DEPARTMENT OF EDUCATION

34 CFR Part 300

RIN 1820–AB60

[Docket ID ED–2008–OSERS–0005]

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

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Secretary proposes to amend the regulations in 34 CFR part 300 governing the Assistance to States for the Education of Children with Disabilities Program and Preschool Grants for Children with Disabilities Program, as published in the **Federal Register** on August 14, 2006, and seeks public comment on the proposed amendments that we have determined are necessary for effective implementation and administration of these programs. The proposed regulations were not included in the notice of proposed rulemaking published in the **Federal Register** on June 21, 2005 to implement changes made to the Individuals with Disabilities Education Act (IDEA or Act), as amended by the Individuals with Disabilities Education Improvement Act of 2004, and, thus, have not previously been available for public comment.

DATES: We must receive your comments on or before July 28, 2008.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Go to *http://www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket is available on the site under ''How To Use This Site.''

• *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about these proposed regulations, address them to Tracy R. Justesen, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5107, Potomac Center Plaza, Washington, DC 20202–2600.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing on the Federal eRulemaking Portal at *http://www.regulations.gov.* All submissions will be posted to the Federal eRulemaking Portal without change, including personal identifiers and contact information.

FOR FURTHER INFORMATION CONTACT: Tracy R. Justesen, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5107, Potomac Center Plaza, Washington, DC 20202–2600. Telephone: (202) 245–7605.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

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

SUPPLEMENTARY INFORMATION:

Invitation to Comment

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should provide to reduce the potential costs or increase potential benefits while preserving the effective and efficient administration of the programs.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You also may inspect the comments, in person, in Room 5104, Potomac Center Plaza, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

On December 3, 2004, the Individuals with Disabilities Education Improvement Act of 2004 was enacted into law as Pub L. 108–446, and made significant changes to the IDEA. On June 21, 2005, the Secretary published a notice of proposed rulemaking in the **Federal Register** (70 FR 35782) (June 21, 2005 NPRM) to amend the regulations governing the Assistance to States for the Education of Children with Disabilities Program (Part 300), the Preschool Grants for Children with Disabilities Program (Part 301), and Service Obligations under Special Education Personnel Development to Improve Services and Results for Children with Disabilities (Part 304).

Final regulations for Part 304—Special Education-Personnel Development to Improve Services and Results for Children with Disabilities were published in the **Federal Register** on June 5, 2006 (71 FR 32396), and became effective July 5, 2006.

On August 14, 2006, the Secretary published final regulations in the **Federal Register** (71 FR 46540) that addressed more than 5,500 public comments on Parts 300 and 301 that were received in response to the June 21, 2005 NPRM. With the issuance of those final regulations, Part 301 was removed and the regulations implementing the Preschool Grants for Children with Disabilities Program were included under subpart H of the final regulations for Part 300. The final regulations became effective October 13, 2006.

In developing final regulations for the Assistance to States for the Education of Children with Disabilities Program, we identified certain issues for which additional regulatory changes might be necessary. These issues, which we address in this NPRM, are: (1) Parental revocation of consent after consenting to the initial provision of services; (2) a State's or local educational agency's (LEA's) obligation to make positive efforts to employ qualified individuals

with disabilities; (3) representation of parents by non-attorneys in due process hearings; (4) State monitoring, technical assistance, and enforcement of the Part B program; and (5) the allocation of funds, under sections 611 and 619 of the Act, to LEAs that are not serving any children with disabilities. This NPRM also proposes minor modifications to the consent provisions to correct an inadvertent omission.

Significant Proposed Regulations

We discuss issues according to subject, with appropriate sections of the proposed regulations indicated.

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

We propose to amend §§ 300.9 and 300.300 (71 FR 46757, 46783–46784) to permit parents to unilaterally withdraw their children from further receipt of special education and related services by revoking their consent for the continued provision of special education and related services to their children. Under the proposed regulation, a public agency would not be able, through mediation or a due process hearing, to challenge the parent's decision or seek a ruling that special education and related services must continue to be provided to the child.

Under section 614(a)(1)(D)(i)(II) of the Act, agencies responsible for making a free appropriate public education (FAPE) available to a child with a disability under Part B of the Act must seek to obtain informed consent from the child's parent before initiating the provision of special education and related services to the child. Section 614(a)(1)(D)(ii)(II) further requires that, if a parent refuses to provide such consent, the LEA shall not require the provision of those services to the child by utilizing the due process procedures under section 615 of the Act. In these circumstances, under section 614(a)(1)(D)(ii)(III) of the Act, the LEA is not considered to be in violation of its obligation to provide FAPE and is not required to convene an individualized education program (IEP) Team meeting or develop an IEP.

The regulations in § 300.300(b) (71 FR 46784) interpret the statutory provision in section 614(a)(1)(D)(i)(II) of the Act to require consent prior to the initial provision of special education and related services; *i.e.*, before a child with a disability receives special education and related services for the first time. However, the regulations do not specifically address whether parents, by revoking their consent, can require a public agency to cease providing their child special education and related services after the parents already have consented to the initial provision of special education and related services and the child has begun receiving those services.

It has been our longstanding interpretation of the current regulations in § 300.300(b), and similar regulations that were in effect prior to October 13, 2006, that, although parents have the right to determine whether their child would initially receive special education and related services by providing or withholding parental consent for the initial provision of services, once the child receives special education and related services, parents cannot unilaterally withdraw their child from receipt of special education and related services. If parents no longer want their child to receive those services, yet the public agency believes the services are necessary to ensure that the child continues to receive FAPE, our view was that the public agency had an obligation to continue to provide the services, or if under State law the parent had the right to consent to continued services, to take the necessary steps, which could include using informal means to reach agreement with the parent, as well as requesting a due process hearing, to seek to override the parent's refusal to consent to the continuation of those services.

