

**Subpart D--Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements**

**Parental Consent**

**§300.300 Parental consent.**

(a) Parental consent for initial evaluation. (1)(i) The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under §300.8 must, after providing notice consistent with §§300.503 and 300.504, obtain informed consent, consistent with §300.9, from the parent of the child before conducting the evaluation.

(ii) Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

(iii) The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.

(2) For initial evaluations only, if the child is a ward of the State and is not residing with the child's parent, the public agency is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if--

(i) Despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child;

(ii) The rights of the parents of the child have been terminated in accordance with State law; or

(iii) The rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

(3)(i) If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures under §300.506 or the due process procedures under §§300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent.

(ii) The public agency does not violate its obligation under §300.111 and §§300.301 through 300.311 if it declines to pursue the evaluation.

(b) Parental consent for services. (1) A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

(2) The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

(3) If the parent of a child fails to respond or refuses to consent to services under paragraph (b)(1) of this section, the public agency 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.

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

(i) Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and

(ii) Is not required to convene an IEP Team meeting or develop an IEP under §§300.320 and 300.324 for the child for the special education and related services for which the public agency requests such consent.

(c) Parental consent for reevaluations. (1) Subject to paragraph (c)(2) of this section, each public agency--

(i) Must obtain informed parental consent, in accordance with §300.300(a)(1), prior to conducting any reevaluation of a child with a disability.

(ii) If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section.

(iii) The public agency does not violate its obligation under §300.111 and §§300.301 through 300.311 if it declines to pursue the evaluation or reevaluation.

(2) The informed parental consent described in paragraph (c)(1) of this section need not be obtained if the public agency can demonstrate that--

(i) It made reasonable efforts to obtain such consent; and

(ii) The child's parent has failed to respond.

(d) Other consent requirements.

(1) Parental consent is not required before—

(i) Reviewing existing data as part of an evaluation or a reevaluation; or

(ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(2) In addition to the parental consent requirements described in paragraph (a) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(3) A public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a) or (d)(2) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.

(4)(i) If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of this section); and

(ii) The public agency is not required to consider the child as eligible for services under §§300.132 through 300.144.

(5) To meet the reasonable efforts requirement in paragraphs (a)(1)(iii), (a)(2)(i), (b)(2), and (c)(2)(i) of this section, the public agency must document its attempts to obtain parental consent using the procedures in §300.322(d).

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

**Evaluations and Reevaluations**

**§300.301 Initial evaluations.**

(a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) Request for initial evaluation. Consistent with the consent requirements in §300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(c) Procedures for initial evaluation. The initial evaluation--

(1)(i) Must be conducted within 60 days of receiving parental consent for the evaluation; or

(ii) If the State establishes a timeframe within which the evaluation must be conducted, within that timeframe; and

(2) Must consist of procedures--

- (i) To determine if the child is a child with a disability under §300.8; and
- (ii) To determine the educational needs of the child.

(d) Exception. The timeframe described in paragraph (c)(1) of this section does not apply to a public agency if--

- (1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation; or
- (2) A child enrolls in a school of another public agency after the relevant timeframe in paragraph (c)(1) of this section has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability under §300.8.

(e) The exception in paragraph (d)(2) of this section applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.

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

**§300.302 Screening for instructional purposes is not evaluation.**

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

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

**§300.303 Reevaluations.**

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§300.304 through 300.311--

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section--

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

(Authority: 20 U.S.C. 1414(a)(2))

**§300.304 Evaluation procedures.**

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

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

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

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

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

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

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

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

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

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

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

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

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

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

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

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

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

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

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

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

(Authority: 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B))

**§300.305 Additional requirements for evaluations and reevaluations.**

(a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must--

(1) Review existing evaluation data on the child, including—

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--

(i)(A) Whether the child is a child with a disability, as defined in §300.8, and the educational needs of the child; or

(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;

(ii) The present levels of academic achievement and related developmental needs of the child;

(iii)(A) Whether the child needs special education and related services; or

(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

(b) Conduct of review. The group described in paragraph (a) of this section may conduct its review without a meeting.

(c) Source of data. The public agency must administer such assessments and other evaluation measures as may be needed to produce the data identified under paragraph (a) of this section.

(d) Requirements if additional data are not needed.

(1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of—

(i) That determination and the reasons for the determination; and

(ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.

(2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents.

(e) Evaluations before change in eligibility.

(1) Except as provided in paragraph (e)(2) of this section, a public agency must evaluate a child with a disability in accordance with §§300.304 through 300.311 before determining that the child is no longer a child with a disability.

(2) The evaluation described in paragraph (e)(1) of this section is not required before the termination of a child's eligibility under this part due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under State law.

(3) For a child whose eligibility terminates under circumstances described in paragraph (e)(2) of this section, a public agency must provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

(Authority: 20 U.S.C. 1414(c))

**§300.306 Determination of eligibility.**

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

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

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

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

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

(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(ii) Lack of appropriate instruction in math; or

(iii) Limited English proficiency; and

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

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

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

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

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

(Authority: 20 U.S.C. 1414(b)(4) and (5))

**Additional Procedures for Identifying Children With Specific Learning Disabilities**

**§300.307 Specific learning disabilities.**

(a) General. A State must adopt, consistent with §300.309, criteria for determining whether a child has a specific learning disability as defined in §300.8(c)(10). In addition, the criteria adopted by the State--

(1) Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in §300.8(c)(10);

(2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and

(3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in §300.8(c)(10).

(b) Consistency with State criteria. A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.

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

**§300.308 Additional group members.**

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

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

**§300.309 Determining the existence of a specific learning disability.**

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

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

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading fluency skills.
- (vi) Reading comprehension.
- (vii) Mathematics calculation.
- (viii) Mathematics problem solving.

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

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

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

- (i) A visual, hearing, or motor disability;
- (ii) Mental retardation;
- (iii) Emotional disturbance;
- (iv) Cultural factors;
- (v) Environmental or economic disadvantage; or
- (vi) Limited English proficiency.

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

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

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

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

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

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

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

**§300.310 Observation.**

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

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

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

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

(c) In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age.

