

Commission of Texas (Texas) that two proration units in the Geopressured Wilcox Lobo formation, located in Zapata County, Texas, be designated as a tight formation. The units are on acreage previously excluded from tight formation designation under § 271.703(c)(2)(i).<sup>2</sup> The Director of the Office of Pipeline and Producer Regulation (Director) issued a notice proposing the amendment on April 1, 1983.<sup>3</sup>

#### Background

On December 13, 1983, Commission staff and Texas staff met to discuss the problems inherent in the proposed amended recommendation. Further work on the recommendation was suspended pending a response from Texas. No response from Texas has been received.<sup>4</sup>

#### Discussion

Under § 271.703(e)(2) of the Commission's regulations, the Commission may approve a recommendation by a jurisdictional agency that a natural gas formation be designated as a tight formation if certain geological criteria are met.<sup>5</sup> Although the individual wells satisfy the guidelines set forth in the regulations, the area surrounding the wells does not. Both wells are located in a block which contains three other wells which do not satisfy the guidelines.<sup>6</sup>

<sup>2</sup> 18 CFR 271.703(c)(2)(i) (1983). In Order No. 153, Docket No. RM79-76 (Texas-8), 46 FR 31,255 (June 15, 1981), the Commission adopted Texas' recommendation that the Geopressured Wilcox Lobo formation underlying Webb and Zapata Counties, Texas, be designated as a tight formation. The area designated as a tight formation by Order No. 153 consists of all of Webb and Zapata Counties, with the exception of approximately 130 square miles identified by Texas in its original recommendation as an area that did not meet the Commission's requirements.

<sup>3</sup> 48 FR 14,974 (April 6, 1983). No comments were received, no party requested a hearing, and no hearing was held.

<sup>4</sup> In a November 16, 1984 letter to the Railroad Commission of Texas, Commission staff noted, "The permeability and flow rate data for each of the wells meets the standards. . . [h]owever, both wells are located in an area which Texas has termed substantially developed conventional production acreage. . . [a]verage reservoir characteristics for this area did not meet the . . . standards. . . [b]ecause of the current well spacing regulations. . . there would be little or no opportunity for further developmental drilling on the acreage recommended. . . ."

<sup>5</sup> Section 271.703(c)(2)(i)(A)-(c) (1984). Incentive pricing under section 107(c)(5) is provided to encourage the exploration for and development of unconventional gas supplies.

<sup>6</sup> The average data for the block shows an average flow rate of 544 Mcf per well per day; the regulations require a flow rate not in excess of 336 Mcf per well per day.

Texas originally excluded the subject block from tight formation designation because it was determined to be a "sweet spot" within an otherwise "tight" formation. Texas explicitly carved out this area from the acreage described in the applicant's proposal. Having reached that determination, the Commission will not now permit individual wells within the "sweet spot" to be eligible for tight formation designation.

#### The Commission Orders

Based on the discussion herein, the Commission rejects the recommendation of the Railroad Commission of Texas that two proration units be included within the previously approved Geopressured Wilcox Lobo Formation.

By the Commission.

Kenneth F. Plumb,

Secretary.

[FR Doc. 85-20210 Filed 8-22-85; 8:45 am]

BILLING CODE 8717-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

23 CFR Parts 635, 710, 712, 713, 720, 740, 750 and 751

#### Relocation Assistance and Real Property Acquisition

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Rescission of regulations; technical amendments.

**SUMMARY:** This document rescinds FHWA's regulations relating to relocation assistance and the acquisition of real property, that are based on the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. 4601 *et seq.*) (Uniform Act). This action is being taken because those regulations have been superseded by a Department of Transportation (DOT) regulation, 49 CFR Part 25 (50 FR 8955, March 5, 1985). The DOT regulation prescribes uniform departmental procedures for compliance with the Uniform Act, and replaces the FHWA regulations that implement the Uniform Act. It is intended to serve as a model for all other Federal agencies operating under the Uniform Act.

**EFFECTIVE DATE:** July 3, 1985, or on such earlier date as the State elects to begin operating under 49 CFR Part 25.

**FOR FURTHER INFORMATION CONTACT:** Barbara Reichart, Chief, Relocation Division (202) 426-0116, Gerald Saunders, Chief, Real Estate Division

(202) 426-0142, or Reid Alsop, Office of the Chief Counsel (202) 426-0800, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m. ET, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** In May 1982, the Office of Management and Budget (OMB) formed a Uniform Act Interagency Regulatory Review Working Group to review existing Federal agency regulations which implement the Uniform Act and to develop recommendations for uniform regulations to be adopted by each covered agency to implement the Uniform Act. This was done in response to concerns expressed by State and local governments through the President's Task Force on Regulatory Relief.

In addition to the Working Group, OMB also established a policy-level Interagency Regulatory Review Steering Group. The Steering Group and the Working Group, both chaired by OMB, included representatives of the Department of Housing and Urban Development, Department of Transportation (DOT), Department of Interior, Department of the Army (Corps of Engineers), and the Environmental Protection Agency. The Working Group developed a proposed regulation that was approved by the Steering Group. The DOT at the request of OMB, published the proposed regulation in the *Federal Register* on April 14, 1983, as a notice of proposed rulemaking (48 FR 16197).

Following the review of comments by the Working Group, a final rule was developed. On March 5, 1985, the Department of Transportation published the final rule in the *Federal Register* (50 FR 8955), as 49 CFR Part 25. This final rule was accompanied by a Presidential Memorandum (50 FR 8953) designating the DOT as the lead agency to coordinate administration and implementation of the Uniform Act. The Presidential Memorandum directed all affected executive departments and agencies to issue common regulations under the Uniform Act that would be consistent with the model rule promulgated by DOT.

The new DOT Uniform Act regulation replaced the prior DOT Uniform Act regulation of Part 25. The prior regulation, in 49 CFR 25.9, permitted the FHWA and other operating administrations in DOT to promulgate their own additional Uniform Act implementing regulations. No such authority is provided by FHWA in the new DOT regulations. Moreover, any such FHWA regulations would be

contrary to the overall policy objectives of the new DOT regulation; that is to provide a single Federal regulation to be used by all agencies operating under the Uniform Act. Accordingly, FHWA regulations that implement the Uniform Act ceased to have effect on the date that a State begins operating under the new DOT regulation. Therefore, FHWA is herewith rescinding those provisions of Parts 710, 712, 713, 720, and 740 which implement the Uniform Act. Only procedural provisions that relate solely to program administration and funding, and other provisions that do not directly implement the Uniform Act are being retained. Several provisions have been moved or renumbered for clarity, and provisions providing a cross reference to the new DOT regulation have been added. This rescission will become effective on the date that the new DOT regulation becomes effective. (July 3, 1985, or earlier at the option of the State).

In order that these changes will be easier to follow, the following status table is provided.

Former Part/Section	Present status
§ 710, Subpart A	Removed.
§ 710.201 (b) and (d)	Removed.
§ 710.203(f)	Added.
§ 710.204	Removed.
§ 710.304(p)(1)(i)	Removed.
712, Subpart A	Removed.
§ 712.204(c)(3)(i)	Removed.
§ 712.304(a)	§ 710.203(e).
§ 712.304(f)(1)	§ 710.203(e)(4).
§ 712.404	Revised.
§ 713.102	Revised.
§ 713.103(b)	Removed.
§ 720.201(d)(1) and (2)	Revised as § 710.304(f).
§ 720.202(e)(5)(i) and (v)	§ 712.203(d)(1) and (2).
§ 720.200 through 720.203	Removed.
§ 720.204(e)(18)	Revised.
Appendix 1 of Part 720	Removed.
§ 720.201	Added.
§ 720.204	720.202.
§§ 740.1 through 740.6	Removed.
§§ 740.10 through 740.15	Removed.
§ 740, Subparts B through F	Removed.
§ 740.7	Revised as § 740.2.
§ 740.8	Revised as § 740.3.
§ 740.9	Revised as § 740.4.
§ 740.1	Added.

The FHWA has determined that this document contains neither a major rule under Executive Order 12291 nor a significant regulation under the regulatory policies and procedures of the Department of Transportation. Since this is a technical amendment that merely rescinds FHWA provisions which have been superseded by DOT provisions which are more uniform, public comment is unnecessary. For this reason, the FHWA finds good cause to make the rescission final without prior notice and opportunity for comment and without a 30-day delay in effective date under the Administrative Procedure Act. For the same reason, notice, and opportunity for comment are not

required under the regulatory policies and procedures of the Department of Transportation because it is not anticipated that such action would result in the receipt of useful information. Again, for the reasons stated above, the preparation of an economic evaluation is unnecessary, since the economic impact is minimal. Also, under the criteria of the Regulatory Flexibility Act, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

In consideration of the foregoing the FHWA hereby amends Parts 710, 712, 713, 720, and 740 of Title 23, Code of Federal Regulations as set forth below.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning, and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

#### List of Subjects in 23 CFR Parts 710, 712, 713, 720, and 740

Grant programs—Transportation, Highways and roads, Real property acquisition, Relocation assistance, Rights-of-way.

Issued on: August 13, 1985.

L.P. Lamm,

Deputy Federal Highway Administrator.

#### PART 710—RIGHT-OF-WAY—GENERAL

1. The authority citation for Part 710 is revised to read as follows:

Authority: 23 U.S.C. 315; 49 CFR 25; 23 CFR 1.4 and 1.32; 42 U.S.C. 2000d *et seq.*; Executive Orders 11240, 11247, and 11375; 49 CFR 21.

#### Subpart A—[Removed and Reserved]

2. Subpart A of Part 710 (§§ 710.101–710.104) is removed and reserved.

#### Subpart B—State Highway Department Responsibilities

##### § 710.201 [Amended]

3. Section 710.201 is amended by removing and reserving paragraphs (b) and (d).

4. Section 710.203 is amended by adding paragraph (f) to read as follows:

##### § 710.203 General responsibilities.

(f) *Additional requirements.*  
Additional requirements governing federally assisted real property acquisition, based upon the Uniform Relocation Assistance and Real Property Acquisition Policies Act, are contained in 49 CFR Part 25, Subpart B.

