter school. In addition to the powers and duties set out in Section 22-5-4 NMSA 1978 and Section 22-1-1 et seq. NMSA 1978 of the Public School Code, the governing body of a charter school shall:

(1) review, approve and support the district's department-approved improvement plan and each school site-level *MLSS Self-assessment* and department approved improvement plan, or the charter school's department approved improvement plan;

(2) employ and evaluate the local superintendent or charter school administrator;

(3) develop a planned program of training annually, in which each member of the governing body participates, to assist in the performance of specified duties; this planned program shall align with all requirements of statute and any other department regulations;

(4) delegate administrative and supervisory functions to the local superintendent or charter school administrator;

(5) refrain from involvement in delegated administrative functions;

(6) review district or charter school policies on an annual basis and revise as needed;

(7) award high school graduation diplomas to students who have successfully completed graduation requirements;

(8) ensure the alignment of district or charter school curricula with New Mexico content standards with benchmarks and performance standards;

(9) ensure that district or charter school funds are appropriately managed and disbursed in accordance with laws, regulations and terms of grants;

(10) approve the annual district or charter school budget;

(11) be responsible for oversight of revenue and expenditures within the district or charter school budget; and

(12) coordinate with the district's superintendent to establish the procedures for discharging and terminating school employees pursuant to the School Personnel Act (Chapter 22, Article 10-A NMSA 1978).

C. Duties and powers of the district superintendent or the administrator of a charter school. In addition to the powers and duties set out in Section 22-5-14 NMSA 1978 of the Public School Code, the local superintendent (or charter school administrator, where relevant) shall:

- (1) administer local board's (or governing body of a charter school's) policies, state and federal requirements and applicable laws, including the Public School Code;
- (2) be accountable for student achievement; budget management; expenditure of funds; dissemination of information; district or charter school communications; development, implementation and evaluation of the Education Plan and all other district or charter school business;
- (3) review, approve and support the district Education Plan and each school site-level *MLSS Self-assessment* and NM School DASH or the charter school's *MLSS Self-assessment* and NM School DASH;
- (4) attend all local board or governing body of a charter school's meetings or, when necessary, designate a licensed administrator to attend;
- (5) ensure that school patrons and the public are informed and involved in the acquisition, planning and development of school facilities and that students are provided with adequate facilities which conform to state and federal mandates;
- (6) be accountable for student safety (see 6.12.6 NMAC - *School District Wellness Policy*):
 - (a) ensure that all students are supervised while on school property and while attending or traveling to school events or activities on school-provided transportation;
 - (b) ensure that all buildings, grounds and facilities provide a safe and orderly environment for public use (see Subsection P of 6.29.1.9 NMAC - *School Facilities and Grounds*; Paragraph (8) of Subsection D of 6.12.6.8 NMAC - *School District Wellness Policy* and 6.19.3 NMAC - *Unsafe School Choice Option*);
- (7) administer and implement the district's or charter school's approved staff accountability plan and procedures;
- (8) ensure that a process is in place to identify, train, assign and support the use of unlicensed content-area experts as resources in classrooms, team teaching, online instruction, curriculum development and other purposes as determined by the superintendent, which shall include, but not be limited to, the following:
 - (a) establish the specific expertise of the person;
 - (b) obtain a background check and fingerprint records;
 - (c) provide the person with a three-hour training, prior to entering a classroom, about how the school operates, appropriate teaching methods and expectations of principal and assigned teacher;
 - (d) establish a start date and ending date for the person;
 - (e) ensure that the person is under the direct supervision of the teacher assigned when students are present; and
 - (f) provide for an evaluation of services upon completion of the assignment;
- (9) shall issue the following notifications in accordance with Section 22-10A-16 NMSA 1978, in addition to any other parental notification requirements contained in the federal Elementary and Secondary Education Act of 1965, as amended; a school district or charter school shall issue these notifications in English and, to the extent possible, in the language of the parent or guardian (if it is known that the parent or guardian's home or heritage language is not English); the district or charter school shall retain a copy of all notifications and shall ensure that information required under this paragraph is available to the public upon request.
 - (a) Within 60 calendar days from the beginning of each school year, a school district or charter school shall issue a notice to parents informing them that they may obtain written information regarding:
 - (i) the professional qualifications of their child's teachers, instructional support providers and school principals or charter school administrators;
 - (ii) other descriptive information, such as whether their teacher has met all qualifications for licensure for the grade level and subjects being taught;
 - (iii) whether their child's teacher is teaching under a teaching or assignment waiver;
 - (iv) the teacher's degree major and any other license or graduate degree held by the teacher;
 - (v) the qualifications of any instructional support providers that serve their child.
 - (b) When, by the end of a consecutive four-week period, a child is still being taught by a substitute teacher or a teacher not holding the requisite licensure or licensure endorsement, the school district or

charter school shall provide written notice to the parent or guardian that the child is being taught by a substitute teacher or a teacher not holding the requisite licensure or licensure endorsement.

(c) No class may be taught by a substitute teacher, in lieu of a licensed teacher under contract, for more than 45 school days during a school year.

(d) The secretary shall consider deviations from the requirements of Subparagraph (c) of Paragraph (9) of Subsection C of 6.29.1.9 NMAC when a written request by a local superintendent or charter school administrator is submitted. The request shall include:

(i) the size of the school district;
(ii) the geographic location of the district;
(iii) demonstrated efforts to employ an appropriately licensed person in the area(s) of need;

(iv) the historical use of substitutes in the district; and
(v) an estimation of the number of days that a substitute will be utilized that exceed the 45 day limit.

D. Licensed staff and administrators.

(1) The licensed staff shall exercise duties specified in law and those assigned by the local district or charter school.

(2) As required by state and federal law, all licensed staff and administrators shall be evaluated on an annual basis.

(3) The detection and reporting of child abuse or neglect is required by both the Children's Code (Section 32A-4-3 NMSA 1978) and the Public School Code (Section 22-5-4.2 NMSA 1978). Abuse of a child under the Children's Code refers to the physical, sexual, emotional or psychological abuse of a child by a parent, guardian or custodian. According to the Children's Code, failure to report abuse or neglect of a child is a misdemeanor. The terms "abuse" and "neglect" are defined in detail in Section 32A-4-2 NMSA 1978 of the Children's Code. There is also the crime of child abuse, which consists of anyone who knowingly, intentionally, negligently or without cause, causes or permits a child to be placed in a situation of endangerment to the child's life or health, torturing or cruelly confining a child, or exposing a child to the inclemency of weather. To address the detection and reporting of child abuse or neglect in public schools:

(a) school districts and charter schools shall adopt written policies that establish a process for the coordination and internal tracking of child abuse or neglect reports made by district personnel;

(b) school districts and charter schools shall include in their policies a requirement that all personnel shall immediately report suspected child abuse or neglect to either a law enforcement agency, the New Mexico children, youth and families department, or a tribal law enforcement or social services agency for any Indian child residing on tribal land;

(c) school districts and charter schools shall not require their personnel to first report to or notify designated school personnel or go through their chain of command before making the mandatory report described in Subparagraph (a) of Paragraph (3) of Subsection D of 6.29.1.9 NMAC;

(d) no school district or charter school shall adopt a policy that relieves any personnel of their duty to report suspected child abuse or neglect;

(e) school personnel detecting suspected child abuse or neglect, including the suspected crime of child abuse, shall immediately - i.e., the same day - report their observations to one of the offices designated in Subparagraph (b) of Paragraph (3) of Subsection D of 6.29.1.9 NMAC;

(f) all licensed school personnel, including substitute teachers, educational assistants, school nurses, school counselors, school psychologists and other instructional service providers shall complete training provided by the department in the detection and reporting of child abuse or neglect, within their first year of employment by, or providing services to, a school district or charter school;

(g) all persons who have never received training required under Subparagraph (f) of Paragraph (3) of Subsection D of 6.29.1.9 NMAC shall make arrangements to receive training before the end of their current school year;

(h) the department shall develop a training program to detect child abuse or neglect, in coordination with the New Mexico human services department and the New Mexico department of health. This program shall be made available to all colleges, school districts and charter schools in the state offering teacher preparation courses;

(i) nothing in Paragraph (3) of Subsection D of 6.29.1.9 NMAC shall be interpreted as preventing a school district or charter school from developing and providing its own training for all staff to detect and report suspected child abuse or neglect, in addition to the training offered by the department.

E. Student intervention system. The school and school district shall follow the multi-layered system of supports (MLSS), which is a three-layer model of student intervention as a proactive system for early intervention for students who demonstrate a need for educational support for learning or behavior or for students who demonstrate a need for advanced instruction. All students shall have access to layer-1, -2, and -3 interventions without a need to convene a SAT team or a referral to special education or related services. At any layer, a parent may request initial evaluation to determine whether a student is a child with a disability requiring special education and related service, in accordance with 6.31.2.10 NMAC. There are no additional documentation requirements under the MLSS outside of what is already required for education professionals.

(1) In layer 1, the school and school district shall ensure that adequate universal screening in the areas of general health and well-being, language proficiency status, and academic levels of proficiency has been completed for each student enrolled. If data from universal screening and progress monitoring suggests that a particular student is in need of additional behavioral and academic supports, then teacher teams shall make a determination on whether or not the student would benefit from layer-2 interventions. Teacher teams, when making a determination for moving a student up or down a layer may consult with non-teacher staff such as counselors, paraprofessionals, administrators, and ancillary personnel to inform the teacher team on how to plan and implement relevant learner interventions in the general education environment.

(2) In layer 2, a properly constituted teacher team shall conduct the student study process and consider, implement, and document the effectiveness of appropriate evidence-based interventions utilizing curriculum-based measures. As part of this process, the teacher team shall address culture and acculturation, socioeconomic status, possible lack of appropriate instruction in reading or math, teaching and learning styles and instructional delivery mechanisms in order to rule out other possible causes of the student's educational difficulties.

(3) In layer 3, students are provided with intensive academic and behavioral supports that are progress-monitored on a bi-weekly basis. At the end of each progress monitoring cycle, the teacher team shall evaluate the efficacy of the supports provided using all available data. At that time, the teacher team may decide whether to continue with the current support, change the intensity, or nature of support. If progress monitoring data suggests that the learner has benefited from provided layer-3 supports and does not show concern for regression, then the teacher team may decide to move the student out of receiving layer-3 supports.

(4) All students shall have access to the MLSS layers of screening and support. Nothing in this section prevents a school district from evaluating a student during the provision of any layer of MLSS to determine whether the student is a child with a disability requiring special education and related services. A parent may request an initial special education evaluation at any time during the public agency's implementation of MLSS, and a school or school district may determine a referral to special education is necessary at any time during the implementation of MLSS if the student is suspected of having a disability. If a school district rejects a request for initial special education evaluation, the parent may use the IDEA procedural safeguards in 34 CFR Secs. 300.506 through 5007 to dispute the rejection of the request to evaluate.

(5) The department's manual, *Multi-layered System of Supports*, shall be the guiding document for schools and districts to use in implementing the student intervention system.

(6) Schools shall complete the *MLSS Self-assessment* annually.

(7) Schools shall include a report on intervention systems in NM School DASH.

(8) Schools shall provide time embedded within the regular school schedule for all students to access targeted and intensive learner interventions or advanced instruction described as follows:

(a) in small group settings;

(b) aligned with New Mexico standard; and

(c) not to exceed twenty-five percent of instructional hours.

(9) Student placement in embedded intervention or advanced instruction shall be reviewed each quarter and students shall be moved in or out of embedded intervention or advanced instruction based on quantitative and qualitative MLSS data.

(10) Embedded intervention or advanced instruction time shall be provided to students without forgoing instruction in art, music, theater, dance, computer science, physical education, library, or other enrichment or experiential learning activities or courses.

(11) Equitable access. Students in any layer shall have access to grade-appropriate, standards-aligned instruction seventy-five percent or more of their instructional hours unless instructional time is allocated differently in an IEP of a student receiving special education or gifted education services.

F. Records and reports.

(1) Each district and charter school shall maintain and treat all personally identifiable educational records in accordance with the Family Educational Rights and Privacy Act (FERPA), the implementing

regulations set forth at 34 Code of Federal Regulations, Part 99 and Inspection of Public Records Act, Sections 14-2-1 through 14-2-12 NMSA 1978.

(2) All records shall be safe from fire and theft and stored in a retrievable manner. All student records, including disciplinary and grading records, shall be retained and disposed of pursuant to 1.20.2 NMAC.

(3) Transcripts and copies of pertinent records of students transferring from one school to another, including disciplinary records with respect to suspension and expulsion, shall be forwarded promptly upon written request by the receiving school.

(4) Local school boards and governing bodies of charter schools shall establish policies providing for inspection of education records by students and parents.

(5) After the administration of the high school system of assessments, school districts and charter schools are required to record test results on each student's official transcript. The information recorded shall include the following:

- (a) district and high school administering the examination;
- (b) date of examination administration;
- (c) results of the examination for each subject area tested; and
- (d) reports of the results in a format and language that is understandable to parents.

G. Organization of grade levels and establishing/closing schools. Any change in a school district or charter school's organizational pattern, including the establishment or closing of a school, shall have the secretary's approval prior to implementation. Requests for change shall be submitted using the department's *organization of grade levels and establishing/closing school waiver request form*. This form shall include: name of superintendent; district/school; mailing address; phone; fax; email address; name of a secondary contact person including the same information; date of submission; local board policy requirement and approval, if required; date of board approval; statement of applicable district or charter school policy and rationale for request. The waiver request shall outline the expected educational benefits.

H. Class loads. Class loads shall be in compliance with the most current class load requirements in Section 22-10A-20 NMSA 1978 and Section 22-5-15 NMSA 1978.

(1) The individual class load for elementary school teachers shall not exceed 20 students for kindergarten, provided that any teacher in kindergarten with a class load of 15 to 20 students shall be entitled to the assistance of an educational assistant.

(2) The average class load for elementary school teachers at an individual school shall not exceed 22 students when averaged among grades one, two and three, provided that any teacher in grade one with a class load of 21 or more shall be entitled to the full-time assistance of an educational assistant.

(3) The average class load for an elementary school teacher at an individual school shall not exceed 24 students when averaged among grades four, five and six.

(4) The daily teaching load per teacher for grades seven through 12 shall not exceed 160 students, except the daily teaching load for teachers of required English courses in grades seven and eight shall not exceed 135, with a maximum of 27 students per class; and the daily teaching load for teachers of required English courses in grades nine through 12 shall not exceed 150 students, with a maximum of 30 students per class. The teaching load for teachers assigned to laboratories and shops shall adhere to the current workplace safety codes of the industry.

