

# Chapter 7

## Summary of Public Comments on Proposed Rules

### January 20, 2007 - March 21, 2007

#### Wyoming Department of Education

##### Part 1 General Provisions

###### Section 1: Authority.

###### Subsection (c)

Comment: A number of comments were received relative to paragraph (c) with respect to the language, “for purposes of services to children with disabilities between the ages of (3) three through twenty-one (21).” The commenters proposed the language be amended to “three through the school year in which the child turns 21.”

Discussion: 1997 Chapter 7 language in Part 3, Section 2(a) used the phrase “aged 3 to 21,” (italics added.) State Statute 21-2- 502( b) states “Notwithstanding W.S. 21-2-501, 21-4-301, and subsection (a) of this Section, any child with a mental, physical or psychological disability receiving programs and services within district facilities who attains the age of twenty-one (21) during any school year shall be provided the opportunity to complete that school year.” The commenters suggested that the present language could be interpreted to end the child’s eligibility on the date the child turns 22. This was not the intent of the present language and the suggested change is consistent with Wyoming law.

Changes: Consistent with W.S. 21-2-502(b), the language in this paragraph and all subsequent references is changed to clarify that eligibility ends upon the close of the school year in which the child reaches age 21. Part 1, Section 1 subsection (b) is amended as follows:

(b) These rules govern the operation of all special education programs and services provided to children with disabilities ages three through the [completion of the school year in which the child turns](#) twenty-one, pursuant to State law, by any Local Education Agency (LEA), by State and local juvenile and adult correctional facilities, and by other public agencies within the State of Wyoming.

(c) All Provisions under the Individuals with Disabilities Education Act 2004 (IDEA 04) (20 U.S. C. 1400 *et seq.*) and all Federal regulations pertaining to this legislation apply to each political subdivision of the State, irrespective of whether the subdivision received any Federal Part B funds. For purposes of services to children with disabilities between the ages of three (3) through [completion of the school year in which the child turns](#) twenty-one (21), unless specifically addressed in these rules, Wyoming hereby adopts Federal legislation IDEA 04 and the supporting Federal regulations 34 CFR 300.1 through 300.818. The requirements of IDEA 04 are binding on each school district or

public agency that has direct or delegated authority to provide special education and related services to children with disabilities in Wyoming. This does not limit the responsibility of any public agency for providing or paying appropriate costs for a Free Appropriate Public Education (FAPE) for children with disabilities in Wyoming.

## Section 2: Definitions

### Subsection (a)

Comment: A commenter stated the correct citation is “the Individuals with Disabilities Education Improvement Act (IDEIA) versus Individuals with Disabilities Education Act (IDEA).

Discussion: While the Law uses the IDEIA in the title of the Act, 601(a) states the law “may be cited as the Individuals with Disabilities Education Act”(IDEA) The exact language also appears in § 300.4 as IDEA.

Changes: None

Comment: Age of Majority- One commenter proposed that the definitions include a statement which defines the age of majority.

Discussion: Age of majority is defined in State law as age 18. Defining age of majority in Chapter 7 rules by repeating State law does not clarify or explain this provision.

Change: None

### Subsection (d)

Comment: Child with a disability- A commenter suggested that language be amended to state that a child with a disability means a child evaluated in accordance with IDEA not Part 4, Sections 4 and 5 of State regulations.

Discussion: The intent of Chapter 7 rules is to create State rules that follow Federal requirements and to use references in the rules that relate to each other rather than causing the reader to go to other source material for reference or clarification of a requirement. The requirement of IDEA 04 that States limit rules that exceed Federal requirements is the standard that WDE followed in proposed rules. The requirements referenced in Part 3, Section 4 and 5 are the Federal requirements for evaluation and reevaluation. Using Federal law citations in State rules rather than causing the reader to reference the State rule requirement would needlessly require the reader to always reference other sources.

Changes: None

Comment: A comment was received that provisions of § 300.8(a)(2)(ii) were not included in Chapter 7 rules;

Discussion: § 300.8(2)(ii) defers to States the decision of whether to consider a child who only needs a related service that "...is considered special education rather than a related service under *State standards...*" (italics added), is a child with a disability. The language in Chapter 7 subsection (d)(i)(iii) is consistent with § 300.8(a)(2)(i) which states "if it is determined through appropriate evaluation under § 300.304 through § 300.311 that a child has one of the disabilities identified in paragraph (a)(1) of this Section but only needs a related service and not special education, the child is not a child with a disability." §300.8(2)(ii) provides if a State considers a particular service that could be encompassed by the definition of related services also to be special education, then the child would be determined to be a child with a disability. The law gives this determination to States and gives States the flexibility to make that choice. The State has made that choice and has followed the regulation in § 300.8(2)(i).

Change: None

#### Subsection (e) Subparagraph (i)

Comment: Autism- Subsection (e)(i)- The comment was received that the term "actions" appears rather than "activities."

Discussion: The commenter is correct and the definition will be changed to state as follows:

Change: (i) "Autism" means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three (3) that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive ~~actions~~ activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

#### Subsection (e) Subparagraph (ii)

Comment: Cognitive Disability- (e)(ii): A number of comments were received that were positive to the change used to describe the term "Mental retardation" as used in Federal regulation and law. 1997 Chapter 7 used the term "Mental disability" and proposed Chapter 7 uses the term "Cognitive disability." One comment was received that did not support this change. One comment was received that while they supported the change it may be confusing. Another commenter indicated that the term "developmental period" be defined as occurring before the age of 18 per the DSM-4. Another commenter suggested that including the term "significant sub-average intellectual functioning" in the definition was offensive and should be removed.

Discussion: The change to Cognitive disability (CD) is widely supported by school and developmental preschool center personnel and parents. In the rules revision process many comments were received by parents, school staff and developmental preschools to change the term “Mental disability” to some other term. Upon release of proposed Chapter 7 rules for public comment many commented favorably on the CD term. Only two comments were received that thought this term would be confusing and only one of those comments suggested retaining the previous term. Of the terms used by States that prefer not to use the term “Mental retardation,” Cognitive disability is the most commonly used term. Research conducted pertaining to whether there would be any impact relative to changing from one term to another indicated that there is no impact on cost, identification rates or other negative consequences as a result of making this change.

The language in the definition follows the definition exactly in § 300.8(c)(6), except for using the term Cognitive disability instead of Mental retardation. This definition remains unchanged since 1977. WDE declines to make any changes to the Cognitive disability term used to describe the condition of Mental retardation.

Changes: None

Subsection (e), Subparagraph (v)

Comment: Developmental delay- Age 3-9: Numerous comments were received on this definition. Because of the large number of comments and the need to provide a comprehensive review of these comments this discussion is addressed under Part 4, Disability Categories.

Subparagraph (vi)

Comment: Emotional disturbance- A number of comments were received to retain the 1997 Chapter 7 category, “Emotional disability” rather than the Federal term “Emotional disturbance.” Comments indicated that the use of the Federal term is offensive and prefer the continued use of “Emotional disability.”

Discussion: Testimony to WDE from most individuals and groups pertaining to recommendations for developing Chapter 7 rules was to adopt Federal language and definitions with the exception of the term used to define Mental retardation. A large number of States use the Federal term “Emotional disturbance.” Some States use the term “Emotional disability.” There is no evidence that determines one term results in more or less children being identified than through use of another term. Since Wyoming previously used the term “Emotional disability” in Chapter 7, any impact on eligibility resulting from use of that term verses the Federal term would already have been discounted.

Change: The term used to describe “Emotional disturbance” per Federal regulation § 300.8 (a) and § 300.8(b)(4)(i) is changed to “Emotional disability.”

Further comments were made other than the use of the term used in the definition for this category of disability. These comments are discussed in Part 4.

Other disability definitions: A few other comments were received pertaining to other disability areas in this Section. These comments were received with respect to eligibility determinations and these comments are addressed in Part 4.

#### Subsection (f)

Comment: Consent- One commenter indicated that the phrase, “by the LEA” be added to the statement that the parent has been fully informed. The commenter suggested that this statement would help clarify the, “on-going dispute between districts and other agencies concerning letters sent by parents requesting evaluations.”

Discussion: The definition of consent in the rules follows Federal regulation § 300.9 exactly as written. Adding the suggested phrase would not be consistent with Federal language nor would it be consistent with the discussion to follow in subsection (j) regarding the specific use of terms like LEA or public agency.

The requirements of consent fall within the responsibilities of procedural safeguards discussed in Part 2 of the rules. The requirements for addressing procedural safeguards fall with the school district or public agency responsible for the child. Part 2, Section 3 of the rules, consistent with Federal regulation 300.300 clearly defines the school district or public agency proposing to conduct or refusing to conduct an initial evaluation or reevaluation is the responsible agent for ensuring that consent and notice of procedural safeguards is carried out. There is no confusion in the rule, nor should there be any dispute or confusion as to which agency is responsible for providing procedural safeguards notice or requesting consent from the parent if the agency proposes to conduct an evaluation or refuses to do so. The WDE declines to further define this requirement for the language in the rule is clear.

Change: None

#### Subsection (j)

Comment: Educational Service Agency, Intermediate Educational Unit-Subsection (v), Local Education Agency-Subsection (w), Public Agency-Subsection (bb)- One commenter requested the words LEA, public agency and school district be consistent throughout the document. The comment was that the words are used interchangeably. In Sections that deal solely with the public agency the commenter requested the words school district be removed.

Discussion: Each of these words is defined separately in the rules for each has either a Wyoming statutory reference or Federal regulation reference and in some cases both. These rules govern the provision of services to children with disabilities provided by public agencies throughout the State. The definitions of each of these entities are specific

and the inclusion of these terms throughout the rules indicates that the specific rule applies to each entity identified in the language of the specific rule. The terms are not used interchangeably as suggested by the commenter but deliberately and consistently. In some cases only the term LEA is used meaning that the rule applies to just those entities that fit that definition. In other cases the term school district which is a subset of the term LEA is used which indicates that rule only applies to that entity. Often the phrase school district or public agency is used which means the rule applies to both entities. Public agency is a broader term including LEAs, ESAs, the WDE, IEUs and public charter schools. The term “public agency” includes the Developmental Preschool Centers under Wyoming Law. Intermediate Service Agencies are defined under Wyoming Law to indicate that the Division of Developmental Disabilities is considered an Intermediate Educational Unit for purposes of IDEA and there by is included under the definition of a public agency. The Division would not be an LEA (or school district). The WDE declines to make any changes with respect to use of these terms within the rules for they have specific definitions, specific references and each of these terms designate agency responsibility consistent with Wyoming law as well as IDEA.

Changes: None

Subsection (p)

Comment: Highly Qualified- A commenter indicated that this paragraph be excluded from Chapter 7 rules because it is governed by the Professional Teachers Standards Board.

Discussion: The addition of Highly Qualified provisions to IDEA 04 is a significant new requirement for public agencies responsible for the provision of FAPE to children with disabilities. Comments received, by almost every constituent, relative to the revision of Chapter 7 rules was to Federalize Chapter 7 as much as possible. The term of “qualified” and “highly qualified” is referred to in a number of Sections and Parts of the Chapter 7 rules. The inclusion of this definition in Chapter 7 is to ensure that appropriate reference is provided when this term is used in the rules in order to be consistent with Federal regulations.

Change: None.

Subsection (gg)

Comment: Services Plan- A commenter suggested the rules add a clarifying statement that the plan is to be provided to parentally placed private school children “within the school district.”

Discussion: The language in paragraph (gg) closely follows Federal regulation § 300.37. In addition Part 7, Section 3, subsection (b) indicates the responsibility of the school district or public agency is to locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private schools “*located in the school district served*”

*by the school district or public agency*” (Italics added). In addition, Part 7, Section 4, subsection (b) of Chapter 7 rules states that a Service plan for parentally placed private school children with a disability “must be developed and implemented for each private school child with a disability who has been designated by the school district or public agency *in which the private school is located* to receive special education and related services...” (italics added.) The present language clearly defines the requirement. The WDE declines to add the proposed language.

Change: None

Subsection (hh)

Comment: Special education- One comment indicated that the term “physical education” is inconsistent with 20 U.S.C. § 1401(29) and § 300.39 in that the phrase is “instruction in physical education” rather than “physical education.”

Discussion: The commenter is correct and the language will be changed to be consistent with Federal language in § 300.39.

Change: (hh) "Special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. and instruction in ~~The term includes~~ physical education. Special education includes each of the following: speech language pathology, if the service is considered special education rather than a related service; travel training; and vocational education. Individual special education terms are defined as follows:

Comment: A commenter indicated that while the second sentence in subsection (hh) paralleled § 300.39(a)(2)(i) it was not consistent with 20U.S.C. § 1401(29) because §300.39(a)(2)(i) is the OSEP interpretation of the law. The line of reasoning was that the OSEP rule potentially violates the law and since the State rule follows Federal regulation the State rule violates the law also.

Discussion: The WDE does not believe the Federal regulation violates the Federal law. The Language in IDEA 04 is identical to the language of IDEA 97. The language in § 300.39 of IDEA 04 is virtually identical to the language in § 300.26 of IDEA 97. The suggestion that rules promulgated by statutorily empowered Federal regulatory agencies do not have the force of law in the country contradicts decades of court rulings that indicate the contrary. Further, regulatory agencies like the FDA, OSHA, EPA and OSEP and at least 50 others are called regulatory agencies because they are empowered to create and enforce rules-regulations that carry the full force of law.

Changes: None

Comment: At no Cost: Subsection (hh)(i)- A commenter recommended that quoting the Federal regulation § 300.39(b)(1) was inadequate because it did not include reference to the binding interpretation of Section 504 dated December 1980.