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

**§300.311 Specific documentation for the eligibility determination.**

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

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

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

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

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

(5) Whether--

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

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

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

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

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

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

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

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

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

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

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

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

United States Department of Education Comments

Specific learning disability (§300.8(c)(10))

Comment: One commenter recommended changing the definition of specific learning disability to refer to a child's response to scientific, research-based intervention as part of the procedures for evaluating children with disabilities, consistent with §300.307(a). A few commenters recommended aligning the definition of specific learning disability with the requirements for determining eligibility in §300.309.

One commenter recommended using the word "disability," instead of "disorder," and referring to specific learning disabilities as a "disability in one or more of the basic psychological processes." A few commenters stated that the terms "developmental aphasia" and "minimal brain dysfunction" are antiquated and should be removed from the definition. A few commenters questioned using "imperfect ability" in the definition because it implies that a child with minor problems in listening, thinking, speaking, reading, writing, spelling, or calculating math could be determined to have a specific learning disability.

Discussion: The definition of specific learning disability is consistent with the procedures for evaluating and determining the eligibility of children suspected of having a specific learning disability in §§300.307 through 300.311. We do not believe it is necessary to repeat these procedures in the definition of specific learning disability.

Section 602(30) of the Act refers to a "disorder" in one or more of the basic psychological processes and not to a "disability" in one or more of the basic psychological processes. We believe it would be inconsistent with the Act to change "disorder" to "disability," as recommended by one commenter. We do not believe that the terms "developmental aphasia" and "minimal brain dysfunction" should be removed from the definition. Although the terms may not be as commonly used as "specific learning disability," the terms continue to be used and we see no harm in retaining them in the definition. We do not agree that the phrase "imperfect ability" implies that a child has a minor problem and, therefore, decline to change this phrase in the definition of specific learning disability.

Changes: None.

Comment: We received several requests to revise the definition of specific learning disability to include specific disabilities or disorders that are often associated with specific learning disabilities, including Aspergers syndrome, FAS, auditory processing disorders, and nonverbal learning disabilities.

Discussion: Children with many types of disabilities or disorders may also have a specific learning disability. It is not practical or feasible to include all the different disabilities that are often associated with a specific learning disability. Therefore,

we decline to add these specific disorders or disabilities to the definition of specific learning disability.

Changes: None.

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

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

Changes: None.

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

##### Specific learning disabilities (§300.307)

Comment: Numerous commenters supported proposed §300.307(a)(1), which allowed States to prohibit LEAs from using a severe discrepancy between IQ and achievement (discrepancy models) to determine eligibility under the specific learning disability (SLD) category. However, many commenters supported the use of discrepancy models and requested that the regulations allow discrepancy models to continue to be used. Numerous commenters stated that §300.307(a)(1) exceeds statutory authority and that LEAs should be permitted to use discrepancy models. Many commenters cited Conf. Rpt. 108-779 and stated that Congress did not intend to prohibit LEAs from using discrepancy models.

Discussion: The Department agrees that proposed §300.307(a)(1) should be removed. We believe this will improve the clarity of the regulations and make it easier for parents and professionals to understand. With respect to permitting LEAs to use discrepancy models, even with the removal of §300.307(a)(1), States are responsible for developing criteria to determine whether a child is a child with a disability, as defined in §300.8 and section 602(3) of the Act, including whether a particular child meets the criteria for having an SLD. Under section 614(b)(6) of the Act, States are free to prohibit the use of a discrepancy model. States, including States that did not use a discrepancy model prior to the Act, are not required to develop criteria that permit the use of a discrepancy model.

Changes: We have removed §300.307(a)(1) and redesignated the subsequent provisions in §300.307.

Comment: Many commenters stated that response to intervention (RTI) should be considered one component of the evaluation process and not the sole component. Another commenter stated that neither a discrepancy model nor an RTI model alone can correctly identify children with SLD and that other data are needed, such as informal and formal assessments, histories, and observations. One commenter stated that all relevant and available evaluation data, such as the nature and type of evaluation, evaluator qualifications, and outcome data should be considered. One commenter recommended that RTI be tied to the general evaluation procedures. Another commenter recommended referencing the evaluation procedures in §300.309 to clarify that RTI must be used as one component of the evaluation process to determine eligibility for special education and related services. Several commenters stated that relying solely on an RTI model would result in larger numbers of children being identified with an SLD.

Discussion: Consistent with §300.304(b) and section 614(b)(2) of the Act, the evaluation of a child suspected of having a disability, including an SLD, must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services. This requirement applies to all children suspected of having a disability, including those suspected of having an SLD.

To simplify new §300.307(a)(2) (proposed §300.307(a)(3)) and remove unnecessary repetition, we will: (a) remove the phrase "as part of the evaluation procedures described in §300.304;" and (b) replace "process that determines if the child responds to scientific, research-based intervention" with "process based on the child's response to scientific, research-based intervention." Section 300.311(a)(7) will also be revised, consistent with this language.

Changes: We have revised new §300.307(a)(2) (proposed §300.307(a)(3)) and §300.311(a)(7) for clarity.

Comment: Several commenters recommended changing new §300.307(a)(2) (proposed §300.307(a)(3)) to require that State criteria "may" rather than "must" permit a process that determines if a child responds to research-based intervention in order to be consistent with section 614(b)(6)(B) of the Act.

Discussion: Making the requested change to new §300.307(a)(2) (proposed §300.307(a)(3)) would be inconsistent with the Act. Section 614(b)(6)(B) of the Act gives LEAs the option of using a process that determines if a child responds to research-based interventions.

Changes: None.

Comment: Several commenters recommended that the regulations include a statement that discrepancy models have been discredited and that there is no evidence that they can be applied in a valid

and reliable manner. Several commenters recommended that the Department urge States, at least through guidance, to eliminate provisions under State laws that permit the use of discrepancy models.

Discussion: We do not believe it is appropriate to add language in the regulations discouraging the use of discrepancy models to identify children with SLD. We removed current §300.541(a)(2), which required States to use a discrepancy model to determine whether a child has an SLD, because section 614(b)(6) of the Act now specifies that an LEA shall not be required to consider a severe discrepancy in determining whether a child has an SLD. New §300.307(a)(2) (proposed §300.307(a)(3)) requires States to permit the use of a process that examines whether the child responds to scientific, research-based interventions as part of the information reviewed to determine whether a child has an SLD. **The regulations reflect the Department's position on the identification of children with SLD and our support for models that focus on assessments that are related to instruction and promote intervention for identified children.**

Changes: None.