(5) Students receiving special education services integrated into a regular classroom for any part of the day shall be counted in the calculation of class load averages. Students receiving special education services not integrated into the regular classroom shall not be counted in the calculation of class load averages. Only classroom teachers charged with responsibility for the regular classroom instructional program shall be counted in determining average class loads. In elementary schools offering only one grade level, average class loads may be calculated by averaging appropriate grade levels between schools in the school district.

(6) The secretary may waive the individual school class load requirements established in this section. Waivers shall be applied for annually, and a waiver shall not be granted for more than two consecutive years. Requests for class load waivers shall be submitted using the department's *class size waiver request form*. This form shall include: name of superintendent; district/school; mailing address; phone; fax; email address; name of a secondary contact person including the same information; date of submission; local board policy requirement and approval, if required; date of board approval; statement of applicable district or charter school policy and rationale for request. Waivers may only be granted if a school district or charter school demonstrates:

- (a) no portable classrooms are available;

classrooms; (b) no other available sources of funding exist to meet the need for additional

(c) the district or charter school is planning alternatives to increase building capacity for implementation within one year; and

(d) the parents of all children affected by the waiver have been notified in writing of the statutory class load requirements; that the school district or charter school has made a decision to deviate from these class load requirements; and of the school district's or charter school's plan to achieve compliance with the class load requirements.

(7) If a waiver is granted pursuant to Paragraph (6) of Subsection H of 6.29.1.9 NMAC to an individual school, the average class load for elementary school teachers at that school shall not exceed 20 students in kindergarten and grade one, and shall not exceed 25 students when averaged among grades two, three, four, five and six.

(8) Each school district or charter school shall report to the department the size and composition of classes subsequent to the 40th day report and the December 1 count. Failure to meet class load requirements within two years shall be justification for the disapproval of the school district's or charter school's budget by the secretary.

(9) The department shall report to the legislative education study committee by November 30 of each year regarding each school district's or charter school's ability to meet class load requirements imposed by law.

(10) Notwithstanding the provisions of Paragraph (6) of Subsection H of 6.29.1.9 NMAC, the secretary may waive the individual class load and teaching load requirements established in this section upon demonstration of a viable alternative curricular plan and a finding by the department that the plan is in the best interest of the school district or charter school; and that, on an annual basis, the plan has been presented to and is supported by the affected teaching staff. The department shall evaluate the impact of each alternative curricular plan annually. Annual reports shall be made to the legislative education study committee. Requests for alternative curricular plans shall be submitted using the department's *collaborative school improvement programs waiver request form*. This form shall include: name of superintendent; district/school; mailing address; phone; fax; email address; name of a secondary contact person including the same information; date of submission; local board policy requirement and approval, if required; date of board approval; statement of applicable district or charter school policy and rationale for request.

I. Student/staff caseloads in gifted and special education.

(1) The student/staff caseload shall not exceed 35:1 for a special education teacher and 60:1 for a speech-language pathologist for special education services or speech-only services, in which properly licensed special education teachers or speech-language pathologists travel from class to class or school to school, providing services to students with disabilities whose individualized education programs (IEPs) require a minimal amount of special education. (A minimal amount of special education services shall not exceed ten percent of the school day/week.)

(2) The student/staff caseload shall not exceed 24:1 for a special education teacher and 35:1 for a speech-language pathologist for special education services or speech-only services which properly licensed special education teachers or speech-language pathologists provide to students with disabilities whose IEPs require a moderate amount of special education. (A moderate amount of special education services shall be less than fifty percent of the school day.)

(3) The student/staff caseload shall not exceed 15:1 for special education services in which properly licensed special education teachers provide services to students with disabilities whose IEPs require an extensive amount of special education for a portion of the school day as appropriate to implement the plan. (An extensive amount of special education services shall be provided fifty percent or more of the school day.)

(4) The student/staff caseload shall not exceed 8:1 for special education services in which a properly licensed professional provides services to students with disabilities whose IEPs require a maximum amount of special education. (A maximum amount of special education services shall be provided in an amount approaching a full school day.)

(5) The student/adult caseload shall not exceed 4:1 for center-based special education services in which one of the adults in the program is a properly licensed professional providing three- and four-year old children with the amount of special education needed to implement each child's IEP.

(6) The student/adult caseload shall not exceed 2:1 for center-based special education services in which three- and four-year old children have profound educational needs.

(7) Adequate student/staff caseloads shall be provided to appropriately address needs identified in the IEPs. Paraprofessionals and assistants who are appropriately trained and supervised in accordance with applicable department licensure rules or written department policy may be used to assist in the provision of special education and related services to students with disabilities under Part B of IDEA.

(8) If the student/staff caseload ratio exceeds the standards provided above, a request for waiver shall be submitted to the department for review and approval by the secretary.

J. Graduation requirements.

(1) The New Mexico high school system of assessments. The district or charter school shall be in compliance with requirements as specified in Section 22-13-1.1 NMSA 1978 and Subsection L of Section 66-7-506 NMSA 1978 (offering driver education, service learning and financial literacy as electives). The department specifies that students shall meet all graduation requirements to be eligible to receive a diploma. This includes the requirement of passing the high school system of assessments.

(2) The next step plan. Each student shall complete a next step plan for each high school year. For students with individualized education programs (IEPs), the transition plan substitutes for the next step plan. The next step plan requires that:

(a) each grade-level next step plan shall be completed within the last 60 school days of the preceding school year (for example, the 9th grade interim next step plan shall be made before the end of the 8th grade year);

(b) only one grade-level next step plan shall be completed for a student each year;

(c) the development of the next step plan shall include the student, the student's parent or guardian and the advisor, but may include additional relevant parties;

(d) to write the next step plan, the advisor shall consult with the student and the student's parent or guardian on academic choices that target the student's interests and meet graduation requirements;

(e) the next step plan shall address career clusters in career and technical education, academic support and study skills, extracurricular experiences and out-of-school activities, exposure to post-secondary education and career options, family and social supports, assessments, credentials and any other relevant information; as part of the next step plan, the advisor shall disseminate and share information concerning advanced placement, honors, dual-credit and distance learning programs;

(f) the next step plan determines whether or not the student is on track with graduation requirements; the plan ensures that gaps in courses and test-taking are filled;

(g) the next step plan may be made in large-group, small-group or individual student settings;

(h) the advisor has the responsibility to see that the student is reasonably informed about curricular and course options, opportunities available that lead to broader post-high school options, and alternative opportunities available if the student does not finish a planned curriculum;

(i) the next step plan shall be signed by the student, the student's parent or guardian and the advisor;

(j) the completed next step plan shall be filed with the school principal or charter school administrator and only the final next step plan shall be filed in the student's cumulative file upon graduation;

(k) during the development of the student's next step plan for the eleventh grade, a plan allowing the student to complete a fourth mathematics course other than algebra 2 may be developed using data from the student's high school short-cycle assessments, the student's most recent system of assessments score in mathematics, other relevant assessment scores and coursework grades and educational career plans recorded in the student's next step plan;

(l) for the student to take four mathematics courses that contain a lesser content than that recommended for inclusion in algebra 2 or its equivalent, the student's parent shall provide written, signed permission on the student's next step plan; parental signature on the next step plan for the eleventh grade indicating the mathematics courses the student will take shall serve as the required signed permission.

(3) Transfer of credits. For students enrolling or re-enrolling in public schools, local school boards or governing bodies of charter schools will establish policies as follows.

(a) Credits shall be transferable with no loss of value between schools that are accredited by a state board of education in the United States, United States territories, Puerto Rico, the freely associated states and outlying areas of the United States, department of defense schools or other authorized body.

(b) Policies of the local school board or the governing body of a charter school, for students transferring from home schools, private schools, or foreign schools to the public schools, will be in accordance with Subsection D of Section 22-1-4 NMSA 1978.

(c) Acceptance of credits earned through correspondence extension study, foreign study, home study courses or non-department accredited, non-public schools is determined by the policy of the local school board or the governing body of a charter school.

(4) Correspondence courses. For students currently enrolled in public schools, local school boards or governing bodies of charter schools will establish policies addressing the use of correspondence courses to meet graduation requirements.

(a) Policies should be based on the following circumstances:

(i) when road conditions or distance from access to school transportation prohibit regular daily attendance;

(ii) when a student cannot attend school due to prolonged illness or recovery from injury, as part of the individual plan to address the student's educational needs developed in accordance with applicable state and federal regulations governing the education of students with disabilities;

(iii) when the occupation of the parent or student requires prolonged periods of time away from the school district;

(iv) when a student is housed in a long-term residential facility; or

(v) to enhance or supplement graduation requirements based on a student's individual need(s).

(b) Schools counting credit for correspondence courses for enrolled students shall ensure that such courses are part of the student's individual plan for graduation. If applicable, such courses are part of the IEP developed in accordance with applicable state and federal regulations governing the education of students with disabilities, and schools shall ensure that assistance is available to students as needed to complete the correspondence courses.

(c) Correspondence courses used to provide graduation credit to currently enrolled students shall be provided by:

(i) a school accredited by the state board of education of the state in which the school is located, or

(ii) a college or university with regional accreditation to perform such function.

(5) Dual credit program. "Dual credit program" means a program that allows high school students to enroll in college-level courses offered by public post-secondary educational institutions that may be academic or career-technical in nature, but may not be remedial or developmental, and through which students can simultaneously earn credit toward high school graduation and a post-secondary degree or certificate. (Refer to 6.30.7.6 NMAC.)

(6) Distance learning courses. "Distance learning" means the technology and the educational process used to provide instruction for credit or for a grade when the course provider and the distance-learning student are not necessarily physically present at the same time or place. Distance learning does not include educational software that utilizes only on-site teaching. Any program involving distance learning shall be governed by the department's distance learning rule, found at 6.30.8 NMAC.

(7) Standardized grading system. A standardized grading system is required to be implemented by each district and charter school. The system shall include the following components:

(a) a written report to parents regarding the performance of their children tested with the New Mexico standards-based assessments;

(b) for grades 3-12, a standardized alphabetic grading system, based on the 4.0 scale (i.e., a minimum of 4.0 or higher=A, 3.0=B, 2.0=C, 1.0=D); certain courses may be assigned a weighted score according to local policy;

(c) alignment of all district and school curriculum to the New Mexico content standards with benchmarks and performance standards; and

(d) all school report cards shall include the results of standards-based assessments and may augment the standardized grading system with a narrative or other method that measures a student's academic, social, behavioral or other skills.

(8) Final examination. A final examination shall be administered to all students in all courses offered for credit.

(9) Credit. Credit cannot be earned twice for the same course.

(10) Other elective credit. Elective credit courses shall meet all New Mexico content standards with benchmarks and performance standards, and shall:

(a) include a written, sequential curriculum;

the course;

- (b) be taught by an instructor who is appropriately licensed and endorsed to teach
- (c) include a final examination; and
- (d) be reviewed and approved by the local board of education or governing body of a charter school.

(11) Alternative credit. Local districts, charter schools or state educational institutions may design elective courses, known as alternative credit courses, to satisfy any of the specified credits required for graduation.

- (a) The process includes:
 - (i) review of the licensure and endorsements of affected staff;
 - (ii) review of required course content standards with benchmarks and performance standards with the proposed elective course, and summary of alignment between the two courses;
 - (iii) determination of the amount of credit that will be generated;
 - (iv) publication of information regarding what course is available for alternative credit and identification of course number;
 - (v) inclusion of the availability of alternative credit in all next-step plans;
 - (vi) note on the student transcript that the graduation requirement course was completed using the named alternative credit course;
 - (vii) review and preliminary approval by the local board of education or governing body of a charter school.

- (b) Once the process has been completed, the district superintendent or administrator of a charter school or state educational institution shall submit a written request, with appropriate documentation, to the secretary for approval.

(12) Excuses from physical education. The physical education graduation requirement may be waived by the secretary, based upon a request by the local superintendent or charter school administrator with documentation from a licensed medical doctor, osteopath, certified nurse practitioner with prescriptive authority or chiropractor, that the student has a permanent or chronic condition that does not permit physical activity. Such requests shall be submitted using the department's *physical education waiver request form*. This form shall include: name of superintendent; district/school; mailing address; phone; fax; email address; name of a secondary contact person including the same information; date of submission; local board policy requirement and approval, if required; date of board approval; statement of applicable district or charter school policy and, for each student for whom the waiver is requested: name, school and year of student graduation, district affirmation that it possesses required medical documentation, name and email address of school principal and rationale for the request. A student receiving special education supports and services pursuant to the IDEA or Section 504 of the federal Rehabilitation Act may also be eligible to request this waiver, when appropriate medical documentation is provided in the IEP.

(13) Graduation requirements for issuance of a conditional certificate of transition or a diploma for students with an IEP. The development of a program of study and the granting of a diploma, or use of a conditional certificate of transition in the form of a continuing or transition individualized educational program (IEP) for students receiving special education services, includes the following governing principles:

- (a) The IEP team is responsible for determining whether the student has completed a planned program of study based on the student's strengths, interests, preferences, identified educational and functional needs and long-term educational or occupational goals, making the student eligible to receive either a diploma or a conditional certificate of transition. A conditional certificate of transition allows the student to participate in graduation activities. If a student receives a conditional certificate of transition, the student shall then return to the program specified in the IEP to complete the student's secondary program and meet the requirements for a diploma. Receipt of a conditional certificate of transition shall not end a student's right to FAPE. In addition, all IEPs shall provide a description of how the student's progress toward meeting annual goals and graduation requirements will be measured, and at what intervals progress will be reported to parents or guardians. A student shall be awarded a diploma upon completion of a planned program of study that meets the requirements of Paragraph (b).

- (b) A student may be awarded a diploma (Section 22-13-1.1 NMSA 1978) through the following programs of study described in Items (i) through (iii). All IEP team discussion points and decisions identified herein, including the identification of the student's program of study and any student or parent proposals accepted or rejected by the IEP team (if the student has not reached the age of majority), shall be documented on the student's IEP and in the prior written notice (PWN) of proposed action.

(i) A standard program of study is based upon meeting or exceeding all requirements for graduation based on the New Mexico standards for excellence (Subsection J of 6.29.1.9 NMAC) with or without reasonable accommodations of delivery and assessment methods. In addition, a student shall pass all sections of the current state graduation examination(s) administered pursuant to Subsection I of Section 22-13-1.1 NMSA 1978 under standard administration or with state-approved accommodations and shall meet all other standard graduation requirements of the district. A diploma obtained through the standard program of study is considered a “regular high school diploma” as defined in 34 C.F.R. § 300.102(a)(3)(iv). Pursuant to 34 C.F.R. § 300.102(a)(3)(i), students with disabilities who graduate from high school with a regular diploma through the standard program of study are no longer entitled to FAPE or continued receipt of special education and related services.

