

# **THE 2006 REGULATIONS TO IDEA 2004:**

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*Below is an outline of changes from the 1999 Regulations to the 2006 Regulations that implement the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>*

## **Definitions:**

### **300.8(c)(8)-Orthopedic Impairment.**

The examples of congenital anomalies (clubfoot, absence of some member) is removed from the definition. The Department indicates that these examples are outdated and unnecessary.

### **300.9-Consent**

Defines meaning of consent. In 99 it cross-referenced 300.500(b)(1). 2006 regulations mirrors 99 regulation at 300.500(b)(1).

### **300.8(c)(9)- Other Health Impairment.**

The definition of “other health impairment” (OHI) now includes Tourette syndrome among the list of “chronic or acute health problems.” The comments to the regulations state that the reason for the addition is because Tourette’s Syndrome is commonly misunderstood to be emotional or behavioral instead of neurological. The addition of Tourette’s in OHI will help to resolve this issue.

### **300.18-Highly Qualified Personnel.**

The current regulations contain provisions regarding a comprehensive system of personnel development. 34 C.F.R. §135-136. The 2004 statutory reauthorization essentially eliminated this system and substituted provisions regarding qualifications for personnel. The 2006 regulations implement the statutory changes. Specifically, the regulations require states to establish and maintain qualifications to ensure that personnel are appropriately and adequately prepared and trained, including related services personnel, paraprofessionals, and special education teachers. The regulation specifically states that the regulation does not create a right of action on behalf of an individual student or a class of students for the failure of a particular state or local educational agency employee to be highly qualified. 34 C.F.R. §300.156. The comments indicate that these requirements apply to early childhood teachers if those programs are included in part of the elementary or secondary school systems.

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<sup>1</sup> Assistance with this document provided by Ron Hager of Neighborhood Legal Services and sections about related services taken from NDRN’s 9/06 Q&A written by Leslie Seid Margolis of the Maryland Disability Law Center. *This document is intended to assist attorneys and advocates as they review and decipher the regulations and not intended as the only interpretation of the regulations.*

**300.19 Homeless Children.**

The 06 regulations add a section referencing the McKinney-Vento Homeless Assistance Act.

**300.20 Indian and Indian Tribe.**

The 06 regulations moves the definition from 300.264 to 300.20.

**300.25- Infant/Toddler**

The definition from the statute (Section 1432) is added here.

**300.26-Institution of higher education.**

Definition added in 06 regulations. It references the Higher Education Act.

**300.27-Limited English Proficient.**

This section is added by reference to the No Child Left Behind Act.

**300.28-Local Educational Agency.**

This section adds the word “nonprofit” before charter making it clear for a charter school to be an LEA it must be a nonprofit.

**Parent-300.30**

*The definition of parent has changed substantially from the 99 regulations. The statute also changed the meaning of parent. Some changes in the 06 regulations are made to align with the statute.*

**300.30(a)(1)**--means biological or adoptive parent. The 06 regulations use the term biological instead of natural.

**300.30(a)(2)**-- foster parent (unless State law, regulations or contractual obligations prohibit). There is a substantial change in this section. The 99 regulations required that in order for a foster parent to act as parent (1) the natural parents’ authority to make educational decisions had to be extinguished and (2) the foster parent had to have an ongoing, long-term parental relationship with the child, willing to make decisions and no conflict of interest. The 06 regulations allow the foster parent to make educational decision unless both the parent and the foster parent are attempting to act as a parent. In that scenario the biological or adoptive parent is the parent for educational purposes. The comments to the regulations state that a biological or adoptive parent is NOT required to affirmatively assert their right to make decisions. The biological or adoptive parent is presumed to be the parent unless there are questions about their legal authority. However, the comments, nor the regulations explain what happens when a foster parent comes to a meeting and a biological/adoptive parent does not (ie: Will the school assume the foster parent is the “parent?”)

**300.30(a)(3)**—a guardian except for the State if the child is a ward of the State. This is similar to the 99 regulations, except that clarifying language is added stating that the guardian must be one who is generally authorized to act as the child’s guardian or is

authorized to make educational decisions. This is to avoid assuming a limited guardian, without specific rights to make educational decisions, has the authority to make such decisions.

**300.30(a)(4)**—an individual acting in the place of a biological or adoptive parent (ie: grandparent, aunt)—same as 99 regs

**300.30(a)(5)**---a surrogate parent—same as 99 regs (but see section on Surrogate parents for differences in surrogate parent language)

**300.30(b)**—Provides that if more than one person is attempting to act as the “parent” the biological or adoptive parent is deemed the “parent” unless the parent is assigned by judicial decree.

## **Related Services.**

**300.34(b)(1)-Surgically implanted medical devices-** The 06 regulations contain an exception to related services that specifically excludes “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.” However, as with hearing aids, a public agency is obligated to perform routine checks of the external components of a surgically-implanted device to make sure it is functioning properly, appropriately monitor and maintain medical devices that are necessary to maintain the health and safety of a child, including breathing, nutrition, or operation of other bodily functions, while the child is being transported to and from school or is at school, and provide any other related services that the IEP team determines are necessary for the child to receive a free appropriate public education. 34 C.F.R. §300.34(b)(2).

*This exception was not in the 99 regulations.*

The obligation of a public agency with respect to routine checking of external components of surgically implanted medical devices is discussed in more detail in 34 C.F.R. §300.113(b). Subsection (a) addresses hearing aids; subsection (b) addresses surgically implanted medical devices. Subsection (b) requires each public agency to ensure that the external components of surgically implanted medical devices are functioning properly. However, the 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.” 34 C.F.R. §300.113.

**300.34(c)(4)-Interpreting Services.** The 2006 regulations add interpreting services to the list of related services. “Interpreting services” for children who are deaf or hard of hearing include “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” For children who are deaf-blind, interpreting services includes “special interpreting services.” 34 C.F.R. §300.34(c)(4). There is no explanation or further definition of “special interpreting services” for children who are deaf-blind.”

**300.34(c)(13)-School Health Services and School Nurse Services.**

The 99 regulations contain a definition of school health services that simply identifies them as “services provided by a qualified school nurse or other qualified person.” 34 C.F.R. §300.24(b)(12). The 2006 regulations have a combined definition of “School health services and school nurse services:”

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.

It appears the purpose of this definition is to be consistent with the U.S. Supreme Court in *Cedar Rapids Comm. Sch. Dist. v. Garret R.*, 526 U.S. 66 (1999) which made clear that if a student needs one-to-one nursing services in order to attend school then the school system is obligated to provide them.

**300.35-Scientifically Based Research.**

This is a new section and it references the definition in the NCLB Act.

**300.37-Service Plan**

This is a new definition. It is the document that describes the services the LEA will provide a student who is parentally placed in private school.