Comment: One commenter recommended that any guidance the Department issues on RTI models should emphasize that RTI represents a shift in how children are identified for special education services and not just an additional task that special education teachers must do.

Discussion: Consensus reports and empirical syntheses indicate a need for major changes in the approach to identifying children with SLD. Models that incorporate RTI represent a shift in special education toward goals of better achievement and improved behavioral outcomes for children with SLD because the children who are identified under such models are most likely to require special education and related services. We will consider addressing this issue in future guidance.

Changes: None.

Comment: Many commenters stated that the elimination of discrepancy models would result in an inability to identify children with SLD who are gifted. One commenter stated that a scatter of scores should be used to identify children with SLD who are gifted.

Discussion: Discrepancy models are not essential for identifying children with SLD who are gifted. **However, the regulations clearly allow discrepancies in achievement domains, typical of children with SLD who are gifted, to be used to identify children with SLD.**

Changes: None.

Comment: Many commenters opposed the use of RTI models to determine whether a child has an SLD, stating that there is a lack of scientific evidence demonstrating that RTI models correctly identify children with SLD. One commenter stated that RTI is a

subjective method of determining whether treatment is effective and is not a treatment itself. A few commenters requested additional research demonstrating the efficacy of the wide-scale use of RTI models. Some commenters stated that research on the use of RTI models has been conducted only in the area of reading in the primary grades and pointed to the lack of scientific data on achievement gains or long-term success. One commenter stated that there is no evidence that RTI is effective for non-native speakers of English and minority populations. Another commenter stated that RTI would fail to identify young children with SLD. One commenter stated that when a child fails to respond to an intervention, it is unclear why the child failed (e.g., inappropriate intervention, ineffective teaching, unreasonable expectations). One commenter stated that longitudinal data are needed to determine if children who succeed in an RTI process later become eligible under the category of SLD based on reading fluency and comprehension difficulties, or difficulties in other academic areas, such as mathematics problem-solving or written expression.

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

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<sup>1</sup> Tilly III, W. D. (2002). School psychology as a problem solving enterprise. In A. Thomas & J. Grimes (Eds.), Best Practices in School Psychology IV. Washington D.C.: National Association of School Psychologists; VanDerHeyden, A.M, Witt, J.C, & Gilbertson, D. (in press). Effect of a problem solving intervention on the accurate identification of children. Journal of School Psychology; Marston, D., Muyskens, P., Lau, M., & Canter, A. (2003). Problem-solving model for decision making with high incidence disabilities: The Minneapolis experience. Learning Disabilities Research and Practice, 18, 187-200; Gresham, F., VanDerHeyden, A.M, & Witt, J.C. (in press). Response to intervention in the identification of learning disabilities: Empirical support and future challenges. School Psychology Review; National Association of State Directors of Special Education (2005). Response to intervention: policy considerations and implementations. Alexandria VA: Author.

Changes: None.

Comment: One commenter expressed concern about how LEAs will conduct evaluations for children suspected of having an SLD who attend private schools because requiring an RTI process could become entangled with the private school's instructional practices. The commenter recommended clarifying that child find does not require an LEA to use RTI to identify children with SLD who are attending private schools.

Discussion: An RTI process does not replace the need for a comprehensive evaluation. A public agency must use a variety of data gathering tools and strategies even if an RTI process is used. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures required under §§300.304 and 300.305. As required in §300.304(b), consistent with section 614(b)(2) of the Act, an evaluation must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services.

It is up to each State to develop criteria to determine whether a child has a disability, including whether a particular child has an SLD. In developing their criteria, States may wish to consider how the criteria will be implemented with a child for whom systematic data on the child's response to appropriate instruction is not available. However, many private schools collect assessment data that would permit a determination of how well a child responds to appropriate instruction. The group making the eligibility determination for a private school child for whom data on the child's response to appropriate instruction are not available may need to rely on other information to make their determination, or identify what additional data are needed to determine whether the child is a child with a disability. However, under §300.306(b), a public agency may not identify any public or private school child as a child with a disability if the determinant factor is lack of appropriate instruction in reading or math.

Changes: None.

Comment: One commenter stated that adoption of new procedures for evaluating children suspected of having an SLD should not penalize or declassify children who under prior procedures were found to have an SLD. The commenter recommended using the requirements in §300.305, rather than data from a child's response to a scientific, research-based intervention process, to consider whether a child continues to have an SLD.

Discussion: An RTI process does not replace the need for a comprehensive evaluation, and a child's eligibility for special education services cannot be changed solely on the basis of data from an RTI process. Consistent with §300.303 and section 614(a)(2) of the Act, a child with a disability must be reevaluated if the public agency determines that the educational

or related services needs of the child warrant a reevaluation or if the child's parent or teacher requests a reevaluation. A reevaluation must occur no more than once a year, unless the parent and the public agency agree otherwise, and at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary, to determine whether the child continues to have a disability and to determine the educational needs of the child. Reevaluations must be conducted in accordance with §§300.304 through 300.311. In addition, as noted in §300.305(e)(1), except for children at the end of their secondary school career, a reevaluation must be done before determining that a child is no longer a child with a disability. In conducting a reevaluation, as noted in §300.305, consistent with section 614(c) of the Act, the IEP Team and other qualified professionals must review existing evaluation data on the child including evaluations provided by the parents of the child; current classroom-based, local, or State assessments and classroom-based observations; and observations by teachers and related services providers.

The results of an RTI process may be one component of the information reviewed as part of the reevaluation process. It is up to each State to develop criteria to determine whether a child continues to have a disability, including whether a particular child has an SLD.

States that change their eligibility criteria for SLD may want to carefully consider the reevaluation of children found eligible for special education services using prior procedures. States should consider the effect of exiting a child from special education who has received special education and related services for many years and how the removal of such supports will affect the child's educational progress, particularly for a child who is in the final year(s) of high school. Obviously, the group should consider whether the child's instruction and overall special education program have been appropriate as part of this process. If the special education instruction has been appropriate and the child has not been able to exit special education, this would be strong evidence that the child's eligibility needs to be maintained.

Changes: None.