Discussion: The Rule stated in Subsection (hh) mirrors § 300.39 and no further reference is necessary.

Changes: None

## **Part 2 Procedural Safeguards**

### Section 1: Prior Written Notice.

Comments: No comments were received relative to this Section.

Discussion: Language in this Section follows Federal regulations.

Changes: None

### Section 2: Notice of Procedural Safeguards.

Comments: No comments were received relative to this Section.

Discussion: Language in this Section follows Federal regulations.

Changes: None

### Section 3: Parent Consent.

Comments: No comments were received relative to this Section. Discussion pertaining to the definition has been reviewed in Part 1 of this document.

Discussion: Language in this Section follows Federal regulations.

Changes: None

### Section 4: Independent Educational Evaluation.

Comments: No comments were received relative to this Section.

Discussion: Language in this Section follows Federal regulations.

Changes: None

### Section 5: Confidentiality of Student Records and Parent Access to Educational Records.

#### Subsection (a)

Comments: A commenter indicated that references to HIPAA be removed from Chapter 7 rules. In addition the commenter indicated that the proposed Chapter 7 rules limited parent access to “education records” verses “all records relating to the student”

Reference to HIPAA was included in proposed rules to remind school districts and public agencies of HIPAA regulations. However, the commenter is correct in that provisions of HIPAA exclude education records covered under FERPA. Comments provided by the Federal Department of Health and Human Services in final regulations for HIPAA reinforces the Congressional intent to provide this exemption. The rule will be changed to exclude reference to HIPAA.

Changes: Section 5, Subsection (a) is amended as follows:

#### Section 5: Confidentiality of Student Records and Parent Access to Educational Records.

(a) Each school district and public agency must take steps to ensure that information and educational records for children with disabilities remain confidential and in compliance with the Family Educational Rights and Privacy Act (FERPA) of 1974 and implementing regulations 34 CFR part 99 ~~and the Health Insurance Portability and Accountability Act (HIPAA) of 1996 and implementing regulations 45 CFR parts 160 and 164.~~

(i) Each school district or public agency shall give notice that is adequate to fully inform parents about the requirement of the Family Education Rights and Privacy Act of 1974 (FERPA) ~~and where applicable the Health Insurance Portability and Accountability Act (HIPAA) of 1996.~~

#### Subsection (b)

Comment: A commenter objected to the term “any” in reference to access to any education record. The commenter suggested that access be to all education records.

Discussion: Language in this Section follows Federal regulations § 300.613. § 300.613(a) and Chapter 7 proposed rules uses the term “inspect and review any education records” verses the language suggested by the commenter.

Changes: None

#### Section 6: Mediation Procedures.

Comments: No comments were received relative to this Section.

Discussion: Language in this Section follows Federal regulations.

Changes: None

### Section 7: State Compliant Procedures.

Comments: Comments suggested that an appeal process by a separate non partial panel be added to the proposed language of this Section for public agencies that were determined to be in noncompliance by WDE with a particular rule or law as a result of a WDE investigation of a compliant filed per this Section. The comment received is quoted as follows: “Adding to the State Compliant Procedures an opportunity for a party to appeal a WDE decision within 10 days and require the WDE to appoint an independent panel to complete a review of the compliant will provide further options for all parties and mirror IDEA 04.” Related to this comment, an additional comment was received that requested the word “final” be removed from the sentence in paragraph (v) which states “Issue a written decision to the complainant that addresses each allegation in the compliant and contains findings of fact and conclusions and the reasons for WDE’s final decision.”

Discussion: Language in this Section follows Federal regulations § 300.151 through §300.153. There is no provision in Federal law or regulation for a State Education Agency (SEA) to delegate the SEA responsibility for general supervision to another entity. Federal regulation 300.149 and § 300.150 requires each SEA to undertake the responsibility to ensure the requirements of IDEA are implemented and to ensure the implementation of procedural safeguards are carried out by all public agencies responsible for the education of children with disabilities age three through the school year the child turns age 21 in the State. These regulations require an SEA to have in effect policies and procedures to ensure enforcement of the law including the specific procedures called for in § 300.600 through § 300.602 and § 300.606 through § 300.608. These regulations are codified in State rules in Part 8 of Chapter 7. The WDE is the agency responsible for enforcement of these rules in the State of Wyoming and is prohibited by Federal as well as State law from delegating this responsibility to any other entity.

The comment requesting the word “final” be removed from paragraph (v) was received from the same source that requested the establishment of a separate appeal system of a WDE compliant decision. Removing the word “final” would allow for the separate appeal panel process requested by the commenter. The decision of the WDE on a compliant is final as per Federal regulation § 300.152(a)(5)(ii).

The WDE declines to add the proposed language to eliminate the word “final” from paragraph (v) and declines to establish a separate review panel to the complaint process.

Changes: None

### Section 8: Impartial Due Process Hearing Procedures.

Subsection (a)

Comment- A commenter suggested the provision to allow an adult student who reached the age of majority and not declared incompetent under Wyoming law to request a due process hearing be expanded to allow students with guardianships established in other states or a conservatorship to be able to bring an action. The suggestion was to allow hearing officers to decide such determinations.

Discussion: The phrase “(a child who has reached the age of majority and has not been declared incompetent by a Wyoming court)” appeared in Chapter 7 rules of 1997. This phrase is not in IDEA 615, or § 300.507(a). Federal law and regulation limits the language to “parent or a public agency”. The phrase in Wyoming Chapter 7 rule expands the provision to specify a child who has reached the age of majority and has not been declared incompetent by a Wyoming court. The language in proposed rule will be amended to reflect Federal regulation and law.

Change: The parenthetical phrase “(or a child who has reached the age of majority and has not been declared incompetent by a Wyoming court)” is removed from subsection (a) of this Section.

(a) A parent ~~(or a child who has reached the age of majority and has not been declared incompetent by a Wyoming court)~~ or a school district or a public agency may request a due process hearing relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child. The parent of a child with a disability may request a due process hearing when the school district or public agency proposes or refuses to initiate or change the identification, evaluation or educational placement of a child with a disability or the provision of FAPE to the child.

#### Subsection (b)

Comment- A commenter indicated that proposed rules requires the appealing party to file the request for a due process hearing with the other party rather that with the WDE. The suggestion was to file the original request with the WDE and the copy of the request to the other party.

Discussion: The language in proposed rule Part 2, Section 8(b) closely follows § 300.508(a). In addition the requirement of § 300.508(a)(2) states “The party filing a due process compliant must forward a copy of the due process compliant to the SEA.” This language is what appears in proposed rule and is consistent with the revisions of IDEA 04 with respect to causing procedures to be in place to enable the parties involved to resolve the dispute directly if possible. The request for a due process hearing is with the other party for their decision relative to the identification, evaluation, or educational placement of the child not with the WDE decision relative to the identification, evaluation or educational placement of the child.

Changes: None

#### Subsection (j)

Comments: One comment was received that requested subsection (j)(ii) be changed to include the statement that the hearing must be convenient to the parent and child “and all parties” involved.

Discussion: Language in this Section follows Federal regulations § 300.515(d). Since the LEA or public agency schedules the hearing it would be logical to assume that the proposed schedule for the hearing is convenient to the public agency that is proposing the date for the hearing. In addition, adding the “all parties” phrase may be difficult to interpret for there may be a number of parties who may wish to be involved. The proposed language relative to adding the phrase “all parties” was addressed in the Federal comment section of the Federal Register on page 46707 of August 14, 2006. Quoting from the Federal comment, “The Department believes that every effort should be made to schedule hearings at times and locations that are convenient to the parties involved. However, given the multiple individuals that may be involved in a hearing, it is likely that hearings would be delayed for long periods of time if times and locations must be mutually convenient for all parties involved. Therefore, we decline to change this regulation.” The WDE concurs with the opinion of the Office of Special Education Programs (OSEP).

Changes: None

#### Section 9: Impartial Due Process Hearing-Agency Responsibility and Hearing Officer Determination, Discloser and Parent Rights at Hearing.

##### Subsection (a)

Comments: A commenter suggested that language in this subsection be changed so as to state that hearing officers conduct the hearing in accordance with IDEA verses State rules.

Discussion: Language in this Section follows Federal regulations § 300.511(b) which states “The hearing described in paragraph (a) of this section must be conducted by the SEA or public agency directly responsible for the education of the child, as determined under State statute, State rule, or a written policy of the SEA.” The language in the Federal regulation is clear that the State conducts the hearing consistent with the rules established by the State in compliance with the requirements of IDEA 04.

Changes: None

##### Subsection (d)

Comment: A commenter suggested that language that requires hearings be conducted in accordance with the Wyoming Administrative Procedure Act be removed and instead state that hearings be conducted in accordance with IDEA 04.

Discussion: The statement is consistent with § 300.511(b) discussed above governing how the hearing officer is to conduct the hearing. Chapter 7 rules relative to this Part, closely follows IDEA 04 Subpart E regulations § 300.500 through § 300.518.

Changes: None

Subsection (e)

Comment: A commenter suggested the ninety-day statute of limitation for bringing a civil action may be in violation of Wyoming constitution Article 2 § 1.

Discussion: The language in this rule follows Federal regulation § 300.516(b) and IDEA 04 20 U.S.C. § 1415 (i)(2)(B) which sets a 90 day time line for bringing a civil action unless a State sets another timeline. The rule in proposed Chapter 7 rules in Part 2, Section 9 subsection (e) indicates that the 90 day timeline is the timeline the State chooses to attempt to resolve the matter.

Changes: None

Section 10: Attorney's Fees.

Comments: No comments were received relative to this Section.

Discussion: Language in this Section follows Federal regulations.

Changes: None.

### **Part 3 Special Education Process**

Section 1: Free Appropriate Education.

Subsection (a)

Comments: A comment was received to change paragraph (a) to state “age three through the school year in which the student turns 21” rather than “age 3 through age 21”

Discussion: This item was discussed in Part 1, Section 1. While language in this Section follows Federal regulations 300.101, the language will follow guidance in W.S. 21-2-502(b) which sets the end date of eligibility to be the end of the school year in which the child turns 21.

Changes: The rule is amended to include the clarification “though the completion of the school year in which the child turns 21.” Part 3, Section 1, subsection (a) is amended as follows:

(a) School districts and public agencies shall ensure that Free Appropriate Public Education (FAPE) is available to all children with disabilities, aged three (3) through [the completion of the school year the child turns](#) twenty-one (21), residing in Wyoming, including those who have been suspended or expelled from school as provided for in Part 6 of these rules.

#### Subsection (d)

Comments: A commenter indicated that the language stating that eligibility determinations be made by “the group responsible within the child’s school district or public agency for making eligibility determinations” violates IDEA 04 because the language does not include the required participation of the parent.

Discussion: The rule closely follows Federal regulation § 300.101(c)(2) which states “The determination that a child described in paragraph (a) of this Section is eligible under this part, must be made on an individual basis by the group responsible within the child’s LEA for making eligibility determinations.” Proposed Chapter 7, Part 3, Section 6 (a) is titled “Determination of Eligibility” and states “...a group of qualified professionals and the parent of the child determines whether the child is a child with a disability.” This language is consistent with Federal regulation § 300.306(a)(1).

Changes: None

#### Section 2: Educational Surrogate Parents.

Comments: No comments were received relative to this Section.

Discussion: Language in this Section follows Federal regulations.

Changes: None.

#### Section 3: Transfer of Rights at Age of Majority.

Comments: No comments were received relative to this Section.

Discussion: Language in this Section follows Federal regulations.

Changes: None.

#### Section 4: General Evaluation Procedures.

##### Subsection (c)

Comments: A commenter requested the time frame for conducting the initial evaluation to determine if a child is a child with a disability detailed in subsection (c) of this Section be amended from the 60 days to 45 “school days.” The 45 school day time line was

proposed to start the day the school district or public agency received parent consent for the evaluation.

Discussion: Language in this Section follows Federal regulations § 300.301(c)(1)(i). Regulation § 300.301(c)(1)(ii) allows States to establish a different time frame at the State's discretion. OSEP comments relative to this issue appears on page 46635 through 46639 of Federal Register of August 14, 2006. Review of practices in other States indicates that many States are retaining the 60 calendar day time frame. Some are defining the time frame a public agency has to process a referral and request parent consent. Others are setting time limits for completing the process from receipt of referral to offer of placement.

The proposed 45 school day proposal would cause a disruption of the evaluation process for days in which the LEA or public agency is not in session. While school districts often have extended periods of school closure, that is not always the case for the Developmental Preschool Centers, or the Wyoming Boys School or Wyoming Girls School. As a result time frames for completing evaluations could vary widely across the State.

Subparagraph (i) of subsection (c) of this Section provides guidance for completing the evaluation within the 60 day time frame when children transfer from one agency to another. Consistent with the flexibility provided to States in § 300.301(c)(1)(ii) relative to determining the time frame limits, subparagraph (ii) offers the parent and public agency the option to extend the 60 day time frame by mutual consent. This enables the LEA or public agency and the parent to complete the initial evaluation in a timely manner yet provides the option to modify the time frame if mutually agreed by the parent and public agency to address unforeseen circumstances that might justify an extension of the 60 day time limit.

Changes: None

Comments: A commenter suggested that extension of the 60 day time frame for an initial evaluation must be in writing signed by the parent and representative of the public agency.

Discussion: The WDE agrees with the commenter and will clarify that written consent be required to extend the 60 day timeline.