The issue of whether parents have the right to unilaterally withdraw their child from continued receipt of special education and related services was not included in the June 21, 2005 NPRM. The Department, however, received several comments on the consent provisions in the proposed regulations in §§ 300.9 and 300.300(b), including comments requesting that we address situations in which a child's parents want to discontinue special education and related services because they believe that their child no longer needs those services. As we indicated in the *Analysis of Comments and Changes* section of the final regulations (71 FR 46551, 46633), these commenters stated that public agencies should not be allowed to use the Part B procedural safeguards to continue special education and related services if a parent revokes consent. In response, we indicated that we would solicit comment on this suggested change in a subsequent notice of proposed rulemaking.

Therefore, we propose to amend the regulations to provide that parents may unilaterally withdraw their child from continued receipt of special education and related services and that public agencies may not take steps to override a parent's refusal to consent to further services. Just as, under section 614(a)(1)(D)(ii)(II), parents have the authority to consent to the initial provision of special education and related services, we believe that parents also should have the authority to revoke that consent, thereby ending the provision of special education and related services to their child. This change is also consistent with the IDEA's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.

These proposed regulations would not require public agencies, once they have obtained parental consent for the initial provision of special education and related services, to obtain parental consent to provide special education and related services at any subsequent time, such as for the provision of services under a subsequent IEP. We believe that including this type of additional consent requirement would be unduly burdensome for public agencies, and an unwarranted intrusion on State and local control of education. States, however, have the discretion to establish additional consent requirements, consistent with the provisions in § 300.300(d) (71 FR 46784).

The proposed amendment to § 300.300(b)(3) would combine the provisions in current § 300.300(b)(3) and (b)(4) (71 FR 46784) relating to parental consent for the provision of initial services. Section 300.300(b)(3) currently provides that a public agency may not use the procedures in subpart E of the regulations (Procedural Safeguards and Due Process Procedures) to obtain agreement or a ruling that services may be provided if the parent of a child fails to respond or refuses to consent to the initial provision of services. Section 300.300(b)(4) currently provides that a public agency will not be considered in violation of its obligation to make FAPE available and is not required to convene an IEP Team meeting or develop an IEP if a parent refuses or fails to consent to the initial provision of services. This proposed change would simplify the regulation by eliminating the slight differences in the introductory material in the current provisions and would clarify that the provision would apply to situations in which a parent refuses or fails to consent to the initial provision of special education and related services.

We propose to add a new § 300.300(b)(4) to provide that if, at any time subsequent to the initial provision of special education and related

services, the parent of a child revokes consent for the provision of special education and related services, a public agency—(a) may not continue to provide special education and related services to the child; (b) may not use the procedures in subpart E of the regulations (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) to obtain agreement or a ruling that services may be provided; (c) will not be considered in violation of its obligation to make FAPE available to the child for failure to provide the child with further special education and related services; and (d) is not required to convene an IEP Team meeting or develop an IEP, under §§ 300.320 through 300.324. Therefore, this proposed regulation would—(a) clarify that parents have the right to withdraw their child from receipt of special education and related services without being subjected to mediation or a due process hearing requested by the public agency; and (b) protect the public agency from any subsequent action by the parents based on the public agency's termination of special education services following the parents' revocation of consent. Of course, if a parent subsequently provides consent for services, a public agency would again have an obligation to make FAPE available to the child, including developing and implementing an IEP, as appropriate. We also note that under current § 300.534(c)(1)(ii) a public agency is not deemed to have knowledge that a child is a child with a disability for purposes of disciplinary actions if the parent of the child has refused services under the IDEA; for example, if a parent revokes consent for the provision of special education services and the child subsequently faces a disciplinary action, the school district would be able to discipline the child in the same manner as a nondisabled child. This provision would apply to situations in which a parent has revoked consent for the receipt of special education and related services.

We also propose to revise § 300.300(d)(2) and (d)(3) (71 FR 46784) to correct an inadvertent omission. Section 300.300(d)(2) (71 FR 46784) currently provides that States may require parental consent for other services and activities under Part 300 in addition to the consent requirements in § 300.300(a) (71 FR 46783), which addresses parental consent for an initial evaluation. Section 300.300(d)(3) (71 FR 46784) currently provides that a public agency may not use a parent's refusal to consent to one service or activity under § 300.300(a) or (d)(2) to deny the parent or child other services and activities. To be consistent with comparable provisions in effect before the final regulations published in 2006, § 300.300(d)(2) should have included a reference to the parental consent provisions in § 300.300(a), (b), and (c), rather than just § 300.300(a), and § 300.300(d)(3) should have referred to § 300.300(a), (b), (c), or (d)(2), rather than just § 300.300(a) or (d)(2). Therefore, we propose to revise § 300.300(d)(2) to refer to paragraphs (a), (b), and (c) of § 300.300 rather than just paragraph (a). We propose to revise § 300.300(d)(3) to refer to paragraphs (a), (b), (c), or (d)(2) of § 300.300, rather than just paragraphs (a) or (d)(2).

We would add a new § 300.9(c)(3) to clarify that, if a parent revokes consent for the child's receipt of special education and related services after the child is initially provided special education and related services, the public agency would not be required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the parent's revocation of consent. We believe that this change is necessary to clarify that the child's education records would not be required to be changed for the period prior to the parent's revocation of consent for special education and related services. Schools need the ability to keep accurate records of a child's school experience, including whether the child received special education and related services.