Alternative research-based procedures (new §300.307(a)(3)) (proposed §300.307(a)(4))

Comment: Many commenters expressed support for allowing the use of alternative research-based procedures to determine whether a child has an SLD. However, a few commenters stated that the use of alternative research-based procedures should be removed because there is no indication that these procedures will assist in identifying a child with an SLD and because the Act does not use this term.

Discussion: New §300.307(a)(3) (proposed §300.307(a)(4)) recognizes that there are alternative models to identify children

with SLD that are based on sound scientific research and gives States flexibility to use these models. For example, a State could choose to identify children based on absolute low achievement and consideration of exclusionary factors as one criterion for eligibility. Other alternatives might combine features of different models for identification. We believe the evaluation procedures in section 614(b)(2) and (b)(3) of the Act give the Department the flexibility to allow States to use alternative, research-based procedures for determining whether a child has an SLD and is eligible for special education and related services.

Changes: None.

Comment: One commenter stated that alternative research-based procedures are not based on scientific research and should therefore be removed.

Discussion: The Department does not support the use of identification procedures that are not based on scientific research. Models or procedures that claim to assist in identifying a child with an SLD, but which are not based on sound scientific research, are not appropriate and should not be adopted by LEAs or States.

Changes: None.

Comment: A few commenters stated that the meaning of alternative research-based procedures is unclear and should be defined. One commenter stated that there would be inappropriate interventions and procedures without further clarification as to the meaning of alternative research-based procedures.

Discussion: As noted in the Analysis of Comments and Changes section for subpart A, we have added the definition of scientifically based research from section 9101(37) of the ESEA to the definitions section of these regulations. This definition is the most appropriate definition to include in these regulations, given the importance Congress placed on aligning the Act with the ESEA. The Department does not intend to dictate how extensive the research must be or who, within an LEA or State, should determine that the research is of high quality. We believe that this is a matter best left to State and local officials because determining the presence of an appropriate instructional process is part of the State-adopted criteria. This addition should provide the clarity requested by the commenters.

Changes: We have added a definition of scientifically based research to §300.35, giving the term the definition in section 9101(37) of the ESEA.

Consistency with State criteria (§300.307(b))

Comment: Several commenters expressed concern about allowing States to decide on the approach to determining whether a child has an SLD, and requested the Department develop criteria to be used across the nation. However, numerous commenters supported the development of State criteria and requiring public agencies to

use the State criteria to determine whether a child has an SLD. Many commenters stated that this requirement is necessary to prevent inconsistent eligibility requirements among LEAs in a State. Other commenters stated that the requirement exceeds statutory authority and that LEAs should be allowed to make decisions about the criteria and methods to identify children with SLD.

Discussion: The Department believes that eligibility criteria must be consistent across a State to avoid confusion among parents and school district personnel. The Department also believes that requiring LEAs to use State criteria for identifying children with disabilities is consistent with the State's responsibility under section 612(a)(3) of the Act to locate, identify, and evaluate all eligible children with disabilities in the State. We believe this provides the Department with the authority to require a public agency to use State criteria in determining whether a child has an SLD, consistent with §§300.307 through 300.311.

Changes: None.

Comment: A few commenters requested requiring States to adopt and implement only one model to determine whether a child has an SLD. However, several commenters requested that States and LEAs have the flexibility to use more than one model. One commenter noted that States need flexibility to determine eligibility criteria until there is greater understanding of the effectiveness of evidence-based protocols in identifying children with SLD.

Discussion: There is nothing in the Act that would require a State to use one model of identification to identify a child with an SLD. We do not believe the regulations should include such a requirement, because section 614(b)(6) of the Act indicates that some flexibility in the selection of models of identification by LEAs can be appropriate, if permitted by the State.

Changes: None.

Comment: One commenter recommended that the Department require States to develop a plan to implement Statewide eligibility criteria that includes dissemination of research-based models, collecting data on the use of such models, providing professional development on the State's criteria, and implementing appropriate services and instruction.

Discussion: We agree that it could be helpful for States to develop a plan to implement any new SLD criteria, as recommended by the commenter. However, we do not believe States should be required to adopt such a plan, as this is a matter that is best left to individual States to decide.

Changes: None.

Determining the existence of a specific learning disability (§300.309)

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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<sup>2</sup> Donovan, M.S., & Cross, C.T. (2002). Minority students in special and gifted education. Washington, DC: National Academy Press; Bradley, L., Danielson, & Hallahan, D.P. (Eds.). Identification of learning disabilities: Research to practice. Mahwah, NJ: Erlbaum; Hoskyn, M., & Swanson, H.L (2000). Cognitive processing of low achievers and children with reading disabilities: A selective meta-analytic review of the published literature. The School Psychology Review, 29, 102-119; Steubing, K.K., Fletcher, J.M., LeDoux, J.M., Lyon, G.R., Shaywitz, S.E., & Shaywitz, B.A. (2002). Validity of IQ-discrepancy classifications of reading disabilities: A meta-analysis. American Educational Research Journal, 39, 469-518.

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

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

Changes: None.

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

Discussion: The Department does not believe that an assessment of psychological or cognitive processing should be required in determining whether a child has an SLD. There is no current evidence that such assessments are necessary or sufficient for identifying SLD. Further, in many cases, these assessments have not been used to make appropriate intervention decisions.

However, §300.309(a)(2)(ii) permits, but does not require, consideration of a pattern of strengths or weaknesses, or both, relative to intellectual development, if the evaluation group considers that information relevant to an identification of SLD. In many cases, though, assessments of cognitive processes simply add to the testing burden and do not contribute to interventions.

As summarized in the research consensus from the OSEP Learning Disability Summit (Bradley, Danielson, and Hallahan, 2002), "Although processing deficits have been linked to some SLD (e.g., phonological processing and reading), direct links with other processes have not been established. Currently, available methods for measuring many processing difficulties are inadequate. Therefore, systematically measuring processing difficulties and their link to treatment is not yet feasible....Processing deficits

should be eliminated from the criteria for classification...." (p. 797).<sup>3</sup> Concerns about the absence of evidence for relations of cognitive discrepancy and SLD for identification go back to Bijou (1942;<sup>4</sup> see Kavale, 2002)<sup>5</sup>. Cronbach (1957)<sup>6</sup> characterized the search for aptitude by treatment interactions as a "hall of mirrors," a situation that has not improved over the past few years as different approaches to assessment of cognitive processes have emerged (Fletcher et al., 2005; Reschly & Tilly, 1999)<sup>7</sup>.