**300.43-Transition Services-**

Consistent with the change made by the reauthorized statute, the 2006 regulation has changed the definition of “transition services” to be within a “results-oriented” process, rather than an “outcome-oriented” process. 34 C.F.R. §300.43(a)(i); (99 Reg at 34 C.F.R. §300.29). As with the 99 regulation, the 2006 regulation specifies that transition services 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.” 34 C.F.R. §300.43(b).

**300.44- Universal Design.**

References the Assistive Technology Act.

**300.45 Ward of the State.**

New Section. Defines a Ward as a child who the State has determined is a foster child, a ward or in the custody of a public child welfare agency. The exception is for a foster child who has a foster parent who is considered a parent under 300.30.

**Least Restrictive Environment:**

**300.114** remains same as 1999 reg at 300.550

**300.116** remains same as the 1999 Reg at 300.552 (draft regulation attempted language that may have undercut LRE for students, but that language did not appear in final regulations)

The Comments to the regulations provide some useful information about LRE: “We believe the LRE provisions are sufficient to ensure that public agencies provide low-incidence children with disabilities access to appropriate educational programming and services in the educational setting appropriate to meet the needs of the child in the LRE.” P. 46587--“Public agencies, therefore, must not make placement decisions based on a public agencies' needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff.” ... “These options must be available to the extent necessary to implement the IEP of each child with a disability. The group determining the placement must select the placement option on the continuum in which it determines that the child's IEP can be implemented in the LRE.” P. 46588-- “Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities, the LEA has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the extent appropriate. In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.”

## **Children in Private School—Parentally Placed**

**300.130**-Definition of parentally placed private school children. It means children placed in private schools by their parents. The 06 regulations make it clear that this includes religious schools.

**300.131-Child Find.** The regulation is changed to conform to IDEA 2004. In IDEA 2004 the law changed the child find obligations from requiring the LEA of residence to engage in child find obligations to requiring the LEA of location to engage in child find. Consistent with the 04 statute, the cost of carrying out the child find obligations, including the cost of individual evaluations may **not** be considered.

The comments to the regulations make clear that the results of the child find evaluations may not be provided to the LEA of residence without parental consent (see §300.622). The comments also state that the LEA where the private school is located is responsible for reevaluations of children with disabilities enrolled in private schools.

The district of residence must offer FAPE to a child who has been identified as a child with a disability through the child find process. However, if the parents choose to keep the child in the private school (ie: do not accept the district's offer of services) the district of residence does not have to provide FAPE to the child. In that situation the LEA of location would be required to provide equitable services (see below).

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

The LEA where the private school is located is responsible for equitable services to children in private schools.

**300.132(b)**—a service plan must be developed for each student.

**300.137-Equitable Services Determined.**

(a)- Parentally-placed private school children have no right to FAPE. Same as in 99 regs.

(b)-Decisions. Decisions about services that will be provided to parentally-placed students must be: made in meetings with a representative of the private school (same as in 99 regs), consulting with representatives of parents and the private school to ensure that students can meaningfully participate in special education and related services. (in 99 this requirement was a bit looser requiring the private school be given a “genuine opportunity” to express views regarding the matter that is subject to consultation.)

**300.138- Equitable Services Provided.**

(a)Teachers in private schools who are providing “equitable services” to private school children are not required to meet the highly qualified special education requirement of the IDEA. *This is a change from 99 which required personnel in private schools to meet the same standards as personnel in public schools. (99 reg at 300.455)*

(b)Each service plan must specifically describe the special education and related services that the LEA will provide to the child based on what the LEA determined it will make available. For those services the LEA is providing the plan –to the extent practicable—must meet: (same 99 reg at 300.455)

- i-the IEP requirements of 300.320 or if 3-5 yr olds the IEP/ISFP requirements;
- ii-be review and revised like an IEP is reviewed and revised (§§300.320-324)

(c)(1)The provision of equitable services may be provided by the public agency or through contract with an individual or association and the public agency.

(c)(2)The services must be secular, neutral and nonideological.

**300.139-Location of Services and Transportation.**

(a) Services may be provide on-site at the private school, even a religious school, as long as consistent with the law.

(b) If transportation is needed for the child to benefit from the service, such transportation must be provided either to and from the school or the home. LEA’s are not required to provide transportation from the child’s home to the private school.

(c) The cost of the transportation may be calculated when determining the expenditure requirements.

This section is the same as the 99 reg at §300.456.

The comments to the regulations encourage LEAs to work with private schools so that services may be provided on-site at the private school and reduce transportation expenses. If children must be bused to other locations for related services, those costs will be incurred by the LEA. For example, if a child needs speech therapy and the service is provided in a hospital instead of at the school, the LEA would be required to transport the student to and from the hospital for this service. Depending on the time of day of the service the LEA would be required to pick the student up from home or school to take the child to therapy and drop the child off at either school or home (ie: depending on if the service was at the beginning, end or middle of the day).

**300.140-Due Process Complaints and State Complaints.**

Basically the same as the 99 regs at §300.357. Parents and children of parentally placed private school children have Due Process rights over child find disputes and evaluation disputes, but not disputes over services.

**300.141-Requirement that funds not benefit a private school.**

LEA can't use funds to benefit a private school or general needs of students in the school. *This is the same as the 99 regs at §300.459*

**300.142-Use of Personnel.**

An LEA may use a public school teacher to the extent necessary to provide services; and the LEA may use a public school teacher if the service is not one usually provided by the private school. An LEA may use a private school teacher if the teacher performs the services outside his or her regular duty hours and if supervised by a public supervisor. *This is the same as 99 regs at §§300.460 and 461.*

**300.143-Separate Classes Prohibited.**

If a school has a class at the same site that includes both private and public school students, the class may not be organized based on the school the child attends or the child's religion. *This is the same as 99 regs at 300.458.*

**300.144-Property, Equipment and Supplies.**

Same as 99 regs at §300.462. Use of supplies and equipment at the private school must be for Part B purposes.

**Children with Disabilities in Private Schools Placed or Referred by Public Agencies.**

**300.146-Responsibility of SEA.**

The State Education Agency must ensure when a child is placed in a private school or facility by a public agency that special education and related services are provided in conformance with an IEP and at no cost to the parents. Further, the education must meet all the standards by the SEA except highly qualified teacher and special education teacher qualification of 300.18 and 300.156(c).

**300.147-Implementation by SEA.**

*Same as 99 reg at §300.402*

## **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.**

**300.148(a), (b), (c) and (d)**—same as 99 regs at §300.403 regarding disagreements about FAPE, reimbursement for private school placement and limitation on reimbursement.

**300.148(e)- Exception.** This section deals with the reduction or denial of reimbursement to parents of private school expenses. A parent, pursuant to section 300.148(d) must provide notice to the school system if they plan to remove their child from the public school and place them in private school if the parent intends to hold the school accountable for the cost of the private education. The 06 regulations state that reimbursement **must** not be reduced or denied to a parent if:

1. the school prevented the parents from providing notice,
2. parents did not receive notice of procedural safeguards or
3. if providing notice to the school would likely cause the child physical harm.