(ii) A modified program of study is developed to provide relevance and is based on a student's career interest as it relates to one of the career clusters, with or without reasonable accommodations of delivery and assessment methods. In addition, a student shall take the current state standards-based assessments required for high school students, under standard administration or with state-approved accommodations as determined by the SEA. Once the student has attempted the state required high school assessments, the student shall achieve a level of competency pre-determined by the student's IEP team on the current state-approved demonstration of competency options for graduation. The student shall earn at least the minimum number of credits required by the district or charter school for graduation through standard or alternative courses that address the employability and career development standards with benchmarks and performance standards, as determined by the IEP team. Course work shall include a minimum of four units of career development opportunities and learning experiences that may include any of the following: career readiness and vocational course work, work experience, community-based instruction, student service learning, job shadowing, mentoring or entrepreneurship related to the student's occupational choices. Credits for work experience shall be related to the program of study that the school offers and specific to the district's ability to offer work experience or community-based instruction credits. The student shall achieve competency in all areas of the employability and career development standards with benchmarks and performance standards, as determined by the IEP team and the student's interest as it relates to the career clusters. The program of study shall address the New Mexico content standards with benchmarks and performance standards in other subject areas as appropriate. A diploma obtained through the modified program of study is not considered a “regular high school diploma” as defined in 34 C.F.R. § 300.102(a)(3)(iv). Pursuant to 34 C.F.R. § 300.102(a)(3)(ii), a student's right to FAPE does not end upon obtaining an alternative diploma through the modified program of study and a student may continue to receive special education and related services until student either meets the requirements to obtain a diploma through the standard program of study or until the end of the academic year in which the student becomes 22 years of age.

(iii) An ability program of study was developed for students who have a significant cognitive disability or severe mental health issues. The IEP goals and functional curriculum course work shall be based on the New Mexico standards with benchmarks and performance standards and employability and career development standards with benchmarks and performance standards. Students in this program of study shall earn the minimum number of credits or be provided equivalent educational opportunities required by the district or charter school, with course work individualized to meet the unique needs of the student through support of the IEP. In addition, a student shall take either the current state standards-based assessments required for high school students, under standard administration or with state-approved accommodations, or the state-approved alternate assessment. Once the student has participated in the state-required high school assessments, the student shall achieve a level of competency pre-determined by the student's IEP team on the current state-approved demonstration of competency options for graduation and meet all other graduation requirements established by the IEP team. A diploma obtained through the ability program of study is not considered a “regular high school diploma” as defined in 34 C.F.R. § 300.102(a)(3)(iv). Pursuant to 34 C.F.R. § 300.102(a)(3)(ii), a student's right to FAPE does not end upon obtaining a diploma through the ability program of study and a student may continue to receive special education and related services until student either meets the requirements to obtain a diploma through the standard program of study or until the end of the academic year in which the student becomes 22 years of age.

(c) Students receiving a diploma through any of the programs of study are permitted to participate in all graduation activities.

(d) Any special education student who obtains a diploma through the modified or ability programs of study may choose to exit high school after receiving the diploma but continues to have an entitlement to FAPE. A student may elect to resume their high school education at their school district of residence

until student either meets the requirements to obtain a diploma through the standard program of study or until the end of the academic year in which the student becomes 22 years of age.

(e) By the end of the eighth grade, each student's IEP shall contain a proposed individual program of study for grades nine through 12. The program of study shall identify by name all course options the student may take and shall align with the student's long-range measurable post-secondary goals and transition services to facilitate a smooth transition to high school and beyond. This program of study shall be reviewed on an annual basis and adjusted to address the student's strengths, interests, preferences and areas of identified educational and functional needs. The IEP team shall document on the IEP the student's progress toward earning required graduation credits and passing the current graduation examination.

(f) A district or charter school shall provide each student, who has an IEP and who graduates or reaches the maximum age for special education services, a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting post-secondary goals.

(g) Students graduating on the standard program of study shall meet the state's minimum requirements on all sections of the graduation examination. IEP teams shall document a plan of action on the IEP and the PWN to be carried out by both the student and the district or charter school, to ensure that the student will pass all sections of the graduation examination.

(h) To establish a level of proficiency on the current graduation examination or the state-approved alternate assessment for students on a modified program of study or ability program of study, IEP teams shall review the student's performance on the first attempt and establish a targeted proficiency on all sections that are below the state's minimum requirement. For those students who meet participation criteria for the New Mexico alternate assessment, IEP teams shall set targeted levels of proficiency based upon previous performance on the test. If the student has previously been administered the New Mexico alternate assessment and has achieved an advanced level of overall performance, the IEP team shall arrange for the student to participate in the general graduation examination and shall identify appropriate accommodations that the student may require. IEP teams shall document the targeted levels of proficiency on the IEP and the PWN, outlining the plan of action to be taken by both the student and the district or charter school to ensure that the student will meet the targeted levels of proficiency. Districts or charter schools may submit a written request for a waiver to the secretary in cases where a student has medical or mental health issues that may result in regression or that negatively influence the student's ability to achieve targeted levels of proficiency. The written request shall be signed by the superintendent or charter school administrator and shall include documentation of the medical or mental health issues.

(i) Changes in programs of study.

(i) Departures from the standard program of study for students receiving special education services and supports shall be considered in the order of the options listed in Subparagraph (b) of Paragraph (13) of Subsection J of 6.29.1.9 NMAC. Any modified program of study may depart from a standard program of study only so far as is necessary to meet an individual student's educational needs as determined by the IEP team. Districts and charter schools are obligated to meet the requirements of IDEA to provide students with IEPs on any one of the three programs of study, and access to the general curriculum in the least restrictive environment. When an alternative program of study is developed, a building administrator or designee who has knowledge about the student shall be a member of the IEP team

(ii) Districts and charter schools shall document changes from the standard program of study on the PWN. IEP teams shall identify the reasons for changing the student's program of study, shall provide parents with clear concise explanations of the modified or ability programs of study, shall notify parents and students of the potential consequences that may limit the student's post-secondary options, and shall make required changes to the IEP and course of study, to ensure that the student meets the requirements of that program of study.

(iii) The IEP team shall not change the program of study for a student entering the final year of high school (not the cohort with which the student entered high school) from the standard program of study to the modified program of study, nor from the modified program of study to the ability program of study, after the 20th school day of the final year of high school. IEP teams may change a student's program of study from the ability program of study to the modified program of study, or from the modified program of study to the standard program of study, if the student meets the graduation requirements of that program of study and if the change is made and documented appropriately in a revised IEP and PWN by a properly constituted IEP team in a properly convened meeting.

(j) A student who receives special education services may be granted a conditional certificate of transition in the form of a continuing or transition IEP when:

- (i) the IEP team provides sufficient documentation and justification that the issuance of a conditional certificate of transition for an individual student is warranted;
- (ii) prior to the student's projected graduation date, the IEP team provides a PWN stating that the student will receive a conditional certificate of transition;
- (iii) the district or charter school ensures that a conditional certificate of transition is not a program of study and does not end the student's right to a FAPE;
- (iv) the district or charter school ensures that a conditional certificate of transition entitles a student who has attended four years or more of high school to participate in graduation activities, and requires that the student continue receiving special education supports and services needed to obtain the high school diploma;
- (v) the district or charter school ensures that, prior to receiving a conditional certificate of transition, the student has a continuing or transition IEP;
- (vi) the student's continuing or transition IEP outlines measures, resources, and specific responsibilities for both the student and the district or charter school to ensure that the student receives a diploma.
- (k) A student who receives a certificate of transition but does not return to complete the program of study as outlined in the continuing or transition IEP will not be considered a dropout.
- (l) A student who receives a conditional certificate of transition is eligible to continue receiving special education services until receipt of a diploma or until the end of the academic year in which the student becomes 22 years of age.
- (m) Graduation plans shall be a part of all IEPs:
 - (i) by the end of eighth grade, or by the time the student turns 14 years of age, and concurrent with the development of the student's transition plan in accordance with federal regulations at 34 CFR 300.320;
 - (ii) when a student returns to a school after an extended absence, and if an IEP program of study may have been developed but needs to be reviewed; or
 - (iii) when evaluations warrant the need for a different program of study at any time after development of an initial graduation plan.
- (n) Graduation plans shall be a part of all of all IEPs and annual reviews and shall follow the student in all educational settings. Receiving institutions that fall under the department's jurisdiction will recognize these graduation plans, subject to revision by new IEP teams, if appropriate to meet a student's changing needs.
- (o) At the exit IEP meeting, the team shall review the student's transition plan, and shall confirm and document that all state and district requirements for graduation under the final IEP have been satisfied. A building administrator who has knowledge about the student shall be a member of this team, and shall sign specifically to verify and accept completed graduation plans, goals and objectives pursuant to (i) - (iii) of Subparagraph (b) of Paragraph (13) of Subsection J of 6.29.1.9 NMAC, or plans for a conditional certificate of transition with a continuing or transition IEP, pursuant to Subparagraph (i) of Paragraph (13) of Subsection J of 6.29.1.9 NMAC. The IEP team shall ensure that the student has current and relevant evaluations, reports, or other documentation necessary to support a smooth and effective transition to post-secondary services for a student who will graduate on one of the three programs of study. The school shall arrange for any necessary information to be provided at no cost to the students or parents. The school shall submit a list of students who will receive the diploma through a modified or ability program of study to the local superintendent or charter school administrator, using the students' identification numbers. This list shall be totaled and submitted to the local school board or governing body of a charter school. This information shall be treated as confidential in accordance with FERPA.
- (p) Students eligible for special education services are entitled to a FAPE through age 21. If a student turns 22 during the school year, the student shall be allowed to complete the school year. If a student becomes 22 prior to the first day of the school year, the student is no longer eligible to receive special education services.
- (q) All diplomas awarded by a school district or charter school shall be identical in appearance and content, except that symbols or notations may be added to individual students' diplomas to reflect official school honors or awards earned by students.

(14) Future changes in graduation requirements. Refer to 6.29.1.13 NMAC.

K. Statewide accountability program.

(1) Educational accountability. The local board of education or charter school governing body and the district superintendent or charter school administrator are responsible for providing educational

services that support student learning. Educational accountability has two mechanisms and three indicators which impact the approval of the district's budget and accreditation status. The accountability mechanisms are accreditation and the program/budget review process. These two mechanisms shall align directly with the district or charter school's Education Plan. The indicators are community representation, local accountability indicators and statewide accountability indicators.

(2) Accountability mechanisms.

(a) Accreditation. Accreditation will be conducted in accordance with Subsection F of Section 22-2-2 NMSA 1978. Verification of the district or charter school's Education Plan and student progress will occur on a regular basis. State and federal regulations which fall within the scope of accreditation will also be monitored.

(b) Program/budget review and approval. The program/budget review and approval process, including assessment and evaluation, occurs annually. Its purpose is to link the district or charter school's program needs directly with budgetary resources. In order for a district or charter school to obtain an approved budget, the district shall:

- (i)** document the local board or charter school governing body's determination of needs as defined in its Education Plan (Section 22-8-18 NMSA 1978);
- (ii)** document minimum budget requirements (Section 22-8-9 NMSA 1978);
- (iii)** document parent involvement in budget preparation (Section 22-8-11 NMSA 1978);
- (iv)** complete the annual program/budget questionnaire; and
- (v)** comply with requirements specified in Section 22-8-5 NMSA 1978.

(3) Accountability indicators.

(a) Community representation. Community representatives shall be involved in the budget preparation process, the Education Plan process, the NM School DASH process, Education Plan evaluation (including the establishment of local student performance indicators) and the accreditation process. Community representatives include parents, students and other community members who reflect the composition of the student population. Evidence shall be provided to verify different forms of representation.

(b) Local student performance indicators. Local student performance indicators shall:

- (i)** be identified by the local school district or charter school in conjunction with students, parents, community members and businesses;
- (ii)** be part of the local Education Plan evaluation;
- (iii)** measure and demonstrate student progress toward the New Mexico content standards with benchmarks and performance standards;
- (iv)** demonstrate student progress toward identified NM School DASH process goals and desired outcomes;
- (v)** be included as an integral part of the accreditation and program/budget review processes; and
- (vi)** use any other indicators the district or charter school shall choose for its students.

(c) Statewide student performance indicators. Statewide student performance indicators shall:

- (i)** be included as an integral part of the accreditation and program/budget review processes;
- (ii)** be part of the local Education Plan evaluation and NM School DASH monitoring;
- (iii)** measure and demonstrate student progress toward the New Mexico content standards with benchmarks and performance standards;
- (iv)** communicate clearly to parents and the general public the students' progress toward meeting the goals established by the district and school, or charter school; and
- (v)** describe performance levels across the grade levels and across the curriculum.

L. Statewide student assessment system. As stated in Section 22-2-8.13 NMSA 1978, students' knowledge and skills are assessed and evaluated through the New Mexico content standards with benchmarks and performance standards, the system of assessments, and local measures.

(1) The statewide student assessment system. All public-school students, with the exceptions indicated below, shall participate in the system of assessments, which includes standards-based assessments in grades 3 through 8 and high school.

(2) Exceptions. Exceptions include special provisions and requirements for the assessment of English language learners and students with IEPs.

(a) English language learners. Students who have limited English language skills (i.e., students who are “English language learners”) as determined by the department-approved English language proficiency screening assessment shall participate in the statewide assessment program. The following considerations specify how assessment shall be conducted.

(i) Length of enrollment in U.S. schools. The options for participation of English language learners in the New Mexico standards-based assessment program depend on the length of time that the student has been enrolled in U.S. public schools. For students who are new to U.S. schools, the following applies: Students who are enrolled for the first year in a U.S. school may receive an exemption from the system of assessments for English language arts, including all subtests therein. In all other content areas of the system of assessments, the student shall participate in the Spanish-language version of the assessment (if available and appropriate) or in the English-language version with accommodations provided, if they are determined to be appropriate by the local school’s team, as described in (iii) of Subparagraph (a) of Paragraph (2) of Subsection L of 6.29.1.9 NMAC. For the subtests other than reading, the test completion status shall be student tested all sessions, and the types of accommodations that are provided, if any, shall be indicated in the student information system. Students who have been in U.S. schools for at least 12 months and less than three consecutive years shall participate in the statewide assessment program in one of three ways: the student may participate in the standard administration of the English-language version of the assessment without accommodations; the student may participate in the English-language version of the assessment with appropriate accommodations; or the student may participate in the standard administration of the Spanish-language version of the assessment, where available and appropriate.