Changes: The rule in Part 3, Section 4 Subsection (c) (ii) is amended as follows:

(ii)The sixty (60) day time frame specified in (c) may be extended by mutual written consent of the child's parent and the group of qualified professionals as specified in Section 6 of this Part.

Subsection (d)

Comments: A commenter objected to including prior written notice for initial evaluations. Because prior written notice language directives are for an IEP team and because an IEP team can only be for a child with a disability, the commenter advised that prior written notice does not apply for an initial evaluation since the child has not been determined to be a child with a disability.

Discussion: The rule closely follows Federal regulation § 300.304(a) which states, “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.” Federal regulation § 300.503 is the prior written notice requirement which states that prior written notice must be given before an agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE or *refuses* (italics added) to initiate or change identification, evaluation, or educational placement of the child or the provision of FAPE.

The suggestion that prior written notice be excluded for initial evaluations is inconsistent with IDEA 04 and decades of Congressional reauthorizations of this Act as well as the corresponding federal regulations. To quote from the OSEP comments printed in the Federal Register of August 14, 2006, page 46636, “...a parent may initiate a request for an initial evaluation to determine if the child is a child with a disability. If the public agency agrees to conduct the evaluation § 300.304(a) requires the public agency to provide notice to the parents, in accordance with § 300.503 that describes any evaluation procedures that the agency proposes to conduct. If however the public agency does not suspect that the child is a child with a disability and denies the request for an initial evaluation, the public agency must provide written notice to the parent, consistent with § 300.503(b) and Section 615(c)(1) of the Act, which explains, among other things, why the public agency refuses to conduct an initial evaluation and the information that was used as the basis to make that decision.” A parent can challenge the refusal and request a due process hearing if they wish. However, the public agency must provide notice consistent with § 300.503, if they provide an initial evaluation or refuse to provide an initial evaluation.

Changes: None

Subsection (e)

Comments: A commenter suggested the that the word ‘shall’ be substituted for the word ‘must’ because § 1414(b)(2)(A) uses the word ‘shall’. The commenter suggests this word “converts a mandate of IDEA 2004 into a wish.”

Discussion: The rule exactly follows the language of § 300.304 (b) which states, “In conducting the evaluation the public agency *must...*” (italics added).

Changes: None

Section 5: Additional Requirements for Evaluation and Reevaluations.

#### Subsection (a)

Comments: A commenter suggested that the language in subsection (a) violated IDEA 04 because the subsection did not include the language of IDEA 04 in 20 U.S.C. § 1414(b)(4)(A) which states that a team of qualified professionals and the parent determine whether the child is a child with a disability and the educational needs of the child.

Discussion: Language in this Section follows Federal regulations § 300.305. In addition consistent with § 300.306 Section 6 of this Part titled “Determination of Eligibility” provides the following language. “Upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals *and the parent of the child* (italics added), determines whether the child is a child with a disability....”

Changes: None in this subsection refer to Section 6.

#### Section 6: Determination of Eligibility

Comments: No comments were received relative to this Section.

Discussion: Language in this Section needs to add the phrase “and the educational needs of the child” to be exactly as stated in § 300.306.

Changes: Subsection ( a) is amended to state as follows: (a) Upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the parent of the child determines whether the child is a child with a disability as defined in Part 1, Section 2(d), and the educational needs of the child. The school district or public agency must provide a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

#### **Part 4 Disability Categories**

General Comment: A commenter suggested that children eligible for services under the Children’s Home and Community Based Waiver, administered by the Developmental Disabilities Division of the Wyoming Department of Health be automatically eligible as a child with a disability as long as such children actively receive services under the children’s waiver.

Discussion: The WDE declines to create an automatic eligibility structure that is outside of the requirements of IDEA 04 and Federal regulations. The protections of IDEA apply equally to all children including children who receive services under the Children’s Home and Community Based Waiver.

Changes: None

## Section 1: Autism.

### Subsection (a)

Comments: A few comments were received that requested the term be “Autism spectrum disorders” rather than Autism. One commenter suggested that without broadening the label children with Aspergers syndrome would be excluded as a child with a disability. Another comment was received that suggested the Aspergers term be clearly excluded from consideration as a condition for Autism. Another comment indicated that the definition follow the DSM-IV. A comment was received that suggested Wyoming follow the Colorado model that uses the term “Pervasive developmental disability (PDD).

Discussion: The definition exactly follows federal definition § 300.8(c)(1)(i). The same term and language was used in 1997 Chapter 7 rules. The term has been part of IDEA since 1994 and the definition and the term used to describe the disability area has not changed.

Fifty-one States (D.C. included) use the exact Federal term autism or autistic. Three of those States use the comparable term “Autism spectrum disorder.” Forty-five States use the exact Federal definition for Autism. Four States use other definitions that use language with slight differences such as “a pervasive impairment of cognitive and perceptual functioning, the consequences of which are manifested by limited ability to understand, communicate, learn and participate in social relationships.” Of the 49 States providing a definition, 14 States specify that one or more of the following conditions also fall under the category of autism: Asperger disorder, Childhood degenerative disorder, Rett’s disorder and/or Pervasive developmental disorder-not otherwise specified (PDD-NOS). However no State excludes Aspergers disorder as a condition that by rule is not a child with a disability. The same can be said of PDD-NOS or Rett’s disorder for that matter.

In the Diagnostic and Statistical Manual of Mental Disorders fourth edition, revised, (DSM-IV) Autism disorder, Rett’s disorder, Childhood disintegrative disorder, Aspergers disorder, and PDD-NOS (including atypical Autism) are found in the Pervasive Developmental Disorders section. The global heading for all of these conditions is Pervasive Developmental Disorders, not Autism.

Children throughout the country who have a medical diagnosis of Aspergers disorder have been identified as a child with a disability under the disability area of Autism. Autism rather than “Autism spectrum disorder” is the term used in most States and is consistent with Federal law and rule. The DSM-IV is one of many sources of definition. This manual changes from one printing to the next and is not the primary source referenced in Federal definitions, regulation or law. Consistent with the intent to federalize Chapter 7 as much as possible the WDE declines to substitute another definition from what appears in Federal IDEA regulation. While 14 states choose to include Rett’s, Aspergers, PDD-NOS, and Childhood disintegrative disorder by reference in either definition or a subset of the definition the WDE believes the current language in

the rule is broad enough to allow evaluation teams to include children diagnosed with Rett's disorder, Aspergers disorder or Childhood disintegrative disorder as children with a disability under the disability area of Autism. Specifically, the term Autism, as defined in IDEA since 1994 is broad enough to enable eligibility teams to include children diagnosed as Aspergers to be considered as a child with a disability, consistent with the evaluation requirements in Part 4 of the rules with respect to the requirement that the evaluation be comprehensive and no single measure be used as the sole determiner of eligibility. That is the practice found in other States using the same definition as is used in Wyoming rules and is the practice enabled in Chapter 7 rules.

Changes: None

#### Subparagraph (i)

Comment: One commenter indicated that the rules did not expressly mention that an educational diagnostician could be one of the individuals who could serve as part of the evaluation.

Discussion: The requirements of the school district or public agency with respect to determining which individuals will serve on the evaluation team, is left to the school district or public agency. The requirements are that all evaluations be conducted by qualified staff. Qualified staff are those meeting the license standards of the State consistent with the requirements of highly qualified as discussed in Part 1 of the rules. Educational diagnosticians are one of the staff that are included as a highly qualified staff that a school district or public agency could use as one of the evaluators.

Changes: None

#### Subparagraph (i)

Comment: A number of comments were received relative to requiring specific individuals to be specified in rule as part of the team such as requiring a psychologist to be appointed to the team. This comment was referenced to Autism, Emotional disability, Other health impaired and Cognitive disability. A related comment referenced the term- "qualified professionals as determined appropriate by the school district or public agency" as not being specific enough. The suggestion was made that substitute language state "the initial evaluation shall be conducted by a qualified diagnostician such as a licensed psychologist, school psychologist, psychiatrist or other qualified professional."

Discussion: The following discussion serves as the response to the comments related to this disability area as well as the others listed above with respect to adding particular staff to the evaluation team, or modifying the phrase "as determined appropriate by the school district or public agency" for all disability areas.

The sentence in the second paragraph of all the disability areas after the definition paragraph includes the following: "The initial evaluation shall be conducted by qualified

professionals as determined appropriate by the school district or public agency.” The following sentence for all disability conditions discusses areas of observation and/or instructional components that need to be addressed by the evaluation team for a particular disability area and provides guidance to the school district or public agency relative to the individual who could address those matters particular to the disability area discussed. In the disability areas of Deaf-blindness, Hearing impairment including deafness, Speech and language impairment and Visual impairment including blindness an additional clarifier is added that is unique to the specific disability area, for example requiring a speech therapist to be part of the evaluation team for that disability area.

Appointment of staff that meet the requirements of highly qualified teachers and related service providers as described in Part 1 of the rules and Federal regulation § 300.18 and the related requirements for these staff to have appropriate licensure in order to conduct the evaluation by a public agency to determine a child’s eligibility as a child with a disability would enable the agency to demonstrate compliance with that standard. These requirements provide clarity to the qualifications and licensure of the evaluator as an individual appointed by the school district or public agency to conduct the evaluation. The standard is that staff be highly qualified and licensed to perform the task for which they are responsible. The responsibility and the compliance standard is for the school district or public agency to appoint licensed staff to perform their assigned task.

All categories of disability criteria reference the requirements of Part 3, Section 4(f)(i) through (ix) which define that assessments for all disability areas are administered by trained and knowledgeable personnel. Consistent with Federal regulation § 300.304, the team must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, may not use any single measure or assessment, as the sole criteria for determining eligibility, use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors as well as physical or developmental factors. Assessments and other evaluation materials used to assess the child must be selected and administered so as not to be discriminatory and are used for the purposes for which the assessments are valid and reliable. The child is assessed in all areas of suspected disability, including if appropriate health, vision, hearing, social emotional status, general intelligence, academic performance, communicative status and motor abilities. The evaluation must be sufficiently comprehensive to identify all of the child’s needs whether or not commonly linked to the disability category in which the child has been classified or considered for initial identification.

This is the standard in § 300.301 through § 300.305 and detailed in Part 3, Section 4 and 5 of Chapter 7. The WDE believes this is a high standard. Schools and public agencies will be required to demonstrate they have met this standard as they proceed through the evaluation process. The school district or public agency is responsible for determining who is to be appointed to the evaluation team. That team will be responsible for documenting compliance with these requirements. The appointment of staff that meets the highly qualified standards ensures appropriately trained and licensed staff addresses the requirements for providing a comprehensive evaluation. Appointment of

inappropriately trained or non licensed staff to conduct the evaluation or address elements of an evaluation for which they are not trained or licensed (for example, determining cognitive ability through assessment by a teacher or some other staff member rather than through an assessment by a licensed psychologist or psychiatrist, or assessing Braille needs without a teacher of the visually impaired) will put the school or public agency in a position of non compliance and the denial of FAPE to the child. The requirement is that the evaluation be comprehensive and conducted by qualified staff. Appointing staff to conduct assessments for which they are not licensed or trained violates the license standards of the State and violates Federal regulations § 300.301 through § 300.305 and as a result is a denial of FAPE.

While the WDE believes the standard in Part 4 of Chapter 7 relative to requirements for the evaluation is a high standard the WDE also recognizes that not all children have the same needs and not all evaluations require the same approach and that there is the need for flexibility for schools or public agencies in meeting this standard. Consistent with Federal regulations in specific disability areas and with the exception of children with sensory impairments, medically related disability conditions or children with speech and language impairments, the WDE declines to establish a requirement that mandates specific individuals be appointed to all evaluation teams for all referred children there by limiting individual determinations by school districts or public agencies with respect to determining what the evaluation will consist of or who will perform particular components of that evaluation.

The standard established in the rule is that individuals appointed to conduct the evaluation are qualified and as a result are licensed and trained to perform the task assigned. The standard is that the evaluation be comprehensive. School districts and public agencies have the responsibility to meet that standard, provide a comprehensive evaluation with staff licensed and trained to perform the assessments for which they are assigned.

Changes: None

Comment: A commenter requested the term “professional” be added to the term “qualified diagnostician” so the term reads “qualified professional diagnostician.”

Discussion: Requiring the addition of the word “professional” to further define a qualified diagnostician implies the public agency conducting the evaluation would need to ensure or otherwise determine that the diagnostician was a “professional” diagnostician, relative to some other standard or criteria describing the term “professional.” Diagnosticians who are already licensed and meet the highly qualified criteria are professional. The WDE believes this is redundant and declines to add the word “professional” as further clarifying the qualifications of the diagnostician. They are licensed staff by State standards and that is the criteria.

Changes: None

Comment: Comment was received that recommended the term “clinical” be stricken as a descriptor of “psychologist,” indicating that there are only school psychologists or psychologists in Wyoming per the “Wyoming Board of Psychology.”

Discussion: The term clinical refers to a widely recognized and commonly understood group of licensed psychologists who are licensed, in private practice or practice in a clinical setting or non school setting. The WDE does not believe this term is inconsistent with commonly recognized practice and declines to make this revision.

Changes: None

Comment: A comment was received that the last sentence of this subparagraph (a)(i) reference Part 3, Section 6 (a) verses all of Section 6. The commenter requested this change in reference for the other disability conditions of Deaf-blindness, Multiple disabilities, Orthopedic impairment, Other health impaired, Specific learning disability, Traumatic brain injury, and Visual impairment including blindness, as well.

Discussion: This statement, referencing Section 6 appears in the close of the second paragraph for all disability criteria. The requirement is for each team to address all the requirements of the determination of eligibility not just the requirements of paragraph 6(a) as suggested by the commenter.