If parents fail to give the school notice, a court or hearing officer **may** reduce or deny reimbursement if:

1. parents are not literate or cannot write English; or
2. providing notice would likely result in serious emotional harm to the child.

*These are major changes from the 99 regulation at §300.403. In 99, the regulation permitted discretion from the court or hearing officer in all 5 scenarios above. The new regulations do not permit discretion regarding a reduction or denial in reimbursement based on parental failure to give notice to the school if the school prevented the parents from doing so, if the school failed to provide procedural safeguards or if such notice would likely cause physical injury to the child.*

## **State Complaint Procedures:**

**300.151: Adoption of State Complaint Procedures.**

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—

*99 Reg:(1) How to remediate the denial of those services, including as appropriate the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child; and*

06 Reg:(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

### **300.152: Minimum State Complaint Procedures.**

Sets out additional requirements for filing a complaint. The SEA must give complainant the opportunity to submit additional information about the allegation and must give the public agency an opportunity to respond. The public agency may present a proposal to resolve the issue and the parties must have the opportunity to engage in mediation about the event.

### **300.153 Filing a Complaint.**

*The 99 regs at 300.662 required the complaint to include a statement that the agency has violated Part B of the Act or of this part and the facts on which the statement is based. It also required the complaint be brought within one year unless longer is reasonable because the issue is ongoing or because the request is for compensatory education, as long as the compensatory education request is within 3 years of the violation.*

The 06 regulation still requires:

- that the complaint include a statement about the violation; and
- that the facts upon which the statement is based are provided

However the 06 regulations also require:

- the signature and contact for the complainant; and
- if alleging violations with respect to a specific child—
  - (i) the name and address for the child
  - (ii) name of the school the child attends.
  - (iii) if the child is homeless available contact information for the child and the name of the school the child is attending.
  - (iv) Description of the nature of the problem, 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.
- The Complaint still must be filed within one year. The new regulations do not provide for a longer time for ongoing complaints, nor does it provide for a 3 year time line for compensatory education issues.

## **Methods of Ensuring Service**

**300.154-Children with disabilities who are covered by insurance or Medicaid.**

The 06 regulation at 300.154(d)(2)(iv) requires that a school obtain parental consent to use a child's insurance or Medicaid each time the school wishes to access the child's insurance or public benefit. Prior to the 06 regulations, the school only needed permission one time to access a child's public benefits.

**Parental Consent.-300.300**

*Throughout the regulations the Department states a parent must either "consent" "agree" or provide "informed consent." The Department states in the Comments that there is no need to differentiate among these words in the regulations. The Department states that whenever the following words are used it means the consent is both informed and written: consent, informed consent, parental consent and written informed consent.*

*When the words "agree" or "agreement" are used it means an understanding between the parent and the LEA about an issue. There is no requirement that an agreement be in writing unless the statute or regulations specifically require it.*

Although the Department does not outline specific procedures for a State that uses electronic mail for parental notices and other communication, the Comments state that a State may use electronic or digital signatures for consent. However, the State would have to take appropriate safeguards to protect the integrity of the consent process.

**300.300(a)(2):** This section discusses the consent needed for initial evaluations. It states that if a child is a ward of the state consent is not needed if the school cannot locate the parent, the parent's rights or educational decision-making rights have been terminated. The Comments further explain that the school does not have to delay an initial evaluation in order to appoint a surrogate parent for the child.

The regulations provide that if the rights' of a parent to make educational decisions have been subrogated and the judge has appointed someone to represent the child to provide consent for an initial evaluation, the school does not have to obtain consent from the parent. The Comments state that the requirements of 300.519(c) regarding "surrogate parent qualifications" do not apply to a person appointed in this instance.

**300.300(a)(3):** Consistent with the statute regarding procedures to initiate evaluations without consent or if parent refuses consent.

**300.300(b):** This section addresses parental consent for special education services. The Comments note that some public comments stated that public agencies should not be allowed to use the procedural safeguards to continue to provide special education services to a child when a parent withdraws a child from special education. *The Department states that they are considering this issue and anticipate publishing a proposed rule for public comment regarding this issue.*

**300.300(b)(4):** Consistent with the statute.

**300.300(c):** Consent for Reevaluations. Before conducting a reevaluation, the public agency must obtain informed consent from the parent. If the parent refuses to consent, the public agency may seek reevaluation through the mediation and due process process, but the agency is not required to do so. However, informed consent is not required if the public agency made reasonable efforts to obtain the consent and the parent failed to respond. In this situation a public agency may proceed with the re-evaluation.

**300.300(d):** This section parts (1)-(3) are consistent with the statute and 99 regulations at 300.505. *Section 300.300(d)(4) states that if a child is home-schooled or parentally placed in a private school, the public agency may not use mediation or due process to override a parent's denial of consent or failure to respond to consent to an initial evaluation or a reevaluation.*

## **Evaluations:**

### **300.301(c) Procedures for initial evaluations.**

This section follows the statute and states that an evaluation must be conducted within 60 days of receiving parental consent or a timeline established by the state. In the Department's comments to the regulations they specify that they are declining to place a limit on a State's ability to place a timeline. The Comments further indicated that a State could have a timeline that is longer than 60-days.

### **300.303: Reevaluations:**

Mirrors the statute. Public agency must ensure that a reevaluation of a child is conducted if the public agency determines that needs of the student warrant a reevaluation or the child's parent or teacher requests an evaluation.

Evaluations may not occur more than once a year, unless the parent and school agree otherwise. However evaluations must occur at least every 3 years.

## **Additional Procedures for Identifying Children with Specific Learning Disabilities:**

Scientifically Based Research has been added as a definition in the Regulations at 300.35. The definition mirrors the NCLB definition to align IDEA more effectively with NCLB.

### **300.307: Specific Learning Disabilities.**

State must adopt criteria for determining if a child is a child with a learning disability. The State criteria **must not** require the use of a severe discrepancy model and must permit the use of a scientific, research-based intervention.

*The Statute at 1414(b)(6) states that a Local Education Agency (LEA) shall not be required to use the severe discrepancy model and that the LEA may use a scientific, research-based intervention. The 99 regulations required the use of the severe discrepancy model to follow the 97 statute. However, because the reauthorized IDEA does not require the use of a severe discrepancy model the regulations had to change accordingly.*

*The comments to the regulation state that the Department believes it is important to have state criteria for the determination of a learning disability. Therefore, the regulation requires state regulation of a Learning Disability determination. However, that criteria must ensure that the LEA can use either a severe discrepancy or a scientific, research-based intervention model. Advocates will need to follow state policy and legislative action to determine the state requirements. It is possible that different LEA's within the state could use different methods to determine Learning Disability eligibility.*

**300.308: Additional Group Members.**

*Same as 99 regulations at 300.540*

**300.309: Determining the existence of a specific learning disability**

Below is a section by section review of 300.309.

Section 300.309(a) sets out when a group of qualified professionals and the parent (notice use of word group (§300.306) instead of IEP team (this is not a change from 99)) may determine a child has a specific learning disability.