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

We propose to amend § 300.177, regarding States' sovereign immunity, by adding a new provision relating to States' and LEAs' obligations to make positive efforts to employ and advance qualified individuals with disabilities. Specifically, we are proposing to redesignate current § 300.177(a) through (c), regarding States' sovereign immunity, as proposed § 300.177(a)(1) through (a)(3), and add a new paragraph (b) to provide that any 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, such as special education programs of an SEA or LEA or the State-wide assessment program of an SEA that is using IDEA funds to develop assessments for children with disabilities. This paragraph would reflect the provisions in section 606 of the Act, which provides that the Secretary will ensure that each grant recipient under the IDEA makes positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under the IDEA.

Representation by Non-Attorneys in Due Process Hearings (§ 300.512)

Section 615(h)(1) of the Act provides that any party to a hearing conducted under Part B of the IDEA has the right to be accompanied and advised by counsel, and by individuals with special knowledge or training with respect to the problems of children with disabilities. This statutory provision is reflected in § 300.512(a)(1) (71 FR 46795).

Both the Act and its implementing regulations are silent on the issue of whether individuals who are not attorneys, but have special knowledge or expertise regarding the problems of children with disabilities, may represent parties at IDEA due process hearings. However, as indicated in an April 8, 1981 letter from Theodore Sky, Acting General Counsel of the Department of Education, to the Honorable Frank B. Brouillet, the Department previously interpreted section 615(h) of the Act and implementing regulations to mean that attorneys and lay advocates may perform the same functions at due process hearings.

One commenter, in responding to the June 21, 2005 NPRM, requested that the Department amend the regulations to indicate that a parent has the right to be represented by a non-attorney at an IDEA due process hearing. The Department believes that some clarification is warranted because the IDEA is silent regarding the representational role of non-attorneys at IDEA due process hearings.

In the absence of statutory or regulatory language, at least one court concluded that State laws regulating the practice of law and prohibiting representation by lay advocates in due process hearings do not conflict with the IDEA. *In re Arons,* 756 A.2d 867 (Del. 2000), *cert. denied sub nom, Arons* v. *Office of Disciplinary Counsel,* 532 U.S. 1065 (2001). Given that the language of the Act and regulations is not clear, we are persuaded now that this position best reflects an appropriate regard for the principle of Federal-State comity. We believe that the regulations should respect the interests that States have in regulating the practice of law so as to protect the public and ensure the appropriate administration of justice.

Therefore, we propose to change the Department's earlier interpretation of section 615(h) of the Act and the regulations regarding representation of parents by non-attorneys in due process hearings, and amend the regulation in § 300.512(a)(1) (71 FR 46795) accordingly.

Specifically, § 300.512(a)(1) (71 FR 46795), concerning a parent's right to be accompanied and advised by counsel and by other individuals with special knowledge or training with respect to the problems of children with disabilities, would be amended to specify that a parent's right to be represented by non-attorneys at due process hearings is determined by State law. We believe alerting parents that State laws affect whether they can be represented in a due process hearing by a non-attorney advocate should reduce future litigation of this issue. The proposed change also is consistent with the Department's general position to provide flexibility to States where the IDEA is silent or where State law does not conflict with the Act.

Because this proposed change would directly reverse a prior interpretation that the Department authoritatively adopted and consistently followed, and the June 21, 2005 NPRM did not indicate that we were considering any change, we are now proposing in this NPRM, that a parent's right to be represented by non-attorneys at a due process hearing must be determined under State law.

Note that this change would not prevent parents from representing themselves in due process hearings or during court proceedings under the IDEA. In *Winkelman* v. *Parma City School District,* 550 U.S. _____, 127 S. Ct. 1994 (2007), the Supreme Court held that parents can prosecute IDEA claims on their own behalf without being represented by an attorney. The proposed regulatory change would not affect this holding.

State Monitoring, Technical Assistance, and Enforcement (§§ 300.600, 300.602, and 300.606)

1. State Determinations About LEA Performance and State Enforcement

Section 616(a)(1)(C) of the Act requires States to monitor the implementation of Part B of the Act by LEAs, and to enforce Part B of the Act in accordance with the monitoring priorities and enforcement mechanisms set forth in section 616(a)(3) and (e) of the Act. Section 300.600(a) (71 FR 46800) implements section 616(a)(1) of the Act, and requires States to monitor implementation of Part B of the Act by LEAs, enforce Part B of the Act in accordance with the statutory enforcement mechanisms that are appropriate for States to apply to LEAs, and annually report on performance under Part B of the Act.

Section 616(e) of the Act makes clear that the Secretary's enforcement actions are based, in large part, on annual determinations about a State's performance, as provided in section 616(d) of the Act. Based on the language in section 616(a)(1)(C)(ii) of the Act, which requires States to enforce Part B of the Act consistent with section 616(e), States also have an obligation to make annual determinations about each LEA's performance using the same categories, under section 616(d) of the Act, that the Secretary applies to States. We believe that § 300.600(a) (71 FR 46800), however, should address more clearly States' responsibilities to make annual determinations about each LEA's performance. Therefore, we propose to amend § 300.600(a) (71 FR 46800) to clarify that a State must annually review and make determinations about the performance of each LEA in the State, consistent with the Secretary's responsibility, under section 616(d) of the Act, to annually review and make determinations concerning the performance of each State. Specifically, we propose adding language to § 300.600(a) to clarify that States must use the categories listed in § 300.603(b)(1) (71 FR 46801) to make annual determinations about the performance of each LEA.