##### § 710.204 [Removed and reserved]

5. Section 710.204 is removed and reserved.

#### Subpart C—Reimbursement Provisions

##### § 710.304 [Amended]

6. Section 710.304 is amended by removing and reserving paragraph (p)(1)(i).

#### PART 712—THE ACQUISITION FUNCTION

7. The authority citation for Part 712 is revised to read as follows:

Authority: 42 U.S.C. 2000d–1; 49 CFR 25; 23 U.S.C. 315 and 323; 49 CFR 1.48(b); 23 CFR 1.32.

#### Subpart A—[Removed and Reserved]

8. Subpart A of Part 712 (§§ 712.101 through 712.103) is removed and reserved.

#### Subpart B—General Provisions and Project Procedures

##### § 712.204 [Amended]

9. Section 712.204 is amended by removing and reserving paragraph (c)(3)(i).

#### Subpart C—Negotiations

10. Subpart C of Part 712 (§§ 712.301 through 712.304) is removed and reserved with the exceptions of § 712.304(a) and (f)(1).

Paragraph (a) of § 712.304 is redesignated as § 710.203(e) and paragraph (f)(1) of § 712.304 is redesignated as § 710.203(e)(4).

#### Subpart D—Administrative Settlements, Legal Settlements, and Court Awards

11. Section 712.404 is revised to read as follows:

##### § 712.404 Administrative settlements.

Administrative settlements on Federal and federally assisted highway projects are governed by the provisions of 49 CFR 25.102(i).

#### PART 713—RIGHT-OF-WAY—THE PROPERTY MANAGEMENT FUNCTION

12. The authority citation for Part 713 is revised to read as follows:

Authority: 23 U.S.C. 315; 49 CFR 25; 23 CFR 1.32; and 49 CFR 1.48(b).

#### Subpart A—Property Management

13. Section 713.102 is revised to read as follows:

**§ 713.102 Applicability.**

The policies in § 713.103 are applicable to all State and political subdivisions thereof that manage real property acquired for any highway or highway related project in which Federal funds will participate in any part of the right-of-way costs of the project. States are encouraged to adopt these procedures for all projects in which Federal funds will participate in any part of the project.

**§ 713.103 [Amended]**

14. Section 713.103 is amended by removing and reserving paragraph (b).

**PART 720—APPRAISAL**

15. The authority citation for Part 720 is revised to read as follows:

Authority: 23 U.S.C. 315; 49 CFR 25; 23 CFR 1.32; 49 CFR 1.48(b).

16. Paragraphs (d)(1) and (2) of § 720.201 are revised and redesignated as § 710.304(r) with a revised paragraph heading, as follows:

**§ 710.304 Reimbursement policy.**

(r) *Appraisal costs and minimum payment.* (1) If otherwise eligible, Federal funds may participate in the cost of appraisal and specialty reports obtained by the State in accordance with its accepted plan of operation.

(2) Where the State prescribes a minimum payment, not to exceed \$500, for the acquisition of a parcel, although the approved appraisal estimate of just compensation reflects a lesser or even a zero consideration, Federal participation shall be allowed if such payment is otherwise eligible.

17. Paragraphs (e)(5)(i) and (v) of § 720.202 are redesignated as § 712.203(d) and given the heading "Reviewing appraiser" as follows:

**§ 712.203 General provisions.**

(d) *Reviewing appraiser.* The reviewing appraiser shall place in the parcel file a signed and dated statement setting forth:

(1) The estimate of just compensation including, where appropriate, the allocation of compensation for the real property acquired and for damages to remaining real property, and an identification or listing of the buildings, structures and other improvements on the land as well as the fixtures which he considered to be a part of the real property to be acquired if such allocation or listing differs from that of the appraisal(s).

(2) The value estimate of items compensable under State law but not eligible for Federal reimbursement, if any.

18. Part 720 is amended by removing § 720.200 through 720.203; removing the last sentence of § 720.204(e)(18); removing Appendix 1 at the end of § 720.204; adding a new § 720.201; and redesignating § 720.204 as § 720.202 as follows:

**§ 720.201 Appraisal requirements.**

Additional policies and requirements governing the appraisal of property for Federal and federally assisted projects, based upon the Uniform Relocation Assistance and Real Property Acquisition Policies Act, are contained in 49 CFR Part 25, Subpart B.

**PART 740—RELOCATION ASSISTANCE**

19. The authority citation for Part 740 is revised to read as follows:

Authority: 49 CFR 25; 23 U.S.C. 315; 49 CFR 1.48(b); 23 CFR 1.32.

20. Part 740, Subparts A, B, C, D, E, and F, (§§ 740.1-740.6, 740.10-740.15, 740.31-740.38, 740.51-740.59, 740.71-740.81, 740.91-740.97 and 740.111-740.121) are removed with the exceptions of §§ 740.7, 740.8, and 740.9.

21. Section 740.7 is redesignated as § 740.2 and is amended by removing paragraphs (c), (d), (g), (h), and (i); and by redesignating the paragraphs (e) and (f) as (c) and (d), respectively, and by revising new paragraph (c)(2) to read as follows:

**§ 740.2 Eligibility for participation of Federal-aid funds.**

(c) *Federal share.* \* \* \*

(2) Federal funds may not participate in any costs of a project, including preliminary engineering, right-of-way, relocation and construction costs, unless prior to their displacement from their home, comparable replacement dwellings were available or provided for displaced individuals and families.

**§ 740.8 [Redesignated as § 740.3 and amended]**

22. Section 740.8 is redesignated as § 740.3 and is amended by removing paragraph (b) in its entirety and by removing the designation to paragraph (a).

**§ 740.9 [Redesignated as § 740.4 and amended]**

23. Section 740.9 is redesignated as

§ 740.4 and is amended by removing paragraph (b); removing everything after the words "Executive Order 11246." in the introductory text of paragraph (c); removing the words "required by this part" and adding in lieu thereof "required by 49 CFR Part 25" in paragraph (e)(2)(ii); removing the words "to ascertain compliance with the provisions of this part" and adding a period after the word "necessary" in paragraph (f); and redesignating paragraphs (c), (d), (e), and (f) as (b), (c), (d), and (e), respectively.

24. Part 740 is amended by adding a new § 740.1 to read as follows:

**§ 740.1 Relocation requirements.**

Substantive requirements governing the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs and projects, prescribed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act, are contained in 49 CFR Part 25.

**Technical Amendments**

Due to the removal of a large portion of 23 CFR Part 740, and other changes the following technical amendments are necessary to correct references found in other parts of Title 23, CFR, and are set forth below.

**PART 635—[AMENDED]****§ 635.309 [Amended]**

25. In § 635.309, paragraph (c)(3) is amended by removing the reference "23 CFR 740.12" and inserting in lieu thereof "49 CFR 25.204".

**PART 710—[AMENDED]****§ 710.304 [Amended]**

26. In § 710.304, paragraph (o)(3)(iii) is amended by removing the phrase "§ 740.9(d) of this subchapter" and inserting in lieu thereof "49 CFR 25.6".

**PART 712—[AMENDED]****§ 712.204 [Amended]**

27. In § 712.204, paragraph (d)(5) is amended by removing the reference "23 CFR Part 740" and inserting in lieu thereof "49 CFR Part 25".

**PART 750—[AMENDED]****§ 750.304 [Amended]**

28. In § 750.304, paragraph (c)(4) is amended by removing the reference "23 CFR 710.204" and inserting in lieu thereof "23 CFR 710.304(h)".

**PART 751—[AMENDED]****§ 751.21 [Amended]**

29. In § 751.21, remove the reference "Part 740, 23 CFR" and insert in lieu thereof "49 CFR 25".

[FR Doc. 85-20079 Filed 8-22-85; 8:45 am]  
BILLING CODE 4910-22-M

**DEPARTMENT OF THE INTERIOR****Bureau of Indian Affairs****25 CFR Part 45****Special Education; Establishment of Standards**

**AGENCY:** Bureau of Indian Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Indian Affairs is publishing a final rule which establishes standards for the provision of special education and related services under the Education for All Handicapped Children Act of 1975, as amended, to Indian schools operated by or under the authority of the Bureau of Indian Affairs (BIA).

**EFFECTIVE DATE:** October 7, 1985.

**FOR FURTHER INFORMATION CONTACT:** Charles Cordova, Chief, Branch of Exceptional Education, Office of Indian Education Programs, Bureau of Indian Affairs, 1951 Constitution Ave., N.W., Room 4651, Washington, D.C. 20245, telephone number: (202) 343-6675.

**SUPPLEMENTARY INFORMATION:** The authority for issuing this rule is contained in 5 U.S.C. 301; 25 U.S.C. 2 and 9. This notice is published in exercise of the authority delegated by the Secretary of the Interior to the Assistant Secretary for Indian Affairs by 209 DM 8.

This final rule establishes criteria for governing the operation of special education programs for handicapped Indian children enrolled or eligible for enrollment in BIA operated and/or funded schools. The regulations establish a single comprehensive set of standards for ensuring all handicapped children enrolled in BIA operated and/or funded schools are provided a free appropriate education in the least restrictive educational environment appropriate to their needs, consistent with their rights and related procedural safeguards.

This rule does not constitute a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969.

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3504(h) *et seq.* The information collections identified in §§ 45.19(d) and 45.33 are required by the Department of Education in 34 CFR 300.

The primary author of this document is Charles G. Cordova, Bureau of Indian Affairs, telephone number: (202) 343-6675.

The Department of Interior has determined that this document pertains only to schools operated or funded by the BIA; and therefore, is not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

The Bureau of Indian Affairs published a proposed rule 25 CFR Part 31k (renumbered throughout this document as Part 45) on September 29, 1980. Public comments were invited until November 27, 1981. In response to this invitation, individuals, groups, schools and interested persons submitted comments. In addition, the Bureau of Indian Affairs, Office of Indian Education Programs, conducted public hearings throughout the Country where large percentages of Indian people are located. During these public hearings, commenters were given an opportunity to write or record their comments for transcript. Copies of the proposed regulations were made available for their convenience. A task force of Bureau of Indian Affairs' (BIA) educators was selected from various locations to review and respond to the comments from the field. The Bureau of Indian Affairs, Office of Indian Education Programs, has carefully considered the views of the public as reflected in the written comments and testimonies at public hearings. The following is a description of these views and BIA responses to them.