(ii) Waivers for home language assessment. Students who have been in U.S. schools for three or more consecutive years shall participate in the English-language version of the assessment with or without allowable accommodations unless a request based on the determination of the local education agency to continue the testing of the student in the home language of Spanish and the request is approved by the secretary. If, after three consecutive years in U.S. schools, the district or charter school determines (on a case-by-case basis) that academic assessments in the student's home language of Spanish would yield more accurate and reliable information about the student's knowledge of a subject, the district or charter school may request a waiver from the secretary to continue to assess the student in the home language of Spanish. Approved waivers are effective for the current year only; annual waiver requests may be approved for a maximum of two years. The waiver request shall be submitted to the secretary for approval at least three months before the assessment, by the district's superintendent or the charter school administrator. The request shall include: student name, student state identification number, school in which the student is currently enrolled, student's grade level, student's most recent department-approved English language proficiency, assessment date and overall composite score, length of enrollment in U.S. schools, an indication of whether this is the first or second waiver request for the student, the reason or justification for the waiver request, and names of the school team members involved in the decision to request the waiver.

(iii) Accommodations. Districts and charter schools shall provide accommodations to English language learners after consideration of their appropriateness for the individual student. To determine the appropriateness of allowing accommodations, the district or charter school shall consider the student's level of proficiency in all domains of language (listening, speaking, reading, writing and comprehension) and the nature of the school's instructional program. The district or charter school shall ensure that students do not receive accommodations without current justification supported by data. District and school staff may obtain the technical assistance on procedures for accommodations from the department's district test coordinator's manual or from the department. Each school shall utilize a team to review individual student progress in order to determine accommodations. For students being served on an individualized education program (IEP) or Section 504 Plan, those teams (IEP or Section 504) will respectively determine appropriate test accommodations. For all other students, the school may use its student assistance team (SAT) or form another school-based team for this purpose, but the team shall be comprised of at least three school staff, including staff who are familiar with the student's abilities and language needs, standardized test procedures and valid ELL test accommodations. Team members may include: the student's bilingual multicultural education- or TESOL-endorsed teacher, the bilingual multicultural education program coordinator, the student's other teacher(s), administrators or school test coordinators, or the school counselor. The student's parent or guardian, the student and other staff members may be also included, as

appropriate. The team shall base its decisions about appropriate accommodations on the following: annual review of the student's progress in attaining English proficiency, student's current English language proficiency, including the student's experience and time in U. S. schools, student's expected date for exiting English language learner accommodations, student's familiarity with the accommodation under consideration, the primary language of instruction used in the content area to be assessed and the length of time that the student has received instruction in that language, and the student's grade level. Written documentation of accommodation decisions made by the team shall be stored in the student's cumulative file and shall be reported to the department's bureau of assessment and evaluation.

(b) Students with IEPs. Students with IEPs who receive special education and related services shall participate in all statewide and district-wide assessments of student achievement or in state-approved alternate assessments. Pursuant to Subsection E of 6.31.2.11 NMAC, 34 CFR 300.320 (a)(2)(ii) and 34 CFR 300.320(a)(6), the IEPs for such students shall specify which assessments each student will participate in and what, if any, accommodations or modifications in administration are needed to enable the student to participate. The IEPs for students who will not participate in a particular statewide or district-wide assessment shall meet state-approved criteria, methods and instruments.

(c) Waiver of the high school system of assessments (graduation requirement assessment).

(i) With the approval of the local board of education or charter school governing body, the local superintendent or charter school administrator may request written approval from the secretary to award a diploma to a student who has not passed the high school system of assessments. The district or charter school shall document student attainment of required competencies through an alternative assessment procedure and shall submit such a request using the department's *high school system of assessments waiver request* form. This form shall include: name of superintendent; district/school; mailing address; phone; fax; email address; name of a secondary contact person including the same information; date of submission; statement of applicable district or charter school policy, list of students for whom the waiver request is being made including: student name, school, date of board approval, and statement of whether or not competencies are documented through an alternative assessment; and rationale for request.

(ii) With appropriate documentation, a passing score on another state's graduation requirement assessment shall substitute for the high school system of assessments.

M. Indigent identification and guidelines.

(1) A student who has been deemed eligible for free or reduced-price school meals, or a student who has been identified by the children, youth and families department as being in the custody of the state, shall be deemed indigent for the purposes of remediation programs and damage of instructional materials, as discussed in Sections 22-2C-6 and 22-15-10 NMSA 1978.

(2) A parent or guardian of a student who has not applied for free or reduced-price school meals shall be notified in writing by the local school board or governing body of a charter school of the availability of remediation at no charge upon an eligibility determination for free or reduced-price school meals.

N. Emergency drills and practiced evacuations.

(1) Emergency drills shall be conducted in each public school and private school in the state, as follows:

(a) at least once per week during the first four weeks of the school year;

(i) one of these drills shall be a shelter-in-place drill, which includes preparation to respond to an active shooter;

(ii) one of these drills shall be an evacuation drill;

(iii) two of these drills shall be fire drills;

(b) during the rest of the school year, each school shall conduct at least four more emergency drills, at least two of which shall be fire drills;

(c) in locations where a fire department is maintained, a member of the fire department shall be requested to be in attendance during the emergency drills for the purpose of giving instruction and constructive criticism;

(d) it shall be the responsibility of the person in charge of a school to carry out the provisions related to emergency drills.

(2) Requirements to comply and penalties for non-compliance:

(a) It shall be the responsibility of the superintendent of a school district, a charter school administrator or private school counterpart(s) to ensure that each school under the person's authority follows the requirements set forth in Subsection N of 6.29.1.9 NMAC.

(b) In the event that the person responsible for complying with Subsection N of 6.29.1.9 NMAC fails or refuses to comply with this subsection, the department may, in the case of a public school, take any action designed to ensure prompt corrective action or future compliance, including reporting the non-compliance to either the state fire marshal or to a local fire department. In the case of a private school, the department will report the non-compliance to either the state fire marshal or to a local fire department and may consider adverse licensure action.

(c) Failure or refusal to comply with the requirements in Subsection N of 6.29.1.9 NMAC for holding emergency drills shall constitute grounds to suspend or revoke the license of the person responsible for compliance. The due process procedures under the Uniform Licensing Act (Sections 61-1-1 through 61-1-31 NMSA 1978) shall apply.

O. School facilities and grounds. Pursuant to Subsection C of 6.29.1.9 NMAC (*Duties of the Superintendent*); Subsection D of 6.12.6.8 NMAC (*School District Wellness Policy*); and 6.19.3 NMAC (*Unsafe School Choice Option*), each school district or charter school shall ensure that all buildings, facilities and grounds provide a safe and orderly environment for public use; i.e., that they shall be:

(1) safe, healthy, orderly, clean and in good repair;
(2) in compliance with the Americans with Disabilities Act-Part III and state fire marshal regulations, Sections 59A-52-1 through 59A-52-25 NMSA 1978;
(3) safe for conducting experiments and school projects in all school laboratories and shops, as established in written school safety procedures which are reviewed annually; these procedures include, but are not limited to:

- (a)** personal protective equipment;
 - (b)** adequate ventilation and electrical circuitry;
 - (c)** material safety data sheets;
 - (d)** body and eye washes; and
 - (e)** training appropriate for each teaching situation;
- (4)** the maximum number of occupants in a laboratory or shop teaching space shall be based

on the following:

(a) the number of work stations;
(b) the building and fire safety codes;
(c) the design of the laboratory or shop teaching facility;
(d) appropriate supervision and the special needs of students; and
(e) all applicable OSHA regulations;

(5) appropriate procedures for the storing, handling and removal of toxic or dangerous substances shall be established and implemented; all school programs (including those areas noted above and custodial areas, art room, library and cafeteria) shall comply with standard safety practices and all applicable state and federal regulations;

(6) use of pesticides by districts and charter schools will be governed by the following standards:

(a) Definitions as used in this section:
(i) "Pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest.
(ii) "Pest" means any living organism injurious to other living organisms, except humans, viruses, bacteria or other microorganisms in or on other living organisms other than plants, which is declared to be a pest pursuant to the Pesticide Control Act, Sections 76-4-1 through 76-4-39 NMSA 1978.

(b) Districts and charter schools will develop procedures for the implementation of pest management with consideration for reducing the possible impact of pesticide use on human health and the environment, including people with special sensitivities to pesticides. Procedures will include, but are not limited to, the following:

(i) No pesticide may be applied to public school property and no pest control device, as defined in the New Mexico Pesticide Control Act, may be used on public school property except those pesticides and devices currently registered for legal use in the state by the New Mexico department of agriculture.

(ii) No pesticide may be applied to public school property except by those persons certified in the applicable category and currently licensed by the New Mexico department of agriculture or by employees under their direct supervision.

(iii) Pesticides will only be applied in or on the outside of school buildings when a pest is present and will not be applied on a regular or calendar basis unless it is to treat an infestation and is a part of a pest management system being implemented to address a particular target pest. A pest is considered to be present when it is observed directly or can reasonably be expected to be present based on finding evidence, such as droppings, body parts, or damage that is typically done by the pest. This section of the regulation does not apply to pre-construction termite treatments or the use of outdoor herbicides.

(iv) Pesticides that are applied in a liquid, aerosolized or gaseous form through spraying, aerosol cans, bombs, fumigation or injections into the ground, foundation or plants will not be applied on public school property when students, staff or visitors are present, or may reasonably be expected to be present within 6 hours of the application. In emergency cases, where a pest infestation threatens the health or safety of the occupants of public school property, and which requires the immediate application of a pesticide to remediate, students, staff and other school occupants will be removed from the treatment area prior to the application. Small amounts of gel or liquid pesticides applied to cracks and crevices or baits used to treat pest infestation are exempt from this section.

(v) At the beginning of each year, and when new students register, schools will develop a list of parents and guardians who wish to be notified prior to pesticide application during the school year. These parents/guardians will be notified in writing prior to pesticide application. General notification of anticipated pesticide applications will occur by posting or dissemination of notices, by oral communication or other means of communication. In emergency cases where a pest infestation threatens the health or safety of the occupants of public school property, no pre-notification is required. Immediately following the application of a pesticide in emergency cases, signs will be posted indicating an application was made.

(vi) Written records of pesticide applications will be kept for three years at each school site and be available upon request to parents, guardians, students, teachers and staff.

(vii) If any part of Paragraph (6) of Subsection O of 6.29.1.9 NMAC is found to be in conflict with the provisions of the Pesticide Control Act, the remainder of the regulation will remain in full force and effect.

P. School district budgeting. Section 22-8-4 NMSA 1978 requires the department to prescribe forms for, supervise and control the preparation of all budgets of all public schools and school districts, and to compile accurate information concerning public school finance and administration. Sections 22-8-5 through 22-8-12.1 NMSA 1978 set out specific budget preparation and submission requirements for the department, public schools and public school districts. Regulations governing budgeting and accounting for New Mexico public schools and school districts are set out in 6.20.2 NMAC.

Q. Final course and other student grade changes. Any changes to students' course or other grades shall be governed by the state rule, "*Final Course and Other Student Grade Changes*" (6.30.10 NMAC). [6.29.1.9 NMAC - Rp, 6.30.2.10 NMAC, 6/30/2009; A, 02/12/2010; A, 10/31/2011; A, 2/28/2017; A, 07/25/2017; A, 12/15/2020; A, 5/24/2022; A, 7/31/2023]

6.29.1.10 WAIVERS:

A. To obtain a waiver from the department for procedural or program requirements, a district superintendent or the administrator of a state-chartered charter school shall submit a request to the secretary, in the manner required by the department, with justification for the change. The request and the response shall be kept on file by the district or charter school and the department, and these records shall be available for review by the public.

B. The secretary may waive a graduation requirement for a student based upon the written request of the superintendent or the administrator of a state-chartered charter school, using the department's *graduation waiver request* form. This form shall include: name of superintendent; district/school; mailing address; phone; fax; email address; name of a secondary contact person including the same information; date of submission; local board policy requirement and approval, if required; date of board approval; statement of applicable district or charter school policy and rationale for request.

C. No other waivers of provisions of the Public School Code shall be permitted unless authorized by law.

[6.29.1.10 NMAC - N, 6/30/2009]

6.29.1.11 PROGRAM REQUIREMENTS:

A. Curriculum.

(1) Local curricula shall be aligned with the applicable New Mexico content standards with benchmarks and performance standards. In accordance with Section 22-13-1.6 NMSA 1978, each school district

shall align its curricula to meet the state standards for each grade level and subject area so that students who transfer between public schools within the school district receive the same educational opportunity within the same grade or subject area.

(2) Adopted instructional materials shall support the aligned local curricula. The state standards revision cycle, the local curriculum cycle and the instructional materials cycle shall be aligned and sequenced to provide standards-based curricula that are supported by aligned instructional materials. At the completion of each standards revision cycle, the standards-based state assessment program shall be reviewed to determine the need for realignment.

(3) All courses offered for credit shall have written, delivered, assessed and sequential curriculum.

(4) Written and delivered curricula shall be congruent, state what students should know and be able to do, and include an assessment process.

(5) The curricula shall support the Education Plan and NM School DASH.

B. Subject areas. The district or charter school shall be in compliance with subject area requirements as specified in Section 22-13-1 NMSA 1978.

(1) The department shall require instruction in specific subject areas as provided in Paragraphs (2) through (7) of Subsection B of 6.29.1.11 NMAC. Any public school or school district failing to meet these minimum requirements shall not be accredited by the department.

(2) All kindergarten through third grade classes shall provide daily instruction in reading and language arts skills, including phonemic awareness, phonics, and comprehension; and in mathematics. Students in kindergarten and first grades shall be screened and monitored for progress in reading and language arts skills, and students in second grade shall take diagnostic tests on reading and language arts skills.

(3) All first, second and third grade classes shall provide instruction in art, music and a language other than English, and instruction that meets content standards, benchmarks and performance standards shall be provided in science, social studies, physical education and health education.

(4) In fourth through eighth grades, instruction that meets academic content and performance standards shall be provided in the following subject areas:

(a) reading and language arts skills, with an emphasis on writing and editing for at least one year and an emphasis on grammar and writing for at least one year;

(b) mathematics;

(c) a language other than English;

(d) communication skills;

(e) science;

(f) art;

(g) music;

(h) social studies;

(i) New Mexico history;

(j) United States history;

(k) geography;

(l) physical education; and

(m) health education.

(5) In eighth grade, algebra I shall be offered in regular classroom settings, through online courses or agreements with high schools.

(6) In fourth through eighth grades, school districts and charter schools shall offer electives that contribute to academic growth and skill development and provide career and technical education.