We also believe that it would be useful to clarify the specific enforcement mechanisms that a State must use, consistent with section 616(a)(1)(C)(ii) and (e) of the Act. The current regulations in § 300.600(a) use regulatory citations to refer to the enforcement mechanisms in § 300.604 that States must use. We propose to revise § 300.600(a) (71 FR 46800) to identify specifically the enforcement mechanisms associated with each relevant regulatory citation. Therefore, we propose to reorganize § 300.600(a) for clarity by indicating that the State must: (a) Under proposed paragraph (a)(1), monitor the implementation of Part B of the IDEA; (b) under proposed paragraph (a)(2), make annual determinations about the performance of each LEA using the categories in § 300.603(b)(1); (c) under proposed paragraph (a)(3), enforce the requirements of the IDEA, consistent with § 300.604, by using applicable enforcement mechanisms in § 300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA's grant), (b)(2)(i) (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 (d) under proposed paragraph (a)(4), report annually to the public on the performance of the State and each LEA under Part B of the Act, as provided in § 300.602(b)(1)(A) and (b)(2).

Proposed § 300.600(e) would clarify that a State, in exercising its monitoring responsibilities under § 300.600(d), must ensure that when it identifies noncompliance with the requirements of Part B of the Act by its LEAs, the noncompliance is corrected as soon as possible, and in no case, later than one year after the State's identification.

We propose to add § 300.600(e) because, based on our monitoring activities, we have determined that correction of noncompliance does not always occur in a timely manner. Noncompliance must be corrected in a timely manner to ensure that children with disabilities receive appropriate services and to ensure proper and effective implementation of the requirements of Part B of the IDEA. Throughout our 30 years of monitoring experience we have observed that, in most cases, when a State makes a good faith effort, the needed corrective actions can be accomplished and their effectiveness verified within one year. It is important to note that timely correction of noncompliance is critical to ensuring that children with disabilities receive a free appropriate public education. Allowing noncompliance to continue can negatively impact the education of great numbers of children with disabilities.

Correction of noncompliance means that a State requires a public agency to revise any noncompliant policies, procedures and practices, and verifies, through a follow-up review of documentation or interviews, or both, that the noncompliant policies, procedures, and practices are corrected. We believe that States must ensure correction as soon as possible and that one year is a reasonable timeframe for an LEA to correct noncompliant policies, procedures, and practices and for the State to verify that the LEA is complying with the requirements under the IDEA. For example, if an SEA determines that an LEA is not in compliance with the requirement to make placement decisions consistent with the least restrictive environment requirements of the Act, we would expect the SEA to require corrective actions and verify correction by determining that the LEA corrected any noncompliant policies, procedures, or practices, and that placement teams,

subsequent to those changes, were making placement decisions consistent with the requirements of the Act.

2. Timeframe for Public Reporting About LEA Performance

Section 300.602(b)(1)(i)(A) (71 FR 46801) implements section 616(b)(2)(C)(ii)(I) of the Act and requires a State to annually report to the public on the performance of each LEA in the State on the targets in the State's performance plan. The Act is silent, however, on when a State must provide this report to the public and the June 21, 2005 NPRM did not address this issue.

Following the publication of the final regulations on August 14, 2006 (71 FR 46540), the Department received many informal inquiries from SEA personnel and other interested parties regarding the timeframe for reporting information to the public about LEAs' performance relative to its State's targets. To clarify States' obligations, we are proposing in § 300.602(b)(2) to require each State to report to the public on the performance of each LEA located in the State on the targets in the State's performance plan no later than 60 days following a State's submission of its annual performance report (APR) to the Secretary under § 300.602(b). We believe this timeframe is reasonable, and would not be burdensome to States. This timeframe should ensure that each State provides timely information to the public.

3. Additional Information To Be Made Available to the Public

Section 300.602(b)(1)(i)(B) (71 FR 46801) implements section 616(b)(2)(C)(ii)(I) of the Act and requires each State to make its performance plan available through public means, including by posting it on the State's Web site and distributing it to the media and through public agencies. The Department received inquiries regarding whether other materials, such as a State's APRs to the Secretary and the annual report on the performance of each LEA on the targets in the State's performance plan, must be made available through the same public means, so that the public has easy access to State and LEA performance information. We believe that public accountability is served by requiring States to make these documents available to the public by the same means as their performance plans, and this requirement should not impose significant burden on States, because the documents are already required and could easily be made available to the public.

Public reporting of each LEA's performance on the targets in the State's performance plan is currently required by § 300.602(b)(1)(i)(A) (71 FR 46801); however, the means by which such public reporting may be completed are not specified. Additionally, a State's APRs are public documents that would otherwise be available to the public on request under State freedom of information laws. Therefore, we propose to amend § 300.602(b)(1)(i)(B) to require States to make each of the following documents available through public means (including, posting on the SEA's Web site, distributing to the media, and distributing through public agencies): (a) The State's performance plan, under § 300.601(a); (b) the State's APRs, under § 300.602(b)(2); and (c) the State's annual reports on the performance of each LEA located in the State, under § 300.602(b)(1)(i)(A). Additionally, in the interest of transparency and public accountability, we strongly encourage States to report to the public on any enforcement actions taken under § 300.604.

4. Notifying the Public of Federal Enforcement Actions

Section 300.606 (71 FR 46802) implements section 616(e)(7) of the Act, which requires any State that has received notice of a determination under section 616(d)(2) of the Act to take steps to bring the pendency of an enforcement action, under section 616(e) of the Act, to the attention of the public within that State. However, § 300.606 is unclear about when States are required to notify the public of enforcement actions. There is confusion in States because of this lack of clarity. Some States may make public the Department's determinations, enforcement actions, both determinations and enforcement actions, or neither determinations nor enforcement actions. This clarification would eliminate the confusion by delineating the public notification requirements. Therefore, we propose to clarify the circumstances under which public notice is required.