**Subpart A—General**

During the comment period, recommendations of numerous changes were received to improve the clarity of the rule and make it consistent with previous regulations relative to Indian children. Several editorial changes were incorporated into the final rule which include the following items:

**General responsibility (§ 45.1)**

**Comment:** Several commenters recommended the term "public" be deleted as it relates to public education since Bureau schools are Federally funded education facilities.

**Response:** We agree that the schools are not public in the strictest sense of the word and the term "public" has been deleted.

**Enrollment in early childhood education programs (§ 45.2)**

The title of this section has been changed to "Provisions of Early Childhood Special Education Programs and Services."

**Comments:** One commenter suggested that the title of this section read: "Provisions of Early Childhood Special Education Programs and Services."

Several commenters suggested that a definition of Early Childhood Special Education be included in the regulations.

Several commenters recommended that this section be charged to include children from birth to five (5) years of age and that the BIA provide special education services to these children.

**Response:** This section has been changed to agree with the requirements of the Indian School Equalization Program (25 CFR Part 39). The ISEP program provides funding for children enrolled in BIA operated or funded schools. At this time, there are no provisions to enroll children in pre-kindergarten programs. Because of the supplemental nature of the funds received through Pub. L. 94-142, it has been determined that funding can only be provided toward the education of children enrolled in BIA operated or funded schools. To require schools to serve zero to five (0-5) year olds would be inconsistent with BIA regulations and practice. Since BIA is not eligible to receive pre-school incentive funds from the Department of Education, a limited number of model programs for handicapped Indian children from birth to age five (5) may be approved for funding. The number will be based on need and funding limitations. Although funding will be limited for children from birth to age five (5), every effort will be made by the BIA to locate and identify handicapped children and to refer them to appropriate service providers.

**Children of ages eighteen through twenty-one (§ 45.3)**

**Comment:** Several comments were received regarding the age range of three (3) to twenty-one (21) years. The commenter felt the age limit of twenty-one (21) should be raised.

**Response:** No change has been made. Pub. L. 94-142 as well as Pub. L. 95-561 provide for services to students only through the age of 21 years.

*Equal education opportunity (§ 45.4)*

The title of this section has been changed to read "Full Educational Opportunity."

*Comment:* Several comments were received regarding lowering the age of provision of Full Educational Opportunity as well as the time line given. One commenter requested a clarification of "all handicapped children."

*Response:* As explained in the response in § 45.2, the BIA only requires the schools to serve handicapped children who are enrolled or eligible to be enrolled; therefore, the age requirement was changed from ages three (3) through twenty-one (21) to ages five (5) through twenty-one (21). The time line was dropped since the date has now passed. These schools not in compliance will be monitored and assistance will be provided to help bring them into compliance.

Every effort will be made to locate, identify and refer handicapped children from birth to five (5) years of age.

*Definition (§ 45.5)*

*Comment:* A comment was received concerning paragraph (a) "Agency" and the Agency's role in reference to contract schools.

*Response:* No changes have been made. The Director has designated specific agency or area offices as being responsible for tribally operated contract schools. The term area/agency is used interchangeably as far as organizational responsibilities are concerned.

*Comment:* A comment was received regarding paragraph (b) "Agency Superintendent for Education", concerning the definition of Agency Superintendent for Education in relation to off-reservation boarding schools.

*Response:* No change was made. Pub. L. 95-561 specifically defines the responsibilities of the Agency Superintendent for Education and the Area Education Program Administrator toward off-reservation boarding schools.

*Comment:* One comment was received regarding paragraph (c) "Approved public or non-public school," and the State of New Mexico's non-participation in Part B of the Education of the Handicapped Act Programs and suggested that a provision be added to allow the BIA schools in this State to make placements, where appropriate, based on a determination of the Office of Indian Education Programs.

*Response:* No change was made. The state of New Mexico has established special education rules which are consistent with Federal regulations. The

state is in compliance with the requirements and placement should not present a problem.

*Comment:* One comment was received in reference to paragraph (f) "Boarding school" as one offering "residential care."

*Response:* The definition of boarding school has been changed to read "Boarding school" which means a Bureau school offering a residential center and support services as well as an academic program.

*Comment:* One comment was received pertaining to paragraph (i) "Cooperative agreements" which asked if "cooperative agreements" must be formal agreements.

*Response:* No change was made. It was felt that some type of formal agreement should be in effect for audit and monitoring purposes. Such an agreement should help to delineate the responsibilities of the Bureau school and the public school district for providing Special Education services.

*Comment:* Several comments were received concerning the definition of "Counseling services" in paragraph (j).

*Response:* No change was made. The definition of counseling services was taken directly from the Pub. L. 94-142 regulations with the addition of counselor training for social workers. It is the intent of these regulations to insure that all individuals providing counseling services to handicapped children have high qualifications and meet the standards set forth by the state licensing office.

*Comment:* Several comments were received regarding the inconsistency between the definitions in paragraph (o) of "Handicapped Child" in these regulations and Pub. L. 94-142 regulations.

*Response:* The definition of handicapped child has been made consistent with Pub. L. 94-142 regulations by adding "seriously" to emotionally disturbed; "specific" to the definition of learning disabled and removing the term "severe language disorder" from the definition. The definition of each handicapping condition has been listed alphabetically under the definition "Handicapped Child."

*Comment:* Several comments were made concerning the exclusion of the term "gifted and talented" from the definitions.

*Response:* No change was made. No provisions were made for this category under Pub. L. 94-142. The Education of the Handicapped Act. Appropriate guidelines, standards or regulations will be published if a program for gifted and talented is included in the Indian School

Equalization Formula. (24 CFR 39.10-39.23)

*Comment:* Several comments were received concerning paragraph (q) "Individualized Education Program", stating that it was not the Pub. L. 94-142 definition.

*Response:* A change has been made. The definition is now consistent with the requirement of this Part and Pub. L. 94-142.

*Comment:* Two commenters were concerned with parts of the paragraph on "Individual Intelligence Quotient" (IQ) test. The commenters stated future mental abilities could not be measured and the word retarded should be deleted.

*Response:* A change has been made. It was determined that the words in question were unnecessary and they were deleted from the definition.

*Comment:* Many comments were received regarding paragraph (v) pertaining to the inconsistency between the definition of "least restrictive environment" (LRE) contained in these regulations and the Pub. L. 94-142 regulations.

*Response:* A change has been made. The definition is more specific and is consistent with the Pub. L. 94-142 regulations.

*Comment:* One commenter requested inserting other words instead of those in the definition of "Native language" in paragraph (w).

*Response:* A change has been made. The definition of native language has been changed to insure understanding of special education proceedings by the parents.

*Comment:* Several comments were received pertaining to paragraph (x) which referred to the lack of specificity in the definition of "parent."

*Response:* A change has been made. The definition is now specific and includes persons acting in place of the parent.

*Comment:* Several comments were made regarding the terseness of the definition of "parental consent" in paragraph (y).

*Response:* A change has been made. The definition is now more specific and consistent with the Pub. L. 94-142 regulations.

*Comment:* Several comments were received concerning paragraph (cc), "School" which objected to the inclusion of "private schools/facilities/institutions" in the definition.

*Response:* No change has been made. The term "school" as used in various sections of this regulation includes private schools/facilities/institutions and they should be included in the

definition. The Bureau supports the education activities of several private schools for handicapped Indian children.

*Comment:* A few comments were received regarding the definition of "Special Education Coordinator" in paragraph (ff) in relation to the role of the Area/Agency and schools.

*Response:* No change has been made. The term Special Education Coordinator refers to the individual at the Agency or Area level who has the responsibility for coordinating the provisions of special education services for one or more schools under the general supervision of the Agency Superintendent for Education or Area Education Program Administrator. The term does not include the local school personnel.

*General Comment:* Many general comments were received regarding definitions of handicapping conditions requesting they be made more specific. It was also suggested various words be added or deleted, additional definitions be added and/or existing definitions be reworded.

*Response:* No change has been made. The definitions of handicapping conditions are consistent with Pub. L. 94-142 regulations and the ISEP regulations.

#### Subpart B—Identification and Evaluation of Handicapped Children

##### Child find (§ 45.11)

*Comment:* Several commenters referred to identifying and locating handicapped children under the age of three years. Some of these comments indicated that funding was available to serve these children.

*Response:* No change has been made. In cooperation with other programs, the BIA will continue to locate and identify these children; however, funding for pre-school programs can not be assured at this time.

*Comment:* Several comments were received which indicated the child find section of the regulations was unclear.

*Response:* A change has been made. The requirements are now more specific. The reference to off-reservation boarding schools was deleted. This section now requires that all schools must conduct in-school identification.

##### Child find elements (§ 45.12)

*Comment:* Many comments indicated the major responsibility for child find elements should not rest with the Agency or schools since they do not have appropriate funding, personnel or time to do an effective job in their area.

*Response:* A change has been made. This section was rewritten to allow

more options for the Agency. The Agency has the responsibility to establish child find procedures. The intent of these procedures is to identify all children who may be in need of Special Education Services.

##### Register of children (§ 45.13)

*Comment:* Several comments were received regarding the register of children to be maintained at the school. These comments questioned the legality of maintaining such a register and necessity of the list.

*Response:* A change has been made. The requirement to keep a register of all children was dropped. The section now includes a requirement that all information collected and maintained must be in accordance with the confidentiality requirements of Pub. L. 94-142 and the Privacy Act.

##### General entry screening (§ 45.14)

*Comment:* Due the stringent requirements in the general entry screening sections, many comments were received regarding the burden placed on the local school to obtain the required information.

*Response:* A change has been made. Only the minimum requirements are now included. A school may choose whatever screening instrument they desire. The intent is that every child enrolled in school be properly screened to identify those children who may need further evaluation.

##### Waiver of general entry screening (§ 45.15)

The title of this section has been changed to read: "Periodic school screening."

*Comment:* Several comments were received questioning the right to regulate parents through this part.

*Response:* A change has been made. The section on waivers has been combined with the section on General entry screening. The intent is to give parents an option and to minimize the number of times a child would be screened. Parents still have the right to waive the screening.

##### Screening personnel (§ 45.16)

*Comment:* Several comments were received asking for clarification of the term "certified, licensed or qualified" in regard to the screening personnel.