Change: None

#### Section 2: Cognitive disability.

Comments: Comments were received supporting the change in the classification of this category from “Mental disability” to “Cognitive disability. This issue was discussed in Part 1 of this document.

#### Section 3: Deaf-blindness.

Comment: There were no comments received with respect to this disability area. There were a number of comments that were received relative to the requirement to have a teacher of the visually impaired in the initial evaluation for determining a child to be eligible under the vision area. The concern was that this put an undue burden on schools because teachers of the visually impaired are few in number.

Discussion: This comment is discussed in Section 13 of this Part.

Changes: None

#### Section 4: Developmental delay.

Many comments from a variety of different sources including school teachers, parents, psychologists, some directors of special education, a few legislators and many staff from the developmental preschool centers supported the change in Chapter 7 that enables this category to be used from age 3 through 9. A number of comments were received that did not support this change. Comments in support generally indicated this would facilitate a smooth transfer for children with disabilities from preschools to school districts, would prevent what was referred to in some of the commentary as a wait to fail practice found in the previous rule and generally was regarded as a positive development. Others commented that this would cause an increase in numbers of children served in special education programs in the school districts. Comments were received that some preschool centers over identified children in this category and that the preschool centers should use the identification of Cognitive disability for a number of these children. Others commented that this label is not over used, that there is no evidence that this category of identification is misused or used inappropriately. A few comments recommended that School districts not be allowed to choose to use the label as specified in § 300.11(b) and be required to use the label to age nine. Other comments were received that the schools should not be permitted to use the label at all.

Discussion: The rule in the 1997 Chapter 7 limited this category for use in preschool centers. Prior to the child's entry into public school the child had to be reevaluated and qualify in one of the other areas of disability to maintain eligibility for services. As WDE undertook the task to revise Chapter 7 rules the issue of changing the age range for the category of Developmental delay was a topic which received extensive comment with many views and opinions expressed. Prior to the WDE determination that this category should be changed in any way the WDE requested a study of this condition, its use across the country as well as in Wyoming, national trends with respect to this category and whether there was evidence of a pattern that caused children previously identified as having a Developmental delay to fail in Wyoming public schools before they were re-identified at some later date as a result of discontinuing identification under the Developmental delay label upon school entry.

The conclusion of this research is that there is ample justification for extending the age range to 9 as authorized by Federal law and regulation. No evidence was found to indicate that changing the age range would cause a significant increase in numbers of children identified as a child with a disability in public schools. No evidence was found that the Developmental delay label was over used in the preschool centers. Abundant evidence was found indicating that significant numbers of children identified as having a Developmental delay leave the preschool centers declassified upon school entry. Evidence is also present that many of these children are often reevaluated after second or third grade and found to be failing and then often re-identified and determined to be in need of special education. Research also demonstrated that Wyoming is the only State that prohibits the use of this category by school districts. Further, the 1997 Chapter 7 rules required the reevaluation of children identified as having a Developmental delay to be conducted by the preschool rather than the receiving school district to determine if the child is a child with a disability in need of special education in another category. That

practice, of having the former public agency be responsible for determining continuing eligibility for a receiving public agency is not found in any other State.

There is significant, overwhelming evidence that the current practice produces a wait to fail model that is not in the best interest of students, parents, schools, developmental preschool centers or public policy. The WDE declines to maintain that practice.

Changes: None

Comment: Developmental delay age range- A few comments were received that requested the addition of the language “or any subset of that age range, including ages three to five,” be added to the definition of Developmental delay.

Discussion: The language recommended to be added to the 3-9 age range appears in §300.111(b)(1) which indicates “A *State* (italics added) that adopts a definition of Developmental delay under § 300.8 (b) determines whether the term applies to children age three through nine, or to a subset of that age range (e.g., ages three through five).” The language in this rule clearly indicates that it is the State that determines what age range will apply for this category and gives the State the option to choose three through nine or any subset of that age range. Adding the proposed language to the State rule would invite misinterpretation and confusion in regards to the State’s definition of Developmental delay. Addition of this language would give the impression that school districts or preschool centers are allowed to establish the age range for defining Developmental delay. Chapter 7 identifies what the State has defined as the age range for the use of Developmental delay for Wyoming. The language under § 300.8(b) in Federal law provides flexibility to States that adopt a definition of Developmental delay to determine whether the term applies to children aged three through nine, or to a subset of that age range.

Proposed Chapter 7 identifies the age range for the term Developmental delay as three to nine years of age. Schools districts or public agencies are not permitted to set an age range independent of what is established in the rule.

Changes: None

Comment: Comments received pertaining to this disability area other than the age range included statements in support of the provision relative to the transition IEP requirement for preschool centers to invite the school district to the last IEP prior to transferring to school. While this requirement is addressed in Part 5, Section 2 of the rules it was often mentioned in discussions of the term Developmental delay. The comments in support generally indicated this will greatly facilitate smoother transitions from preschool to public school for the parents and child. Comments received indicated that enabling the use of the Developmental delay category in schools would likely reduce the pressure on preschools to use the category of Speech & Language as the qualifying condition for children to retain their status as a child with a disability when transitioning from

preschools to public schools. Comments were also received that the Developmental delay label should not be used in schools.

Discussion: Part 1, Section 2 paragraph (v) (A) of Chapter 7 and Federal regulation § 300.111(b), indicates a school district or public agency is not required to use the Developmental delay label for a child within their jurisdiction. The State does not believe it has the authority to ignore this provision in the law as suggested by one comment. If the agency chooses to use the term they must use the WDE definition and age range. In addition, consistent with Part 5, Section 2 of Chapter 7 rules and Federal regulations §300.323(e) and (f) a school must provide services to a child with an IEP transferring from a preschool center in Wyoming or a public agency from another State until the school district either, adopts the child's IEP from the previous public agency or develops, adopts and implements a new IEP.

In the event the school district or public agency chooses not to use the Developmental delay label as is authorized in Chapter 7, Part 1, Section 2(v)(A) and Federal regulation §300.111(b) the school district or public agency, consistent with Federal regulation §300.323(e) and (f) and as codified in Chapter 7, Part 5, Section 2(b)(i)(A) and (B), may conduct an evaluation subject to consent requirements. During that time, the school district or public agency must continue to provide FAPE to the child, including services comparable to those described in the child's IEP from the previous public agency until the completion of the evaluation and determination of eligibility. If the parent disagrees with the evaluation results they would have options for dispute resolution including due process, mediation, or request for an independent educational evaluation as is authorized under IDEA and Chapter 7.

The implementation of Federal regulation § 300.111(b) relative to enabling an LEA to choose to use the Developmental delay label is likely to be a challenging decision for the LEA. The WDE believes the decision by an LEA to decline to use a Developmental delay label for service to children with disabilities in their community is a significant decision for that community. This is not a decision that the WDE believes can be unitarily made by a single individual. The developmental preschool centers as well as school districts are the legally constituted, public entities statutorily empowered to provide educational services to children with disabilities in their respective communities. The citizens of these communities expect these bodies to undertake their responsibilities with deliberation and attention to the needs of the children in their community. The public constituents of those communities have a voice in this decision. The respective local public boards authorized to govern the LEA is the entity to which the constituents of the community need to articulate their perspectives and preferences on how their community addresses the service arrangements for children with disabilities in their communities, so that the board can make an informed decision about the use of a Developmental delay label.

A proposal that the Developmental delay category be restricted to just the developmental preschools as was suggested by a few comments would put the State out of compliance per IDEA 04 §608 and Federal regulations § 300.323 unless the Developmental delay (DD) label was also prohibited for use by the preschool centers. The State of Wyoming

has a long history related to the use of the category of Developmental delay in the developmental preschool centers. There have been no comments, nor has anyone proposed that the WDE, as is authorized in 300.111, deny or discontinue the category of Developmental delay in the developmental preschool centers. The study undertaken to review this issue indicates there is no evidence that this term is overused or otherwise misused by the developmental preschool centers. The study also indicates that Wyoming is the only State to deny school district use of the Developmental delay label. If the developmental preschool centers are to continue to use this label and if the State is to be in compliance with Federal regulation §300.323 the option to enable school districts to use the category of Developmental delay becomes mandatory. The WDE declines to discontinue the use of the Developmental delay category in the State and declines to prohibit the School districts of the State to use this label if they choose to do so as is authorized in Federal law and regulation.

Changes: None

Comment: A few comments were received that children with disabilities identified by the developmental preschool centers under the condition of Developmental delay will now be required to be served in the school districts and that this is a violation of the least restrictive environment provisions. In addition the comment was made that requiring schools to serve children with this label as they transfer from the preschools prevents the child from being provided services through a response to intervention system in the elementary grades. Further this prevents regular education teachers from having the opportunity to, as one commenter phrased it, “step up to the plate” to serve these children and as a result is not a least restrictive option for these children.

Discussion: The comment that children transferring to public schools with the Developmental delay label will result in a violation of the least restrictive environment provisions of IDEA for the child implies that any child with an IEP who transfer from one public school to another will also be subject to these violations. A child identified as a child with a disability in the area of Developmental delay by a developmental preschool center in the State of Wyoming is a child with a disability. If a child transfers into a Wyoming school district from a public school from another State with a disability label of Developmental delay, the child is a child with a disability. In both examples, the receiving school must provide FAPE and implement the IEP with comparable services until the school district adopts or develops a new IEP or asks for parental consent to reevaluate. To propose that children with disabilities who transfer from one school to another causes a violation of least restrictive environment provisions because the receiving school is required to implement the child’s IEP developed by the former school is an interpretation of IDEA to which the WDE declines to agree.

With respect to the comment that requiring the receiving school to implement the child’s IEP prevents the implementation of RtI techniques for the child would imply that children with disabilities do not have access to the regular curriculum. There are no provisions in regulation or law that would prohibit or otherwise prevent or in any way limit the IEP team from convening to discuss whether the child would benefit from

services or remedial programming that is available to children without disabilities. Children with disabilities are not prohibited access to the regular curriculum and regularly participate in intervention strategies available to children without disabilities. The IEP team is required to address accommodations, modifications, supplementary aides and services that are provided in regular education. There is no reason why a service provided within context of a school's response to intervention structure can not be provided to a child with a disability.

Changes: None

Comment: One commenter proposed that the Developmental delay eligibility criteria be modified to require the child to be reevaluated three years after the child was initially evaluated and determined to be eligible under Developmental delay. Another proposal was to amend the criteria to be more inclusive ages 3 to 6 and more exclusive ages 6 through 9. Another commenter suggested this disability area not be a stand alone category and instead allow the child to be classified with a developmental delay as well as some other disability area.

Discussion: Three year reevaluations are already a requirement of the law and Chapter 7 rules. Changing criteria to be more inclusive for preschools and retaining present standards for school age children would foster confusion and anxiety for staff and parents during transition between the preschool centers and the public schools. The WDE declines to make this change.

The term used to describe this condition has been changed from the 1997 Chapter 7 rules where it was defined as "Developmental disability" to be consistent with the Federal definition of Developmental delay. The intent of this label was to provide educators in preschools and in the primary grades the option to serve children as a child with a disability, with all the protections given this class, in a non categorical disability area. It is a functional, non categorical approach, in some ways similar to the early intervention structure available to children with disabilities age birth up to their third birthday under Part C of IDEA.

The IDEA did not make this term "Developmental delay" the fourteenth disability area. Had IDEA done so, there would have been language similar to the other disability areas that focus on unique etiologies. If it was the fourteenth disability area Congress would not have given States the option to serve this disability condition or not. Had it been the fourteenth disability area Congress would not have given States the option to set an age range from age three to nine or any subset of that age range the State chose. Those options do not exist for Mental retardation (Cognitive disability), Specific learning disability or any other disability condition. A State cannot decide not to serve children with Mental retardation (Cognitive disability). A State cannot decide only to serve children with Autism up to age 9. IDEA did not establish other disability areas such as Speech and language disability, Specific learning disability, and others as an early intervention structure, by defining it as Speech and language *delay*, or Specific learning *delay*.

The term used in IDEA for this condition is Developmental *delay* not Developmental *disability*. The distinction in that terminology is an important distinction. IDEA gave Developmental delay as an option for States to use, if the State elected to do so, to address children in preschool and primary grades in a functional, non categorical structure, similar to the early intervention model used in Part C of IDEA. When Children reach age three, Part B of IDEA becomes the governing structure. Now, under Part B public agencies must identify children as “children with a disability.” Under Part C they were children “needing early intervention services.” The distinction is significant and IDEA recognizes that distinction. The intent of giving States the option to use the Developmental delay category was to create a non categorical, functional approach to address children’s needs under the umbrella of a child with a disability, all be it a disability area with a non specified etiology. It was intended to be the structure States could use as an option for early intervention services for preschool and primary grade children under Part B of IDEA as a child with a disability.

As an example of this non categorical approach for children in these early years, ten States use this term to subsume all other disability labels for the age range specified by the State. In those States this is the only disability area for children with disabilities for the age range the State specifies.

While ten States use this term to replace all other terms for a specified age range, forty-three States use quantitative criteria for determining Developmental delay. Thirty-five of the forty-three States that use quantitative measures use a standard deviations structure that is the same model with similar language to what appears in Wyoming Chapter 7 rules. Ten States allow this term to be used with other disability labels, which presently Wyoming has chosen not to do.