Specifically, we propose to amend § 300.606 to require States to provide public notice of any enforcement action taken by the Secretary pursuant to § 300.604. This change would clarify that States do not have to provide public notice of the Secretary's annual determinations, but must provide public notice when the Secretary takes an enforcement action as a result of those determinations. We believe that this clarification will minimize the States' reporting burden while providing the public with appropriate notice of the actions taken by the Secretary as a result of the determinations required by section 616(d) of the Act and § 300.603. Additionally, we propose to amend § 300.606 to specify that each State's public notice of enforcement actions must include, posting the notice on the State's Web site and distributing the notice to the media and through public agencies.

Allocation of Funds Under Section 611 of the IDEA to LEAs That Are Not Serving Any Children With Disabilities (§ 300.705)

1. Subgrants to LEAs

We propose to add language to § 300.705(a) (71 FR 46808), regarding subgrants to LEAs, to clarify that States are required to make a subgrant under section 611(f) of the Act to eligible LEAs, including public charter schools that operate as LEAs, even if an LEA is not serving any children with disabilities. This requirement would take effect with funds that become available on the first July 1 following the effective date of the final regulations.

The Department's Office of Inspector General (OIG) indicated, in an October 26, 2004 final audit report (2004 OIG Report), that the regulations and guidance implementing Part B of the Act in effect at that time did not address the application of the funding formula under section 611 of the Act for a charter school established as an LEA that does not have a child with a disability enrolled during the school's first year of operation. *See http://www.ed.gov/about/offices/list/oig/auditreports/a09e0014.pdf.* The OIG recommended that we consider providing guidance on this issue. Given the OIG's recommendation and because the Act and its implementing regulations are silent on this issue, we believe that it is necessary to regulate to ensure that all States treat LEAs, including public charter schools that operate as LEAs, in the same manner when making a subgrant under section 611(f) of the Act to LEAs, including those LEAs that are not serving any children with disabilities.

Under section 611(f)(1) of the Act, each State must provide subgrants to LEAs, including public charter schools that operate as LEAs in the State, that have established their eligibility under section 613 of the Act for use in accordance with Part B of the Act. Under section 613(a) of the Act, an LEA is eligible for assistance under Part B of the Act for a fiscal year if the LEA submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in section 613(a) of the Act. There is no requirement in section

613(a) of the Act that an LEA must be serving children with disabilities for an LEA to be eligible for a subgrant. We believe that requiring States to make a subgrant to all eligible LEAs, including public charter schools that operate as LEAs, would ensure that LEAs have Part B funds available if they are needed to conduct child find activities or to serve children with disabilities who subsequently enroll or are identified during the year. The payment made to an LEA, including a public charter school that operates as an LEA, that is not serving any children with disabilities, would be based on enrollment and poverty data and any base payment to which the LEA is entitled, in accordance with the statutory formula in section 611(f)(2) of the Act.

Under the current regulations, a previously-existing LEA not serving any children with disabilities, is entitled to the base payment it received in the previous fiscal year. A newly-created LEA, including a new public charter school LEA, is entitled to a base payment that is calculated by dividing the base allocation of 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 currently provided special education by each of the LEAs. *See* § 300.705(b)(2)(i) (71 FR 46808–46809). For a newly-created LEA that is not a public charter school LEA, a State has some flexibility in determining the number of children with disabilities currently provided special education by the newly-created LEA. For example, a State may choose to determine the base payment of a newly-created LEA based on the location of children with disabilities who were included in a previous count or a new count of children served that year. If the SEA determines that the newly-created LEA is not serving any children with disabilities, based on its count, the newly-created LEA would be entitled to a base payment of zero in its first year of operation.

In determining the base payment to which a new public charter school LEA would be entitled, States must comply with the requirements in section 5206 of the ESEA and its implementing regulations in subpart H of 34 CFR part 76 of the Education Department General Administrative Regulations (EDGAR). These requirements apply to a public charter school LEA that opens or significantly expands its enrollment. Specifically under 34 CFR 76.791(b), when making a subgrant to a new public charter school LEA, a State cannot rely on enrollment or eligibility data from a prior year when calculating the subgrant of a public charter school LEA opening for the first time. A State may, but is not required to, allocate funds to, or reserve funds for, an eligible new public charter school LEA based on reasonable estimates of projected enrollment at the public charter school LEA, in accordance with 34 CFR 76.789(b)(2). Once the public charter school LEA is open, the public charter school LEA must provide actual enrollment and eligibility data to the SEA at a time the SEA may reasonably require in accordance with 34 CFR 76.788(b)(2)(i). A State is not required to provide funds to a new public charter school LEA until the public charter school LEA provides the SEA with the required actual enrollment and eligibility data in accordance with 34 CFR 76.788(b)(2)(ii). If the SEA allocates funds based on estimated enrollment or eligibility data, the SEA must make appropriate adjustments to the amount of funds allocated to a new public charter school LEA, as well as to other LEAs, based on actual enrollment or eligibility data for the public charter school LEA, on or after the date the public charter school LEA first opens, in accordance with 34 CFR 76.796. If, on the date the SEA reasonably requires the new public charter school LEA to provide actual enrollment and eligibility data, which must be on or after the date the public charter school LEA opens, the new public charter school LEA is not serving any children with disabilities, its base payment in its first year of operation would be zero.

Because we believe it would be burdensome for States to comply with the requirement to distribute funds to eligible LEAs not currently serving children with disabilities after subgrants have been made for a fiscal year, we propose to add language to § 300.705(a) to clarify that this requirement would take effect with funds that become available on the first July 1 following the effective date of the final regulations.