(1)--A child may be a child with a Learning Disability if the child is not achieving adequately for his or her age or grade-level in one or more of several categories (oral expression, mathematics, etc.) and the child was provided with an appropriate learning experience and instruction for the child's age or grade-level.

*The Department does not specify a qualifier between sections (1) and (2), however logically there should be an "and" between these two sections.*

(2)(i)- With the use of scientific, research-based intervention the child does not make sufficient progress to meet age or grade-level standards; or  
(ii)- Using appropriate assessments, the child exhibits a pattern of strengths and weaknesses in performance, achievement or both based on the child's age grade-level or intellectual development that is determined by the group to be relevant to the identification of a LD; and

(3)(a) The determination of failure to achieve adequately cannot be a result of vision, hearing, motor disability, mental retardation, ED, cultural factors, environmental or economic disadvantage; or Limited English Proficiency (LEP).

(3)(b)However when the group determines whether or not a child has a Learning Disability, as part of the evaluation process the group **must consider:**

- (1) Data that shows that child was provided with appropriate instruction in a regular education setting, provided by *qualified* personnel. The instruction must have been provided either prior to or as part of the referral process; and
- (2) There must be data-based documentation of repeated assessments done at reasonable intervals and the assessments must reflect formal assessment of the

student's progress and the documentation must have been provided to the child's parents.

This part of the regulation requires that in order for a child to be deemed a child with a learning disability the school must:

- 1-provide "appropriate instruction" by qualified personnel and
- 2-assess achievement periodically by formal testing and
- 3-document the assessments and
- 4-provide the documentation to the parents.

The next question is what constitutes a period of formal testing and what constitutes documentation of that testing? The regulations do not answer this.

The last section regarding evaluations for LD is section 300.309(c). It requires the public agency to evaluate a student with a possible learning disability within the 60-day timeline applicable to other testing (300.301 and 300.303). However, this section explicitly permits parents and schools to mutually agree to extend the evaluation timeline.

This section also provides a general child find requirement at (c)(1)(if child has not made adequate progress after an appropriate amount of time in school) and (c)(2) requires the public agency to promptly request parental consent to evaluate the child when the child is referred for an evaluation.

*300.540 and 541: The 1999 regulation at 300.540 and 300.541 required their to be a severe discrepancy between achievement and intellectual ability in one of several areas (ie: oral expression, written expression...) The 2006 regulations promote a researched based model, but do not require it. (see also, 300.307(a)(1) and (2))*

### **300.310: Observation**

*The 99 regulations at 300.542(a) required a classroom observation of a child suspected of having a learning disability. This observation had to be conducted by a team member other than the child's regular classroom teacher. (Team member indicates an IEP team member)*

The 06 regulations still require a classroom observation; however, the group (defined in §300.306 as "qualified professionals and the parents") may use information from routine classroom instruction (from the regular classroom teacher) to meet the observation requirement. Alternatively, a member of the group must conduct an observation of the child's performance after the child has been referred for an evaluation and the school has obtained parental consent.

If the child is less than school age or out of school a group member must observe the child in an environment appropriate for a child that age.

*The 99 regulations at 300.542(b) required a **team** member (as opposed to a group member) to conduct the observation for a child less than school age or out of school.*

**300.311: Specific documentation for the eligibility determination.** *This section requires written statements documenting that a student has a learning disability. The 99 regulations at 300.543 also required written statements; however, the 06 regulations require additional information.*

**300.311(a)(1) and (a)(2)**—substantially similar to the 99 regulations. These sections require a statement of whether a child has a specific learning disability and the basis for making that determination. Section (a)(2) also makes clear that the determination is made by drawing upon a variety of information and sources (300.306(c).)

**300.311(a)(3)**- This section combines two points in the 99 regulations and adds a qualifier. The 06 regulations require a statement about the relevant behavior, **if any**, noted during the observation of the child and the relationship of the behavior to the child’s academic functioning; (previously the statement about the behavior and the relationship of the behavior to academics were in two separate sentences. Combining the sentences does not change the meaning of the requirement.)

**300.311(a)(4)**- requires the educationally relevant medical findings (same as in 99)

**300.311(a)(5)**- This section requires written documentation that the child has a learning disability as outlined in §300.309. Specifically, this section requires:

A statement of whether the child does not achieved adequately for the child’s age or meet State-approved grade-level standards consistent with 300.309(a)(1)(discussed above);

and

the child does not make sufficient progress to meet age or State-approved grade-level standards; or

the child exhibits a pattern of strengths and weaknesses in performance, achievement... (This language is the same in 300.309(a)(2)(i) and (ii) discussed above.)

**300.311(a)(6)**- This section requires documentation of the determination required by 300.309(a)(3) regarding the effects of a visual, hearing or motor disability; mental retardation, emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child’s achievement level; and

**300.311(a)(7)**- This section requires certain information if the school used a scientific, research-based intervention process to assess the child. Specifically it requires instructional strategies used and the student-centered data collected; and documentation that the child’s parents were notified about: (A) the data that would be collected and educational services provided; (B) strategies for increasing the child’s learning and (C) the parents’ right to request an evaluation.

Therefore, if research-based interventions are used to assess a child's learning a parent has the right to request a formal evaluation of the child and the school must inform the parent of that right.

**300.311(b)**- Each group member must certify if the conclusions in the report reflect their opinion. If not, the group member must submit information stating his or her conclusions.

*This requirement was the same in 99 except it referred to each team member instead of group member.*

## Individual Education Programs

### **300.320: Definition of individualized education program.**

**300.320(a)**: This section has been modified to comport with the statute at §1414(d)(1)(A). It revises the 99 regulation, §300.347(a).

Adds general statement defining an IEP as a “written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§300.320-324.

Still requires statement of how child's disability affects involvement and progress in general education and for preschool children how the child's disability affects appropriate activities. However, the 06 regulations add in a requirement to provide a statement of a child's present levels of academic achievement and functional performance. (to be consistent with IDEA 2004).

**300.320(a)(2)**: Similar to 99 regulation at 300.347(a)(2) except that 06 regulation requires a statement of measurable annual goals, including academic and functional goals whereas the 99 regulations required a statement of measurable annual goals including benchmarks and short-term objectives. This change is consistent with the statute.

Adds in a section 300.320(a)(2)(ii). This section requires a description of benchmarks and short-term objectives for children who take alternate assessments aligned to alternate achievement standards.

**300.320(a)(3)** is similar to 300.347(7). This section requires a description of how the child's progress in meeting annual goals will be measured. It also requires periodic reporting of how a child is progressing towards his or her annual goals. However, the requirement that the reporting be “at least as often as parents are informed of their non-disabled children's progress” is no longer required specifically. Nor is there a specific requirement to state if the progress is sufficient to achieve the goals by the end of the year. The Comments to the regulations state that the specific manner and format to report a child's progress is best left to the State and local officials.