*Response:* A change has been made. It was the intent of this section to require that school personnel doing the screening should be trained in these duties. Classroom teachers, special education teachers and in the case of some specific screening, technician aides may be trained to perform the

screening. This section has been changed and directs the school to utilize personnel who are trained to do the specific screening which is being performed.

##### Report of general screening (§ 45.17)

The title of this section has been changed to read "Screening results and referrals."

*Comment:* Several commenters expressed confusion regarding the implications of a general entry screening. Many also recommended changing the time lines.

*Response:* A change has been made. This section was rewritten and the time lines were adjusted to accommodate the needs of the schools with limited staff. The school now has 30 days to complete their reports and confer with the parents.

##### Individual evaluations (§ 45.18)

*Comment:* Several comments expressed concern that the requirements as written might be against a parent's wishes.

*Response:* A change has been made. This section now states specifically when a child should be evaluated. Parent consent is always required for the initial evaluation (see § 45.52).

##### Evaluation procedures (§ 45.19)

*Comment:* Many comments were received regarding this section. These comments covered a wide range of concerns including: (1) comments stating this section did not outline evaluation procedures and (2) possible violation of parent's rights.

*Response:* A change has been made. This section has been rewritten and it outlines the evaluation procedures step by step. The reference to parent was deleted and may now be found in Subpart D.

##### Individual evaluation objectives (§ 45.20)

*Comment:* Several comments were received requesting that assessment team members recommend intervention strategies.

*Response:* A change has been made. The section lists intervention strategies as one of the objectives.

##### Formation of multi-disciplinary evaluation teams (§ 45.21)

*Comment:* Several comments were received regarding the responsibility for selecting the multi-disciplinary evaluation teams.

*Response:* A change has been made. This section was rewritten to eliminate the contradiction of responsibilities. The

school supervisor has overall responsibility for the individual evaluation; however, the Special Education Coordinators, because of their specialized training and experience, will coordinate the effort.

*Composition of multi-disciplinary evaluation teams (§ 45.22)*

*Comment:* Several comments were received concerning the term "certified."

*Response:* A change has been made. The term certified has been deleted and "qualified" has been inserted.

*Content of individual evaluations (§ 45.23)*

*Comment:* Many commenters were concerned about the cost and the limited number of personnel in their schools. Some commenters stated that the requirement was unrealistic, particularly the one requiring vocational assessments when most schools do not have a vocational education program.

*Response:* A change has been made. The regulation now only requires an educational assessment, a health assessment and a psychological assessment for children referred for reasons other than a speech impairment. The portion on vocational education has been deleted.

*Test administration (§ 45.24)*

*Comment:* Several comments were received which requested definitions for racial, cultural, and sex bias.

*Response:* No change was made. It is the responsibility of the multidisciplinary team to ensure appropriateness of tests.

*Location of evaluation (§ 45.25)*

*Comment:* Several comments were received requesting clarification of the term geographical proximity.

*Response:* A change has been made. The term geographical proximity has been deleted. Testing may occur at a site compatible with the child's condition upon agreement between the school official and the parents.

*Multi-disciplinary evaluation team procedures (§ 45.26)*

*Comment:* Several commenters questioned whether the school supervisor or the Special Education Coordinator should be the designated responsible official. There was much concern with the time lines and lack of adequate resources.

*Response:* No change has been made. The time lines have not changed. The intent of this requirement is to complete the evaluations as soon as possible and to provide a comprehensive assessment of each child. The Special Education

Coordinator has been designated to ensure appropriate procedures are followed. The members of the evaluation team have a right and the responsibility to determine the appropriate material to be used and any additional information which would assist them in the comprehensive assessment of each child to determine if he/she is indeed handicapped and in need of exceptional education.

*Emergency evaluation and placement (§ 45.27)*

*Comment:* Several commenters requested that time lines and procedures be further clarified.

*Response:* A change was made to emphasize that emergency placement is temporary and specific time lines have been incorporated.

*Independent educational evaluations (§ 45.28)*

*Comment:* Several commenters questioned the independent evaluation at public expense.

*Response:* No changes were made. The outlined procedures comply with the requirements of the regulations implementing Pub. L. 94-142.

*Additional procedures for evaluating specific learning disabilities (§ 45.29)*

*Comments:* Many comments were received regarding the length and extensiveness of the Specific Learning Disability regulations.

*Response:* No change has been made. The requirements reflect those set forth in 34 CFR 300.540. Pertaining to evaluation of learning disabled children.

**Subpart C—Provision of Special Education and Related Services**

*Free, appropriate public education (§ 45.30)*

*Comment:* Several commenters made reference to the absence of the terms "Each BIA funded or operated school. . . ."

*Response:* A change was made. These regulations apply to all schools funded or operated by the BIA.

*Individualized education program (IEP) (§ 45.31)*

*Comment:* One commenter questioned the development of an IEP based on the "results of an individual evaluation" and requested a change to "as a result of the determination of a multi-disciplinary team."

*Response:* A change was made. The recommendation was adopted.

*Content of individualized education program (§ 45.32)*

*Comment:* Several commenters wanted to know who would determine whether the objectives were being met.

*Response:* No change has been made. The individuals providing the direct services are the logical persons to determine when objectives are being met. The annual review of the IEP would also help determine whether objectives were being met.

*IEP development (§ 45.33)*

*Comment:* Several commenters objected to the described process of obtaining permission from the Central Office Director because it would delay the writing of the IEP if diagnosis was made near the end of the school year.

*Response:* A change was made. "Agency Superintendent for Education" has been substituted for the "Director" to allow for localization of policy and procedures.

*Comment:* Two commenters objected to mandated progress reporting for elementary and secondary handicapped students.

*Response:* No change has been made. Progress reports should be made on handicapped students on a regular basis just as for the regular student population.

*Comment:* Several commenters requested that a sixth listing of specific related service personnel be included in the IEP Committee.

*Response:* No change has been made. To do so might serve to limit related service personnel participation, whereas the term "other individuals" as referred to in paragraph (b)(5) allows more extended participation.

*Placement recommendation in the IEP (§ 45.34)*

*Comment:* One commenter requested clarification on the definition of continuum of services for placement in regard to the least restrictive environment.

*Response:* No change has been made. This continuum is self-explanatory and needs no further clarification.

*Comment:* Several commenters responded regarding the boarding school as being the least restrictive environment.

*Response:* No change has been made. The intent is to differentiate between Bureau operated boarding schools and other non-Bureau residential facilities. It would not be unusual to place a handicapped Indian student in a Bureau funded boarding school; whereas in the private sector, placement in a residential facility would probably

indicate an inability of the school system to provide services due to the severity of the handicapping condition.

*Comment:* Several comments were received concerning the schools' ability to contract for services to the handicapped.

*Response:* No change has been made. Should a school find that it is impossible to offer the full continuum of services, due to isolation or non-availability of personnel, then alternate means for providing an appropriate education in the least restrictive environment should be considered. This might include contractual cooperative arrangements.

*Comment:* Several comments were received regarding paragraph (j) "respite care."

*Response:* A change was made. The paragraph was deleted because this option was not relevant to Bureau education programs.

*Comment:* Several concerns were expressed over the teacher-pupil ratio in paragraph (g) guidelines since they have not been published.

*Response:* A change has been made. Reference to teacher-pupil ratio has been deleted. The complexity of the BIA education program demands that teacher-pupil ratio have enough flexibility to meet the needs of the students and to be cost effective in each given situation.

#### *Approval of IEP and placement recommendation (§ 45.35)*

*Comment:* One commenter felt the need to require official minutes of each meeting be kept in the child's folder.

*Response:* No change has been made. The documentation required in the development of an IEP should be sufficient documentation of the IEP meeting.

*Comment:* Several commenters wanted the term "School Supervisor" defined further in paragraph (c)(3).

*Response:* A change was made. The word coordinator was inadvertently left in the draft and has been deleted.

*Comment:* One commenter advanced the idea that while the parent is encouraged to attend IEP meetings, they are not encouraged to participate.

*Response:* No change has been made. The actions recommended in paragraph (b) of § 45.35 encourage the attendance and participation of the parents.

*Comment:* One commenter reported an inaccurate reference in § 45.35(b)(5).

*Response:* A change was made. The reference was changed to § 45.58.

*Comment:* Several comments requested the term "Evaluation Coordinator" be changed to "Special Education Coordinator" in paragraph (b)(1).

*Response:* A change was made adopting the comment.

*Comment:* One commenter suggested that an interpreter fluent in English and the Native languages be made available to parents who are deficient in English where appropriate.

*Response:* No change was made. § 45.35(d) specifies "The School Supervisor should take whatever action is necessary to insure that the parents understand the IEP and the proposed placement . . ." and § 45.36(e) requires that an interpreter be provided.

*Comment:* Several comments were received which encouraged the term "or his designee" be included along with the school supervisor.

*Response:* A change was made to adopt the comment.

#### *Parent participation (§ 45.36)*

*Comment:* Several commenters responded regarding the necessity of encouraging parental participation in both the placement and IEP meetings.

*Response:* No change has been made. This section outlines the procedures a school must use to involve parents in the IEP meeting; however, in some instances parents may be unresponsive even after repeated efforts to involve them. In these cases a school must have documentation of their efforts to prove they were not out of compliance with the parent participation requirement.

#### *IEP implementation and placement (§ 45.37)*

*Comment:* One commenter made reference to the Indian Child Welfare Reform Act in placement involvement.

*Response:* No change was made. § 45.33(b)(1) outlines individuals who must be involved in the IEP development meeting, including "other individuals at the discretion of the parent, agency or school."

*Comment:* Clarification was requested on § 45.37(c) regarding the IEP.

*Response:* A change has been made. The IEP must be reviewed at least annually. Emphasis is made on having a valid IEP for students who were in the special education program during the previous school term.

*Comment:* One reader commented that the language in § 45.37(a)(2) is not clear.

*Response:* A change has been made. The paragraph was not clear. It has been rewritten to clarify the requirement.

*Comment:* One commenter suggested that placement within 30 days of written parental approval may not be possible.

*Response:* No change has been made. The intent is to provide special education to the child as soon as

possible. It is the Agency Superintendent's responsibility to make appropriate decisions regarding all children within his/her area of supervision.