Changes: None.

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

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

Changes: None.

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

Discussion: As indicated above, an assessment of intra-individual differences in cognitive functions does not contribute to identification and intervention decisions for children suspected of having an SLD. The regulations, however, allow for the assessment of intra-individual differences in achievement as part of an identification model for SLD. The regulations also allow for the assessment of discrepancies in intellectual development and achievement.

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<sup>3</sup> Bradley, R., Danielson, L., & Hallahan, D.P. (Eds.). (2002). Identification of learning disabilities: Research to practice. Mahwah, NJ: Erlbaum.

<sup>4</sup> Bijou, S. W. (1942). The psychometric pattern approach as an aid to clinical assessment - a review. American Journal of Mental Deficiency, 46, 354-362.

<sup>5</sup> Kavale, K. (2002). Discrepancy models in the identification of learning disabilities. In R. Bradley, L. Danielson, & D.P. Hallahan (Eds.). Identification of learning disabilities: Research to practice (pp. 370-371). Mahwah, NJ: Erlbaum.

<sup>6</sup> Cronbach, L.J. (1957). The two disciplines of scientific psychology. American Psychologist, 12, 671-684.

<sup>7</sup> Fletcher, J.M., Denton, C., & Francis, D.J. (2005). Validity of alternative approaches for the identification of LD: Operationalizing unexpected underachievement. Journal of Learning Disabilities, 38, 545-552; Reschly, D.J., & Tilly, W.D. (1999). Reform trends and system design alternatives. In D.J. Reschly, W.D. Tilly, III, and J.P. Grimes (Eds.). Special education in transition: Functional assessment and noncategorical programming. Longmont, CO: Sopris West.

Changes: None.

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

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

Changes: None.

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

Several commenters expressed concern that the eligibility determination for SLD is based on whether the child achieves commensurate with his or her age because current practice uses normative data that are based on grade level. These commenters recommended clarifying that grade level or classmate performance should also be considered.

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

abilities or classmates simply dilutes expectations for children with disabilities.

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

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

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

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

Changes: None.

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

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

Changes: None.

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

Discussion: We do not agree that "and" should be used instead of "or" between §300.309(a)(2)(i) and (ii), because this would subject the child to two different identification models. We agree that failing a State assessment alone is not sufficient to determine whether a child has an SLD. However, failing a State assessment may be one factor in an evaluation considered by the eligibility group. As required in §300.304(b)(1), consistent with section 614(b)(2)(A) of the Act, the evaluation must use a variety of assessment tools and strategies to gather relevant information about the child. Further, §300.304(b)(2), consistent with section 614(b)(2)(B) of the Act, is clear that determining eligibility for special education and related services cannot be based on any single measure or assessment as the sole criterion for determining whether a child is a child with a disability.

We agree that §300.309(a)(2)(ii) could be stated more clearly and will rewrite it to state that the eligibility group can determine that a child has an SLD if the child meets the criteria in §300.309(a)(1) and exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age and State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of an SLD.

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

Comment: Several commenters requested a definition of "State-approved results." One commenter stated that the language was extremely confusing and that "State-approved results" could be

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<sup>8</sup> Burns, M., Appleton, J., Stehouwer, J. (2005). Meta-analytic review of responsiveness-to-intervention research: Examining field-based and research-implemented models. Journal of Psychoeducational Assessment, 23, 381-394.

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

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

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

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

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

Changes: None.

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

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

Changes: None.

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

the flexibility necessary to accommodate the array of RTI models already in use.

Several commenters requested that the Department define and set a standard for responsiveness that calls for demonstrated progress and improvement in the rate of learning, to indicate that a child can function in the classroom. Several commenters stated that there would be a dramatic increase in the number of children identified with an SLD without a clearly defined system in place. Discussion: There are many RTI models and the regulations are written to accommodate the many different models that are currently in use. The Department does not mandate or endorse any particular model. Rather, the regulations provide States with the flexibility to adopt criteria that best meet local needs. Language that is more specific or prescriptive would not be appropriate. For example, while we recognize that rate of learning is often a key variable in assessing a child's response to intervention, it would not be appropriate for the regulations to set a standard for responsiveness or improvement in the rate of learning. As we discussed earlier in this section, we do not believe these regulations will result in significant increases in the number of children identified with SLD.

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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

Discussion: It is not necessary for these regulations to require a transition period for implementing RTI models, particularly because there are many schools and districts currently implementing RTI models. Under the requirements in section 614(b)(6) of the Act, which took effect July 1, 2005, States should have developed mechanisms to permit LEAs to use RTI models. States may need to make adjustments based on these final

regulations. Nothing in these regulations requires an LEA to drop current practices in favor of a new model with no transition. Obviously, a plan would need to be developed when changing to an RTI model, including strategies for implementation and professional development.

Changes: None.

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

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

Changes: None.

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

Discussion: Patterns of strengths and weaknesses commonly refer to the examination of profiles across different tests used historically in the identification of children with SLD. We

believe that the meaning of "pattern of strengths and weaknesses" is clear and does not need to be clarified in these regulations.

Changes: None.

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

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

Changes: None.

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

Discussion: We believe the term "intellectual development" is the appropriate reference in this provision. Section

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

Changes: None.

Comment: One commenter reviewed the list of factors in §300.309(a)(3) that must be ruled out as primary reasons for a child's performance and asked whether children with other health impairments (OHI), traumatic brain injury (TBI), or speech impairments would overlap with the SLD definition. Several commenters noted that many children with hearing, visual, or motor disabilities; mental retardation; or emotional disturbances (ED) also have concomitant learning disabilities that go unidentified,

and that these children end up with lower academic and functional achievement levels than they should because an important contributing factor to their learning problems has not been addressed. Several commenters recommended adding language to the regulations stating that a child with a disability other than an SLD may also be identified with an SLD.

Discussion: Children with one of the disabilities in §300.8 should be identified as a child with a disability using the category that is most appropriate for the child. Some children may be identified under other disability categories, such as OHI, TBI, ED, or speech impairment, and may also have low achievement and even meet SLD criteria. Services must meet the child's needs and cannot be determined by the child's eligibility category. We believe it is unnecessary to add language regarding SLD as a concomitant disability.