**300.320(a)(4)** is similar to 300.347(3). This section requires a statement of the special education and related services to be provided to the child. Consistent with the statute, the 06 regulation requires that those services be based on peer-reviewed research to the extent practicable.

**300.320(a)(5): Definition of individualized education program**  
*same as 99 regulation at 300.347(a)(4).*

**300.320(a)(6)** is similar to 300.320(a)(5) regarding the modifications needed to assessments. The 06 regulations, consistent with the statute, require a statement about the accommodations needed to measure the academic achievement and functional performance of the child on State and district-wide assessments.

**300.320(b): Transition**

The regulations encourage transition services to begin earlier than age 16 “if determined appropriate by the IEP Team.” Specifically the 06 regulation states: 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— (transition goals and services)

*The age requirements for Transition services changed with the 2004 IDEA. In IDEA 97 transition began at age 14, however the reauthorized law does not require transition services to begin until age 16 (but does not forbid services to begin at a younger age). (20 U.S.C. §1414(d)(1)(A)(i)(VIII)) The regulation makes it clear that transition services should be provided at the age services are needed rather than waiting until the child turns 16.*

In the 99 regulations, the Department gave examples of areas of study that might require transition services. These examples are no longer in the regulations. The Comments state that the reference to “course of study” include the specific examples provided in 99 and that such examples are not needed to understand the section. [This was also removed from the statute]

**300.320(d):** This section is a new addition and states that nothing in the above section shall be construed to require more information in the child’s IEP than what is required by the Act or require the IEP team to include in one component of an IEP what is already contained elsewhere in the IEP. [As required by IDEA 04]

**IEP Team-300.321**

**300.321(a):** Follows the statute at §1414(d)(1)(B) and the 99 regulation at §300.344(a)

**300.321(b): Transition services participation.** School districts are required *to the extent appropriate* to invite a representative of other agencies—that are likely to be responsible for providing or paying for transition services—to an IEP meeting. Schools must have the consent of the parents (or child of the age of majority) before inviting the other agency personnel.

*This is a change from 99 which required schools to invite other agencies (without seeking consent of the parent.) If the other agency personnel did not come to the meeting, schools were required to take other steps to obtain the participation of the other agencies. The 06 regulations do not require this second step of attempting to obtain participation. The Comments state that because the school districts have no authority to require action or services from the other agencies, it was impossible for the schools to carry-out this provision.*

## **IEP Team Attendance.**

**300.321(e).** *This regulation is new because the rules surrounding attendance at IEP meeting changed with IDEA 2004.*

*Section 300.321(e)(1) allows a member of the IEP to be excused from attending the meeting if the public agency and the parent agree. This language follows the statute at §1414(d)(C) with minor changes. The regulation uses the term “public agency” whereas the statute uses the term “local education agency.”*

*Section 300.321(e)(2): Follows the statute.*

*The Comments to the regulations note that there is a difference between the agreement required in (e)(1) (IEP member excusal for area not discussed during IEP meeting) and parental consent of (e)(2) (IEP member excusal when issue area will be discussed). The Comments state the later requires informed written consent.*

**300.321(f)-** *Invitation to initial IEP meeting must, at the request of parent be sent to Part C coordinator. This regulation mirrors the statute at 1414(d)(1)(D).*

## **300.322: Parent Participation.**

*This section follows the 99 regulations at 300.345 with the exception of changes to conform with the statute (Ex: indicate at age 16 postsecondary goals will be discussed as opposed to age 14 and 16.)*

*This section adds one new part. It now requires the public agency to inform parents of the provision in 300.321(f) which states that at the request of a parent an invitation to the initial IEP meeting under Part B must be sent to the Part C coordinator (or other Part C individuals).*

## **Parent Participation:**

### **300.322(d) -**

*Same requirements as in 99 at 300.345(d) to contact parents (visits to come, document calls and letters). The draft regulations attempted to remove the language that provided suggested ways schools should contact parents to convince them to attend IEP meetings (ie: this section states that a school cannot go forward with an IEP unless unable to convince the parents to attend). The final regulations follow the 99 and 1983 regulations.*

## **When IEP's must be in effect -300.323:**

**300.323(a):** follows 99 regulations at 300.342(a).

**300.323(b):** *IEP or IFSP for children aged three through five.*

300.323(b) also discusses using an IFSP as the IEP for a child who is 3-5 years old. The section is similar to the 99 regulations at §300.342(c). However the 06 regulations stress that the IFSP contents that must be considered include the natural environment statement and an educational component that promotes school readiness and incorporates pre-literacy, language and numeracy skills for children who are at least 3 years old.

**300.323(c):** *In the 99 regulations there was a requirement in 300.323(b)(which dealt with provision of services) that an IEP be in effect before special education services are provided. The Comments state that this provision is not needed because it is implicit in the requirement of each public agency to have an IEP in effect at the beginning of each school year for a child that is eligible for services.*

This section is a combination of the 99 regulations at 300.342 and 343. The 06 regulations require an IEP meeting within 30 days of an eligibility determination just as required in 99, however the requirement is in a different section of the regulations. The 99 regulations require that an IEP is implemented as soon as possible after the IEP meeting. The 06 regulations require that “special education and related services are made available to the child...” as soon as possible after an IEP meeting. The wording is slightly different, but the meaning is the same.

**300.323(d):** Accessibility of child's IEP to teachers and others.

This language follows the language in the 99 regulation at 300.342(b)(2). This section requires the school to make the IEP accessible to teachers and service providers that are responsible to implement the IEP. It also requires the school to inform each teacher and service provider with their specific implementation responsibilities. This part of the regulation was absent from the draft regulations.

**300.323(e); 300.323(f) and 300.323(g):** These three sections address the requirements for children who transfer schools within the same state and transfers to another state.

The 06 regulations follow the meaning of the statute at 1414(d)(2)(C) with some changes to the wording. The interesting part of this regulation is found in the Department's Comments.

When a child transfers to a new school, the new public agency must provide the child with services that are “comparable” to the services in the existing IEP. The Department declined to define “comparable” but then goes on to say they interpret “comparable” to have the “plain meaning” of the word, which is “similar” or “equivalent.” Therefore, when a child transfers schools, the new public agency must provide services that are similar or equivalent to the services provided by the former school.

The Department states in its comments that when a child transfers from one state to a new state and the new state determines an evaluation of a child is necessary, the purpose of

that evaluation is to determine eligibility. Because the purpose is to determine eligibility the testing should be considered an initial evaluation requiring parental consent. However, the school district must provide FAPE to the child until the evaluation is conducted. If the parent and the school disagree with “comparability of services” during the evaluation time “stay-put” does not apply.

The regulations follow the statute with regard to the transfer of records. The Department declined to set a specific requirement of days to transfer the records finding that it is an issue left to the States to determine.

**300.324: Development of IEP: Development, review, and revision of IEP.**

300.324(a)(1): The 06 regulations no longer specifically require consideration of the child’s performance on state or district-wide assessments. However, the regulations now specifically require consideration of the academic, developmental and functional needs of the child. *The requirement to consider state or district-wide assessments was removed in IDEA 2004, and therefore has been removed from the regulation.* However, the Comments to the regulations make clear that consideration of state or district-wide tests would be required to fully consider the child’s academic, developmental and functional needs.