#### *IEP revision, review of placement (§ 45.38)*

*Comment:* One commenter asked if a child should have an IEP update if the child is to move from one grade or one school to another.

*Response:* No change has been made. An annual update is required. There is nothing to prevent more frequent updates or revisions. This concern is addressed in § 45.38(a).

*Comment:* One commenter suggested that the term "long-term" be removed and "short-term" educational needs be inserted in § 45.38(a)(5).

*Response:* A change has been made. The statement was corrected.

*Comment:* One commenter wanted to know if all participants involved in the original assessment of the student should be involved in the annual review.

*Response:* No change has been made. The annual review is in reference to the IEP. Persons involved must be consistent with the requirement of this part. Involvement of the multi-disciplinary team is based on the needs of the student, the parent and the school.

#### *Re-evaluation (§ 45.39)*

*Comment:* Several commenters suggested that the school, rather than the agency, has the responsibility for re-evaluation of a child.

*Response:* A change has been made. The schools are now responsible.

*Comment:* A commenter expressed a concern that requests for re-evaluation might become redundant or unreasonable and the school authority should have the right to deny a request.

*Response:* A change has been made. This section was rewritten to include a "reasonable request."

*Comment:* Several commenters responded that parental consent should be required should the school seek to re-evaluate the student before the three year period expires.

*Response:* A change has been made. This section was rewritten to clarify the intent; however, the requirement is only that parents must be notified of the re-evaluation. This is consistent with the requirements of 34 CFR 300.504.

*Comment:* One commenter noted that a re-evaluation, at least every three years, is required.

*Response:* A change has been made. A final phrase was added which states: "a re-evaluation at least once every



three years" to re-emphasize this legal requirement.

*Extended school year services (§ 45.40)*

*Comment:* Commenters were concerned about the availability of funds.

*Response:* No change has been made. If a student's IEP calls for more than 180 days, it is the school's responsibility to provide such services. (See *Crawford v. Pittman* 708 F. 2nd 1028 (5th Cir. 1983).

*Outcome goals (§ 45.41)*

*Comment:* Several commenters expressed the concern that this section would result in "tracking" handicapped children, i.e., putting children in a program over which they and their parents have no control and forcing him/her to remain in that "track."

*Response:* A change has been made. This section now allows optional vocational education opportunities for handicapped students.

*Comment:* One commenter requested clarification of "regular" high school diploma.

*Response:* No change has been made. The term "regular" when used in special education refers to that program or service available to non-handicapped students within the school.

*Related services (§ 45.42)*

*Comment:* Several commenters requested more specificity as to the definition of related services.

*Response:* A change has been made. This section has been changed to insure the provision of services from any source. To be more specific could limit the services provided to a child. Services provided should meet the needs of the individual child in order to provide him/her with an appropriate education.

*Non-academic and extra-curricular services (§ 45.43)*

*Comment:* One commenter wanted to know if funding was available for non-academic extra-curricular services.

*Response:* No change has been made. The purpose of this section is to assure the inclusion of handicapped children in all programs available to non-handicapped children.

*Physical education and athletics (§ 45.44)*

*Comment:* Several commenters were concerned whether the specially designed physical education required by the child should be indicated on the IEP.

*Response:* No change has been made. The IEP must contain the specialized physical education program required by the child as well as any other services

which are necessary for an appropriate education.

*Discipline (§ 45.45)*

The title of this section has been changed to "Expulsion/Suspension."

*Comment:* One commenter expressed concern that this section prohibits temporary removal of a disruptive handicapped student from the regular or alternative program.

*Response:* No change has been made. The removal of a disruptive student from a class for a brief cooling-off period is still a viable option for a school. The intent of this section was to simply prohibit the use of expulsion and suspension as replacements for appropriate programming and to emphasize that alternative action must be considered.

*Comment:* One commenter was concerned about the lack of residential programs available.

*Response:* No change has been made. It is the LEA's responsibility to provide the handicapped child with a free appropriate education. If the multi-disciplinary team determines that residential placement is necessary, placement in a state or private facility is considered. Such placements are coordinated with Social Services and the responsible Education Specialist for institutional placement.

*Comment:* Several commenters expressed concern that this section is too broad and all inclusive as written.

*Response:* A change has been made. This section has been rewritten. The issue is not that handicapped students cannot be disciplined but rather that expulsion or suspension is not a viable alternative to be used in lieu of appropriate programming. It was not the intent to prohibit any and all disciplinary actions regarding handicapped students.

*Geographic accessibility (§ 45.46)*

*Comment:* Several commenters expressed concern regarding placement of children in off-reservation boarding schools.

*Response:* No change has been made. This section only reiterates that attendance in an off-reservation boarding school is not a restrictive placement and may be considered as a school nearest the child's home if it is a school that he/she would normally attend if he/she were not handicapped.

*Architectural barriers and program accessibility (§ 45.47)*

*Comment:* Several commenters referred to the lack of administrative control to assure compliance when

dealing with constructural arrangements for facilities.

*Response:* A change has been made to reflect the concerns stated. The American National Standards and Institute accessibility standards must be followed. The wording of the regulation was changed to be more specific in terms of administrative responsibility.

*Comment:* A commenter suggested that the regulation as written was a standard and as such belonged under standards for special education, in proposed 25 CFR Part 36.

*Response:* No change has been made. Reference was made to the fact that standards for facilities and programs accessibility are contained in Part 45 because of the need for administrative awareness to comply with these standards. It was decided to clarify several sections and that they would keep them under Part 45.

*Handicapped children in private schools placed or referred by agencies (§ 45.48)*

*Comment:* Several commenters requested clarification of this section.

*Response:* No change has been made. This section meets the requirements of 34 CFR 300.347 and assures that children placed in private or state schools have the same rights and receive equitable treatment with children attending BIA funded or operated schools.

*Handicapped children in private schools placed by parents (§ 45.49)*

*Comment:* Several commenters requested clarification of the funding source for private schools.

*Response:* No change has been made. § 45.48 and § 45.49 differentiate the funding source depending on who places a child in a facility other than a BIA funded or operated school.

**Subpart D—Procedural Safeguards**

*Full and effective notice (§ 45.51)*

The title of this section has been changed to read: "Notice to parents."

*Comment:* One commenter was concerned that a full explanation of due process and Family Educational Rights and Privacy Act rights had to be given with each note sent home.

*Response:* No change has been made. This Subpart carefully outlines procedural safeguard. This does not prohibit sending a notice to parents. It outlines the minimum requirements that a school must meet in order to comply with the law.

*Comment:* Two commenters suggested that a specific number of days be specified regarding written notification to parents.

*Response:* No change has been made. The intent is to assure that parents are notified of any action involving their child and that they are aware of their rights in regard to the special education programs.

#### Parental consent (§ 45.52)

*Comment:* One commenter stated that there appeared to be a conflict between this section and the Privacy and Freedom of Information Acts.

*Response:* A change has been made to indicate that all disclosures made under this section will be consistent with the disclosure provisions of the Privacy Act.

*Comment:* One commenter mentioned that § 45.52 allowed all agencies listed in § 45.12(d) to gather identifiable data without parental consent.

*Response:* No change has been made. The intent of § 45.12(d) was to establish a procedure to regularly collect data. All agencies listed are still required to secure appropriate consent prior to actual collection of any information.

#### Rights of handicapped children (§ 45.53)

*Comment:* Several commenters questioned the appointment of surrogate parents.

*Response:* A change has been made. The regulations concerning appointment of surrogate parents are now clearly stated in § 45.56.

#### Access rights (§ 45.54)

*Comment:* One commenter suggested the addition of a section regarding the parents' right to insert material into the student's record.

*Response:* A change has been made. Paragraph (b)(4) was added to § 45.54 detailing the parents' rights to add information and/or comments to their child's record.

#### Confidentiality of information (§ 45.55)

*Comment:* A few commenters expressed concern for the handling of personally identifiable records when they are no longer needed to provide educational services to the child.

*Response:* No change has been made. The specific policy for complying with this section is to be addressed by the local school boards.

#### Surrogate parents (§ 45.56)

*Comment:* Many commenters were concerned with the legality of appointing a surrogate parent.

*Response:* A change has been made. A child's rights must be protected in instances of educational decision making, identification, evaluation and placement. An alternate process for selecting surrogate parents has been added.

#### Hearing officers (§ 45.59)

*Comment:* A few commenters questioned the appropriateness of the Agency Superintendent for Education selecting the hearing officer.

*Response:* No change has been made. The Agency Superintendent for Education is the educational authority at the Agency level. The decision is subject to challenge as outlined in paragraph (c) of this section.

#### Impartial hearing officer (§ 45.60)

*Comment:* One commenter requested information regarding the qualifications of the hearing officer.

*Response:* No change has been made. It is believed that the regulations sufficiently address the process for the selection of the hearing officer. Qualifications may be adopted by the local school boards. Additionally, all hearing officers must be properly trained in the procedures.

#### Hearing rights (§ 45.61)

The title of this section has been changed to "Hearing reports."

*Comment:* One commenter suggested changing "accompanied and advised by counsel" to "represented by counsel."

*Response:* No change has been made. This hearing is not intended to replace a court. The intent is for all parties to have expert advice during the proceedings.

*Comment:* One commenter suggested including a regulation on paying attorney fees.

*Response:* No change has been made. The purpose of a hearing is to ensure that handicapped children are provided a free appropriate education. No provision has been made relating to hearing costs.

#### Administrative appeal (§ 45.63)

*Comment:* Some comments were received concerning legal actions and the legal aspects of appealing to the Director following due process hearing.

*Response:* A change has been made. When a parent or the school disagrees and cannot informally come to terms, then a third party is brought in to have a hearing. If that does not provide resolution to the matter, either party may appeal to the Assistant Secretary—Indian Affairs.

#### Appointment of a special education coordinator (§ 45.64)

*Comment:* Commenters disagreed on this section. Some wanted more precise requirements, and some requested deleting the entire section.

*Response:* A change has been made. This section was deleted. The regulation as written would have infringed on the

rights of the Agency and Agency School Board to structure their organization to meet local needs. Deletion of this section, however, does not guarantee that funds will be available to all agencies desiring a Special Education Coordinator.

#### In-Service training (§ 45.65)

*Comment:* Two commenters requested a definition of the term "LEA."