Changes: None.

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

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

Changes: None.

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

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

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

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

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

Changes: None.

Comment: We received a number of comments concerning the requirement for high-quality, research-based instruction provided by qualified personnel. One commenter stated that it would be difficult for rural school districts to meet this requirement because of staffing requirements in the regular education setting. Several commenters stated that the requirement for high-quality, research-based instruction exceeds statutory authority and should be removed, because it provides a basis for challenging any determination under the category of SLD. One commenter asked for clarification regarding the legal basis for providing high-quality, research-based instruction if the child is not determined eligible for special education. Another commenter stated that attorneys will read §300.309(b) as providing a legal entitlement to ESEA, research-based instruction and data-based documentation

for every child considered for eligibility under the category of SLD, and that when this standard is not met, will bring the matter to a due process hearing and request compensatory education.

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

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

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

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

regulations to require that the eligibility group consider evidence that the child was provided appropriate instruction and clarify that this means evidence that lack of appropriate instruction was the source of underachievement.

The eligibility group should not identify a child as eligible for special education services if the child's low achievement is the result of lack of appropriate instruction in reading or math. Eligibility is contingent on the ability of the LEA to provide appropriate instruction. Determining the basis of low achievement when a child has been given appropriate instruction is the responsibility of the eligibility group.

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

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

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

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

Changes: None.

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

Discussion: As part of the evaluation, the eligibility group must consider whether the child received appropriate instruction from qualified personnel. For children who attend private schools or charter schools or who are home-schooled, it may be necessary to

obtain information from parents and teachers about the curricula used and the child's progress with various teaching strategies. The eligibility group also may need to use information from current classroom-based assessments or classroom observations. On the basis of the available information, the eligibility group may identify other information that is needed to determine whether the child's low achievement is due to a disability, and not primarily the result of lack of appropriate instruction. The requirements for special education eligibility or the expectations for the quality of teachers or instructional programs are not affected, and do not differ, by the location or venue of a child's instruction.

Changes: None.

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

Discussion: Section 300.156 and section 614(a)(14) of the Act are clear that each State is responsible for establishing and maintaining personnel qualifications to ensure that personnel are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. Consistent with §300.18 and section 602(10) of the Act, a public school teacher, including a special education teacher, who teaches core academic subjects must meet the highly qualified teacher standards under the Act. The term that is used in §300.309(b)(1), "qualified personnel," does not, and should not be interpreted to, require that private school teachers be "highly qualified" to deliver the instruction discussed in §300.309(b)(1).

Changes: None.

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

Discussion: What is important is that the group making the eligibility decision has the information that it needs to rule out that the child's underachievement is a result of a lack of appropriate instruction. That could include evidence that the child was provided appropriate instruction either before, or as a

part of, the referral process. Evidence of appropriate instruction, including instruction delivered in an RTI model, is not a substitute for a complete assessment of all of the areas of suspected need. As discussed earlier in this section, we have revised §300.309(b) to make this clear.

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

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

Comment: Numerous commenters asked how long an intervention should continue before determining a child has not made adequate

progress and a referral for an evaluation to determine eligibility for special education is made. Several commenters recommended that if a child is not making progress within 45 days, an evaluation should take place. Other commenters recommended a time limit of 90 days. One commenter recommended the regulations include a range of active intervention days, not just a waiting period, within which the IEP Team expects to notice a change, and recommended between 45-75 school days. One commenter suggested 6-10 weeks as an appropriate period of time.

A few commenters recommended requiring States to establish reasonable time limits for decision making. Several commenters recommended requiring the IEP Team and the parents to agree on an appropriate period of time.

Several commenters stated that unless a timeline is specified in the regulations, there would be different standards occurring throughout the country. A few commenters expressed concern that if time limits were not clarified, school districts and parents would interpret the timelines differently, which would result in contentious situations and litigation. One commenter stated that a parent could sue for compensatory services if, after requesting an evaluation, the LEA requires an assessment of how the child responds to high quality research-based instruction.

Several commenters stated that the lack of a specific timeline means that an evaluation could be indefinitely delayed and children denied services. Several commenters recommended adding language to the regulations to ensure that RTI models could not be used to delay an evaluation of a child suspected of having a disability, access to special education and related services, or protections under the Act.

In addition to requesting a definition of an "appropriate period of time," a few commenters requested a definition of "adequate progress" and recommended adding language to require States to define "adequate progress." One commenter stated that a child's rate of learning needs to be examined carefully. One commenter offered a definition of a "developmentally appropriate rate" as the time or the number of repetitions required to have at least 85 percent of children at the same age or grade level acquire and retain the particular skill or academic levels, as established by research or by experience with the delivery of that curriculum or program.

**Discussion:** Instructional models vary in terms of the length of time required for the intervention to have the intended effect on a child's progress. It would not be appropriate for the Department to establish timelines or the other requirements proposed by the commenters in Federal regulations, because doing so would make it difficult for LEAs to implement models specific to their local school districts. These decisions are best left to State and local professionals who have knowledge of the instructional methods used in their schools.

The Department believes that good instruction depends on repeated assessments of a child's progress. This allows teachers to make informed decisions about the need to change their instruction to meet the needs of the child, and also provides parents with information about their child's progress so that they can support instruction and learning at home. Parents should be informed if there are concerns about their child's progress and should be aware of the strategies being used to improve and monitor their child's progress.

We understand the commenters' requests for more specific details on timelines and measures of adequate progress. However, as noted above, these decisions are best left to professionals who have knowledge about the instructional models and strategies used in their States and districts.

We also understand the commenters' concerns that the requirements in §300.309(b) may result in untimely evaluations or services and that parents must be fully informed about the school's concerns about their child's progress and interventions provided by the school. Therefore, we will combine proposed §300.309(c) and (d), and revise the new §300.309(c) to ensure that the public agency promptly requests parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided with appropriate instruction, which could include instruction in an RTI model, and whenever a child is referred for an evaluation. We will also add a new §300.311(a)(7)(ii) to ensure that the parents of a child suspected of having an SLD who has participated in a process that evaluates the child's response to scientific, research-based intervention, are notified about the State's policies regarding collection of child performance data and the general education services that will be provided; strategies to increase their child's rate of learning; and their right to request an evaluation at any time. If parents request an evaluation and provide consent, the timeframe for evaluation begins and the information required in §300.309(b) must be collected (if it does not already exist) before the end of that period.