The basis of the Developmental delay category, in place, across the country, has been to use this category as an early intervention, non categorical, non etiological structure for children with disabilities for preschool and primary grade children. That has not been the practice in Wyoming for until proposed Chapter 7 rules this option was denied to school districts. WDE believes that much of the concerns expressed around proposed changes in the Speech and language area is because practitioners used the Speech and language disability area as a qualifying area to establish eligibility as a child with a disability due to the fact that a child with a label as Developmental delay under former Chapter 7 rules would likely not receive continuing special education services in the school district upon transfer. The comprehensive study done on the Developmental delay issue in Wyoming indicated that most children are identified as having a Speech and language disability in the preschools rather than having a Developmental delay. If a child is potentially eligible under any other category the pressure has been to use that category because identification under Developmental delay is not going to enable the child to continue to maintain eligibility once the child transfers to school.

Many comments were received as part of the rules revision process that this is exactly the process in place for the preschools. Many Speech and language therapists indicated that

the Speech and language disability area was the area to be used for early intervention because Developmental delay was not available in schools. They also observed that the Developmental delay criteria were more restrictive than Speech and language criteria. Some suggested lowering the criteria from 2.0 SD to something less. Comments were received that it is easier, under the 1997 Chapter 7 rules, to identify a child as a child with a disability using the criteria in Speech and language than the criteria for Developmental delay. As a result incidence in Wyoming for speech and language for children ages 3-5 is the highest in the country based on the OSEP report to Congress of 2002. This information will be discussed in greater detail in Section 11 dealing with Speech and Language criteria. Clearly the evidence is convincing that Developmental delay category in Wyoming has not been used for the purpose for which it was intended. Clearly Speech and language has been used as the qualifying disability to provide early intervention services to children in Wyoming. The proposed rules put in place the opportunity to change this circumstance.

With respect to the suggestion that the Developmental delay not be a category of last resort and instead allow it's use in conjunction with other disability labels, it is unclear as to whether there is any advantage or benefit of this option. While ten States do allow this option it is unclear as to whether this is more or less inclusive. The concept behind the use of this category is one that proposes a non categorical approach, enabling identification to be generic, non etiological in focus and functional in terms of addressing the child's needs. It is intended to be vehicle to enable an "early intervention" approach that is not concerned with a categorical structure as a foundation.

The WDE declines to amend the Developmental delay eligibility criteria to enable its use with another category. The State has not been able to comprehensively use this label for the purpose for which it was created because school districts were denied access to its use. The WDE believes that at this time, having this label used in concert with some other disability label will tend to confuse its intended purpose. Considerable technical assistance to the developmental preschool centers as well as schools districts will have to be provided to facilitate appropriate implementation of this area of disability.

Changes: None

Comment: A related comment was provided to adjust the standard deviation to a lower level and to allow for clinical judgment in consideration with the standard deviation criteria.

Discussion: While most States use the same structure relative to standard deviation criteria found in Wyoming proposed Chapter 7 language a number of States include language that authorizes clinical judgment. In addition, a number of States set criteria at a more inclusive level than present Chapter 7 language. Modifying the standard deviation criteria is consistent with the discussion that indicates the standards for this eligibility area is more restrictive than others.

The WDE agrees with the comment that modifying the language in the rule to enable clinical judgment would be instructive. It would assist in clarifying that while the requirement of Part B of IDEA is to identify a child as a child with a disability in order to qualify for special education services, this disability category of eligibility in particular was created by Congress for States to use if the State chooses to do so as a vehicle to address a child's needs in preschool and primary grades in a generic, non categorical, functional structure. In addition, modifying the criteria of 2.0 standard deviations to 1.75 standard deviations will address the concerns that this disability area is more restrictive than others. These two modifications combined should enable eligibility teams to have greater flexibility in transitioning from Part C to Part B.

The study by the Human Services Research Institute in June of 2003 and the Utah State University study of 2005 titled "An Outcomes Based Approach to Evaluating Preschool Services and Costs in Wyoming" both indicated that while Wyoming has experienced rapid growth in the identification of and services to preschool children with disabilities aged birth through age 5, both of these studies commend Wyoming because the State does a better job of serving these children than other States. The WDE desires to retain this positive development for children in our State. One of the goals in redrafting Chapter 7 rule change for Developmental delay is to have preschool centers and school districts use this category for enabling children to receive special education services rather than the extensive reliance on qualifying children under the Speech and language disability area. Providing this modification in criteria and adding clarification about the use of clinical judgment in determination of eligibility will assist in reaching this goal.

The WDE believes this language provides the evaluation and eligibility team the opportunity to ensure decisions are based on a perspective that is broader than any single measure or assessment indicator and causes the team to establish eligibility from a variety of sources including clinical judgment.

Change: The WDE will modify language in Chapter 7, Part 4, Section 4, subsection (a) sub paragraph A and B of the rule to state as follows:

(A) The child's performance is significantly below the mean performance ~~two~~ 1.75 or more ~~(2)~~ standard deviations expected of children of comparable chronological age in one area (physical, cognitive, social/emotional, communication, or adaptive functioning). In determining the child's performance as being markedly below the expected level for children of comparable age the team must be allowed to establish eligibility based on a preponderance of the information presented and that other measures may be used to determine eligibility such as observations, criterion referenced measures, clinical judgment and other clinically accepted practices.

(B) The child's performance is markedly (1.5 standard deviations below the mean performance expected of children of comparable chronological age in two or more areas (physical, cognitive, social/emotional, communication, or adaptive functioning). In determining the child's performance as being markedly below the expected level for children of comparable age the team must be allowed to establish eligibility based on a preponderance of the information presented and

[that other measures may be used to determine eligibility such as observations, criterion referenced measures, clinical judgment and other clinically accepted practices.](#)

#### Section 5: Emotional disturbance.

Comment: The comments relative to changing the descriptor to Emotional disabilities verses Emotional disturbance as appears in Federal law and regulation and the recommendation to have particular staff appointed to the evaluation team, and adding the word “professional” as an adjective describing the term “diagnostician” has been previously discussed. A few comments were received that indicated the changes made were an improvement over the 1997 Chapter 7 language. One commenter suggested that Wyoming adopt the rules in place in Colorado. Another recommended that subparagraph (A) read “Despite *documented* implementation of one or more positive regular education strategies...”(italics added). Another comment suggested the definition follow the “Bower Definition” and another suggested it follow the DSM-IV. A comment was received that questioned the inclusion of social maladjustment.

Discussion: The definition exactly follows § 300.8(c)(4). This definition has remained unchanged since 1977.

Changes: None

#### Section 6: Hearing impairment including deafness.

Comment: A comment repeated by a number of individuals indicated that the terms Deafness and Hearing impairment should be separated for they are two very different disabilities. Comments were received recommending adding the 1997 Chapter 7 language relative to the eligibility criteria and effectively not make any change in determining eligibility including using the practice of decibel losses of particular ranges in either ear. In addition comments were received that the term “central hearing loss” be eliminated for it would be confused with “central auditory processing disorder.” Another comment suggested that this term be further clarified by having the statement read “Central hearing loss (impaired understanding and processing)” rather than just “central hearing loss”. Another commenter suggested that the words “or certified” be added to the term “licensed audiologist.” In contrast to these suggestions one audiologist in the State wrote “I find this draft to be as nearly close to perfect as could ever be written and I would encourage adoption of this revised section regarding Hearing impairment including deafness and the eligibility criteria without further revision.”

Discussion: Federal law IDEA 04 602(3)(A)(i) defines children with disabilities using the term “hearing impairment including deafness”. The Federal definition in IDEA 04 regulations § 300.8(c)(3) states “Deafness means a *hearing impairment* that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification that adversely affects a child’s educational performance” (italics added.) Hearing impairment is defined in § 300.8(c)(5) as “an impairment in hearing,

whether permanent or fluctuating, that adversely affects a child's educational performance, but that is not included in the definition of deafness." The proposal to separate these two terms and instead have two disability areas, one for deafness and one for hearing impairment stems from the 1997 Chapter 7 rules and that Federal regulations define both conditions where as Federal law lists them together as one disability area.

One of the characteristics of this disability area is that children's hearing is not always stable. It can fluctuate for a variety of reasons. If a child qualifies under the term deafness, and no longer exhibits the severity of processing linguistic information because of a variety of possible circumstances but retains eligibility under hearing impairment, the school district or public agency would not have to reevaluate the child to further qualify the child given the inclusive and comprehensive structure of combining these two conditions. For example a child could be deaf but after receiving a cochlear implant can now process linguistic information but still may have an impairment in hearing that adversely affects educational performance.

Review of practices found in a number of States indicates combining these two terms as more of a continuum verses separate disability conditions is an accepted, common practice. Data available from Project FORUM (February 2004) from the National Association of State Directors of Special Education (NASDE) indicates that of the thirty-three States that use the term deafness, ten include eligibility criteria under the category of hearing impairment and an additional fifteen States do not use the term deafness but includes that term under the category of hearing impairment. Consistent with trends found in a growing number of States and consistent with the desire to have this disability be more inclusive and comprehensive and consistent with the definition in IDEA 04 602(3)(A)(i) the WDE has combined these terms.

Changes: None

Comments: Another comment indicated the definition for this disability area should be "Hard of Hearing" rather than "Hearing Impairment." The comment was that "hard of hearing is more "politically correct." Another comment requested the definitions of both terms be modified from what appears in Federal language to be other language more in line with the view of the commenter.

Discussion: Forty-three States use the exact Federal term of Hearing Impairment verses some other term. Of those forty-three States, thirty-three use the exact Federal definition of the term Hearing Impairment. Thirty-two States require audiological assessment or diagnosis by an audiologist or some other outside professional. Nineteen States include specific criteria regarding the types and/or severity of impairment such as listing decibel losses of 20 decibels or more in the speech range. With respect to those States a number are reconsidering their State's criteria in light of IDEA 04 regulations.

With respect to the suggestion to use of the term "Hard of hearing", no such term appears in Federal regulation or law. Federal regulation § 300.8 (c)(3) defines "deafness" and sub paragraph (5) defines "Hearing impairment". Consistent with the recommendation to

Federalize Chapter 7 rules and evidence existing in forty-three other States the decision was made to use the same term that describes these disability areas as used in Federal regulation and law. With respect to the suggestion that definitions for this disability area or any disability area be changed to some wording or phraseology that is not found in Federal regulation or law, the WDE, as is evident in forty-three other States declines to create definitions for disability categories that are not consistent with Federal regulation or law.

Changes: None

Comment: The suggestion was made by a number of commenters that the terms used to define conductive hearing loss be defined by adding language referencing a decibel loss in the speech range, “impedance measures in either ear greater than -200mmH<sub>2</sub>O, or +100mmH<sub>2</sub>O middle ear pressure or the child exhibits an abnormal tympanogram on at least two occasions. Similarly these commenters recommended that sensorineural hearing loss be defined as “the child fails to respond in either ear to a pure tone stimuli at 20 decibels in the speech range,(1000Hz,2000Hz or 4000Hz.) A related comment was received that indicated that the present descriptors of sensorineural loss, conductive loss, mixed loss, and central hearing loss have no educational value because they are not instructionally based. Additionally a comment was made that subparagraph (A) regarding “documentation of the child’s potential need for amplification” was problematic because it does not specify whether the amplification is personal or classroom based and that it implies that this disability area is always addressed by amplification.

Discussion: The definition in paragraph (a) of the rule follows Federal regulation §300.8(c) (3) and (5) as discussed above. A key phrase is, “means a hearing impairment including deafness that, *with or without amplification*, adversely affects educational performance...”(italics added). The comment that the requirement in subparagraph (A) implies all children require amplification, would necessitate that the team disregard the definition which states “*with or without amplification*.” The language in subparagraph (A) uses the term “potential requirement for amplification.” The wording does not indicate that amplification be required but that the team reviews whether amplification is required. The suggestion that the language does not clarify whether amplification is individual or classroom based could also be made of the Federal definition. Nothing in the rule prevents the team or restricts the team from reviewing any kind of amplification. The WDE declines to further specify in rule which type of amplification is to be reviewed for no Federal requirement exists for that degree of specificity.

Testimony by a number of individuals as the rules were being developed stated that language in the 1997 Chapter 7 rules was exclusionary to a number of children and that the criteria needed to be revised. With respect to comments relative to recommending decibel ranges be added to the criteria, the criteria in paragraph (a) (i) of the proposed Chapter 7 rule states that eligibility is established through a comprehensive evaluation and shall include assessments in academic/pre-academic, communication/language development, parent interview/input, teacher interview/input, audiological, and classroom based assessments and qualitative data from at least one observation or other assessments

and/or qualitative data as determined appropriate by the team. The rule also states that a licensed audiologist be on the evaluation team. This language in this disability area and repeated in others is consistent with the requirements of IDEA with regard that the evaluation be comprehensive, not rely on any single measure, use qualified, licensed or certified staff as appropriate and focus on the educational and functional needs of the child.

The American Hearing Research Foundation, the American Speech-Language-Hearing Association (ASHA), the National Institute on Deafness and other Communication Disorders (NIDCD) as well as many research documents from the National Dissemination Center for Children with Disabilities (NDCCD) generally define deafness and hearing impairment as most often consisting of three “pure” types and one mixed type. Sensorineural is the most common type of hearing loss. The term is used to indicate that there is a problem in the inner ear or along the nerve pathway between the inner ear and the brain. This type of loss could be from aging, infection, disease, noise exposure or related to a genetic disorder. This loss is usually not curable. Individuals with sensorineural loss can often be helped to hear better with devices such as hearing aids or sometimes cochlear implants.