(7) In ninth through 12th grades, instruction that meets academic content and performance standards shall be provided in health education, including:

(a) age-appropriate sexual abuse and assault awareness and prevention training that meets department standards developed in consultation with the federal centers for disease control and prevention that are based on evidence-based methods that have proved to be effective;

(b) lifesaving skills training that follows nationally recognized guidelines for hands-on, compression only, psychomotor skills (skills that use hands-on practice to support cognitive learning) cardiopulmonary resuscitation training including:

(i) use of a course curriculum, which allows for demonstration of competency in performing cardiopulmonary resuscitation and associated skills;

(ii) training that conforms to the most recent, national, evidence-based guidelines established by the American heart association, the American red cross, or another nationally recognized, NM public education department-approved non-profit organization;

(iii) training to recognize the signs of a heart attack;

(iv) training on use of an automated external defibrillator; and

(v) training on how to perform the Heimlich maneuver for choking

victims;

(c) lifesaving skills training that may use the following instructors if qualified to teach hands-on psychomotor skills cardiopulmonary resuscitation training:

(i) school nurses;

(ii) health teachers;

(iii) athletic department personnel as instructors; and

(iv) any qualified volunteers, as defined by 6.50.18.8 NMAC, providing training at no cost to the school district that the school district determines to be eligible to offer instruction as prescribed in Subparagraph (b) of Paragraph (7) of Subsection B of 6.29.1.11 NMAC including, but not limited to, emergency medical technicians, paramedics, police officers, firefighters, representatives of the American heart association or the American red cross, or other similarly qualified individuals;

(d) training and instructional materials related to Subparagraph (b) of Paragraph (7) of Subsection B of 6.29.1.11 NMAC in both English and Spanish to include:

(i) materials, equipment, and services that are needed as part of the instruction obtained on loan from state-recognized organizations, such as the New Mexico heart institute; and

(ii) materials, equipment, and services received by schools as in-kind donations; and

(e) combined instruction, whereby school districts and charter schools may work with other school districts and charter schools to provide the training or with a regional education cooperative to provide or facilitate the training.

(8) The requirements as prescribed in Subparagraph (b) of Paragraph (7) of Subsection B of 6.29.1.11 NMAC for health education shall not be required for students in grades nine through 12 who are enrolled in a virtual charter school.

(9) A school district or charter school may submit a waiver request to the department for the requirement as prescribed in Subparagraph (b) of Paragraph (7) of Subsection B of 6.29.1.11 NMAC for health education for a student receiving special education supports and services pursuant to the IDEA or Section 504 of the federal Rehabilitation Act in grades nine through 12 with a disability as documented through an individualized education program (IEP) if the requirement as prescribed in Subparagraph (b) of Paragraph (7) of Subsection B of 6.29.1.11 NMAC cannot be reasonably met with accommodations for a given student.

(10) In every grade, inquiry-based laboratory components are at the core of the science program and shall be woven into every lesson and concept strand. For required science units in grades nine through twelve, "laboratory component" means an experience in the laboratory, classroom or the field that provides students with opportunities to interact directly with natural phenomena or with data collected by others using tools, materials, data collection techniques and models. Throughout the process, students shall have opportunities to design investigations, engage in scientific reasoning, manipulate equipment, record data, analyze results and discuss their findings. The laboratory component comprises at least 40 per cent of the unit's instructional time. All science classes that include dissection activities as part of the curriculum shall provide virtual dissection techniques as alternative activities for any student who is opposed to real dissections for ethical, moral, cultural or religious reasons. Alternative techniques shall approximate the experience of real dissection activities as closely and appropriately as possible. A virtual dissection technique means carrying out dissection activities using computer two-dimensional or three-dimensional simulations, videotape or videodisk simulations, take-apart anatomical models, photographs or anatomical atlases.

C. Bilingual multicultural education. Bilingual multicultural education programs shall be provided to meet the identified educational and linguistic needs of linguistically and culturally different students, including Native American children, and other students who may wish to participate, in grades K-12, with priority to be given to programs in grades K-3. These programs shall:

(1) provide services in accordance with the Bilingual Multicultural Education Act (Sections 22-23-1 through 6 NMSA 1978) and the Bilingual Multicultural Education Program Regulation (Sections 6.32.2.7 through 6.32.2.11 NMAC);

(2) be implemented in accordance with the identified needs of qualifying culturally and linguistically different students and ensure equal educational opportunities;

(3) be assessed as part of the Education Plan process; and

(4) support the local curriculum and Education Plan and NM School DASH.

D. Career and technical education (CTE). Career and technical education programs for both elementary and secondary levels shall:

(1) be in accordance with Section 22-14-1 through 22-14-30 NMSA 1978 and the Carl Perkins Act;

(2) provide exploratory and skill development program offerings;

(3) ensure students' mastery of the New Mexico career and technical education content standards with benchmarks and performance standards;

(4) include competency-based applied learning; and

(5) support the local curriculum and the NM School DASH.

E. School health. School health programs provide opportunities for all students to develop healthy behaviors. Districts and charter schools shall provide or make provisions for school health programs that address the health needs of students and staff. Districts and charter schools shall provide the following programs: health education, physical education, health services and school counseling. Additional programs may include: nutrition, staff wellness, family-school-community partnerships, healthy environment and psychological services. These programs shall:

(1) be in accordance with Section 22-10A-34 and Section 24-5-1 through 24-5-6 NMSA 1978;

(2) provide education and skill development program offerings;

(3) provide community partnerships which help to achieve the goal of healthy students and staff; and

(4) support the local curriculum SS] Education Plan, and NM School DASH.

F. Special education. Special education is specially designed instruction that is provided at no cost to parents to meet the unique needs of a student with a disability, as defined in the IDEA regulations (34 CFR Part 300 and state special education regulations (6.31.2 NMAC). Special education programs shall:

(1) provide specially designed instruction in career and technical education and travel training for students whose IEPs require such services;

(2) provide instruction to students placed on homebound services as per their IEP; and

(3) provide instruction in state-supported educational programs, hospitals, institutions and other settings. As set forth in the state special education regulations at Paragraph (15) of Subsection C of 6.31.2.7 NMAC, special education may include speech-language pathology services consisting of specially-designed instruction that is provided to enable a student with a disability, as recognized under IDEA, to have access to the general curriculum and to meet the educational standards of the public agency that apply to all children;

(4) be assessed as part of the Education Plan process; and

(5) support the local curriculum, Education Plan, and NM School DASH.

G. Supplemental programs. Programs which supplement, but do not replace, state operational programs may include, but are not limited to: Title I - Improving the Academic Achievement of the Disadvantaged; Title II - Preparing, Training and Recruiting High Quality Teachers and Principals; Title III - Language Instruction for Limited English Proficient and Immigrant Students; Title IV, Part A - Safe and Drug Free Schools and Communities; Title V - Promoting Informed Parental Choice and Innovative Programs; Title VI - Flexibility and Accountability; Title VII - Indian, Native Hawaiian and Alaska Native Education; Title VIII - Impact Aid Program; the Johnson-O'Malley Act; and Individuals with Disabilities Education Improvement Act (IDEA). Supplemental programs shall:

(1) provide services as required by federal laws and assurances, including Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act (EEOA) of 1974;

(2) be assessed as part of the Education Plan process; and

(3) support the local curriculum, Education Plan, and NM School DASH.

H. Support services. Districts and charter schools shall provide support service programs which strengthen the instructional program. Required support service programs are library media, school counseling and health services. Support services shall:

(1) have a written, delivered and assessed program, K-12;

(2) provide licensed staff to develop and supervise the program; and

(3) support the local curriculum, Education Plan, and NM School DASH.

I. Technology in education. The Technology for Education Act establishes a fund and a system for equal distribution of funds based upon final funded student membership within each school district and charter school. The Technology for Education Act requires annual review and approval of each school district and charter school's educational technology plan, through which every school district and charter school reports to the department the fiscal distributions received, expenditures made and educational technology obtained by the district or charter school, and other related information. As districts and charter schools develop, refine and implement strategic long-range plans for utilizing educational technology, each plan shall:

- (1) be in accordance with Section 22-15A-10 NMSA 1978; and
- (2) support the local curriculum, Education Plan, and NM School DASH.

J. Gifted education. Gifted education is specially designed instruction to meet the individual needs of gifted students pursuant to 6.31.3 NMAC. Gifted education programs shall:

- (1) provide gifted students appropriate instruction in required subject areas, in accordance with Article 13 of Chapter 22 NMSA 1978;
- (2) be assessed as part of the Education Plan process; and
- (3) support the local curriculum, Education Plan, and NM School DASH.

[6.29.1.11 NMAC - Rp, 6.30.2.11 NMAC, 6/30/2009; A, 2/28/2017; A, 12/15/2020; A, 7/31/2023]

6.29.1.12 SEVERABILITY: If any part or application of this rule is held invalid by a court of competent jurisdiction, the remainder or its application to other situations shall not be affected.

[6.29.1.12 NMAC - N, 6/30/2009]

6.29.1.13 FUTURE CHANGES IN LAW THAT AFFECT THIS RULE: This rule will be periodically amended to reflect changes in law or laws that were enacted with delayed effect provisions.

[6.29.1.13 NMAC - N, 6/30/2009; A, 10/31/2011]

HISTORY OF 6.29.1 NMAC:

Pre-NMAC HISTORY: The material in this part is derived from that previously filed with the State Records Center:

SDE 74-17, (Certificate No. 74-17), Minimum Educational Standards for New Mexico Schools, filed April 16, 1975.

SDE 76-9, (Certificate No. 76-9), Minimum Education Standards for New Mexico Schools, filed July 7, 1976.

SDE 78-9, Minimum Education Standards for New Mexico Schools, filed August 17, 1978.

SBE 80-4, Educational Standards for New Mexico Schools, filed September 10, 1980.

SBE 81-4, Educational Standards for New Mexico Schools, filed July 27, 1981.

SBE 82-4, Educational Standards for New Mexico Schools, Basic and Vocational Program Standards, filed November 16, 1982.

SBE Regulation No. 83-1, Educational Standards for New Mexico Schools, Basic and Vocational Program Standards, filed June 24, 1983.

SBE Regulation 84-7, Educational Standards for New Mexico Schools, Basic and Vocational Program Standards, filed August 27, 1984.

SBE Regulation 85-4, Educational Standards for New Mexico Schools, Basic, Special Education, and Vocational Programs, filed October 21, 1985.

SBE Regulation No. 86-7, Educational Standards for New Mexico Schools, filed September 2, 1986.

SBE Regulation No. 87-8, Educational Standards for New Mexico Schools, filed February 2, 1988.

SBE Regulation No. 88-9, Educational Standards for New Mexico Schools, filed October 28, 1988.

SBE Regulation No. 89-8, Educational Standards for New Mexico Schools, filed November 22, 1989.

SBE Regulation No. 90-2, Educational Standards for New Mexico Schools, filed September 7, 1990.

SBE Regulation No. 92-1, Standards for Excellence, filed June 30, 1992.

History of Repealed Material:

6.30.2 NMAC, Standards for Excellence, filed November 2, 2000 - Repealed effective June 30, 2009.

NMAC History:

6 NMAC 3.2, Standards for Excellence, filed October 17, 1996.

6.30.2 NMAC, Standards for Excellence, November 2, 2000, replaced by 6.29.1 NMAC, General Provisions; 6.29.2 NMAC, Arts Education; 6.29.3 NMAC, Career and Technical Education; 6.29.4 NMAC, English Language Arts;

6.29.5 NMAC, English Language Development; 6.29.6 NMAC, Health Education; 6.29.7 NMAC, Mathematics; 6.29.8 NMAC, Modern, Classical and Native Languages; 6.29.9 NMAC, Physical Education; 6.29.10 NMAC, Science; 6.29.11 NMAC, Social Studies; effective June 30, 2009.

Tab 5

New Mexico Administrative Code

Rights and Responsibilities of the Public Schools and Public School Students

6.11.2 NMAC (8/25/2020)

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 11 PUBLIC SCHOOL ADMINISTRATION - STUDENT RIGHTS AND RESPONSIBILITIES
PART 2 RIGHTS AND RESPONSIBILITIES OF THE PUBLIC SCHOOLS AND PUBLIC
SCHOOL STUDENTS

6.11.2.1 ISSUING AGENCY: Public Education Department, hereinafter the department.
[6.11.2.1 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.2 SCOPE: This rule applies to public schools and public school students.
[6.11.2.2 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.3 STATUTORY AUTHORITY: This rule is being promulgated pursuant to Sections 22-2-1, 22-2-2, and 22-5-4.12 NMSA 1978 and 42 U.S.C. 11431 et seq., the McKinney-Vento Homelessness Assistance Act.
[6.11.2.3 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.4 DURATION: Permanent.
[6.11.2.4 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.5 EFFECTIVE DATE: August 25, 2020, unless a later date is cited at the end of a section.
[6.11.2.5 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.6 OBJECTIVE: To provide a comprehensive framework within which school districts, local school boards, locally chartered charter schools, state-chartered charter schools, and governing bodies of charter schools may carry out their educational mission and exercise their authority and responsibility to provide a safe environment for student learning and provide students and parents with an understanding of the basic rights and requirements necessary to effectively function in the educational community.
[6.11.2.6 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.7 DEFINITIONS:

A. "Administrative authority" means the school district superintendent, the head administrator of a state-chartered charter school, a principal, or their delegate to act officially in a matter involving school discipline or the maintenance of order. The term may include school security officers, but only to the extent of their authority as established under written local school board policies.

B. "Child with a disability" or "student with a disability" means a child who meets all requirements of 34 CFR Sec. 300.8 and:

(1) is age three through 21 or who will turn age three at any time during the school year;
(2) has been evaluated in accordance with 34 CFR Secs. 300.304 through 300.311 and any additional requirements of these or other department rules and standards as having one or more of the disabilities specified in 34 CFR Sec. 300.8, including an intellectual disability; a hearing impairment, including deafness, speech or language impairment; a visual impairment, including blindness; emotional disturbance; orthopedic impairment; autism; traumatic brain injury; other health impairment; a specific learning disability; deaf-blindness; or being developmentally delayed as defined in Paragraph (4) of Subsection B of 6.31.2.7 NMAC; and who has not received a high school diploma; and

(3) at the discretion of each local educational agency and subject to the additional requirements of Paragraph (2) of Subsection F of 6.31.2.10 NMAC, may include a child age three through nine who is evaluated as being developmentally delayed and who, because of that condition, needs special education and related services.

C. "Criminal acts" means acts defined as criminal under federal and state law, and any applicable municipal or county criminal ordinances.

D. "Delinquent acts" means acts as defined in Subsection A of Section 32A-2-3 NMSA 1978, the Delinquency Act.

E. "Detention" means requiring a student to remain in a designated area in the student's school outside of instructional time, such as before school, during recess, during lunch, or after school. No detained student shall be denied an opportunity to eat lunch or reasonable opportunities to go to the restroom.

F. "Disciplinarian" means a person or group authorized to impose consequence(s) after the facts of a case have been determined by a hearing authority.

G. "Disruptive conduct" means willful conduct that is unruly, disruptive, or abusive and interferes with a school teacher's or school administrator's ability to communicate with the students in a classroom, with a student's ability to learn, or with the operation of a school or a school-sponsored activity.