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

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

Several commenters recommended that the regulations address the need for an extension of the timeline and allow States to set an alternative timeline without a written agreement. Several commenters requested adding a provision for an extended timeline, with parental consent, in exceptional circumstances. Several commenters stated that the language regarding an extension of timelines is confusing.

Discussion: Section 300.309(c), as revised, clarifies that if a child has not made adequate progress after an appropriate period of time, a referral for an evaluation must be made. As required in §300.301(c), the initial evaluation must be conducted within 60 days of receiving consent for an evaluation (or if the State establishes a timeframe within which the evaluation must be completed, within that timeframe). Models based on RTI typically evaluate the child's response to instruction prior to the onset of the 60-day period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on the child's achievement, including observation data. RTI models provide the data the group must consider on the child's progress when provided with appropriate instruction by qualified professionals as part of the evaluation.

Section 300.309(b)(1) requires that the eligibility group consider data on the child's progress when provided with appropriate instruction by qualified professionals as part of this evaluation. These data, along with other relevant information, will assist the eligibility group in determining whether the child's low achievement is attributable to a lack of appropriate instruction. As required in §300.306(b)(1)(i) and (ii), consistent with section 614(b)(5)(A) and (B) of the Act, a child

cannot be identified as a child with a disability if the determinant factor for that determination is lack of appropriate instruction in reading or math.

Based on their review of the existing data, and input from the child's parents, the eligibility group must decide, on a case-by-case basis, depending on the needs of the child and the information available regarding the child, what additional data, if any, are needed to determine whether the child is a child with a disability, and the educational needs of the child. If the eligibility group determines that additional data are needed and that these data cannot be obtained within the 60-day timeframe (or the timeframe established by the State), new §300.309(c) (proposed §300.309(d)) allows the extension of the timeframe with mutual written agreement of the child's parent and the eligibility group.

Changes: None.

Comment: One commenter asked how the 60-day timeframe would be followed if the time extends over school breaks.

Discussion: The 60-day timeframe refers to 60 calendar days and would include school breaks.

Changes: None.

Comment: Several commenters stated that the regulations appear to set up a separate process and procedure for the evaluation and identification of children with SLD, and then impose the timeframe and procedures that apply to the evaluation of all other disability categories. One commenter stated that the timeframe for evaluating children with SLD is less stringent than for other disability categories and is, therefore, discriminatory.

Discussion: Although there are additional criteria and procedures for evaluating and identifying children suspected of having SLD, the group must also comply with the procedures and timelines that apply to all evaluations, including evaluations for SLD. Evaluation of children suspected of having SLD must follow the same procedures and timeframes required in §§300.301 through 300.306, in addition to those in §§300.307 through 300.311.

Changes: None.

Comment: One commenter stated that "appropriate period of time" should be replaced with "reasonable period of time" because courts are accustomed to deciding what constitutes a reasonable timeframe in various evaluation contexts.

Discussion: It is not necessary to change "appropriate period of time" to "reasonable period of time," because the terms here have similar meanings and are commonly understood to be synonymous.

Changes: None.

Comment: One commenter requested that the regulations clarify who should refer a child for an evaluation to determine eligibility for special education services.

Discussion: Under §300.301(b), and consistent with the requirements in §300.300 and section 614(a)(1)(D) of the Act, either a parent of a child or a public agency may initiate a

request for an evaluation at any time to determine if the child is a child with a disability. We do not believe that further clarification is necessary.

Changes: None.

Comment: One commenter stated that a school district should retain its discretion not to evaluate a child subject to the parent's right to contest the decision through due process procedures.

Discussion: The commenter's concern is already addressed in §300.111, which provides that an LEA must identify, locate, and evaluate children who are in need of special education and related services. If an LEA refuses to evaluate a child, the LEA must provide prior written notice, consistent with §300.503 and section 615(b)(3) of the Act. The parent can challenge this decision through a due process hearing.

Changes: None.

Observation (§300.310)

Comment: Many commenters recommended removing the observation requirements in §300.310, stating that they are costly and overly prescriptive and have no statutory basis. One commenter stated that the requirements for determining eligibility under the category of SLD are so specific that the observation requirements are unnecessary.

Discussion: The observation requirements for children suspected of having SLD have been in the regulations since before 1983. Important information can be obtained about a child through observation in the classroom, or for a child less than school age, in an environment appropriate for a child of that age. Objective observations are essential to assessing a child's performance and should be a part of routine classroom instruction and are not costly or overly prescriptive. We believe the observation requirements are an important matter to regulate clearly. We will, therefore, change §300.310(a) through §300.310(c) to clearly state that the public agency must ensure appropriate observation and documentation of the child's academic performance and behavior in the areas of difficulty to determine whether a child has an SLD.

Changes: We have changed §300.310(a) through §300.310(c) to clearly state the observation requirements in determining whether a child has an SLD.

Comment: Several commenters supported requiring a member of the group to be trained in observation. Many commenters requested clarification regarding what it means to be trained in observation. One commenter stated that there are no established training protocols or uniform professional standards for conducting an observation.

Discussion: We agree that the requirement for an individual to be trained in observation is unclear and should be removed. States are responsible for determining specific personnel qualification

requirements, and, for the reasons stated under §300.308, States and LEAs should determine appropriate group membership.

Changes: We have removed the phrase "trained in observation" from §300.310(a).

Comment: Several commenters stated that the public agency should determine the most appropriate individual to conduct the observation. One commenter recommended specifying a reading specialist to conduct the observation when the child's learning problems involve reading. Another commenter stated that the observer should not be limited to a member of the eligibility group. One commenter stated that it is not necessary to obtain parental consent for the observation.

Discussion: The person conducting the observation should be a member of the eligibility group because information from the observation will be used in making the eligibility determination. If information is available from an observation conducted as part of routine classroom instruction that is important for the eligibility group to consider, the eligibility group should include the person who conducted that routine classroom. This will eliminate redundant observations and save time and resources. Parental consent is not required for observations conducted as part of routine classroom instruction and monitoring of the child's performance before the child is referred for an evaluation.