Conductive loss is the second most common loss in the general population but is a more frequent occurrence in the school age population (Laryngoscope Monograph Supplement #73. “Hearing Sensitivity and Related Factors in Children”, Eagles, E., Wishik, S.S., Doerfler, L.G., Melnick, W., Levine, H.S., 1973.) Conductive loss occurs when sound is not conducted efficiently through the outer ear canal to the eardrum and the bones in the middle ear. It usually results in a loss in sound level, or the ability to hear faint sounds. Possible causes may be wax in the ear canal, perforation of the eardrum, or fluid in the middle ear. This loss is usually treatable with either medical or surgical intervention. Mixed loss refers to a conductive loss and a sensorineural loss occurring at the same time. In other words there may be damage in the outer or middle ear and in the inner ear (cochlea) or auditory nerve.

The incidence of central hearing loss is not as firmly established compared to conductive or sensorineural loss. Central hearing loss may be due to nerve cell pathology or neuro-maturational disorders in the central nervous system. They usually originate in the cochlear nuclei and may ascend up to and including the auditory cortex of the brain. There is generally no medical or surgical treatment for a central hearing loss.

The terms discussed above are measured in degrees of loss generally defined in five broad categories that are universally recognized throughout the country. They are normal, being zero decibel (db) to 20 db. Mild loss = 20db to 40db. Moderate loss = 40 db to 60 db. Severe = 60 db to 80 db. Profound loss = 80 db or more.

The recommendation to clarify or identify the type of hearing loss by using a specified range of decibel loss in the speech range measured by particular instruments specified in rule is a practice that is not found in any State and is not found in the literature as an accepted practice. The language in proposed Chapter 7 rules requires the licensed

audiologist to conduct an evaluation of the child using measures that are consistent with the profession in which this individual is trained and licensed. To require language in the rule regarding decibel loss would be redundant. The scope of practice in this field already identifies what a recognized loss is for purposes of defining a hearing impairment including deafness. Consistent with the language in IDEA of requiring a variety of assessments, that no single measure be used, that decisions be made by the group with information provided from a variety of sources, that eligibility for this disability area be more inclusive and consistent with trends found in a growing number of States as they develop their rules; the WDE declines to specify that types of hearing loss are determined by particular decibel losses or by finite instruments.

With respect to the suggestion that the term “Central hearing loss” be further clarified by adding the parenthetical phrase “(impaired understanding and processing)”, WDE concurs with this suggestion.

Changes: Sub paragraph (IV) of Part 4, Section 6 is amended as follows:

(IV) Central hearing loss ([impaired understanding and processing](#)).

#### Section 7: Multiple disabilities.

Comment: Only one comment was received in this area recommending that the term “clinical” be stricken from the description of psychologist.

Discussion: This was discussed previously in Part 4, Section 1 of this document.

Changes: None

#### Section 8: Orthopedic impairment.

Comment: No comments were received in this area.

Discussion: None

Changes: None

#### Section 9: Other health impaired.

Comment: One comment was received to add to subparagraph (a)(i)(A) the following: “In case of attention deficit disorder or attention deficit hyperactivity disorder, a licensed school psychologist can document that a child meets eligibility requirements for other health impaired for an initial evaluation and as deemed appropriate for determining continued eligibility for a reevaluation.”

Discussion: The results of the NASDE Forum study of February 2004 indicates that all States use the Federal term and 49 of the 51 (including Washington DC) use the Federal

definition. Thirty-three States require a physician in one or more phases of the eligibility determination process. Of the thirty-three States, 23 States require a physician diagnosis at least for the initial evaluation. An additional four States require diagnosis or assessment by a physician, except in case of ADD or ADHD. Five States make special mention of ADD/ADHD. Of these, four include specific eligibility criteria for ADD/ADHD as follows; three States require diagnosis by either a physician or a mental health professional; and one requires assessment to include an observation by a team member plus completion of an ADD/ADHD rating scale. While only five States make mention of ADD/ADHD and four States offer specific criteria for this area the proposed language offers schools and other public agencies an option for initial eligibility that provides flexibility and is consistent with the scope of practice and license qualifications for this group of professionals. Consistent with language in subparagraph (i) the suggested change is incorporated in subparagraph (A) as listed below.

Changes: The language in Part 4, Section 9 (a)(i)(A) is amended as follows:

(A) Subject to the provisions of subdivision (I) of this subparagraph with respect to attention deficit disorder or attention deficit hyperactivity disorder, documentation of an acute or chronic health problem from a licensed physician within the previous twelve (12) months for an initial evaluation and as deemed appropriate for continuing eligibility for a reevaluation.

(I) In concert with the provisions of paragraph (i) of this Section, as determined appropriate by a school district or public agency a licensed psychologist or certified psychologist, in lieu of a physician may document the child meets eligibility requirements for an Other health impairment with respect to attention deficit disorder or attention deficit hyperactivity disorder for an initial evaluation and as deemed appropriate for continuing eligibility for a reevaluation.

#### Section 10: Specific learning disability.

Comment: A commenter proposed that language in proposed rule be changed to remove all reference to discrepancy models and that allowing schools to choose different models violates the Wyoming constitution. Another commenter suggested that schools must use a severe discrepancy model rather than have the choice to use that model. Another suggested the language in the rule follow the law not the Federal regulation for this disability area. Another commenter suggested Chapter 7 rules follow the order of the Federal regulation rather than how the order appears in proposed Chapter 7 language. Another commenter suggested the opposite, that the order of proposed rules added clarity to the Federal regulations. A commenter suggested that proposed rules include the 1997 Chapter 7 practice of override.

Discussion: The definition in proposed rule follows exactly the Federal regulation §300.8(c)(10). The proposed Chapter 7 language closely follows Federal regulations §300.307 through §300.311. Key components of § 300.307(a)(1) and (2) is that a “State must not require the use of a severe discrepancy...” and “*must permit* (italics added) the use of a process based on a child’s response to scientific, research-based intervention.” This regulation is consistent with IDEA 04 614(b)(6) which states “an LEA *shall not be required* (italics added) to take into consideration whether a child has a severe

discrepancy...” and “an LEA *may use* a process that determines if the child responds to scientific, research-based intervention” (italics added).

Proposed Chapter 7 language is consistent with the law and regulations by allowing a school district or public agency to use either method. The position to prohibit use of a severe discrepancy model as suggested by one commenter or prohibit the use of a response to scientific based intervention as suggested by another commenter is not consistent with the law or rule. The suggestion to retain an override process is viewed as unnecessary given the changes in IDEA 04 relative to the addition of options for determining eligibility through procedures relating to whether the child responds to scientific, research-based intervention.

The proposed Chapter 7 rule closely follows Federal regulations which allows either method for identification, and provides procedures for the school district or public agency to document the child’s eligibility through use of either method. The WDE has created a task force to assist in clarifying how a school district or public agency could establish eligibility through use of a process that determines if the child responds to scientific, research-based intervention. This task force is on going and has been charged with the task to create a model that could be adopted by school districts or public agencies to follow with respect to this process.

Changes: None

#### Section 11: Speech or language impairment.

Comments: This area received the most comments. Many comments from parents, school staff, developmental preschool staff and a few legislators indicated they were apposed to proposed rules in this area. Suggestions were many including retaining previous language, changing the 1.75 standard deviation (SD) requirement to 1.0, 1.25, 1.33 or 1.5 or eliminating standard deviation and use percentile scores instead. Suggestions were made to clarify whether clinical judgment was an option in any of the areas of eligibility. Comments received were apposed to the articulation and language subcategories in particular with objections in the articulation area to the 90% requirement for subparagraph A and the 40% criteria in subparagraph C. Many comments were made that using the criteria in proposed rules would drastically reduce numbers of children served in the preschool centers and would prevent early intervention services for these children, would create a wait to fail model and would result in many children no longer served as a child with a disability. Several comments were received to require cognitive referencing in the Speech and language eligibility criteria. Others agreed that cognitive referencing needed to be removed from the rule as was done in proposed Chapter 7 rule. Comments relative to the voice subcategory were positive.

Discussion: As part of Chapter 7 rules revision process comments were solicited by WDE regarding the areas in the 1997 Chapter 7 rules that should be changed. With respect to the Speech and language disability area, prior to drafting Chapter 7 rules numerous suggestions were received that recommended that the 1997 Chapter 7 rules

allowed a large number of children to be identified in this area and that language in the new rules should be more clarifying. The other area that received the most comment prior to the revision of Chapter 7 rules was the issue of the Developmental delay category and that the State needed to change this category to allow schools to use this label after children entered the K-12 system. The need to expand the Developmental delay category and modify the Speech and language criteria were the most frequently voiced concerns prior to redrafting Chapter 7 rules. These two issues are related. Discussion of Developmental delay has been addressed above.

A number of studies were reviewed in reference to proposed Chapter 7 rules. The Developmental delay research paper provided extensive evidence that the 1997 Chapter 7 rules limited this category in a number of ways. First it prohibited the use of this category in Wyoming school districts. This had the effect of forcing the developmental preschool centers to not use this category if at all possible because the child would not continue to receive services upon transferring to the public schools. The effect of that practice was to cause children to be classified as Speech and language disabled because schools would accept that category. Many speech therapists indicated that is exactly the circumstance. Also reviewed were the studies by the Human Services Research Institute in June of 2003 and the Utah State University study of 2005 titled "An Outcomes Based Approach to Evaluating Preschool Services and Costs in Wyoming." Both studies indicated that Wyoming has experienced rapid growth in the identification of and services to preschool children with disabilities aged birth through age 5. Both of these studies commend Wyoming because the State does a better job of serving these children than other States. The WDE also reviewed the 2002 OSEP report to Congress.

OSEP reported that the prevalence of Speech and language for preschool children ages 3 through 5 is the highest in Wyoming of all the fifty States. The average in all States was 5.56 % of the population. Wyoming prevalence was 8.54% or 2.98% above the national average. Stated another way, Wyoming is 156% above the national average. The next highest State was Kentucky at 6.52% or a difference of 2.02%. No other State reported a higher difference in prevalence from one State to another than the 2.02% difference from Wyoming to any other State. The OSEP report also indicated that for all children aged 6-21 in Wyoming, identified as children with disabilities, that 23.2% of that population was identified under the Speech and language disability condition. Wyoming rated 43 out of 50 States in this statistic. For children ages 3 through 5 identified as Speech and language disabled compared to all other disability conditions combined Wyoming ranks 48 out of 50 States. Review of this combined data indicates that the use of Speech and language as an identification area for children with disabilities in Wyoming significantly and routinely exceeds the practices found in other States.

In the rules revision process, this information poses a number of questions. One question is to decide if this is a positive development or not in reference to serving children with disabilities? Another question is to discover if there are reasons for this high identification rate? If the reasons are for positive purposes (providing early intervention services for preschool children), is the high identification rate for Speech and language justified? Are there other options available that, retains the provision of early intervention

services to preschool and primary grade children without having to rely on a rate of identification of these children as being Speech and language disabled that far exceeds national trends? The changes in Chapter 7 with respect to the Developmental delay category discussed above, provides a vehicle that addresses special education services for preschool and primary grade children.

To review this matter further, practices found in other States were investigated and found to vary widely relative to establishing Speech and language criteria. Fifty-three States (including DC, Puerto Rico and Guam) use the Federal term Speech or language impairment and thirty-six States use the exact Federal definition as does Wyoming. Thirty States divide the category into four or more subcategories as does Wyoming. Thirty nine States provide specific criteria usually in these four or more sub categories as does Wyoming. Twenty-two States require general communications assessment by a Speech and language professional as does Wyoming. Seventeen States also include specific communications assessments to determine eligibility in one or more sub categories.

States vary in establishing scores for eligibility. Review of available data indicates many States decline to provide specific score levels and instead include language directing documentation of performance in one area or another. States that do provide guidance on score criteria vary. States that use terms that reference deviations from the norm use standard deviation structures verses the percentile structure referenced in current Wyoming Chapter 7. Four States require 2 standard deviations or more below the mean in performance. Thirteen States require 1.5 or 1.75 standard deviations or more with the majority requiring 1.5 SD. One State recently changed from 1.3 SD to more generic requirements. Another State declines to indicate score criteria in rule but establishes 1.5 SD in their guideline document to schools. Currently Chapter 7 rules had scores for Wyoming at the 12<sup>th</sup> percentile which is the most inclusive threshold identified in any State.

Only a few States include the concept of cognitive referencing which is a discrepancy between language and intellectual scores. Current Chapter 7 rules included this concept. Proposed Chapter 7 rules omit this concept. Past practices of cognitive referencing have been questioned in literature and by the American Speech-Language-Hearing Association (ASHA). The cognitive referencing requirements have also been the focus of litigation as a potential denial of FAPE.

The definition in proposed Chapter 7 rules is lifted from Federal regulation § 300.8 (b)(11) which is as follows: “The child demonstrates Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment or a voice impairment, that adversely affects a child’s educational performance.”

Chapter 7, Part 4, Section 11, subsection (a) sub paragraph (i) details the requirements of IDEA 04 which states multiple forms of assessment information must be used to reach a determination of whether a child is a child with a disability. Federal regulations 300.304

as well as Chapter 7, Part 3, Sections 4 and 5 prohibits the use of any one single measure or assessment as the sole criterion for determining whether a child is a child with a disability and requires that an evaluation of a child suspected as having a disability be conducted using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. IDEA requires that children be evaluated in all areas of suspected disability as does Chapter 7 rules. Similarly the evaluation must be comprehensive as is stated in subsection (a) of the rule. The evaluation team must employ a variety of measures and techniques to establish the presence of a disability and evidence that the impairment adversely affects the child's educational performance.