2. Base Payment Adjustments

The 2004 OIG Report also recommended that the Department consider issuing guidance on whether a public charter school LEA that has no children with disabilities enrolled in its first year of operation is entitled to a base payment adjustment in subsequent years if it enrolls children with disabilities. We agree that further clarification is necessary and propose to add a new paragraph (iv) to § 300.705(b)(2) (71 FR 46808–09), regarding base payment adjustments. The amended regulations would require that an LEA that received a base payment of zero in its first year of operation because it was serving no children with disabilities, and that subsequently provides special education and related services to children with disabilities, must receive a base payment adjustment for the fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities. Under this provision, the State must divide the base allocation determined under § 300.705(b)(1) 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.

Under this proposed change, an LEA, including a public charter school that operates as an LEA, that received a base payment of zero in its first year of operation, would be entitled to a base payment adjustment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities. This adjusted base payment would apply to all subsequent years, unless the LEA's base payment is adjusted due to one of the other circumstances described in § 300.705(b)(2) (71 FR 46808–46809). Because the current regulations do not require a base payment adjustment under these circumstances, and we believe that it would be burdensome for States to comply with this requirement after subgrants have been made for a fiscal year, we propose to add language to § 300.705(b)(2)(iv), to clarify that this requirement would take effect with funds that become available on the first July 1 following the effective date of the final regulations.

3. Reallocation of Funds

Section 611(f)(3) of the Act and § 300.705(c) (71 FR 46809) authorize an SEA to reallocate Part B funds not needed by an LEA, if the 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. Under these statutory and regulatory provisions, States may, but are not required to, reallocate these Part B funds. The regulations in current § 300.705(c) do not address reallocation of funds from an LEA that does not use its funds because it is not serving any children with disabilities.

We propose to amend § 300.705(c) (71 FR 46809) to indicate that, after an SEA distributes funds under Part B to an eligible LEA that is not serving any children with disabilities, as provided in proposed § 300.705(a), the SEA must determine, within a reasonable period of time prior to the end of the carryover period specified in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may, if it chooses, 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. Given the fact that small amounts of funds distributed late in their period of availability to LEAs would be prone to lapse, we are clarifying that States may use these funds at the State level, to the extent the State has not set aside the maximum amount for State-level activities, in order to increase the chance these funds would be well spent. Whether funds are reallocated or retained for use at the State-level under § 300.705(c), they must be obligated prior to the close of the period of availability for those funds. In sum, these proposed regulations would help to ensure that the funds under section 611 of the Act do not lapse, by making it clear that SEAs may redistribute funds that have not been obligated by LEAs that currently are not serving any children with disabilities or retain these funds for State-level activities.

Allocation of Funds Under Section 619 of IDEA to LEAs That Are Not Serving Any Children With Disabilities (§ 300.815)

1. Subgrants to LEAs

We propose to add language to § 300.815 (71 FR 46813), regarding subgrants to LEAs, to clarify that States are required to make a subgrant under section 619(g) of the Act to eligible LEAs, including public charter schools that operate as LEAs, that are responsible for providing education to children aged three through five years (preschool), even if an LEA is not serving any preschool children with disabilities. This requirement would take effect with funds that become available on the first July 1 following the effective date of the final regulations.

The Department's OIG indicated, in the 2004 OIG Report, that the regulations and guidance implementing Part B of the Act in effect at that time did not address the application of the funding formula under section 619 of the Act for a public charter school established as an LEA that does not have a preschool child with a disability enrolled during the school's first year of operation. *See http://www.ed.gov/about/offices/list/oig/auditreports/a09e0014.pdf.* The OIG recommended that we consider providing guidance on this issue. Given the OIG's recommendation and because the Act and its implementing regulations are silent on this issue, we believe that it is necessary to regulate to ensure that all States treat LEAs, including public charter schools that operate as LEAs, in the same manner when making a subgrant under section 619(g) of the Act to LEAs, including those LEAs that are not serving any preschool children with disabilities.

Under section 619(g)(1) of the Act, each State must provide subgrants to LEAs, including public charter schools that operate as LEAs in the State, that have established their eligibility under section 613 of the Act. Under section 613(a) of the Act, an LEA is eligible for assistance under Part B of the Act for a fiscal year if the LEA submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in section 613(a) of the Act. There is no requirement in section 613(a) of the Act that an LEA must be serving preschool children with disabilities in order for an LEA to be eligible for a subgrant. We believe that requiring States to make a subgrant to all eligible LEAs responsible for providing education to preschool children, including public charter schools that operate as LEAs, would ensure that LEAs have Part B funds available if they are needed to conduct child find activities or to serve preschool children with disabilities who subsequently enroll or are identified during the year. The payment made to an LEA, including a public charter school that operates as an LEA, that is not serving any preschool children with disabilities, would be based on enrollment and poverty data and any base payment to which the LEA is entitled, in accordance with the statutory formula in section 619(g) of the Act.

Under the current regulations, a previously-existing LEA not serving any preschool children with disabilities, is entitled to the base payment it received in the previous fiscal year. A newly-created LEA, including a new public charter school LEA, is entitled to a base payment that is calculated by dividing the base allocation of LEAs that would have been responsible for serving preschool children with disabilities now being served by the new LEA, among the new LEA and affected LEAs, based on the relative numbers of preschool children with disabilities currently provided special education by each of the LEAs. *See* § 300.816(b)(1) (71 FR 46813). For a newly-created LEA that is not a public charter school LEA, a State has some flexibility in determining the number of preschool children with disabilities currently provided special education by the newly-created LEA. For example, a State may choose to determine the base payment of a newly-created LEA based on the location of preschool children with disabilities who were included in a previous count or a new count of preschool children served that year. If the SEA determines that the newly-created LEA is not serving any preschool children with disabilities, based on its count, the newly-created LEA would be entitled to a base payment of zero in its first year of operation.