*Response:* A change has been made. Training sources have been clearly specified, references to "LEA" have been deleted.

*Comment:* One commenter recommended that this section be expanded to insure that each Agency and/or school develop and implement an in-service training plan regardless of the funding source.

*Response:* A change has been made. The section was rewritten to clarify the necessary assurances for in-service training and insure coordination between agencies and schools.

#### Qualifications of staff (§ 45.66)

*Comment:* A number of commenters expressed concern regarding staff qualifications in non-BIA operated schools.

*Response:* No change has been made. BIA personnel regulation, 25 CFR 38.4, require certification of school personnel. It is assumed that the tribes operating non-BIA schools will, in the interest of a sound education for their children, establish certification standards for the staff. Additionally, a child receiving services from a non-certified teacher can not be counted to receive ISEP funds.

#### Self-evaluation (§ 45.71)

The title of this section has been changed to "Annual evaluation."

*Comment:* One commenter requested that the Director be required to measure and evaluate the effectiveness of the Bureau's efforts to provide a free appropriate education to all handicapped Indian children.

*Response:* No change has been made. Internal evaluations should be directed by the governing body of the school with input from parents and advocates for the students.

*Comment:* Several commenters recommended a clarification of self-evaluation responsibilities and evaluation procedures.

*Response:* A change has been made. Annual evaluation rules have been added to this section in accordance with the requirements of 34 CFR 300.146.

*Comment:* One commenter felt that keeping self-evaluation records for three years did not seem necessary.

*Response:* A change has been made. The requirement has been deleted. After submitting the annual evaluation report to the Central Office the Agency/school should retain the results only as long as they are useful to improve the special education program.

#### Non-Discrimination (§ 45.73)

*Comment:* Several commenters recommended including the word "Indian" between "handicapped" and "child."

*Response:* A change has been made. The word "Indian" has been included to identify the children to be served.

#### The Division (§ 45.74)

*Comment:* Several commenters questioned the Director's role and responsibility for educational programs for handicapped children.

*Response:* No change has been made. The Director has the responsibility to insure an appropriate education for all Indian children attending BIA operated or funded schools.

#### Monitoring (§ 45.75)

*Comment:* One commenter recommended that § 45.75(a)(3) be revised to allow for a review of the exceptional child component of the ISEP regulations in addition to Federal fund utilization.

*Response:* A change has been made. The monitoring of special education programs includes a review of all funds utilized in the program regardless of source. § 45.75(a)(3) has been clarified.

*Comment:* One commenter recommended that the monitoring include consideration of small agencies, rural areas, cultural values and tribal traditions.

*Response:* No change has been made. The purpose of monitoring is to determine compliance with Pub. L. 94-142. The consideration for and incorporation of cultural values and tribal traditions into the special education programs rests with the local school boards.

*Comment:* One commenter recommended parental involvement in the monitoring process.

*Response:* No change has been made. Parental involvement at the local level is highly encouraged, particularly as the program affects and meets their own child's needs. The parents should have access to the monitoring findings and recommendations; however, the purpose of monitoring is to determine the degree of compliance with Pub. L. 94-142 in

providing special education to handicapped children.

*Comment:* One commenter recommended that the regulations include a provision that the Division of Exceptional Education provide a written monitoring report to the Agency.

*Response:* A change has been made. The Division of Exceptional Education does provide a written report to the Agency; however, this was not addressed in this section. A new paragraph (f) has been added to § 45.75 to address this concern.

#### Use of available funds (§ 45.77)

*Comment:* One commenter recommended that this section be expanded to include funding received through the exceptional education component of ISEP.

*Response:* A change has been made. The intent of this section was to include all funding specifically appropriated for the special education program of the Bureau. All special education funds must be used for the identification, evaluation and the provision of an appropriate education to handicapped Indian children. This section has been re-written to clarify this requirement.

#### Children for whom the Division of Social Services has accepted financial responsibility (§ 45.78)

*Comment:* Several commenters requested that a clearer statement be made concerning the Division of Exceptional Education and the Division of Social Services.

*Response:* This section was rewritten to include suggestions from the commenters. The regulations as stated here are compatible with Social Services regulations (25 CFR Part 20).

#### Cooperative agreements (§ 45.79)

*Comment:* Several commenters recommended the inclusion of cooperative agreements with other Federal agencies such as Indian Health Services.

*Response:* No change was made. The BIA can not regulate other agencies. Indian Health Service has a responsibility to provide medical services to Indian people.

*Comment:* One commenter recommended that the section be deleted suggesting that the contents were covered in § 45.34.

*Response:* No change has been made. Section 45.34 does not refer to cooperative agreements. This also does not negate the authority of schools or agencies from entering into cooperative agreements for the provision of special education and related services to handicapped Indian children.

#### Vocational education coordinator (§ 45.80)

*Comment:* Several commenters expressed confusion over the intent of this section.

*Response:* A change has been made. This section has been deleted. This was a policy statement, not a regulation.

#### Bureau of Indian Affairs' Advisory Committee for Exceptional Children (§ 45.81)

*Comment:* One commenter recommended several modifications be made, suggesting the inclusion of "within the BIA" after "handicapped children".

*Response:* A change has been made. The term "Indian" was added to § 45.81(a) and now reads: "the education of handicapped Indian children". § 45.81(b) has been changed to "children attending BIA operated or funded schools".

*Comment:* One commenter requested that paragraph (a)(4) of § 45.81 "State and local educational offices" be changed to read: "BLA Agency and school officials".

*Response:* A change has been made. The proposed wording was adopted.

*Comment:* One commenter recommended that § 45.81(b)(1) be expanded to include the Assistant Secretary of Indian Affairs.

*Response:* No change was made on paragraph (b)(1) of § 45.81. However, paragraph (b)(2) was changed by deleting "Director" and inserting the words "Assistant Secretary—Indian Affairs."

*Comment:* One commenter recommended that paragraph (b)(1) of § 45.81 be changed to read: "Unmet special education needs of Indian children."

*Response:* A change has been made. The proposed wording was adopted.

*Comment:* One commenter recommended that the Bureau place limits on the number of meetings held during the fiscal year.

*Response:* No change has been made. The Advisory Council activities are coordinated with the Division of Exceptional Education and meetings are called only when necessary to conduct its business.

*Comment:* One commenter recommended that "reasonable and necessary expenses" should be more explicitly defined.

*Response:* A change has been made. Paragraph (h) of § 45.81 now reads: "will be reimbursed for travel and expenses in compliance with Federal travel regulations" issued by the General

Service Administration. § 45.81 is hereby redesignated as § 45.80 to assure continuity of section numbers.

*Further guidelines and directives*  
(§ 45.82)

*Comment:* Several commenters recommended that this section was unnecessary and should be deleted from the regulations.

*Response:* A change has been made. This recommendation was adopted and this section was deleted.

**List of Subjects in 25 CFR Part 45**

Education of handicapped, elementary and secondary education, Equal education opportunity, Indian education and students.

A new Part 45 to Subchapter E, Chapter I of Title 25 of the Code of Federal Regulations is added to read as follows:

**PART 45—SPECIAL EDUCATION**

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Authority: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 20 U.S.C. 1411-1420.

**Subpart A—General**

**§ 45.1 General responsibility**

(a) Schools are responsible for providing a free appropriate education to all handicapped Indian children enrolled in a school operated or funded by the Bureau of Indian Affairs (BIA) who are between the ages of five (5) and twenty-one (21). Children whose fifth birthday occurs on or before December 31 or whose twenty-second birthday occurs during the course of the regular school year shall be regarded as eligible children for the entire school year.

(b) The BIA has the responsibility to ensure the provision of a free appropriate education until a handicapped child successfully completes a secondary school program, voluntarily withdraws or attains the age of twenty-two (22) years, regardless of whether the handicapped child is provided special education and related services:

- (1) By a school directly;
- (2) Through a contract entered into by the school with a public or private agency;
- (3) By an educational cooperative of which the school is a member; or
- (4) By an approved public or non-public school program (following placement or referral).

**§ 45.2 Provision of early childhood special education programs and services.**

(a) Children from birth to four (4) years of age, who are not enrolled in BIA funded or operated schools, may receive special education services through coordination with Head Start and other existing Early Childhood Special Education programs (ECSE).

(b) Early Childhood Special Education (ECSE) means specially designed special education and related services, to meet the unique needs of a child under the age of five (5) years whose handicap or impairment adversely affects the child's educational performance or learning abilities.

**§ 45.3 Children of ages eighteen through twenty-one.**

A child of ages eighteen (18) through twenty-one (21) shall be entitled to all of the rights given to children and parents by this part.

**§ 45.4 Full educational opportunity.**

A full educational opportunity must be provided to all handicapped children, ages five (5) through twenty-one (21) who are enrolled in schools operated or funded by the BIA.

**§ 45.5 Definitions.**

(a) "Agency" means an organizational unit of the Bureau which provides direct services to the governing body or bodies of one or more specified Indian tribes. The term includes Bureau Area Education offices only with respect to off-reservation boarding schools, cooperative schools, and tribally operated contract schools located in the Area for which the Director has not designated an Agency.

(b) "Agency Superintendent for Education" means the Bureau official in charge of Bureau education programs and functions in an Agency, and who

reports to the Director, Office of Indian Education Programs (OIEP).

(c) "Approved public or non-public school" means:

(1) either a public school operated by an intermediate educational unit, a local education agency or other public agency (as those terms are defined in 34 CFR 300.7, 8, 11) of a State which receives funds under Part B of the Education of the Handicapped Act, as amended (20 U.S.C. 1411-1420) pursuant to a current annual program plan approved by the Secretary of Education; or

(2) a non-public school located in a State determined by the State educational agency to be in full compliance with all applicable State and Federal special education requirements.

(d) "Area Education Program Administrator" means the Bureau official in charge of Bureau Education programs and functions in a Bureau Area office and who reports to the Director.

(e) "Assistant Secretary" means the Assistant Secretary—Indian Affairs, Department of the Interior, or his/her designee.

(f) "Boarding school" means a Bureau school offering a residential center and support services as well as an academic program.

(g) "Bureau" means the Bureau of Indian Affairs of the Department of the Interior.

(h) "Child identification" means the identification, location, and individual evaluation of handicapped children.