Part 4, Section 11, subsection (a) sub paragraph (i) in the proposed Chapter 7 rules outlines the minimal requirements of a comprehensive evaluation specific to the area of Speech and language impairment. This means that the criterion of a standardized assessment cannot be the sole criterion for determining the presence of a disability for determining eligibility. A test is only one of the tools utilized in the assessment process. No child should be considered eligible or not eligible as a child with a disability in any category of disability solely on the basis of standardized test results. Standardized tests tend to examine discrete skills in a decontextualized manner (i.e., away from natural communicative environments). Further, not all children are suitable candidates for standardized tests. If a child scores poorly on standardized measures but meets communicative expectations on functional measures the child's difficulties cannot be said to be adversely affecting educational performance. Conversely, if a child performs poorly on functional measures, but scores well on standardized tests, the child may be eligible for speech and language services as a child with a disability. The purpose of administering tests is to assist in appropriately identifying instructional implications and strategies as well as the determination of whether a child has a Speech or language disability. The goal is to appropriately identify children with a disability without over-identifying a normally developing child as disabled or under-identifying a disabled child as normal. The cut off scores or standards are identified in the criteria as markers to be considered as part of the big picture contained in all of the eligibility criteria as defined in Part 4, Section 11 for a Speech or language impairment.

The method of evaluation set forth in IDEA provides check and balances for potential over or under identification and requires the evaluation to critically examine the efficacy of a cut off score, standard or one single measurement when there is a mismatch with the other information provided as part of the evaluation. Comments received in this area tended to focus on the scores as being the sole criteria, the only item to be considered verses the bigger picture and this is not the intent. The large numbers of comments pertaining to this issue indicates a need for clarification of the intent. That was the intent of subparagraph (B) of subsection (d)(i). Clearly the language in subparagraph (B) needs further review to ensure the intent of this requirement is followed.

Similarly, comments received about three of the four sub category areas focused on just the scores indicated not the need for comprehensive measures and the intended use of clinical judgment if necessary. These areas need further clarification.

In answer to some of the questions relative to whether the data posed by the OSEP 2002 report is a positive development or not the following observations are offered. WDE supports the conclusions of the Human Services Research Institute and the Utah State University studies commending Wyoming for services to preschool disabled children. However it is probably good policy to cause our States Speech and language identification rates to be more in line with national trends. We believe we have discovered some of the reasons for the high identification rates in Speech and language and have made changes in the proposed Chapter 7 rules to address that. Changing Speech and language criteria to be more in line with practices found in other States is a positive development. Changing the Developmental delay category by redefining it, moving the age to 9 and permitting schools to use this disability category will likely reduce the tendency to use the Speech and language category as a qualifying area as a child with a disability. That process provides other options, that retains the provision of early intervention services to preschool and primary grade children without having to rely on a rate of identification of these children as being Speech and language disabled that far exceeds national trends. Ensuring that the rules have clear directions for evaluation teams relative to enabling clinical judgment for the determination of eligibility for both Speech and language and Developmental delay is an important addition to the rules development process as a result of public comment.

Changes: The Speech and language eligibility criteria are amended as follows:

Section 11. **Speech or Language Impairment.**

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

(i) Speech or language impairment eligibility criteria: Criteria are established through a comprehensive evaluation in accordance with the requirements of Part 3, Sections 4 and 5, of these rules. The initial evaluation shall be conducted by a Speech Language Pathologist (SLP) and other qualified professionals as determined appropriate by the school district or public agency. The initial evaluation process shall include academic/pre-academic, communication/language development, parent interview/input, teacher interview/input, and classroom-based assessments and qualitative data from at least one observation or other assessments and/or qualitative data as determined appropriate by the school district or public agency. In accordance with the requirements in Part 3, Section 6, of these rules, a child is identified as a child with a speech or language impairment in the qualifying area/s of articulation, language, stuttering, or voice, if the specific criteria designated under a qualifying area are satisfied.

(b) Qualifying area. Articulation means speech sound production or phonological errors atypical of a child of comparable age and development.

(i) Eligibility criteria -- articulation: Criteria under (A) or (B) or (C) or (D) are required.

(A) Documentation that the child exhibits ~~one or more~~ errors of speech sound production beyond the age at which ~~90%~~ 85% of typically developing children have achieved mastery (based on current developmental norms) or clinical judgment that evidences the child is in need of intervention;

(B) Documentation that the child's performance on a standardized evaluation instrument is ~~1.75~~ 1.5 standard deviations or greater below the mean for chronological age on a norm-referenced test of articulation or phonology;

(C) Documentation that one or more phonological patterns of sound are significantly disordered and evidence that the child's conversational intelligibility is affected; ~~at least 40% disordered;~~

(D) Documentation that the child's scores are at a moderate, severe, or profound rating on ~~phonological~~ appropriate evaluation instruments. In determining that the child's speech is unintelligible the use of clinical judgment and other measures may be used to document severity.

(c) Qualifying area. Stuttering means abnormal flow of speech evident in interruptions by hesitations, repetitious or prolongation of sounds, syllables, words or phrases or articulatory positions or by avoidance and struggle behaviors.

(i) Eligibility criteria -- stuttering: Criteria under (A) and (C) or (B) and (C) are required.

(A) Documentation that the child demonstrates at least a moderate rating or its equivalent on a formal fluency rating scale. In determining that the child's fluency is at least moderately impaired clinical judgment and other measures may be used to document how the child's fluency is impaired;

(B) Documentation that the child exhibits stuttering on ~~10%~~ 5% or more of words spoken in a ~~representative language sample of 100 words;~~ representative language sample or demonstrates stuttering in varied speaking situations;

(C) An observation documenting that the child's stuttering interferes with communication and calls attention to itself.

(d) Qualifying area. Language impairment means a deficiency in language comprehension or production evident in the content, form or use of oral communication or its equivalent.

(i) Eligibility criteria -- language: Criteria under (A) or (B) and (C) are required.

(A) The child demonstrates on standardized measures an understanding and use of morphologic, syntactic, semantic, or pragmatic patterns at ~~1.75~~ 1.5 deviations below the mean for chronological age.

(B) If the standardized measures do not accurately or sufficiently reflect that the child's language is impaired in the use of morphologic, syntactic, semantic, or pragmatic patterns the team must be allowed to establish eligibility based on a preponderance of the information presented and that other measures may be used to determine eligibility such as observations, criterion referenced measures, clinical judgment and other clinically accepted practices. ~~If determined that technically adequate norm-referenced language measures are not appropriate to provide evidence of 1.75 standard deviations below the mean, then two measurement procedures shall be used to document a significant difference in the child's understanding and use of morphologic, syntactic, or semantic patterns given consideration to the child's chronological age, developmental level, and method of communication. Measurement procedures may include additional language samples, criterion-referenced measures of assessment, or other reliable informal measures of assessment.~~

(C) Documentation that receptive or expressive language interferes with the child's oral communication or primary mode of communication.

(e) Qualifying area. Voice means a significant deviation in pitch, intensity, or quality which consistently interferes with communication, draws unfavorable attention, adversely affects the speaker or listener(s), or is inappropriate for the age, sex, or culture of the child.

(i) Eligibility criteria -- voice: Criteria under (A) through (C) are required.

(A) Documentation that the child exhibits abnormal voice quality, pitch, resonance, loudness or duration;

(B) Documentation that the condition is evident on two separate occasions, two weeks apart, at different times of the day;

(C) A physician's statement documenting that voice therapy is not contraindicated.

(f) The evaluation process must take into account that the child does not exhibit any one of the exclusionary variables (i) through (v).

(i) Mild, transitory, or developmentally appropriate speech or language difficulties that children experience at various times to various degrees; or

(ii) Speech or language difficulties resulting from dialectical difference or from learning English as a second language, unless the child has a language impairment in his or her native language; or

(iii) Difficulties with auditory processing without a concomitant impairment in speech sound production; or

(iv) A tongue thrust which exists in the absence of a concomitant impairment in speech sound production; or

(v) Elective or selective mutism or school phobia without a documented oral speech or language impairment.

Section 12: Traumatic brain injury.

Comment: No comments were received in this area.

Changes: None

Section 13: Visual impairment including blindness.

Comment: A number of comments were received that recommended language in the rule needed to be changed to allow the evaluation team to have an Optometrist and or a certified teacher if the visually impaired rather than requiring a teacher of the visually impaired to serve on the team. Commenters indicated that allowing the choice was necessary because teachers of the visually impaired are difficult to find.

Discussion: The provision of Subsection (a)(i) of the rule allows the school district or public agency to appoint “other qualified professionals as determined appropriate by the school district or public agency.” They can choose to appoint an Optometrist if they wish but not in place of a teacher of the visually impaired. If the child is determined eligible for services the IEP team must, consistent § 300.324(a)(2)(iii) “provide for instruction in Braille and the use of Braille unless the IEP team determines after an *evaluation* of the child’s reading and writing skills, needs, and appropriate reading and writing media (including an *evaluation* of the child’s future needs for instruction in Braille or the use of Braille) that instruction in Braille or the use of Braille is not appropriate for the child,” italics added. The only qualified professional that is trained and licensed to assess these required areas is a teacher of the visually impaired.

Changes: None

**Part 5 IEP Process**

Section 1: General Provisions-Individualized Educational Program (IEP)

Comment: No comments were received in this Section.

Changes: None

Section 2: IEP for Children Who Transfer Public Agencies

#### Subsection (a)

Comment: A commenter indicated that the proposed rule should mandate that the IEP meet the standard of IDEA rather than reference the requirements of Chapter 7 rules.

Discussion: This comment was previously reviewed. The intent of Chapter 7 rules is to implement Federal regulations pertaining to IDEA 04. References within the document relate to Chapter 7 rules verses Federal regulation or law so as to enable the reader not to have to reference other sources for clarifying one item or another in the rule. This specific rule is consistent with § 300.323(e).

Changes: None

#### Subsection (b)

Comment: A number of comments were received that approved of the language in this subsection. One comment requested the rules provide clarification of what happens if the school does not attend the IEP meeting.

Discussion: The requirement in Part 5, Section 2(b) is stated as follows: “Consistent with prior written notice requirements discussed in Part 2 of these rules, ...the developmental preschool center shall invite a representative of the school district or public agency in which the child with a disability is anticipated to enroll, to participate in the last IEP meeting conducted by a developmental preschool center prior to the child’s scheduled enrollment in the school district or public agency.”

The intent of this language is to define the structure of this meeting and the responsibility relative to which agency is responsible for the meeting, the corresponding notice requirements and who is to be invited. This is in marked contrast to 1997 Chapter 7 language which called for school districts and preschool centers to participate in a “planning conference.” Subparagraphs (i) and (ii) of this subsection clearly indicate that the child’s IEP will transfer and that the school district must provide comparable services to implement that child’s IEP until the school district either adopts or develops a new IEP. The school district could choose to evaluate subject to consent by the parent. However, during that evaluation process the child receives comparable services detailed in the previous IEP.

Given these requirements it would be to the benefit of the child to have the school district attend this meeting. It would be to the benefit of the school district also in order to become familiar with the provision of services the child is receiving, previous evaluations, transition questions the parent and preschool center may have as well as a method for the school to become aware of the parent’s concerns and child’s needs in a context of planning for that child’s transition to school. If the school district fails to participate in the IEP meeting the preschool center could reschedule the meeting for a time that will allow participation by a representative of the school district.

The WDE does not believe the school district will fail to attend these meetings. The preschool centers as well as the school district are responsible for the provision of a free and appropriate public education of children with a disability in their community. They are both significant public institutions charged with specific responsibilities for educating children in their communities with expectations by their constituents that they perform these responsibilities in a purposeful, professional manner. In the unexpected event that the public school declines to undertake their responsibility to facilitate an appropriate transition for a preschool child in their community that decision could lead to a denial of FAPE. In such a circumstance either the parent or the preschool center or both have the option to submit a complaint per the procedures outlined in Part 2 of the Chapter 7 rules.

Changes: None

Subsection (d)

Comments: Comments were received that supported the time limit of five (5) business days to transfer records from the previous school to the receiving school. Comments were received that were opposed to this time limit.

Discussion: As part of the rule making process the WDE received suggestions and comments relative to the time frame for transferring requested educational records between public schools and between public agencies. In addition WDE monitors schools for compliance with IDEA and has evidenced circumstances where records transfer has taken long periods of time to accomplish.

Sub paragraph (ii) closely follows § 300.323 (g) which states public agencies take “reasonable efforts to respond to the request from the new school district or public agency” for the transfer of records. To quote from page 46682 of the August 14, 2006 Federal Register, OSEP offered the following: “There is nothing in the Act that would prevent a State from requiring it’s public agencies to obtain a child’s records or respond to requests for a child’s records within a specific timeframe. This is an issue appropriately left to States to determine.”

Review of practices found in other States indicates that many States set timelines for the transfer of records between public agencies. Days are defined as business days or days. Times vary with how they are defined. Five (5) business days is a standard observed in other States. This standard has not been a burden for the agencies in those States and facilitates an expectation for promptly responding to records requests.

Changes: None

### Section 3: IEP Team Membership

Comment: A commenter proposed that the rule clarify that the designated staff listed on the IEP meeting notice are not allowed to be excused from the meeting in whole or in part without written consent of the parent. The commenter indicated this also applies to

the school district representative authorized to commit resources. A commenter also requested the rule mandate that the agency representative have complete authority to bind the agency in all matters relating to the IEP.