If an observation has not been conducted, or additional observation data are needed, the decision as to which person should conduct the observation is best left to members of the eligibility group, based on the type of information that is needed to make the eligibility determination and identify the child's needs. Parental consent is required for observations conducted after the child is suspected of having a disability and is referred for an evaluation. We will revise §300.310 to clarify the different ways in which observation data may be obtained and to clarify that parental consent is required for observations conducted after the child is suspected of having a disability and is referred for an evaluation.

Changes: We have revised §300.310 to specify in paragraph (a) that the public agency must ensure that the child is observed in the child's learning environment. A new §300.310(b) has been added to require the eligibility group to use the information obtained from the routine classroom observation or conduct a new observation and to require parental consent for observations conducted after the child is suspected of having a disability and is referred for an evaluation. Proposed §300.310(b) has been redesignated as new §300.310(c).

Comment: One commenter requested clarification regarding the definition of an "appropriate" environment in which to conduct the observation of a child who is less than school age, as well as

guidance in determining what such an environment would be for children who are out of school.

Discussion: The eligibility group is in the best position to determine the environment appropriate for a child who is less than school age or out of school.

Changes: None.

Comment: One commenter requested clear guidance about the working relationship between the special education teacher and the general education teacher in conducting an observation.

Discussion: We decline to provide specific guidance on the working relationship between the special education teacher and the general education teacher in conducting an observation because this relationship will necessarily vary depending on how classrooms are structured and teacher responsibilities assigned. Such decisions are best made at the local level. Generally, we would expect that the child's general education teacher would have data from routine classroom instruction and would work with the other members of the eligibility group to determine what additional data, if any, are needed to determine whether a child has an SLD. A special education teacher who is experienced in working with children with SLD, for example, might have suggestions on ways to structure a particular observation session to obtain any additional information that is needed, and may be able to assist the general education teacher in gathering the data.

Changes: None.

Comment: One commenter recommended requiring an observation for any child suspected of having a disability, not just those suspected of having an SLD.

Discussion: Observation data will generally be a part of the existing data reviewed for any child suspected of having a disability. Section 300.305(a)(1) requires the eligibility group for any child suspected of having a disability to review existing evaluation data, including classroom-based observations and observations by teachers and related services providers. We do not believe that requiring an observation of children suspected of other disabilities is necessary, however, as identification of those other disabilities is not always as dependent on classroom performance and behavior as is identification of children with SLD.

Changes: None.

Specific documentation for the eligibility determination (proposed Written report) (§300.311)

Comment: Several commenters supported the requirements for the written report, stating that they provide a useful framework for practitioners. However, several commenters stated that the requirements for the written report should be removed because they go beyond the requirements of the Act and impose additional procedural and paperwork burdens for school personnel. Several

commenters stated that the report is much more detailed than the evaluation and eligibility report for children with other disabilities, and stated that this could discourage schools from evaluating children suspected of having SLD.

Discussion: Section 614(b)(4)(B) of the Act requires the public agency to provide a copy of the evaluation report and the documentation of determination of eligibility to the parents for all children evaluated under the Act. Section 300.311 specifies the content for the evaluation report for children suspected of having SLD. States and LEAs have more discretion over the specific content of an evaluation report for children suspected of having a disability under the other disability categories. Therefore, whether the SLD evaluation report is more detailed or burdensome than other evaluation reports would depend on State and local requirements. We believe that the elements of the report specified in §300.311 provide important checks to prevent misidentification and ensure that children who actually have SLD are identified.

Changes: None.

Comment: Several commenters recommended that the written report include statements regarding the existence of a psychological processing disorder and the basis for making the determination; whether the child achieved commensurate with the child's age and ability; whether the child achieved commensurate with the child's age and intellectual development; whether the child achieved commensurate with the child's peers; and whether there are strengths and weaknesses in performance or cognitive abilities in one or more of the areas in §300.309(a) that require special education and related services.

Discussion: We decline to change the content of the written report in the manner recommended by the commenters because the statements that commenters recommended be included in the written report are inconsistent with the eligibility requirements for children with SLD in §300.309.

Changes: None.

Comment: One commenter recommended including an assurance that the eligibility determination was made in accordance with §300.306(c)(1), regarding procedures for determining eligibility and placement, and §300.8(c)(10), regarding the definition of specific learning disability.

Discussion: Section 300.311(b) requires each member of the eligibility group to certify in writing whether the report reflects the particular member's conclusion about whether the child has an SLD, and if it does not reflect his or her conclusion, submit a separate statement presenting his or her conclusions. There is no need for any additional assurances.

Changes: None.

Comment: One commenter stated that including "evaluation report" in the description of the written report is confusing because it

is unclear whether the evaluation report is something additional to the written report.

Discussion: The information required in the written report in §300.311 is a part of the documentation of eligibility required in §300.306(a)(2). Section 300.306(b) and (c) lists the requirements for eligibility determinations for all children suspected of having a disability, including children suspected of having SLD. Section 300.311 provides specific elements that must be addressed in the report for children suspected of having SLD. Two separate reports are not necessary as long as the information in §300.311 is included in the documentation of the eligibility determination in §300.306(a)(2). We agree that this should be clarified. Therefore, we will change the heading for §300.311 from "Written report" to "Specific documentation for the eligibility determination" and will modify the language in §300.311(a) accordingly.

Changes: We have changed the heading for §300.311 and modified §300.311(a) to clarify that the requirements in §300.311 are in addition to the requirements for the documentation of the eligibility determination required in §300.306(a)(2).

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

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

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

Comment: Several commenters requested clarification of what happens if a group member disagrees with the report and agreement is never reached. Other commenters asked whether services are delayed pending a group consensus; whether the submission of a separate statement is synonymous with a veto for eligibility; whether it matters which group member submits a separate report; and whether each group member has equal standing.

Discussion: The eligibility group should work toward consensus, but under §300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability. Parents and school personnel are encouraged to work together in making the eligibility determination. If the parent disagrees with the public agency's determination, under §300.503, the public agency must provide the parent with prior written notice and the parent's right to seek resolution of any disagreement through an impartial due process hearing, consistent

with the requirements in §300.503 and section 615(b)(3) of the Act.

Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal dispute resolution process. However, as stated in §300.506(b)(1)(ii) and section 615(e)(2)(A)(ii) of the Act, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B of the Act.

Changes: None.