(i) "Cooperative agreements" means an agreement between schools operated or funded by the BIA and state and local education agencies for the provision of special education and related services to handicapped children enrolled or eligible to be enrolled in the BIA school.

(j) "Counseling services" means services provided by qualified social workers (with training as counselors), psychologists, guidance counselors, or other qualified personnel.

(k) "Days" mean consecutive calendar days.

(l) "Director" means the Director, Office of Indian Education Programs.

(m) "The Division" means the Branch of Exceptional Education, Office of Indian Education Programs, Bureau of Indian Affairs, Department of the Interior.

(n) "EHA" means Part B of the Education of the Handicapped Act as amended by the Education of All Handicapped Children Act of 1975 (Pub. L. 94-142), 20 U.S.C. 1411-1420, and the regulations issued by the U.S. Department of Education, 34 CFR 300.1.

(o) "Handicapped child" means a child evaluated in accordance with the

requirements of this Part who is determined to be mentally retarded, hard of hearing, deaf, deaf-blind, speech impaired, visually handicapped, seriously emotionally disturbed, multi-handicapped, orthopedically impaired, other health impaired or as having specific learning disabilities and who because of these impairments needs special education and related services. The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-Blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multi-handicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc., but not including speech impaired), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means (i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or (ii) having

limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance including:

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

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

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

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

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

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, or mental retardation, or emotional disturbance, or of environmental, cultural, or economic disadvantage.

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

(11) "Visually handicapped" means a visual impairment which even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(p) "Independent education evaluation" means an evaluation conducted by a qualified examiner who

is not employed by the Agency responsible for the education of the child in question.

(q) "Individualized Education Program" (IEP) means the written individualized education for a handicapped child which is consistent with all the requirements of § 45.31-38 of this part.

(r) "Indian" means a person who is a member of an Indian tribe.

(s) "Indian Tribe" means any Indian Tribe, Band, Nation, Rancheria, Pueblo, Colony or Community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is recognized by the Secretary as eligible for the special programs and services provided through the Bureau to Indians because of their status as Indians.

(t) "Individual Intelligent Quotient (IQ) test" means any individual test, device, or measure which purports to assess a child's current mental abilities, capacity, intellectual functioning, intellectual development or aptitude, but does not include achievement test or adaptive behavior scales.

(u) "In-service training" means training other than that received by an individual in a full-time program which leads to a degree.

(v) "Least Restrictive Environment" (LRE) means that to the maximum extent appropriate, handicapped children in public or private institutions or other care facilities, are educated with children who are not handicapped; and that special classes, separate schooling or other removal of handicapped children from the regular environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(w) "Native language" when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child. In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(x) "Parent" means a parent, a guardian, or person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 45.56. The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or step-

parent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

(y) "Parental Consent" means: (1) that the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; (2) the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and (3) the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(z) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(aa) "Physical education" means the development of physical and motor fitness; fundamental motor skills and patterns; skills in aquatics, dance, individual, and group games and sports. The term includes special physical education, adaptive physical education, movement education and motor development.

(bb) "Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(cc) "School" means educational or residential centers operated by or under contract with the Bureau of Indian Affairs offering services to Indian students under the authority of a local school board and the direction of the school supervisor. A school may be located on more than one physical site. The term "school", unless otherwise specified, is meant to encompass day schools, boarding schools, cooperative schools, and contract schools as those terms are commonly used. The term "school" shall also encompass private schools, facilities, and institutions, with which the Bureau of Indian Affairs may contract for services to handicapped Indian children.

(dd) "Section 504" means section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

(ee) "Special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(ff) "Special education coordinator" means the qualified employee of an Area/Agency responsible for ensuring that all requirements of this part are complied with by the schools within the jurisdiction of the Area/Agency.

(gg) "Supervisor" or "school supervisor" means the individual in the position of authority at any school.

(hh) "Trially operated contract school" means a school (other than a public school) which is financially assisted under a contract with the Bureau.

(ii) "Vocational education" means organized educational programs which are directly related to the preparations of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

#### Subpart B—Identification and Evaluation of Handicapped Children

##### § 45.11 Child find.

Each Agency must insure that every child within its jurisdiction between the ages of birth and twenty-two years who is suspected of being handicapped and in need of special education and related services is identified and located. A formal child find effort must be conducted at least once each school year and must include procedures to identify children:

(a) Enrolled in a regular education program operated by the schools of the Agency;

(b) Enrolled in a pre-school or day-care program on or near the reservation; or

(c) Currently out-of-school, including dropouts but excluding children who have graduated or otherwise successfully completed programs. Schools shall conduct child find activities for in-school identification as described in § 45.12.

##### § 45.12 Child find—elements.

Each Agency shall:

(a) Conduct a *formal community* survey through any effective method to identify children of all ages who may be in need of special education and related services.

(b) Regularly present or distribute child find information at tribal

government or agency meetings, tribal fairs, chapter/district meetings, etc.

(c) Establish a system of in-school identification by which each local school supervisor or designee refers children whose academic performance, attendance, or other behavior indicates the possibility of a handicapping condition for an individual evaluation.

(d) Establish a procedure by which child identification data is regularly collected from the Indian Health Service, local Headstart programs, day care facilities, group homes, local public and non-public schools, the state education agency (of the state in which the Agency is located), tribal agencies and/or organizations and any other appropriate education, health, welfare or social service organization in the community served by the Agency. A formal procedure for the exchange of information between the State Organizational Unit conducting the "Early Periodic Screening, Diagnosis and Treatment Program" (mandated by Title XIX of the Social Security Act) for the state in which the school is located and the Agency in which the school is located shall be established within 180 days from the effective date of this part.

(e) Publish public information articles and programs in local media, including announcements of times, dates, and places of free orientation workshops and free screening.

(f) Initiate annual community-wide communication to all parents of school age children which describes the special education program. Such communication shall emphasize the availability of programs and services for school age children.

#### § 45.13 Register of children.

Each school shall maintain information on each handicapped child enrolled in the program. All information collected and maintained must be kept in accordance with the confidentiality requirements of Pub. L. 94-142 and the Privacy Act.

#### § 45.14 General entry screening.

Each school shall participate in a screening program for all newly enrolled children and children who have not previously been screened in the school. Such screening shall be conducted by the school in order to identify those children who should be referred for a full individual evaluation. The general entry screening shall consist of the following elements, appropriately adapted for use with children of his/her particular age. This screening must be completed within thirty (30) days of the child's enrollment and include at a minimum:

- (a) An appropriate vision screening;
- (b) An appropriate hearing screening;
- (c) A screening of the child's primary language skills;
- (d) The administration by a classroom teacher of a general screening instrument (i.e., rating scale) to provide information regarding:
  - (1) Current academic performances,
  - (2) Social and emotional behavior,
  - (3) Gross motor skills,
  - (4) Fine motor skills,
  - (5) Any observable health problems, and
- (e) The teachers impression of the need for additional assessment.

#### § 45.15 Periodic school screening

(a) At a minimum, schools must annually screen all students enrolled in odd numbered grades (i.e., first, third, fifth, seventh, ninth and eleventh grades) within the first thirty (30) days of enrollment.

(b) For schools using a non-graded system, the screening must occur every other year, beginning with the first level of enrollment at the school. The periodic school screening must meet the requirements set forth in § 45.14. Nothing in this part exempts newly enrolled students in even numbered grades, kindergarten, or pre-school from being screened as required in § 45.14.

#### § 45.16 Screening personnel.

The school shall utilize personnel who are trained to do the specific screening which is being performed.

#### § 45.17 Screening results and referrals.

The school supervisor or designee shall review all results obtained through the screening procedures indicated in § 45.14-15 with the classroom teacher as a team within ten (10) days of completion of this screening and determine if an individual evaluation is warranted.

(a) Upon the determination that an individual evaluation is needed, the school supervisor or designee shall within twenty (20) days complete the following:

- (1) Inform the parents of the screening results and the recommendations of the team.
- (2) Explain parental rights as required in § 45.51 to the parents.
- (3) Obtain parental consent to perform an individual evaluation.
- (4) When parental consent for an individual evaluation is obtained a formal referral must be prepared according to procedures established by the Agency Special Education Coordinator in consultation with the school supervisor. The referral shall be

fowarded to the appropriate personnel for action.

(b) Should parental consent be denied, possible alternatives to formal evaluation such as modifications to the regular classroom program must be considered and discussed with the parent and classroom teacher prior to implementing due process procedures as provided in § 45.58. The discussion required in this part must be held within five (5) days of formal denial of consent and any modifications agreed upon must be implemented within thirty (30) days. If no agreement can be reached through these "conciliation" measures the due process procedures in § 45.58 should be considered.

(c) Nothing in this part is to be interpreted as prohibiting the child's parent, teacher or school administrator from referring a child for an individual evaluation should they feel that an evaluation is needed regardless of the screening cycle.

(d) Screening scales completed on children must be kept in the child's cumulative file until the succeeding scale is completed. If a child is placed in a Special Education Program, the screening results will then become a part of the child's handling file. The child, once placed, will become exempt from the screening procedures conducted thereafter.

#### § 45.18 Individual evaluations.

(a) An individual evaluation must be conducted after receiving parental consent when:

- (1) The child is referred based on the screening results, or
- (2) Requested by the parent, teacher or administrator in writing.

(b) A student must be re-evaluated when:

- (1) A disagreement occurs between the school and parent regarding a change of placement from one program to another (i.e., full-time special education to regular classroom, part-time special education to regular classroom, etc.),
- (2) A change is proposed for the identification of a student's handicapping condition to a different condition (i.e., seriously emotionally disturbed to specific learning disabled, mentally retarded to specific learning disability, etc.),

(3) A child is currently enrolled in a special education program and the last evaluation was administered three years ago, or

- (4) Requested by the parent.

**§ 45.19 Evaluation procedures.**

Procedures for selecting testing and evaluation materials and procedures developed for the purpose of evaluation and placement of handicapped children will not be racially or culturally discriminatory. Materials or procedures shall be provided and administered in the child's native (primary) language or mode of communication unless it is clearly not feasible to do so. No single procedure shall be the sole criterion for determining an appropriate educational program for a child. Assessment instruments should be selected on a child-by-child basis. Assessments must be reported in such a manner as to indicate present levels of the child's performance, to determine the need for special education and related services. Based on the individual needs of the child, additional specialized assessments may be required.