In determining the base payment to which a new public charter school LEA would be entitled, States must comply with the requirements in section 5206 of the ESEA and its implementing regulations in subpart H of 34 CFR part 76 of EDGAR. These requirements apply to a public charter school LEA that opens or significantly expands its enrollment. Specifically, under 34 CFR 76.791(b), when making a subgrant to a new public charter school LEA, a State cannot rely on enrollment or eligibility data from a prior year when calculating the subgrant of a public charter school LEA opening for the first time. A State may, but is not required to, allocate funds to, or reserve funds for, an eligible new public charter school LEA based on reasonable estimates of projected enrollment at the public charter school LEA, in accordance with 34 CFR 76.789(b)(2). Once the public charter school LEA has opened, the public charter school LEA must provide actual enrollment and eligibility data to the SEA at a time the SEA may reasonably require in accordance with 34 CFR 76.788(b)(2)(i). A State is not required to provide funds to a new public charter school LEA until the public charter school LEA provides the SEA with the required actual enrollment and eligibility data in accordance with 34 CFR 76.788(b)(2)(ii). If the SEA allocates funds based on estimated enrollment or eligibility data, the SEA must make appropriate adjustments to the amount of funds allocated to a new public

charter school LEA, as well as to other LEAs, based on actual enrollment or eligibility data for the public charter school LEA, on or after the date the public charter school LEA first opens, in accordance with 34 CFR 76.796. If, on the date the SEA reasonably requires the new public charter school LEA to provide actual enrollment and eligibility data, which must be on or after the date the public charter school LEA opens, the new public charter school LEA is not serving any preschool children with disabilities, its base payment in its first year of operation would be zero.

Because we believe it would be burdensome for States to comply with the requirement to distribute funds to eligible LEAs not currently serving preschool children with disabilities, after subgrants have been made for a fiscal year, we propose to add language to § 300.815 to clarify that this requirement would take effect with funds that become available on the first July 1 following the effective date of the final regulations.

2. Base Payment Adjustments

The 2004 OIG Report also recommended that the Department consider issuing guidance on whether a public charter school LEA that has no preschool children with disabilities enrolled in its first year of operation is entitled to a base payment adjustment in subsequent years if it enrolls preschool children with disabilities. We agree that further clarification is necessary and propose to add a new paragraph (4) to § 300.816(b) (71 FR 46813), regarding base payment adjustments. The amended regulations would require that an LEA that is responsible for providing education to preschool children, but that received a base payment of zero in its first year of operation because it was serving no preschool children with disabilities, and that subsequently provides special education and related services to preschool children with disabilities, must receive a base payment adjustment for the fiscal year after the first annual child count in which the LEA reports that it is serving any preschool children with disabilities. Under this provision, the State must divide the base allocation determined under § 300.816(a) for the LEAs that would have been responsible for serving preschool children with disabilities now being served by the LEA, among the LEA and affected LEAs, based on the relative numbers of preschool children with disabilities currently provided special education by each of the LEAs.

Under this proposed change, an LEA, including a public charter school that operates as an LEA, that received a base payment of zero in its first year of operation, would be entitled to a base payment adjustment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any preschool children with disabilities. This adjusted base payment would apply to all subsequent years, unless the LEA's base payment is adjusted due to one of the other circumstances described in § 300.816(b) (71 FR 46813). Because the current regulations do not require a base payment adjustment under these circumstances, and we believe it would be burdensome for States to comply with this requirement after subgrants have been made for a fiscal year, we propose to add language to § 300.816(b)(4), to clarify that this requirement would take effect with funds that become available on the first July 1 following the effective date of the final regulations.

3. Reallocation of Funds

Section 619(g)(2) of the Act and § 300.817 (71 FR 46813) authorize an SEA to reallocate section 619 funds not needed by an LEA, if the SEA determines that an LEA is adequately providing FAPE to all preschool children with disabilities residing in the area served by that agency, with State and local funds. Under these statutory and regulatory provisions, States may, but are not required to, reallocate these section 619 funds. The regulations in current § 300.817 do not address reallocation of funds from an LEA that does not use its funds because it is not serving any preschool children with disabilities.

We propose to amend § 300.817 (71 FR 46813) to indicate that, after an SEA distributes funds under section 619 to an eligible LEA that is not serving any preschool children with disabilities, as provided in proposed § 300.815, the SEA must determine, within a reasonable period of time prior to the end of the carryover period specified in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may, if it chooses, 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 preschool 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 § 300.812. Given the fact that small amounts of funds distributed late in their period of availability to LEAs would be prone to lapse, we are clarifying that States may use these funds at the State level, to the extent the State has not set aside the maximum amount for State-level activities, in order to increase the chance these funds would be well spent. Whether funds are reallocated or retained for use at the State level under § 300.817, they must be obligated prior to the close of the period of availability for those funds. In sum, these proposed regulations would help to ensure that the funds under section 619 of the Act do not lapse, by making it clear that SEAs may redistribute funds not obligated by LEAs that currently are not serving any children with disabilities aged three through five or retain these funds for State-level activities.