**300.324(a)(2): Consideration of special factors.**

Moves the specific requirement to ensure the “special factors” are considered when an IEP is reviewed. That section is now 324(b)(2)

**300.324(a)(3): Requirement with respect to regular education teacher.**

The 06 regulations are substantially similar to the 99 regulations at 300.346(d). The language is slightly different, but the meaning is essentially the same.

**300.324(a)(4): Agreement.**

This section was added to the regulations because of the addition in the statute. This section permits parents and the public agency to make changes to a child’s IEP without an IEP meeting. The regulations that detail the ability to amend the IEP are almost identical to the statute (keeping the same meaning). However, the regulations also add that if changes are made to the child’s IEP, the child’s IEP team must be informed of those changes.

*The additional requirement of the school personnel to inform the IEP team of IEP changes is beneficial to children. It at least ensures that if a change is made all team members are aware of the change.*

**300.324(a)(5): Consolidation of IEP’s and reevaluation meetings.** This section mirrors the statute.

**300.324(a)(6): Amendments to the IEP.** Amendments may be made by the entire IEP team or by agreement of the parent and public agency. This section mirrors the statute.

**300.324(b):** This section states the requirements for review and revision of IEP's. It substantially follows the statute. Section 300.324(b)(2) states that special factors must be considered when reviewing an IEP. This requirement was part of the 99 regulations. However, it was in a different section of the regulations. (see above)

**300.324(c): Failure to meet transition objectives.**

Same as the 99 regulations at 300.348(a) and (b).

**300.324(d): Children with disabilities in adult prisons.**

Same as the statute and 99 regulations at 300.311

**300.325: Private school placements by public agencies.**

Same as regulations at 300.349.

**300.326. Reserved**

**300.327: Educational placement.**

Mirrors statute at §1414(e)

**300.328: Alternative means of meeting participation.**

Mirrors statute at §1414(f)

## Due Process Procedures for Parents and Children

**300.500: Responsibility of SEA and other public agencies.**

*Still requires SEA's to establish, maintain and implement procedural safeguards for due process, but it does not define consent, evaluation and personally identifiable here. The definitions have been moved to the definition section (300.9, 300.15 and 300.32 respectively). These definitions are the same as in the 99 regulations.*

**300.501: Opportunity to examine records; parent participation in meetings.**

**300.501(a)(3):** This section states that 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.

*However it removes the next phrase found in the 99 regulation at 300.501(b)(2) that states: if those services are not addressed in the child's IEP.*

**300.501(c): Parent involvement in placement decisions.**

Schools must ensure that parents have the opportunity to be involved in placement decisions for their children. The school must make attempts to convince the parent to come to a meeting about placement consistent with **§300.322** (document calls to home, letters and home visits)(99 reg at 300.345).

However, a placement decision may be made without the parent's participation if the public agency cannot obtain the parent's participation. In this situation the public agency must have a record of its attempt to secure the parent's involvement.

**300.502. Independent education evaluation.**

**300.502(b)(5):** The 06 regulations limit a parent's right to an independent evaluation at public expense to one independent evaluation each time the public agency conducts an evaluation with which the parent disagrees. This language was not proposed in the draft regulations, nor do the comments provide any discussion about this section in its discussion about IEE's. This is a change from the 99 regulations at 300.502 which did not set such a limit.

**300.502(c):** *The 99 regulation provided that if a parent obtains an IEE at private expense the results of the evaluation must be considered by the public agency and it may be presented as evidence at a hearing.*

The 06 regulations require that an IEE obtained at public expense and an IEE obtained at private expense and shared with the public agency must be considered by the public agency and may be presented by any party as evidence at a due process hearing.

**300.503: Prior notice by the public agency; content of notice.**

Same as in 99 regulations at 300.503.

**300.504: Procedural safeguards notice.**

**300.504(a):** This regulation was changed to be consistent with the statutory change. The Department also added language helpful for parents.

The statute at 1415(d)(1)(A) only requires that schools provide parents with procedural safeguards one time a year with three exceptions. Those exceptions are upon initial referral or parental request for an evaluation; the first occurrence of filing a due process complaint; and upon request by a parent.

The regulations clarify that a copy of procedural safeguards must be provided:

- Upon receipt of the first due process request in a school year;
- Upon receipt of the first State complaint in a school year; and
- In accordance with the Discipline procedures (when removal of a child is a change in placement, LEA must provide procedural safeguards to parents)(§300.530(h))

**300.504(c):** This section lists the required contents of a procedural safeguards notice. It includes a new requirement that explains the difference between due process complaint and state complaint procedures.

**300.505: Electronic Mail. (Parental Consent)**

*This section set out the requirements for informed parental consent that must be obtained before conducting evaluations. This section was moved to §§300.300 and 300.9.*

The electronic mail section permits schools to send parents prior written notices and procedural safeguards (300.503 and 504) by electronic mail if the parent elects to do so.

**300.506: Mediation.**

This section is changed to be consistent with the statutory changes.

**300.506(a):** Mediation must now be available involving matters that arise prior to a due process hearing.

**300.506(b):** *In the 99 regulations the public agency was permitted to require parents who choose not to go to mediation to meet with a disinterested party about the benefits of mediation. The 06 regulations state, consistent with the 2004 statute, that the public agency may establish procedures to offer parents and schools that choose not to go to mediation a chance to talk to a disinterested party about the benefits of mediation.*

**300.506(b)(3):** The SEA may now select mediators on a random, rotational or other impartial basis. *In 99 regulations if a mediator was not selected on a random basis, both parties had to be involved in the selection of the mediator.*

**300.506(B)(6)(i):** The 06 regulations still require that mediation remain confidential and not used as evidence in any subsequent due process hearing or civil proceeding. (In the draft regulations the Department attempted to lessen this protection). However, the 06 regulations do not state that the parties may be required to sign a confidentiality pledge prior to the beginning the process. (parties may still do so, however)

**300.506(6)(ii):** The regulations make clear that the agreement must be signed by the parent and a representative of the agency who has authority to bind the agency.

**300.506(7):** Makes clear that a written, signed mediation agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States.

**300.507: Filing a due process complaint.**

Follows statute by stating that a due process complaint must be filed within 2 years of when the parent or public agency knew or should have known about the action that is the basis for the complaint. Or, if a state has an explicit time limitation the state timeline applies. The exception is in cases where the LEA misrepresented or withheld information (300.511(h)). *The Comments to the regulations state that “nothing in the Act precludes a state from having a time limit for filing a complaint that is shorter or longer [then two years].”*

*The section providing that the SEA or LEA responsible for the child has responsibility for conducting the hearing depending on state law has been moved to 300.511(b). (99 reg at 300.507(b))*

*The remainder of 99 regulation at 300.507 has been divided into several parts. They are outlined below.*

**300.508: Due process complaint.** Changes are made from the 99 regulations to be consistent with the 2004 statutory changes.