Discussion: Section 3, subsection (a) follows § 300.321(a) and uses the same language to describe all participants of an IEP team including the representative of the public agency, commonly referred to as the LEA or agency representative. Subsection (d) of this section relative to IEP attendance follows the language in § 300.321 (e). This requirement already states that written agreement for enabling one of the designated, required IEP participants as specified in § 300.321(a)(2) through (5) and as appears in Section 3(a)(i) through (v) may be excused from the meeting in whole or in part per these regulations. The commenter proposed the rule clarify whether the staff designated on the IEP meeting notice to not be allowed to be excused in whole or in part without written agreement. Adding that language would exceed what is specified in Federal rule and law. If a members area is not being modified or discussed § 300.321(e)(1) and Section 3(d) provides that the member may be excused from the meeting if the parent and the school or public agency agree in writing that the member's attendance is not necessary.

Per the OSEP comments on page 46673 of the August 14, 2006 Federal Register, “an agreement is not the same as consent, but instead refers to an understanding between the parent and the agency.” Section 614(d)(1)(C) of IDEA 04 specifically requires that the agreement between the parent and the school or public agency to excuse a member's attendance at an IEP meeting be in writing as does Section 3(d)(i). If however, the member's area is being modified or discussed, §300.321(e)(2) and Section 3(d)(ii), consistent with 614(d)(1)(C)(ii) of IDEA 04 requires the school or public agency to provide written informed consent.

It is possible the IEP meeting notice could list individuals that are in addition to those individuals required to be at an IEP meeting. The rule specifies that excusal for attending the IEP meeting in whole or in part only applies to the required participants, not to individuals who are not required participants. OSEP comments on page 46675 of the August 14, 2006 Federal Register provides some direction on this matter. To quote; “ We do not believe it necessary to require consent or a written agreement between the parent and the public agency to excuse individuals who are invited to attend IEP meetings at the discretion of the parent or public agency because such members are not required members of the IEP team.”

With regard to situations when there is more than one special education provider for the child, OSEP provides the following clarification: “Section 300.321(a)(3) requires the IEP team to include not less than one special education provider for the child. As explained earlier, a special education provider is a person who is, or will be, responsible for implementing the IEP. Therefore, if a speech pathologist, occupational therapist, or other special education provider, other than the child's special education teacher is on the IEP team, written consent from the parent would be required for the speech pathologist , occupational therapist, or other special education provider to be excused from attending

the IEP meeting in whole or in part, when the IEP team meeting involves a modification to, or a discussion of, the IEP team member's related service or area of curriculum.”

Changes: None

#### Section 4: Parent Participation in IEP Meetings and Child and Other Agency Participation In Transition IEP Meetings

Comments: A commenter preferred to modify the language to state “the first IEP to be in effect after the child turns fifteen” rather than “be in effect when the child turns sixteen.”

Discussion: The proposed rule in subsection (b)(ii) follows §300.322(b)(2) which states “... beginning not later than the first IEP to be in effect when the child turns sixteen or younger if determined appropriate by the IEP team...”

Changes: None

#### Section 5: IEP Definition and Required Content

Comment: No comments were received in this Section.

Changes: None

#### Section 6: Development, Review and Revision of the IEP

Comments: A commenter suggested that using the word “must” instead of “shall,” in this section “converts an IDEA mandate into a wish.”

Discussion: The language in this Section closely follows § 300.324 (a) through (d). The term “must” is used throughout the rule. § 300.324 (a) is quoted as follows: “Development of the IEP- In developing each child’s IEP the IEP team *must...*” (italics added).

Change: None

#### Subsection (b)(vi)

Comments: A commenter suggested inserting “if the child is or may be participating in the regular education environment” with reference to the role of the regular education teacher.

Discussion: The language in proposed rule follows § 300.324( a)(3) exactly. Further, Section 3, Subsection (a)(ii) of this Part, consistent with § 300.321(a)(3) specifies that a regular education teacher is appointed to the IEP team if the child is or may be participating in the regular education environment.

Changes: None

#### Subsection (c) (B)

A Commenter pointed out that there is a typographical error in the word “revaluation” verses “reevaluation.”

Change: The word will be corrected.

#### Subsection (e)

Comments: A few commenters agreed with the provision in the rule requiring participation of or approval by an agency representative for an IEP amendment. No comments were received that were opposed to this provision.

Changes: None

#### Subsection (f)

Comment: A commenter suggested the amendment agreement be signed by the parties.

Discussion: The proposed rule closely follows § 300.324(a)(4) which requires the amendment to be in writing. There is no Federal requirement that the amendment be signed, just that it be in writing. The proposed rule is consistent with Federal regulations.

Changes: None

### Section 7: Children with Disabilities in Adult Prisons

Comments: No comments were received in this Section

Changes: None

### Section 8: Placement in Least Restrictive Environment (LRE)

#### Subsection(c)(vi)

Comment: a commenter suggested the term “ensure” be changed to “encourage” relative to a public agencies responsibility to involve parent participation in placement decisions.

Discussion: The language in proposed rule exactly follows § 300.501(c)(3) which requires the public agency to *ensure* parent participation verses *encourage* parent participation.

Changes: None

## Section 9: Extended School Year (ESY)

### Subsection: (d)(i)(C)

Comment: A commenter requested to either define or include where “meets WDE Standards” can be referenced.

Discussion: The language questioned by the commenter also appears in 1997 Chapter 7. The proposed rule closely follows § 300.106 which states that ESY services meet standards of the SEA. The rule allows States to establish standards for ESY including the concept of “recoupment” and “likelihood of regression” as one of the concepts to consider for determining eligibility for ESY. State standards must be consistent with the individually oriented requirements of the Act. Although ESY is not included in the language of IDEA 04 it is included in federal regulations § 300.106. Given the responsibility to create Chapter 7 rules consistent with IDEA and Federal regulations the regulatory language is included in proposed rule as it was in previous rule.

There are well established judicial precedents including *Johnson v. Bixby Independent School District* 4, 921 F.2d 1022 (10<sup>th</sup> Cir. 1990); *Crawford v. Pittman*, 708 F.2d 1028 (5<sup>th</sup> Cir. 1983); *GARC v. McDaniel*, 716 F.2d 1565 (11<sup>th</sup> Cir. 1983) that States can use to help establish guidelines for school districts and public agencies to use in the determination of eligibility for ESY services. As Chapter 7 rules are finalized, model forms will be developed to serve as suggested implementing structures for public agencies to adopt or adapt. ESY will be one of those model structures.

## **PART 6 Discipline Procedures for Children with Disabilities**

General Comment: A general comment was received that Part 6 be rewritten to be consistent with the language in IDEA 04 not the language in Federal regulations. The commenter suggested Federal regulations promulgated by OSEP on August 14, 2006 likely violate IDEA 04. The commenter suggested that since Chapter 7 rules follow Federal regulations for the vast majority of the proposed rule that Chapter 7 rules violate IDEA 04 also.

Discussion: This comment was discussed previously in this document. The WDE does not believe that Federal implementing regulations, developed by the agency authorized in law to enforce IDEA, promulgated rules for IDEA that is in violation of the Act.

Changes: None

## Section 1: Change of Placement

### Subsection (b)

Comments: A commenter indicated the rule violates IDEA 04 because removal from the IEP setting beyond the tenth removal constitutes a placement decision under IDEA. The

commenter indicated that as a result parents are mandatory participants in any additional removal decisions.

Discussion: The proposed rule exactly follows the language in § 300.536(b).

Change: None

#### Section 2: Authority of School Personnel

Comment: A commenter objected to the language in this Section because it violates IDEA 04. The recommendation was to follow the language of the law because the Federal regulations violate the law.

Discussion: This issue was discussed above. Section 2 of proposed rules exactly follows § 300.530(a), (b), (c), (d) and § 300.531 which requires the IEP team to determine the interim alternative educational setting for services.

Changes: None

#### Section 3: Manifestation Determination

Comments: A commenter suggested this Section violates IDEA 04 because the proposed rules follow Federal regulations which the commenter believes violates IDEA 04.

Discussion: This issue was discussed above. Section 3 of proposed rules exactly follows § 300.530(e), (f), (g), (h) and in the exact order of this rule.

Changes: None

#### Section 4: Appeals Regarding Disagreements Pertaining to Disciplinary Decisions

Comment: A commenter suggested this Section violates IDEA 04 because the proposed rules follow Federal regulations which the commenter believes violates IDEA 04.

Discussion: This issue was discussed above. Section 4 of proposed rules follows § 300.532(a), (b), and (c) and in the exact order of this rule. In addition proposed rule in this Section follows § 300.533 relative to placement during appeals.

Changes: None

#### Section 5: Protections for Children Not Yet Eligible for Special Education and Related Services

Comment: A commenter suggested this Section violates IDEA 04 because the proposed rules follow Federal regulations which the commenter believes violates IDEA 04.

Discussion: This issue was discussed above. Section 4 of proposed rules follows § 300.534 (a), (b), (c) and (d) and in the exact order of this rule.

Changes: None

#### Section 6: Referral to Action by Law Enforcement and Judicial Authorities

Comments: No comments were received concerning this Section.

Changes: None

### **Part 7 Children with Disabilities in Private Schools**

#### Section 1: Private School Placements by Public Agencies

Comments: No comments were received concerning this Section.

Changes: None

#### Section 2: Placement of Children by Parents when FAPE is at Issue

Comments: A commenter suggested that (a)(ii) of this Section allows an award of funds for damages and should be through a court verses a hearing officer.

Discussion: The proposed rule in this Section closely follows § 300.148(b) which states that disputes about FAPE and whether financial reimbursement for private school placement by the parent are appropriate are the subject for due process hearing per Part 2 of the rules. Those procedures could be resolved in court if parties to the dispute choose to appeal a hearing officer's determination.

Changes: None

#### Section 3: Child Find for Parentally Placed Private School Children

No comments were received concerning this Section.

Changes: None

#### Section 4: Provision of Services for Parentally Placed Private School Children

Comments: No comments were received concerning this Section.

Changes: None

#### Section 5: Expenditures

Subsection (a)(i) A commenter proposed changing the 3-21 reference to through the completion of the school year in which the child turns 12.

Discussion: This subsection will be corrected as indicated below.

Changes: The rule in subsection (a)(i) is amended as follows:

(i) For children aged three (3) through [the completion of the school year the child turns](#) twenty-one (21), an amount that is the same proportion of the school district's or public agency's total subgrant under Section 611(f) of Part B of IDEA 04 as the number of private school children with disabilities aged three (3) through [the completion of the school year the child turns](#) twenty-one (21) who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the school district or public agency, is to the total number of children with disabilities in its jurisdiction aged three (3) through [the completion of the school year the child turns](#) twenty-one (21).

#### Section 6: Annual Count of the Number of Parentally Placed Private School Children with Disabilities

Comments: No comments were received concerning this Section.

Changes: None

#### Section 7: Consultation in Determining Services

Comments: No comments were received concerning this Section.

Changes: None

#### Section 8: Compliance

Comments: No comments were received concerning this Section.

Changes: None

#### Section 9: Equitable Services Determined

Comments: No comments were received concerning this Section.

Changes: None

#### Section 10: Equitable Services Provided

Comments: No comments were received concerning this Section.

Changes: None

Section 11: Location of Services and Transportation

Comments: No comments were received concerning this Section.

Changes: None

Section 12: Due Process Hearings and State Compliant Rights

Comments: No comments were received concerning this Section.

Changes: None

Section 13: Property Equipment and Supplies

Comments: No comments were received concerning this Section.

Changes: None

**PART 8 LEA Use of Part B Federal Funds and State Compliance**

Section 1: Local Education Agency Eligibility for Federal Part B Funds

Comments: No comments were received concerning this Section.

Changes: None

Section 2: Permissive Use of Part B Funds

Subsection (g)

Comment: A commenter suggested including the phrase “and IDEA 04” with reference to approved costs.

Discussion: The proposed rules in this Section are consistent with § 300.208. Any use of Part B Federal funds for IDEA would need to consistent with IDEA. The WDE determines the proposed language is unnecessary.

Changes: None

Section 3: Early Intervening Services

Subsection (e)

Comments: A commenter proposed that the term “as defined in the State performance plan” be added to describe disproportionality.

Discussion: The proposed rule closely follows § 300.646 which requires a State to monitor school districts and public agencies on disproportionality with respect to the identification of children with disabilities, or the placement in particular educational settings of the children in accordance with the collection and examination of data by the State in order to address disproportionality with respect to race and ethnicity. The Federal regulation does not define disproportionality relative to the State performance plan.

Changes: None

#### Section 4: Charter Schools

Comments: No comments were received concerning this Section.

Changes: None

#### Section 5: WDE Enforcement- General

Comments: No comments were received concerning this Section.

Changes: None

#### Section 6: WDE Enforcement Monitoring Focus and Targets

Comments: No comments were received concerning this Section.

Changes: None

#### Section 7: WDE Enforcement- Determinations

Comments: No comments were received concerning this Section.

Changes: None

### Appendix A

Comments: A commenter offered that since IDEA “expressly prohibits states from continuing to require districts to follow a severe discrepancy formula...Appendix A should be removed from the proposed rules.”

Discussion: The IDEA did not mandate that States prohibit the use of a severe discrepancy formula as the commenter suggests. As stated earlier in this document § 300.307 (a) indicates that a State must adopt criteria for determining whether a child has

a specific learning disability and “*must not require* the use of a severe discrepancy between intellectual ability and achievement... and *must permit* the use of a process based on the child’s response to scientific researched-based intervention” (italics added). The use of either model is authorized under IDEA and proposed rules. The WDE declines to restrict the options schools or public agencies use to make the determination of whether the child is a child with a Specific learning disability.

Changes: None

## **Appendix B**

Comments: No comments were received concerning this Section.

Changes: None