Executive Order 12866

1. Potential Costs and Benefits

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

Under Executive Order 12866, we have assessed the potential costs and benefits of these proposed regulations. In conducting this analysis, the Department examined the extent to which the amended regulations would add to, or reduce, the costs for public agencies and others in relation to the costs of implementing the program regulations. Based on this analysis, the Secretary has concluded that the amendments to the regulations would not impose significant net costs in any one year. The amendments to the regulations would primarily affect SEAs and LEAs responsible for carrying out

the requirements of Part B of the Act as a condition of receiving Federal financial assistance under the Act. For example, the amendments to the regulations add language to further explain the intent of the Act, clarify the intent of existing regulations, and add timeframes for implementation. The amendments do not add provisions to the regulations that would increase the fiscal responsibilities of, or burdens on, SEAs or LEAs in implementing the proposed amendments. In fact, the provisions related to parental revocation of consent may reduce burden on, and costs to, LEAs by relieving them of the obligation to override a parent's refusal to consent subsequent to the initiation of special education services through informal means or through due process procedures. The clarification relating to non-attorney representation at due process hearings can be expected to reduce costs associated with disputes regarding non-attorney representation.

2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a number heading; for example, § 300.172, regarding access to instructional materials.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand see the instructions in the **ADDRESSES** section of the preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these amendments to the final regulations governing the Assistance to States for the Education of Children with Disabilities and the Preschool Grants for Children with Disabilities programs, would not have a significant economic effect on a substantial number of small entities. The small entities that would be affected by these proposed regulations regarding allocation of funds under sections 611 and 619 of the IDEA to LEAs, that are not serving any children with disabilities, are small LEAs, including charter schools that operate as LEAs. These small entities would benefit from the proposed changes that clarify their eligibility for funding in cases where they are not serving any children with disabilities.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), we have assessed the potential information collections in these proposed regulations that would be subject to review by the OMB. In conducting this analysis, the Department examined the extent to which the amended regulations would add information collection requirements for public agencies. Based on this analysis, the Secretary has concluded that these amendments to the Part B IDEA regulations would not impose additional information collection requirements. The proposed changes to § 300.602(b)(1)(i)(B) (71 FR 46801) would—(1) Add the State's APR to the list of documents that a State must make available through public means; and (2) specify that the SEA make the State's performance plan, the State's APR, and the State's annual reports on the performance of each LEA in the State available to the public by posting the documents on the State's Web site and distributing the documents to the media and through public agencies. Each State already is required to report to the Secretary on the annual performance of the State as a whole in its APR. Because the APR is a completed document, the additional time for reporting to the public would be minimal and is within the established reporting and recordkeeping estimate of current information collection 1820–0624 (71 FR 46751–46752). Additionally, States already are required by current § 300.602(a) and (b)(1)(i)(A) to analyze the performance of each LEA on the State's targets, and to report annually to the public on the performance of each LEA on the targets. The proposed regulation, by requiring that these documents be posted on the State's Web site and be distributed to the media and through public agencies, merely adds specificity about the means of public reporting. The additional time for reporting to the public through these means would be minimal and is within the established reporting and recordkeeping estimate of current information collection 1820–0624 (71 FR 46751–46752).

Intergovernmental Review

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

This document provides early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

The Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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List of Subjects in 34 CFR Part 300

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

Dated: May 7, 2008.

Margaret Spellings,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend title 34 of the Code of Federal Regulations as follows:

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

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

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

* * * * *

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

The addition reads as follows:

§ 300.9 Consent.

* * * * *

(c) * * *

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

* * * * *

3. Section 300.177 is revised to read as follows:

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

(a) *States' sovereign immunity.*

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

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

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

(b) *Positive efforts to employ and advance qualified individuals with disabilities.*

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

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

4. Section 300.300 is amended by:

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

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

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

The revision reads as follows:

§ 300.300 Parental consent.

* * * * *

(b) * * *

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

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

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

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

(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent 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;

(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 available FAPE to the child because of the failure to provide the child with further special education and related services; and

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

* * * * *

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

§ 300.512 Hearing rights.

(a) * * *

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

* * * * *

6. Section 300.600 is amended by:

A. Revising paragraph (a).

B. Adding a new paragraph (e).

The revision and addition read as follows:

§ 300.600 State monitoring and enforcement.

(a) The State must—

(1) Monitor the implementation of this part;

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

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

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

* * * * *

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

* * * * *

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

§ 300.602 State use of targets and reporting.

* * * * *

(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 no later than 60 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 State's Web site, and distribute the plan and reports to the media and through public agencies.

* * * * *

8. Section 300.606 is revised to read as follows:

§ 300.606 Public attention.

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

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

9. Section 300.705 is amended by:

A. Revising paragraph (a).

B. In paragraph (b)(2)(ii), removing the word ''and'' at the end of the paragraph.

C. In paragraph (b)(2)(iii), removing the punctuation ''.'' and inserting in its place the words ''; and''.

D. Adding a new paragraph (b)(2)(iv).

E. Revising paragraph (c).

The revisions and addition read as follows:

§ 300.705 Subgrants to LEAs.

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

(b) * * *

(2) * * *

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

* * * * *

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

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

* * * * *

10. Section 300.815 is revised to read as follows:

§ 300.815 Subgrants to LEAs.

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

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

11. Section 300.816 is amended by:

A. In paragraph (b)(2), removing the word ''and''.

B. In paragraph (b)(3), removing the punctuation ''.'' and adding, in its place, the words ''; and''.

C Adding a new paragraph (b)(4) to read as follows:

§ 300.816 Allocations to LEAs.

* * * * *

(b) * * *

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

* * * * *

12. Section 300.817 is revised to read as follows:

§ 300.817 Reallocation of LEA funds.

(a) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged three through five years residing in the area served by the LEA with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years residing in the areas served by those other LEAs. The SEA may also retain those funds for

use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.

(b) After an SEA distributes section 619 funds to an eligible LEA that is not serving any children with disabilities aged three through five years, as provided in § 300.815, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those funds not obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.

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

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