**300.508(a)(2):** consistent with the statute, the party filing a due process complaint must forward a copy of the complaint to the SEA. (§1415(b)(7))

**300.509. Model forms.**

Public agency must develop forms to assist parents who file due process, but the agency cannot require the use of the forms. A parent or agency may use any form or other document they desire to file for due process as long as they meet the requirements of 300.508(b)(contents of a complaint).

**300.510: Resolution Session.**

**300.510(b)(2):** The 06 regulations make clear that the 45-day due process timeline begins when the 30-day resolution period ends.

**300.510(b)(3):** If a parent who filed a due process complaint fails to participate in a resolution meeting the resolution process and the due process hearing timelines will be delayed until the meeting is held. *This is not in the statute.*

**300.510(b)(4):** LEA must document attempts to have parent participate in the resolution session by using the process in §300.322(d) (calls, letters, home visits). If at the end of the 30-day period the parent has not participated in the meeting, the LEA may request that a hearing officer dismiss the parent's due process complaint.

**300.510(b)(5):** If the LEA fails to hold the resolution session within 15 days 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.

*This section at least provides an avenue for parents to start the hearing before the 30-day timeline if the school fails to follow-through properly on the resolution session requirements.*

**300.510(c):** Adjustments to 30-day resolution period. This section requires the hearing timeline to begin the day after one of the following events occurs (which occurs before the expiration of the 30-day resolution session):

(c)(1): when both parties waive the resolution meeting. *This is helpful as it clearly states that parties who waive the resolution session go straight to hearing. Parties are not forced to unnecessarily extend the hearing timeline by 30 days if they are not planning to meet to discuss the dispute.*

(c)(2): the parties engage in mediation or a resolution session, but decided before the end of the 30-day period that an agreement is not possible. This agreement must be in writing.

(c)(3): If both parties agree in writing to continue with mediation after the 30-day period, but one of the parties later withdraws from the mediation process.

**300.510(d)** written settlement agreement.  
Follows the statute.

**300.511 Impartial due process hearing.**

Section (a) and (b) are consistent with the statute. Part (c) follows the statute about qualifications for impartial hearing officers and adds the following: each public agency must keep a list of the hearing officers with a statement of their qualifications.

**300.511(d):** consistent with the statute, parties may not raise issues at the due process hearing that were not raised in the request unless the other party agrees.

**300.511(e):** consistent with the statute, parties must request a due process hearing within 2 years of when they knew or should have known of the action that is the basis for their complaint. If a state has an explicit timeline for bringing due process hearings that timeline applies.

**300.511(f)—Exception.** However, the timeline in (e) above does not apply if a public agency prevented the parent from filing because of specific misrepresentations by the LEA that the problem is resolved or if the LEA withheld information they were required to provide to the parent.

**300.512: Hearing rights.**

No substantive changes from the 99 regulations at 300.509

**300.513: Hearing Decisions.**

Follows the statute at 1415(f), (h) and (o).

**300.514: Finality of decision; appeal; impartial review.**

*Mirrors 99 regulations at 300.510.*

**300.515: Timelines and convenience of hearings and reviews.**

The underlying requirements of this section are the same as in the 99 regulation at 300.511. However, the timeline has been changed to add the 30-day resolution period to the 45 days. Now the regulation requires that a public agency ensure a final decision in due process hearings occurs and is mailed to the parties within 45 days after the 30-day period. This is subject to the 30-day exceptions in 300.510(c) (ie: both parties agree to waive the resolution session).

**300.516: Civil action.**

**300.516(a)**-mirrors the 99 regulation at 300.512(a)

**300.516(b)**-This is a new section. It states—consistent with the statutory addition to IDEA 2004—that a party has 90 days to bring a civil action. If a state has a specific timeline the state statute of limitations applies. However, the regulations clarify that the 90 days begins after the date of a hearing officer’s decision, or the date of a decision of a state review official. *The statute only refers to a hearing officer’s decision. This clarification is useful as it ensures that the 90 day timeline to file an appeal does not expire before the state review process is completed.*

**300.516(c)**: The 99 regulation at 300.512(b) listed the additional requirements when a case is appealed to federal or state court. These requirements are that the court receives the records of the administrative proceedings, hears additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, grants the relief the court determines to be appropriate.

The remainder of the regulations mirrors the 99 regulation at 300.512.

**300.517 Attorneys’ fees.**

The 99 regulation at 300.513 was changed to conform to the statute.

300.517(a): states that attorney’s fees may be awarded to a prevailing parent. It also states that fees may be awarded to a prevailing SEA or LEA against the attorney of a parent when the complaint is frivolous, unreasonable....or against the parent if the due process request was filed to harass, cause delay....

**300.517(c) Award of fees.**

**300.517(c)(2)C(ii)**-Attorneys’ fees may not be awarded for any meeting of the IEP team unless the meeting is convened as a result of a due process or judicial action. The State has discretion to determine if attorneys’ fees are available for mediation.

*In 99, the regulations stated that attorneys’ fees were not available for mediation that is conducted prior to filing for hearing. The 06 regulations conform with the 04 statute.*

**300.517(c)(4)**- the court may reduce the amount of attorneys’ fees if the parent or parent’s attorney, unreasonably protracted the final resolution of the controversy. *In the 99 regulation this section referred only to the parent and did not include the parent’s attorney.*

**300.518: Child’s status during proceedings.**

This section has one major change from the 99 regulations at 300.514. In the 06 regulations at 300.518(c) the Department adds in a requirement regarding Part C (Early Intervention) students. The regulation requires that if a parent files a complaint about initial services under Part B (services for students 3-21) and the child is transitioning from Part C services (0-3 yrs. old) because they are no longer eligible for Part C services (ie: turned 3 yrs. old) the child does not stay-put in Part C services. Instead if the child is

eligible for Part B services and the parent consents then the public agency is only required to provide services that are not in dispute.

*This regulation was not in the draft regulations and therefore NDRN (and others) did not have the opportunity to comment on this section.*

**300.519: Surrogate parents.**

300.519(a)- This section sets out that a public agency must protect the rights of a child when a parent is not available. The 06 regulations add a requirement that the rights of a child who is an unaccompanied homeless youth must be protected. *IDEA 2004 specifically mentions the needs of homeless children and the regulation is added because of the statutory addition. (although the public agency should have been protecting the rights of homeless youth under the 97 law, the 04 law provided for specific assurance that the rights of these students are protected).*

**300.519(c)- Wards of the State.**

Section 300.510(d) sets out criteria for the selection of a surrogate parent. The criteria are as follows: the surrogate parent is not an employee of the SEA, the LEA or any other agency involved in the education or care of the child; the surrogate parent has no personal or professional interests that conflict with the interest of the child; and the surrogate parent has knowledge and skills that ensure adequate representation of the child.