H. "Expulsion" means the removal of a student from school either permanently or for an indefinite time exceeding 10 school days or a locally established shorter period.

I. "Hearing authority" means a person or group designated to hear evidence and determine the facts of a case at a required formal hearing.

J. "Immediate removal" means the removal of a student from school for one school day or less under emergency conditions and without a prior hearing.

K. "In-school suspension" means requiring a student to spend time in a designated area at the same school or in an environment where the student is allowed to continue with their academic learning.

L. "Legal limits" include the requirements of the federal and state constitutions and governing statutes, standards, and regulations, and include the fundamental common-law requirement that rules of student conduct be reasonable exercises of the schools' authority in pursuance of legitimate educational and related functions. There are special limitations arising from constitutional guarantees of protected free speech and expression which shall be balanced against the schools' need to foster an educational atmosphere free from undue disruptions to appropriate discipline.

M. "Local school board" includes the governing body of a charter school.

N. "Local school district" or "school district" includes a state-chartered charter school.

O. "Long-term suspension" means the removal of a student from school for a specified time exceeding either 10 school days or a locally established shorter period.

P. "Mechanical restraint" means the use of any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body and that the student cannot easily remove, but "mechanical restraint" does not include mechanical supports or protective devices.

Q. "Parent" means the natural parent, legal guardian, or other person having custody and control of a student who is subject to Section 22-12A-1 et seq. NMSA 1978, the Attendance for Success Act, or the student if the student is not subject to compulsory attendance.

R. "Physical restraint" means the use of physical force without the use of any device or material that restricts the free movement of all or a portion of a student's body, but "physical restraint" does not include physical escort.

S. "Public school" means the campus and any building, facility, vehicle, or other item of property owned, operated, controlled by or in the possession of a local school district. For purposes of student discipline, the term also includes any non-school premises being used for school-sponsored activities.

T. "Refusal to cooperate with school personnel" means a student's willful refusal to obey the lawful instructions or orders of school personnel whose responsibilities include supervision of students.

U. "Refusal to identify self" means a person's willful refusal, upon request from school personnel known or identified as such to the person, to identify themselves accurately.

V. "Restraint" when not otherwise modified means mechanical or physical restraint.

W. "Review authority" means a person or group authorized by the local school board to review a disciplinarian's final decision to impose a long-term suspension or expulsion.

X. "Seclusion" means the involuntary confinement of a student alone in a room from which egress is prevented. "Seclusion" does not mean the use of a voluntary behavior management technique, including a timeout location, as part of a student's education plan, individual safety plan, behavioral plan or individualized education program that involves the student's separation from a larger group for purposes of calming.

Y. "Sexual harassment," regarding students, means unwelcome or unwanted conduct of a sexual nature (verbal, non-verbal or physical) when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of the advancement of a student in school programs or activities;

(2) submission to or rejection of such conduct by a student is used as the basis for decisions or opportunities affecting the student; or

(3) such conduct substantially interferes with a student's learning or creates an intimidating, hostile, or offensive learning environment.

Z. "School personnel" means all members of the staff, faculty, and administration employed by the local school board. The term includes school security officers, school bus drivers, and their aides, and also authorized agents of the schools, such as volunteers or chaperones, whose responsibilities include supervision of students.

AA. "Student" means a person who is enrolled in one or more classes at a public school.

BB. "Student experiencing homelessness" means children and youth as defined by Section 725(2) of the federal McKinney-Vento Homeless Assistance Act.

CC. "Superintendent of a school district" includes the head administrator of a state-chartered charter school.

DD. "Temporary suspension" means the removal of a student from school for a specified period of 10 or fewer school days after a rudimentary hearing.

EE. "Weapon," as set forth in Section 22-5-4.7 NMSA 1978, means:

(1) any firearm that is designed to, may readily be converted to, or will expel a projectile by the action of an explosion; and

(2) any destructive device that is an explosive or incendiary device, bomb, grenade, rocket having a propellant charge of more than four ounces, missile having an explosive or incendiary charge of more than one-quarter-ounce, mine or similar device.

[6.11.2.7 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.8 GENERAL PROVISIONS:

A. Jurisdiction over students. Public school authorities, which include all officials, employees and authorized agents of public schools, whose responsibilities include supervision of students shall have comprehensive authority within constitutional bounds to maintain order and discipline in school. In exercising this authority, such officials, employees, and authorized agents of public schools may exercise such powers of control, supervision, and correction over students as may be reasonably necessary to enable them to properly perform their duties and accomplish the purposes of education. This authority applies whenever students are lawfully subject to the schools' control, regardless of place. During such periods, public school authorities shall have the right to supervise and control the conduct of students, and students shall have the duty to submit to the schools' authority. The foregoing is intended to reflect the common law regarding the rights, duties, and liabilities of public school authorities in supervising, controlling and disciplining students. Nothing herein shall be construed as enlarging the liability of public school authorities beyond that imposed by statute, common law, or department rule.

B. School authority over non-students. In furtherance of the state's compelling interest in the orderly operation of public schools and school activities, school officials have the following forms of authority over non-students whose actions adversely affect school operations or activities.

(1) On school property: Local school boards may prohibit entry to and provide for the removal from any public school building or grounds any person who refuses to identify themselves and state a lawful purpose for entering. Any person who refuses to identify themselves may be removed by school authorities, who may use reasonable physical force to accomplish the removal. Alternately, a person who refuses to identify themselves and who refuses a lawful request to leave school premises may be subject to arrest by law enforcement officers for criminal offenses including but not limited to criminal trespass, interference with the educational process, or disorderly conduct. A person who identifies themselves and states a lawful purpose may nevertheless be subject to removal by school officials for engaging in activities prohibited by this rule. The person may also be subject to arrest by law enforcement officers if the person is committing any crime.

(2) Off school property: Public school authorities have indirect and limited authority over the activities of non-students off school property. To the extent that non-students' conduct at or near schools or school-sponsored activities may constitute a criminal offense, including the crimes of interference with the educational process, disorderly conduct or criminal trespass after refusing a lawful request to leave, school authorities may request law enforcement agencies to arrest the offenders.

C. Statement of policy. A primary responsibility of New Mexico public schools and their professional staff shall be to instill in students an appreciation of our representative form of government, the rights and responsibilities of the individual or group, and the legal processes whereby necessary changes are effected.

(1) The school is a community and the rules of a school are the laws of that community. All persons enjoying the rights of citizenship are subject to the laws of their community. Each right carries with it a corresponding obligation.

(2) The right to attend public school is not absolute. It is conditioned on each student's acceptance of the obligation to abide by the lawful rules of the school community until and unless the rules are changed through lawful processes.

(3) Teachers, administrators, and other school employees also have rights and duties. Teachers are required by law to maintain a suitable environment for learning in their classes and to assist in maintaining school order and discipline. Administrators are responsible for maintaining and facilitating the

educational program by ensuring an orderly and safe environment in public schools. In discharging their duties, all school employees have the right to be free from intimidation or abuse and to have their lawful requests and instructions followed.

(4) Nothing in this rule shall be held to affect the due process rights of school employees or their use of any local school district grievance procedure. This rule does not address employment disputes.

D. Local school board authority: Local school boards have the authority and responsibility to ensure that suitable rules of student conduct and appropriate disciplinary processes are established within their school districts. Within legal limits as defined in Subsection L. of 6.11.2.7 NMAC, and subject to the minimums prescribed in this rule, local school boards have discretion to develop such rules, policies, and procedures as they deem appropriate to local conditions, including policies which afford students more protection than the minimums established here. Local school boards and administrative authorities which deem it appropriate may provide for student, community or appropriate state and local agency participation in the formulation and enforcement of school rules.

E. Severability. Any part of this rule found by adjudication before a competent tribunal to be contrary to law shall be stricken without effect to the remainder.

[6.11.2.8 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.9 RULES OF CONDUCT FOR NEW MEXICO PUBLIC SCHOOLS: The acts specified in Subsection A of 6.11.2.9 NMAC are prohibited in all public schools in New Mexico. Within legal limits as defined in Subsection L of 6.11.2.7 NMAC, local school boards have discretion to develop rules of conduct governing all others area of student and school activity.

A. Prohibited activities: The commission of or participation in the activities designated below is prohibited in all public schools and is prohibited for students whenever they are subject to school control. The following acts are prohibited by this rule:

- (1) criminal or delinquent acts;
- (2) committing, threatening to commit, or inciting others to commit or threaten to commit any act of violence, directly or indirectly, in person or through electronic means, against a public school, student, or school personnel or official;
- (3) sexual harassment;
- (4) disruptive conduct;
- (5) refusal to identify self; and
- (6) refusal to cooperate with school personnel.

B. Regulated activities: Beyond those activities designated as prohibited in Subsection A of 6.11.2.9 NMAC, all other areas of student conduct may be regulated within legal limits by local school boards as they deem appropriate to local conditions. Conduct by non-students which affects school operations may be regulated within legal limits pursuant to any of the forms of authority described in Subsection B. of 6.11.2.8 NMAC. Activities subject to local school board regulation within legal limits include:

- (1) school attendance;
- (2) use of and access to public schools, including:
 - (a) restrictions on vehicular traffic on school property;
 - (b) prohibition of, or conditions on, the presence of non-school persons on school grounds or in school buildings while school is in session; and
 - (c) reasonable standards of conduct for all persons attending school-sponsored activities or other activities on school property;
- (3) students' dress and personal appearance;
- (4) use of controlled substances, alcohol and tobacco in public schools;
- (5) speech and assembly within public schools;
- (6) publications distributed in public schools;
- (7) the existence, scope, and conditions of availability of student privileges, including extracurricular activities and rules governing participation;
- (8) per Section 22-5-4.7 NMSA 1978, each school district is required to adopt a policy providing for the expulsion from school, for a period of not less than one year, any student who is determined to have knowingly brought a weapon to a public school under the jurisdiction of the local school board. The local school board or the superintendent of the school district may modify the expulsion requirement on a case-by-case basis; the special rule provisions of Subsection D of 6.11.2.11 NMAC, apply to students with disabilities; and

(9) the discipline of students for out-of-school conduct having a direct and immediate effect on school discipline or the general safety and welfare of the school.
[6.11.2.9 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.10 ENFORCING RULES OF CONDUCT:

A. Enforcing attendance requirements. Local school districts and public schools shall establish, maintain, and enforce attendance policies and requirements set forth in Section 22-12A-1 et seq. NMSA 1978, the Attendance for Success Act, and Section 32A-3A-1 et seq. NMSA 1978, the Family Services Act.

B. Search and seizure. School property assigned to a student and a student's person or property while under the authority of a public school are subject to search, and items found are subject to seizure, in accordance with the following requirements:

(1) Notice of search policy. Students shall be given reasonable notice, through distribution of written policies or otherwise, of each school's policy on searches at the beginning of each school year or upon admission for students entering during the school year.

(2) Who may search. Certified school personnel, school security personnel and school bus drivers are "authorized persons" to conduct searches when a search is permissible as set forth in Subsection B of 6.11.2.10 NMAC. An authorized person who is conducting a search may request the assistance of one or more people, who upon consent become authorized to search for the purpose of that search only.

(3) When a search is permissible. Unless local school board policy provides otherwise, an authorized person may conduct a search when the authorized person has a reasonable suspicion that a crime or other breach of disciplinary rules is occurring or has occurred. An administrative authority may direct or conduct a search under the same conditions and also when the administrative authority has reasonable cause to believe that a search is necessary to help maintain school discipline.

(4) Conduct of searches and witnesses. The following requirements govern the conduct of permissible searches by authorized persons.

(a) School property, including lockers and school buses, may be searched with or without students present unless a local school board or administrative authority provides otherwise. When students are not present for locker searches, another authorized person shall serve as a witness whenever possible. Locks furnished by students should not be destroyed unless a student refuses to open one or circumstances otherwise render such action necessary in the judgment of the administrative authority.

(b) Student vehicles when on campus or otherwise under school control and students' personal effects, which are not within their immediate physical possession, may be searched in accordance with the requirements for locker searches in Subparagraph (a) of Paragraph (4) of Subsection B of 6.11.2.10 NMAC.

(c) Physical searches of a student's person may be conducted only by an authorized person of the same sex as the student and, except when circumstances render it impossible, may be conducted only in the presence of another authorized person of the same sex. The extent of the search must be reasonably related to the infraction, and the search shall not be excessively intrusive in light of the student's age and sex, and the nature of the infraction.

(5) Seizure of items. Illegal items, legal items which threaten the safety or security of others and items which are used to disrupt or interfere with the educational process may be seized by authorized persons. Seized items shall be released to appropriate authorities or a student's parent or returned to the student when and if the administrative authority deems appropriate.

(6) Notification of law enforcement authorities. Unless a local school board policy provides otherwise, an administrative authority shall have discretion to notify the local children's court attorney, district attorney, or other law enforcement officers when a search discloses illegally possessed contraband material or evidence of some other crime or delinquent act.

C. Basis for disciplinary action. A student may appropriately be disciplined by administrative authorities in the following circumstances:

(1) for committing any act that endangers the health or safety of students, school personnel, or others for whose safety the public school is responsible, or for conduct that reasonably appears to threaten such dangers if not stopped, regardless of whether an established rule of conduct has been violated;

(2) for violating valid rules of student conduct established by the local school board or by an administrative authority to whom the local school board has delegated rulemaking authority, when the student knew or should have known of the rule in question or that the conduct was prohibited; or

(3) for committing acts prohibited by this rule, when the student knew or should have known that the conduct was prohibited.

D. Selection of disciplinary sanctions. Within legal limits as defined in Subsection L of 6.11.2.7 NMAC, local school boards have discretion to determine the appropriate sanction(s) to be imposed for violations of rules of student conduct or to authorize appropriate administrative authorities to make such determinations.

(1) School discipline and criminal charges. Appropriate disciplinary actions may be taken against students regardless of whether criminal charges are also filed in connection with an incident.

(2) Nondiscriminatory enforcement. Local school boards and administrative authorities shall not enforce school rules or impose disciplinary punishments in a manner which discriminates against any student on the basis of race, religion, color, national origin, ancestry, sex (including sexual orientation and transgender status), or disability, except to the extent otherwise permitted or required by law or regulation. This statement shall not be construed as requiring identical treatment of students for violation of the same rule; it shall be read as prohibiting differential treatment which is based on race, religion, color, national origin, ancestry, sex (including sexual orientation and transgender status), or disability rather than on other differences in individual cases or students.

E. Restraint or seclusion. In accordance with Section 22-5-4.12 NMSA 1978, each school shall establish requirements for the use of restraint and seclusion techniques.

(1) Schools shall establish policies and procedures, as approved by the local school board or governing body, for the use of restraint and seclusion techniques. Schools shall review such policies and procedures on a triennial basis, before submitting the school safety plan.

(a) A school may permit the use of restraint or seclusion techniques on any student only if the student's behavior presents an imminent danger of serious physical harm to the student or others and only if less restrictive interventions appear insufficient to mitigate the imminent danger of serious physical harm. Less restrictive interventions include de-escalation strategies, positive behavioral intervention supports, or other comparable behavior management techniques.

(b) The restraint or seclusion techniques shall be used only by school employees who are trained in de-escalation strategies, positive behavioral intervention supports, and the safe and effective use of restraint and seclusion techniques, unless an emergency does not allow sufficient time to summon those trained school employees.

(c) The restraint or seclusion techniques shall not impede the student's ability to breathe or speak, shall be in proportion to a student's age and physical condition, and shall end when the student's behavior no longer presents an imminent danger of serious physical harm to the student or others.

(d) If a restraint or seclusion technique is used on a student, trained and authorized school employees shall maintain continuous visual observation and monitoring of the student while the restraint or seclusion technique is in use.

(2) In accordance with Section 22-5-4.12 NMSA 1978, schools shall establish policies and procedures for the use of restraint and seclusion techniques in a school safety plan.

(a) A school safety plan, pursuant to requirements of Paragraph (7) of Subsection D of 6.12.6.8 NMAC, shall include the following minimum requirements:

(i) The school safety plan shall not be specific to any individual student; and

(ii) The school safety planning team shall include at least one administrator, one educator, and one special education expert and may include a counselor or social worker, nurse, and school resource officer or security staff. The school safety planning team shall include personnel who are trained as designated school personnel restraint and seclusion.

(b) A school safety plan, pursuant to requirements of Paragraph (7) of Subsection D of 6.12.6.8 NMAC, shall be submitted to the department on a triennial basis, on a schedule determined by the department. The department will provide local education agencies notice of a deadline to submit a school safety plan 90 days prior to the due date.

(3) Policies and procedures for the use of restraint and seclusion techniques shall require and describe appropriate training for designated school personnel.

(a) School districts and charter schools shall provide training for designated school personnel regarding de-escalation strategies, positive behavioral intervention supports, or other comparable behavior management techniques and the use of restraint or seclusion techniques. Designated school personnel shall attend training at least every two years or complete a certification course, exam, or other comparable demonstration of competency that provides evidence that the individual has up-to-date knowledge of proper restraint and seclusion techniques.

(b) In the event that new designated school personnel are identified within the school after the provision of the training, certification course, exam, or other comparable demonstration of

competency, the school district or charter school shall ensure that a training or other competency demonstration is provided to new designated school personnel within 60 days of being designated.

(4) Policies regarding restraint or seclusion shall consider school district support and strategies for school employees to successfully reintegrate a student who has been restrained or secluded back into the school or classroom environment.

(5) Schools shall implement the following review procedures for incidents in which restraint or seclusion techniques are used.

(a) If a student has been restrained or secluded two or more times within 30 calendar days, the school shall review strategies used to address the student's behavior and determine whether the student needs a functional behavior assessment or referral to a student assistance team, behavioral intervention plan team, or, if a student has an individualized education program, a referral to the student's individualized education program team.

(b) If a student has been restrained or secluded two or more times within 30 calendar days, the student's individualized education program team, behavioral intervention plan team, or student assistance team shall meet within two weeks of each subsequent use to provide recommendations for avoiding future incidents requiring the use of restraint or seclusion.

(c) The review shall include whether school personnel involved in the incidents were trained in the use of de-escalation strategies, positive behavioral intervention supports, or restraint and seclusion techniques. Additionally, the review shall consider whether the individual who restrained or secluded a student needs additional training.

(d) To improve internal practices relative to incidents of restraint or seclusion, schools shall conduct an annual review and analysis of all incidents in which restraint or seclusion techniques were used, including the number of incidents, the type of incident, personnel involved, the need for additional training, and student demographics.

(6) Schools shall establish documentation and reporting procedures pursuant to the requirements listed in Section 22-5-4.12 NMSA 1978. In addition, schools shall provide written or oral assurance of secure storage and access to written documentation in accordance with this rule, 20 USC. Section 1232(g), 34 CFR Part 99, the Family Educational Rights and Privacy Act, and any other applicable federal or state laws or rules governing the privacy of such documents.

(a) A school employee shall provide the student's parent with written or oral notice on the same day the incident occurred, unless circumstances prevent same-day notification. If notice is not provided on the same day of the incident, notice shall be given within 24 hours after the incident.

(b) Within a reasonable time following the incident, no longer than two school days, a school employee shall provide the student's parent with written documentation that includes information about any persons, locations, or activities that may have triggered the behavior, if known, and specific information about the behavior and its precursors, the type of restraint or seclusion technique used, and the duration of its use.

(c) Schools shall report to the department, through the department's data collection and reporting system, the following information on a timeline and reporting frequency established by the department:

- (i) all instances in which a restraint or seclusion technique is used;
- (ii) all instances in which law enforcement is summoned instead of using a restraint or seclusion technique;
- (iii) the names of the students and school personnel involved in an incident in which restraint or seclusion was used; and
- (iv) if a student was restrained, the type of restraint, including mechanical restraint or physical restraint, that was used.

(d) If a school summons law enforcement instead of using a restraint or seclusion technique on a student, the school shall comply with the reporting, documentation, and review procedures established pursuant to this rule and Section 22-5-4.12 NMSA 1978.

F. Corporal punishment. Corporal punishment shall be prohibited by each local school board pursuant to Subsection B of Section 22-5-4.3 NMSA 1978. Restraint or seclusion techniques used in compliance with Subsection E of 6.11.2.10 NMAC shall not be deemed to be corporal punishment.

G. Detention, suspension and expulsion. Where detention, suspension, or expulsion is determined to be the appropriate penalty, it may be imposed only in accordance with procedures that provide at least the minimum safeguards prescribed in 6.11.2.12 NMAC. Suspensions or expulsions of students with disabilities shall be subject to the further requirements of Subsection I of 6.11.2.10 NMAC and 6.11.2.11 NMAC.

H. Discipline of students experiencing homelessness. Removing students experiencing homelessness from school shall be used only as a last resort, pursuant to the requirements in 42 USC Sec. 11431 et seq., the McKinney-Vento Homelessness Assistance Act.

(1) Public schools shall develop discipline policies and procedures that are reviewed at least annually and align with local school board policies. Policies and procedures shall:

(a) through professional development activities, create an awareness among educators and administrators of the types of behaviors that students experiencing homelessness may exhibit due to homelessness and provide strategies and supports to address the behaviors through the student assistance team process in accordance with Subsection D of 6.29.1.9 NMAC;

(b) take into account the issues related to a student's homelessness by talking with the student and applicable staff and families prior to taking disciplinary action;

(c) consult with school behavior response teams or other applicable personnel to assign appropriate discipline related to the behavior;

(d) implement discipline alternatives to temporary or long-term suspensions or expulsions or classroom removals, if possible; and

(e) connect students with mental health services as needed.

(2) Public schools shall review school discipline records and data of students experiencing homelessness in order to identify any patterns in disciplinary actions that indicate an unfair bias against the students. The collection and review of such records shall be in compliance with the Family Educational Rights and Privacy Act, as well as any other applicable federal or state laws or rules governing the privacy of such documents.

I. Discipline of students with disabilities. Students with disabilities are not immune from school disciplinary processes, nor are they entitled to remain in a particular educational program when their behavior substantially impairs the education of other children in the program. However, public schools are required by state law and rule to meet the individual educational needs of students with disabilities to the extent that current educational expertise permits. Public school personnel may consider any unique circumstances on a case-by-case basis when determining whether a change of placement, consistent with the other requirements of 6.11.2.11 NMAC, is appropriate for a student with a disability who violates a code of conduct as provided in 34 CFR Sec. 300.530.

(1) Long-term suspensions or expulsions of students with disabilities shall be governed by the procedures set forth in 6.11.2.11 NMAC.

(2) Temporary suspensions of students with disabilities may be imposed in accordance with the normal procedures prescribed in Subsection D of 6.11.2.12 NMAC, provided that the student is returned to the same educational placement after the temporary suspension and unless a temporary suspension is prohibited under the provisions of Paragraph (3) of Subsection I of 6.11.2.10 NMAC.

(3) Program prescriptions. A student with a disability's individualized education program (IEP), under the Individuals with Disabilities Education Improvement Act (IDEA), need not affirmatively authorize disciplinary actions which are not otherwise in conflict with this rule. However, the IEP team may prescribe or prohibit specified disciplinary measures for an individual student with a disability by including appropriate provisions in the student's IEP. Administrative authorities shall adhere to any such provisions contained in a student with a disability's IEP, except that an IEP team may not prohibit the initiation of proceedings for long-term suspension or expulsion which are conducted in accordance with this rule.

(4) Immediate removal. Immediate removal of students with disabilities may be done in accordance with the procedures of Subsection C of 6.11.2.12 NMAC.

(5) A student who has not been determined to be eligible for special education and related services under 6.31.2 NMAC and who has engaged in behavior that violated a code of student conduct may assert any of the protections provided for in this subsection if the conditions set forth in 34 CFR Sec. 300.534 have been met.

(6) Referral to and action by law enforcement and judicial authorities.

(a) Nothing in these rules of conduct prohibits an administrative authority from reporting a crime committed by a student with a disability to appropriate authorities or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a student with a disability.

(b) Transmittal of records.

(i) An administrative authority reporting a crime committed by a student with a disability must ensure that copies of the special education and disciplinary records of the student are transmitted, for consideration by the appropriate authorities, to whom the administrative authority reports the crime.

(ii) An administrative authority reporting a crime under this section may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.
[6.11.2.10 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.11 DISCIPLINARY REMOVALS OF STUDENTS WITH DISABILITIES:

A. General. The following rules shall apply when a student with a disability under IDEA violates a rule of conduct as set forth in this rule which may result in:

(1) long-term suspension or expulsion; or
(2) any other disciplinary change of the student's current educational placement as specified in the federal regulations implementing IDEA at 34 CFR Secs. 300.530 through 300.536 and these or other department rules and standards.

B. Manifestation determination.

(1) For disciplinary removals of students with disabilities that exceed 10 consecutive school days or result in a disciplinary change of placement as defined by 34 CFR 300.536, the administrative authority must conduct a manifestation determination to determine whether the conduct was a manifestation of the child's disability pursuant to this Subsection.

(2) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a rule of student conduct, the administrative authority, the parent, and relevant members of the child's IEP team (as determined by the parent and the administrative authority) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

(a) if the conduct in question was caused by or had a direct and substantial relationship to, the child's disability; or

(b) if the conduct in question was the direct result of the administrative authority's failure to implement the IEP.

(3) If the administrative authority, the parent, and relevant members of the child's IEP team determine the condition in either Subparagraph (a) or (b) of Paragraph (2) of Subsection B of 6.11.2.11 NMAC is met, the conduct must be determined to be a manifestation of the child's disability.

C. Determination that behavior is a manifestation of disability. If the administrative authority, the parent, and relevant members of the IEP team determine the conduct was a manifestation of the child's disability, the IEP team must take immediate steps to comply with 34 CFR Sec. 300.530(f) and remedy any deficiencies.

D. Determination that behavior is not a manifestation of disability. If the administrative authority, the parent, and relevant members of the IEP team determine the conduct was not a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to a child with a disability in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in Subsection I of this section.

E. Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child's behavior involves one of the special circumstances listed in 34 CFR Sec. 300.530(g). For purposes of this subsection, the definitions provided in 34 CFR Sec. 300.530(i) shall apply.

F. Determination of setting. The student's IEP team determines the interim alternative educational setting for service under Subsections D and E of this section.

G. Change of placement because of disciplinary removals. For purposes of removals of a student with a disability from the child's current educational placement under 6.11.2.11 NMAC and 6.11.2.12 NMAC, a change of placement occurs if the conditions provided in 34 CFR Sec. 300.536 are met.

H. Parental notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a student with a disability because of a violation of a code of student conduct, the administrative authority must notify the parents of that decision, and provide the parents the procedural safeguards notice described in 34 CFR Sec. 300.504.

I. Services. A student with a disability who is removed from the student's current placement for 10 school days in the same school year must continue to receive special education and related services as provided in 34 CFR Sec. 300.530(b) and 34 CFR Sec. 300.530(d).

J. Appeal.

(1) The parent of a student with a disability who disagrees with any decision regarding the placement or the manifestation determination under this section, or an administrative authority that believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to Subsection I of 6.31.2.13 NMAC.

(2) A hearing officer who hears a matter under Paragraph (1) of Subsection J of 6.11.2.11 NMAC, has the authority provided in 34 CFR Sec. 300.532(b).

(3) When an appeal under this subsection has been made by the parent or the administrative authority, the student must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in Subsections D or E of this section, whichever occurs first, unless the parent and the administrative authority agree otherwise.
[6.11.2.11 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

6.11.2.12 PROCEDURE FOR DETENTIONS, SUSPENSIONS, AND EXPULSIONS: The authority of the state and of local school boards to prescribe and enforce standards of conduct for public school students must be exercised consistently with constitutional safeguards of individual student rights. The right to a public education is not absolute; it may be taken away, temporarily or permanently, for violations of school rules. The right to a public education is a property right which may only be denied where school authorities have adhered to the minimum procedural safeguards required to afford the student due process of law. This section prescribes minimum requirements for detention, in-school suspension, and temporary, long-term or permanent removal of students from public schools. Local school boards may adopt procedures which afford students more protection than this rule requires. The procedures in this section apply only to disciplinary detentions, suspensions, and expulsions. They do not apply to disenrollment of students who fail to meet immunization, age, residence, or other requirements for valid enrollment, nor to the removal from school membership reports of students who have been absent from school for 10 consecutive school days in accordance with Subsection B of Section 22-8-2 NMSA 1978. Nothing in this section shall be construed as prohibiting school boards or administrative authorities from involving other school staff, students, and members of the community in the enforcement of rules of student conduct to the extent they believe is appropriate.

A. Post-suspension placement of students. Any student suspended from school shall be delivered directly by a school official to the student's parent(s) or an adult designated by the parent(s) or kept on school grounds until the usual end of the school day.

B. Students with disabilities. This section does not apply to long-term suspension or expulsion of students with disabilities pursuant to the IDEA or Section 504. The procedures for long-term suspension or expulsion of students with disabilities are set forth in Section 6.11.2.11 NMAC. School personnel under this section may remove a student with a disability who violates a rule of student conduct from the student's current placement to an appropriate interim alternative educational setting, another setting, or suspension, for no more than 10 consecutive school days to the extent those alternatives are applied to students without disabilities, and for additional removals of no more than 10 consecutive school days in the same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement under Subsection G of 6.11.2.11 NMAC.