If a child is a ward of the State, the judge who is overseeing the child's case may appoint the surrogate. The requirements that apply to a judge appointed surrogate is that the surrogate must not be an employee of the SEA, LEA or any other agency involved in the education or care of the child, and a person who qualifies as a surrogate under paragraph (d) is not considered an employee of the agency solely for being paid by the agency for their surrogate work.

*Interestingly, the Department requires only one selection criteria for court appointed surrogate parents, whereas any other surrogate parent must not have a conflict of interest and must have the requisite knowledge and skills to adequately represent the child. There does not appear to be any basis for this distinction. However, one would expect that a judge would not appoint a surrogate unless he or she was free of a conflict of interest and had the requisite skills to advocate for the child.*

**300.519(f)- Unaccompanied homeless youth.** The 06 regulations again set a different standard for surrogates for one subgroup of students. If a child is a homeless youth, a temporary surrogate can be appointed without regard to whether or not the surrogate is an employee of the SEA, LEA or of any other agency involved in the education or care of the child. The temporary surrogate may stay in place until a surrogate meeting all the selection requirements can be found. There is no time limit set on how long an agency may take to find an appropriate replacement surrogate.

**300.519(f)-** Once a public agency determines a surrogate parent is needed, the SEA must make reasonable efforts to ensure a surrogate is appointed within 30 days. This language is consistent with the statute at §1414(b)(2)(B).

**300.520: Transfer of parental rights at age of majority.**  
No substantial change.

## Discipline Procedures

### **300.530: Authority of School Personnel.**

**300.530(a): Case-by-case determination.** Adds in phrase “consistent with the other requirements of this section” meaning, according to the comments, that school personnel may not order a change in placement unless consistent with the remainder of §300.530. According to the Department’s comments this section gives school personnel the ability to determine if a change in placement that is otherwise permitted is appropriate. If it is not appropriate the school personnel can decide it should not occur. The comments say a school may involve the parents or IEP team in this decision. However, schools cannot punish a child without going through the due process requirements set out in the law.

**300.530(b)(2): General.** A school is *not* required to provide services to a child with disabilities until removed from school for 10-days. However, if the public agency provides services to non-disabled children when they are removed from school for less than 10 days, public agency must provide services to students with disabilities who are similarly removed. **Section 300.530(d)(3)**

*This is how schools were typically proceeding in practice. However, § 1412(a) requires FAPE when a child is suspended or expelled. This reference makes no distinction for suspensions of less than or greater than 10 days. However, this 06 regulation mirrors the 99 regulations at §300.121(d)*

**300.530(c): Additional authority.** If a child is removed from school for more than 10 consecutive days and the behavior was NOT a manifestation of the child’s disability the child may be disciplined in the same manner the school would discipline a child without disabilities except that some level of special education services must be provided. **(300.530(d) services)**

**300.530(d).** **Section 300.530(d)** requires schools to provide FAPE 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 receive a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. *This clause which mirrors 1415(k)(1)(D)(i) and (ii) is arguably something less than FAPE.*

The comments to the regulations acknowledge that 300.530(d) is a modified FAPE standard.

**300.530(d)(4):** Even after a child has been removed from school for 10 school days, if the current removal (day 11 removal) is less than 10 consecutive school days and is not a change in placement, the school personnel along with a teacher determine if a student needs FAPE services.

*1999 Regulation 300.121(d) states that if a child is removed for more than 10 consecutive days and the current removal is NOT a change in placement the public agency must provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP.*

**300.530(d)(5):** If the removal is a change in placement the IEP team determines appropriate services.

**300.530(e): Manifestation determination.**

The regulation follows the statute with one exception that is positive for children. If the LEA, parent and relevant members of the IEP team determine that the child's behavior was a direct result of the LEA's failure to implement the IEP, the LEA must take immediate steps to remedy the deficiencies in the IEP.

**300.530(f): Determination that behavior was a manifestation.**

Follows the statute.

**300.531: Determination of setting.**

Follows the statute.

**300.532: Appeal**

**300.532(b) Authority of Hearing Officer.**

*The statute gives a hearing officer the authority to order a change in placement for 45 days if the current placement is substantially likely to result in injury to the child or other. The statute also gives a hearing officer the authority to return the child to the placement the child was removed from without qualifiers (or restrictions).*

The regulation gives the hearing officer the same authority to remove a child. However, the regulation qualifies the authority of a hearing officer to return a child back to his or her placement. The regulations state that a hearing officer can return a child if there was a violation of §300.530 (authority of school personnel to discipline students) or the child's behavior was a manifestation of the child's disability.

**300.532(c) Expedited due process.**

The due process procedures in an expedited hearing must follow those in a typical due process hearing. (requirements of 300.507 and 300.508), except that the sufficiency provision of 300.508(d) do not apply in expedited due process hearings. The rights and

requirements of sections 300.510-514 apply as well (resolution sessions, due process hearing process—impartial hearing officer, timelines, hearing rights, hearing decisions and appeal rights). The other exception is that the timeline for the hearing is different in expedited hearings (20 school days as per statute) and the regulations set out a resolution process for discipline hearings.

**300.532(c)(3)-** A resolution meeting must occur within 7 days of when the due process complaint was received unless the parties agree to waive it or agree to go to mediation. If the issue is not resolved within 15 days of receipt of the complaint the hearing may proceed. However, the hearing must occur within 20 school days of filing the complaint (the statute says the hearing takes place 20 days from the date the hearing is requested, so to be consistent with the statute the term filed in the regulations must mean the “date the hearing was requested.”)

*The Comments to the regulation appear to modify the timeline for the expedited hearing. The Comments state that after 15 days if there is no agreement a hearing may commence. However, because the statute requires that the hearing must take place within 20 school days, the regulation may not change that timeframe.*

**300.532(c)(4)-** This section permits States to set out their own procedural rights for expedited hearings, however States must maintain all the basic hearing rights such as right to impartial hearing officer, right to cross-exam witnesses, etc (§300.510-514).

**300.533: Placement during appeals.**

Follows the statute.

**300.534: Protections for children not determined eligible for special education and related services.**

The regulations follow the statute until (d) Conditions that apply if no basis of knowledge. And the 06 regulations follow the 99 regulations at 300.527(d) for this section.

**300.535: Referral to and action by law enforcement and judicial authorities.**

Follow the statute at 1415(k)(6) and the 99 regulations at 300.529.

**300.536: Change of placement because of disciplinary removals.**

The 99 regulations at 300.519 stated that a change in placement occurs when the removal is for more than 10 consecutive school dates in a school year or because the child has been removed from school a series of times that result in a pattern because: the removals total more than 10 school days and because the length of each removal, total amount of time the child has been removed and the proximity of the removals to one another results in a change of placement. The 06 regulations require all of the above, but also add that the behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals.

The Department also made it clear that the public agency determines on a case-by-case basis whether a pattern of removals constitutes a change in placement. *Again, this determination is subject to review by a hearing officer if a parent files a due process complaint about the issue.*