C. Immediate removal. Students whose presence poses a continuing danger to persons or property or an ongoing threat of interfering with the educational process may be immediately removed from school, subject to the following rules:

(1) A rudimentary hearing, as required for temporary suspensions, shall follow as soon as possible;

(2) Students shall be reinstated after no more than one school day unless within that time a temporary suspension is also imposed after the required rudimentary hearing. In such circumstances, a single hearing will support both the immediate removal and a temporary suspension imposed in connection with the same incident(s); and

(3) The school shall exert reasonable efforts to inform the student's parent of the charges against the student and the action taken as soon as practicable. If the school has not communicated with the parent by telephone or in person by the end of the school day following the immediate removal, the school shall on that day mail a written notice with the required information to the parent's address of record.

D. Temporary suspension.

(1) A local school board may limit temporary suspensions to periods shorter than 10 school days.

(2) A student facing temporary suspension shall be granted a rudimentary hearing in which the student shall first be informed of the charges against the student and, if the student denies them, shall be told what evidence supports the charge(s) and be given an opportunity to present the student's version of the facts. The following rules apply:

(a) the hearing may be an informal discussion and may follow immediately after the notice of the charges is given;

(b) unless the administrative authority decides a delay is essential to permit a fuller exploration of the facts, informal discussion may take place and a temporary suspension may be imposed within minutes after the alleged misconduct has occurred;

(c) a student who denies a charge of misconduct shall be told what act(s) the student is accused of committing, shall be given an explanation of the evidence supporting the accusation(s), and shall be given the opportunity to explain the student's version of the facts. The administrative authority is not required to divulge the identity of informants, although the administrative authority should not withhold such information without good cause. The administrative authority is required to disclose the substance of all evidence on which the administrative authority proposes to base a decision in the matter;

(d) the administrative authority is not required to allow the student to secure counsel, to confront or cross-examine witnesses supporting the charge(s), or to call witnesses to verify the student's version of the incident, but none of these is prohibited; and

(e) the school shall exert reasonable efforts to inform the student's parent(s) of the charges against the student and the possible or actual consequence as soon as practicable. If the school has not communicated with the parent(s) by telephone or in person by the end of the first full day of suspension, the school shall on that day mail a written notice with the required information to the parent's address of record.

E. In-school suspension.

(1) In-school suspension may be imposed with or without further restriction of student privileges. Any student who is placed in in-school suspension which exceeds 10 school days must be provided with an instructional program that meets state and local educational requirements. Student privileges, however, may be restricted for longer than 10 school days.

(2) In-school suspensions of any length shall be accomplished according to the procedures for a temporary suspension as set forth in Subsection D of 6.11.2.12 NMAC. A local school board may limit the length of in-school suspensions which may be accomplished under temporary suspension procedures. No student in in-school suspension shall be denied an opportunity to eat lunch or reasonable opportunities to go to the restroom.

F. Detention.

(1) Detention may be imposed in connection with in-school suspension, but is distinct from in-school suspension in that detention does not entail removing the student from any of the student's regular classes.

(2) The authority of the schools to supervise and control the conduct of students includes the authority to impose reasonable periods of detention during the day or outside normal school hours as a disciplinary measure. Reasonable periods of detention may be imposed in accordance with the procedures for temporary suspension.

G. Long-term suspension and expulsion.

(1) Each local school board shall authorize appropriate administrative authorities to initiate procedures leading to long-term suspension or expulsion. Where prompt action to suspend a student long-term is deemed appropriate, a temporary suspension may be imposed while the procedures for long-term suspension or expulsion are activated. However, where a decision following the required formal hearing is delayed beyond the end of the temporary suspension, the student shall be returned to school pending the final outcome unless the provisions of Subparagraphs (j) and (k) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC apply.

(2) A student who has been validly expelled or suspended is not entitled to receive any educational services from the local school district during the period of the exclusion from school. A local school board may provide alternative arrangements, including correspondence courses at the expense of the student or parent(s) pursuant to department requirements, if the local school board deems such arrangements appropriate.

(3) Each local school board shall establish, or shall authorize appropriate administrative authorities to establish, appropriate processes for handling long-term suspensions and expulsions. Unless the terms expressly indicate otherwise, nothing in Paragraph (4) of Subsection G of 6.11.2.12 NMAC shall be construed as directing that any required decision be made by any particular person or body or at any particular level of administrative organization.

(4) The following rules shall govern the imposition of long-term suspensions or expulsions:

(a) Hearing authority and disciplinarian. The same person or group may perform the functions of hearing authority and disciplinarian. Where the functions are divided, the hearing authority's determination of the facts shall be conclusive to the disciplinarian, but the disciplinarian may reject any consequence(s) recommended by the hearing authority.

(b) Review authority. Unless the local school board provides otherwise, a review authority shall have discretion to modify or overrule the disciplinarian's decision, but may not impose harsher consequences. A review authority shall be bound by a hearing authority's factual determinations except as provided in Subparagraph (o) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC.

(c) Disqualification. No person shall act as hearing authority, disciplinarian, or review authority in a case where the person was directly involved in or witnessed the incident(s) in question, or if the person has prejudged disputed facts or is biased for or against any person who will actively participate in the proceedings.

(d) Local school board participation. A local school board may act as hearing authority, disciplinarian, or review authority for any cases involving proposed long-term suspensions or expulsions. However, whenever a quorum of the local school board acts in any such capacity, Section 10-15-1 et seq., NMSA 1978, the Open Meetings Act, requires a public meeting.

(e) Initiation of procedures. An authorized administrative authority shall initiate procedures for long-term suspension or expulsion of a student by designating a hearing authority and disciplinarian in accordance with local school board policies, scheduling a formal hearing in consultation with the hearing authority, and preparing and serving a written notice meeting the requirements of Subparagraph (h) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC.

(f) Service of notice. The written notice shall be addressed to the student, through the student's parent(s), and shall be served upon the parent(s) personally or by mail.

(g) Timing of hearing. The hearing shall be scheduled no sooner than five nor later than 10 school days from the date of receipt of the notice by the parent(s). The hearing authority may grant or deny a request to delay the hearing in accordance with the provisions of Subparagraph (i) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC.

(h) Contents of notice. The written notice must contain all of the following information, parts of which may be covered by appropriate reference to copies of any policies or regulations furnished with the notice:

(i) the school rule(s) alleged to have been violated, a concise statement of the alleged act(s) of the student on which the charge(s) are based, and a statement of the possible penalty;

(ii) the date, time, and place of the hearing, and a statement that both the student and parent(s) are entitled and urged to be present;

(iii) a clear statement that the hearing will take place as scheduled unless the hearing authority grants a delay or the student and parent(s) agree to waive the hearing and comply voluntarily with the proposed disciplinary action or with a negotiated penalty, and a clear and conspicuous warning that a failure to appear will not delay the hearing and may lead to the imposition of the proposed penalty by default;

(iv) a statement that the student has the right to be represented at the hearing by legal counsel, a parent or some other representative designated in a written notice filed at least 72 hours before the hearing with the contact person named pursuant to Item (vi) of Subparagraph (h) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC;

(v) a description of the procedures governing the hearing;

(vi) the name, business address, and telephone number of a contact person through whom the student, parent(s), or designated representative may request a delay or seek further information, including access to any documentary evidence or exhibits which the school proposes to introduce at the hearing; and

(vii) any other information, materials or instructions deemed appropriate by the administrative authority who prepares the notice.

(i) Delay of hearing. The hearing authority shall have discretion to grant or deny a request by the student or the appropriate administrative authority to postpone the hearing. Such discretion may be limited or guided by local school board policies not otherwise inconsistent with this rule.

(j) Student status pending hearing. Where a student has been suspended temporarily and a formal hearing on long-term suspension or expulsion will not occur until after the temporary suspension has expired, the student shall be returned to school at the end of the temporary suspension unless:

(i) the provisions of Subparagraph (k) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC apply, or

(ii) the student and parent(s) have knowingly and voluntarily waived the student's right to return to school pending the outcome of the formal proceedings; or

(iii) the appropriate administrative authority has conducted an interim hearing pursuant to a written local school board policy made available to the student which affords further due process protection sufficient to support the student's continued exclusion pending the outcome of the formal procedures.

(k) Waiver of hearing, voluntary compliance, or negotiated penalty. A student and the student's parent(s) may elect to waive the formal hearing and review procedures and comply voluntarily with the proposed penalty, or may waive the hearing and review and negotiate a mutually acceptable penalty with the designated disciplinarian. Such a waiver and compliance agreement shall be made voluntarily, with knowledge of the rights being relinquished, and shall be evidenced by a written document signed by the student, the parent(s), and the appropriate school official.

(l) Procedure for hearing and decision. The formal hearing is not a trial. The formal hearing is an administrative hearing designed to ensure a calm and orderly determination by an impartial hearing authority of the facts of a case of alleged serious misconduct. Technical rules of evidence and procedure do not apply. The following rules govern the conduct of the hearing and the ultimate decision:

(i) The school shall have the burden of proof of misconduct.

(ii) The student and the student's parent(s) shall have the following rights: The right to be represented by legal counsel or other designated representative, however, the school is not required to provide representation; the right to present evidence, subject to reasonable requirements of substantiation at the discretion of the hearing authority and subject to exclusion of evidence deemed irrelevant or redundant; the right to confront and cross-examine adverse witnesses, subject to reasonable limitation by the hearing authority; the right to have a decision based solely on the evidence presented at the hearing and the applicable legal rules, including the governing rules of student conduct.

(iii) The hearing authority shall determine whether the alleged act(s) of misconduct have been proved by a preponderance of the evidence presented at a hearing at which the student or a designated representative have appeared.

(iv) If no one has appeared on the student's behalf within a reasonable time after the announced time for the hearing, the hearing authority shall determine whether the student, through the parent(s), received notice of the hearing. If so, the hearing authority shall review the schools' evidence to determine whether it is sufficient to support the charge(s) of misconduct.

(v) A hearing authority who is also a disciplinarian shall impose an appropriate sanction if the hearing authority finds that the allegations of misconduct have been proved under the standards of either Item (iii) or (iv) of Subparagraph (l) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC. A hearing authority who is not a disciplinarian shall report the findings, together with any recommended sanction, to the disciplinarian promptly after the hearing.

(vi) Arrangements to make a tape recording or keep minutes of the proceedings shall be made by the administrative authority who scheduled the hearing and prepared the written notice. A verbatim written transcript is not required, but any minutes or other written record shall fairly reflect the substance of the evidence presented.

(vii) The hearing authority may announce a decision on the question of whether the allegation(s) of misconduct have been proved at the close of the hearing. A hearing authority who is also a disciplinarian may also impose a penalty at the close of the hearing.

(viii) In any event, the hearing authority shall prepare and mail or deliver to the student, through the parent(s), a written decision within five working days after the hearing. The decision shall include a concise summary of the evidence upon which the hearing authority based its factual determinations. A hearing authority who is also a disciplinarian shall include in the report a statement of the penalty, if any, to be imposed, and shall state reasons for the chosen penalty. A hearing authority who is not a disciplinarian shall forward a copy of the hearing authority's written decision to the disciplinarian forthwith. The disciplinarian shall prepare a written decision, including reasons for choosing any penalty imposed, and mail or deliver it to the student, through the parent(s), within five working days of receipt of the hearing authority's report.

(ix) A disciplinarian who is not a hearing authority may observe but not participate in the proceedings at a formal hearing. If the disciplinarian is present at the formal hearing and if the hearing authority announces a decision at the close of the hearing, the disciplinarian may also announce the disciplinarian's decision at that time.

(x) The disciplinarian's decision shall take effect immediately upon initial notification to the parent(s), either at the close of the hearing or upon receipt of the written decision. If initial notification is by mail, the parent(s) shall be presumed to have received the notice on the fifth calendar day after the date of mailing unless a receipt for certified mail, if used, indicates a different date of receipt.

(m) Effect of decision. If the hearing authority decides that no allegation(s) of misconduct have been proved, or if the disciplinarian declines to impose a penalty despite a finding that an act or acts of misconduct have been proved, the matter shall be closed. If the disciplinarian imposes any sanction on the student, the decision shall take effect immediately upon notification to the parent and shall continue in force during any subsequent review.

(n) Right of review. Unless the local school board was the disciplinarian, a student aggrieved by a disciplinarian's decision after a formal hearing shall have the right to have the decision reviewed if the penalty imposed was at least as severe as a long-term suspension or expulsion, an in-school suspension exceeding one school semester, or a denial or restriction of student privileges for one semester or longer. A local school board may grant a right of review for less severe penalties. Local school boards shall establish appropriate mechanisms for review except where the local board was the disciplinarian, in which case the local school board decision is final and not reviewable administratively. A student request for review must be submitted to the review authority within 10 school days after the student is informed of the disciplinarian's decision.

(o) Conduct of review. Unless the local school board provides otherwise, a review authority shall have discretion to modify the disciplinarian's decision, including imposing any lesser sanction deemed appropriate. A review authority shall be bound by the hearing authority's factual determinations unless the student persuades the review authority that a finding of fact was arbitrary, capricious, or unsupported by substantial evidence or that new evidence, which has come to light since the hearing and which could not with reasonable diligence have been discovered in time for the hearing, would manifestly change the factual determination. Upon any such finding, the review authority shall have discretion to receive new evidence, reconsider evidence introduced at the hearing, or conduct a de novo hearing. In the absence of any such finding, the review shall be limited to an inquiry into the appropriateness of the penalty imposed.

(p) Form of review. Unless the local school board provides otherwise, a review authority shall have discretion to conduct a review on the written record of the hearing and decision in the case, to limit new submissions by the aggrieved student and school authorities to written materials, or to grant a conference or hearing at which the student and the student's representative and school authorities may present their respective views in person. Where a conference or hearing is granted, the record-keeping requirements of Item (vi) of Subparagraph (l) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC apply.

(q) Timing of review. Except in extraordinary circumstances, a review shall be concluded no later than 15 working days after a student's written request for review is received by the appropriate administrative authority.

(r) Decision. A review authority may announce a decision at the close of any conference or hearing held on review. In any event, the review authority shall prepare a written decision, including concise reasons, and mail or deliver it to the disciplinarian, the hearing authority and the student, through the parent(s), within 10 working days after the review is concluded.

(s) Effect of decision. Unless the local school board provides otherwise, a review authority's decision shall be the final administrative action to which a student is entitled.

[6.11.2.12 NMAC – Rp, 6.11.2.7 NMAC, 8/25/2020]

HISTORY OF 6.11.2 NMAC:

6.11.2 NMAC, Rights and Responsibilities of the Public Schools and Public School Students, filed 8/15/1997, was repealed and replaced by 6.11.2 NMAC, Rights and Responsibilities of the Public Schools and Public School Students, effective 8/25/2020.