Assessment reports should contain a summary of the diagnosis and specific educational recommendations for remediation. Assessment of a handicapped child will be multi-disciplinary, in order to provide a comprehensive view of the child from the perspective of the school, home, and community.

(a) For the purposes of non-discriminatory testing and evaluation practices, the following shall apply:

(1) Assessment instruments shall be appropriately adapted when used with children of impaired sensory, physical, or speaking skills and such adaptation shall consider each child's age and socio-economic and cultural background.

(2) Specialists implementing evaluation procedures must be familiar with local, cultural, language, and social patterns and practices.

(3) Interpreters, in the native language and/or sign language may be used throughout all phases of the evaluation.

(4) Communication with parents and the child shall be in the native language of the home (through the use of an interpreter) unless the English language is well understood by the parents, guardians, or child.

(5) Local community norms shall be considered when norm referenced tests are used.

(6) Criterion referenced instruments should be used.

(7) Developmental checklist(s) should be used where appropriate.

(8) Instruments shall be administered only by trained personnel and according to the producer's instructions.

(9) Instruments shall assess specific abilities, not merely produce a single IQ score.

(10) No one result shall determine placement.

(b) Assessment instruments should be adapted in accordance with the producer's instructions to meet the individual needs of the child being evaluated. This requires that:

(1) Instruments be adapted according to age, socioeconomic, and cultural background of each child before or during a child's evaluation.

(2) Instruments be adapted for children with perceptual problems either before or during an evaluation.

(c) Evaluation shall be conducted in educationally related areas to verify a child's suspected need for special education. Evaluations shall be accomplished through coordination with the school supervisor and the Agency Special Education Coordinator when appropriate.

(d) An assessment by a psychologist shall be provided when appropriate to the child's needs. Such assessment may include:

(1) An individually appropriate psychological examination culminating in specific recommendations, based upon the child's developmental and social history.

(2) Observation of the child in familiar surroundings, such as a classroom or home.

(3) Inventory of sensory, motor, language, perceptual, attentional, cognitive, affective, attitudinal, self-image, interpersonal, behavioral, interest and vocational factors, in regard to the child's maturity, integrity and interaction with the educational and/or home context.

(e) An assessment by a nurse, social worker, or a counselor shall be provided when appropriate for the child. Such assessment of pertinent family history and home situation factors shall include:

(1) A description of pertinent family history and individual developmental history and estimates of adaptive behavior at home in the neighborhood and in local peer groups.

(2) Estimates of adaptive behavior shall be based to the greatest possible degree on information obtained by direct observation or interview of the child and/or parent in the neighborhood setting.

(f) Each qualified specialist providing an assessment component shall give the child a professionally sound, complete and suitable individualized examination or assessment in the context of the child's physical, developmental, social and educational history and current circumstances.

(g) Individual evaluations shall be conducted on a child unless there are written and documented reasons

determined on an individual basis, for waiving evaluations. Acceptable reasons may include but are not limited to circumstances where:

(1) The parents refuse to permit an evaluation.

(2) The parents arrange for an equivalent evaluation of their child by a qualified professional.

(3) An equivalent evaluation has been completed within the past three (3) years.

**§ 45.20 Individual evaluation objectives.**

The objectives of an individual evaluation are to:

(a) Determine where a child is handicapped;

(b) Diagnose and evaluate the nature and extent of the effect of such impairment or condition on the educational performance of the child; and

(c) Assess the need for special education and related services and to recommend intervention strategies.

**§ 45.21 Formation of multi-disciplinary evaluation teams.**

(a) The school supervisor will be responsible for the overall conduct of the individual evaluation and shall collect and review all pertinent information regarding the child to be evaluated.

(b) The Special Education Coordinator shall coordinate through the school supervisor, the selection of a multi-disciplinary evaluation team for the conduct of the evaluation.

**§ 45.22 Composition of Multi-disciplinary evaluation teams.**

The multi-disciplinary evaluation team shall be composed of qualified persons appropriate to complete an assessment of the suspected disability. In all cases the classroom teacher (or other instructional staff member) familiar with the child and a person knowledgeable with respect to the suspected disability must be included on the team.

**§ 45.23 Content of individual evaluations.**

Each individual evaluation must include:

(a) An assessment of the child's educational status which includes:

(1) A history of the child's prior evaluations.

(2) A statement of the child's attendance pattern to include schools attended and average daily attendance in prior years.

(3) An educational history including:

(i) The child's academic grades.

(ii) The child's achievement and aptitude test scores and a statement of



the child's current academic standing or school readiness.

(iii) Previous educational strategies used to remediate the child's educational need.

(iv) A statement of the child's social relations with groups, peers, and adults based on classroom and teacher observations.

(v) A description of the child's academic strengths that promote learning.

(vi) A description of the child's physical limitations and behavior that inhibit learning.

(vii) A statement of the child's attentional capacity and communication skills.

(b) A health assessment which includes:

- (1) Present and past medical review.
- (2) Physical examination.
- (3) Current existing medical conditions and prescribed treatment(s).

(c) An assessment by a psychologist, including an individual psychological examination culminating in specific recommendations, as contained in § 45.19.

(d) Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist will:

(1) Evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and

(2) Where necessary, make referrals for additional assessments needed to make an appropriate placement decision. For example, if a child is suspected of being seriously emotionally disturbed, the child should be evaluated by either a clinical psychologist or a psychiatrist.

#### § 45.24 Test administration.

Agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are

designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child;

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

(f) Tests, to the greatest extent possible, are free from racial, cultural and sexual bias; and

(g) Determinations of mental retardation are based on an assessment of a variety of factors including adaptive behavior and past and current development activities (e.g., indices or manifestations of social, intellectual, adaptive, verbal, motor, language, emotional and self-care development for age).

#### § 45.25 Location of evaluation.

(a) The evaluation shall take place in the school or at another facility which is jointly approved by the child's parents and school officials.

(b) When a child has been referred for an evaluation and, at the time of such referral, such child is in a hospital or is otherwise living away from home, the Agency shall make appropriate arrangements for the provision of the evaluation.

#### § 45.26 Multi-disciplinary evaluation team procedures.

(a) Each individual evaluation must be completed, with full attention to its comprehensiveness and thoroughness, within thirty days from the date of written parental consent. An extension of time of thirty additional days may be approved in writing by the Agency Superintendent for Education after written documentation by the school that unusual circumstances exist preventing completion of the individual evaluation in the specified time. No more than one extension may be approved in connection with a single

individual evaluation unless approved in writing by the Director, or designee.

(b) The comprehensive assessment must reflect a compilation of information drawn from different assessment sources. The depth of the assessment in each area will vary based on the initial review of screening information conducted by the school supervisor.

(c) The Special Education Coordinator is responsible for ensuring that full and complete records of information collected or generated in connection with an individual evaluation are maintained. A report setting forth a full written explanation of the findings and the recommendations made by the multi-disciplinary evaluation team must be prepared. The report must include:

(1) A description of the child's present level of functioning;

(2) A description of the needs of the child in rank order of importance;

(3) A recommendation of the types of services which should be provided for each listed need;

(4) A written summary of the procedures employed, the results, and the diagnostic impression;

(5) A proposed date for the review of the child's progress prior to the review required in § 45.38, if such assessment so indicates; and

(6) Criteria by which at that time, the effectiveness of the child's program may be determined.

(d) Each member of the multi-disciplinary evaluation team shall certify in writing whether the report prepared by the team reflects his or her conclusions, and if not, shall submit a separate statement presenting his or her conclusions. The report must be prepared no later than fifteen (15) days after completion of the evaluation.

(e) Members of the multi-disciplinary evaluation teams must be responsible for all aspects of the individual evaluation including: the selection; administration and interpretation of evaluation materials; the collection of all appropriate social and cultural background and adaptive behavior information related to each evaluation; and the confidentiality of information collected during the individual evaluation.

#### § 45.27 Emergency evaluation and placement.

(a) Where a child demonstrates documented instances of dangerously assaultive or self-abusive behavior, the school supervisor may approve a temporary change in placement (i.e., to a special education setting other than the regular classroom) on an emergency

basis. The school supervisor shall immediately notify the Special Education Coordinator of the placement. The Agency shall no later than the following day determine the appropriateness of the placement and initiate the evaluation process.

(b) The parent shall be informed immediately of the child's behavior and shall participate (if possible within the constraints of time) in the emergency placement decision and consent for evaluation will be obtained.

(c) An individual evaluation must be completed within fifteen days of the emergency placement. Procedures as outlined in § 45.23 must be followed. A final placement determination, made by the IEP committee, must be made within five (5) days following completion of the individual evaluation.

#### § 45.28 Independent educational evaluation.

(a) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section. Each school/Agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(b) A parent has the right to an independent education evaluation at public expense if the parent disagrees with an evaluation obtained by the school or Agency. However, the school or Agency may initiate a hearing in accordance with the procedures of this part to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at school expense.

(c) If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the school in any decision made with respect to the provision of a free appropriate public education to the child; and

(2) May be presented as evidence at a hearing regarding that child.

(d) If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at school or Agency expense.

(e) Whenever an independent evaluation is at school or Agency expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the school

or Agency uses when it initiates an evaluation.

#### § 45.29 Additional procedures for evaluating specific learning disabilities.

(a) In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 45.22, each Agency shall include on the multi-disciplinary evaluation team:

(1) The child's regular teacher; or  
(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified to teach a child of his or her age; and

(4) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(b) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting. (In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.)

(c) The team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (c)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression;  
(ii) Listening comprehension;  
(iii) Written expression;  
(iv) Basic reading skill;  
(v) Reading comprehension;  
(vi) Mathematics calculation; or  
(vii) Mathematics reasoning.

(d) The multi-disciplinary team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

(1) A visual, hearing, or motor handicap;  
(2) Mental retardation;  
(3) Emotional disturbance; or  
(4) Environmental, cultural or economic disadvantage.

(e) The multi-disciplinary team shall prepare a written report of the results of the evaluation. The report must include a statement of:

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

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

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

(6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(f) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions. The report must be prepared no later than fifteen (15) days after completion of the evaluation.

#### Subpart C—Provision of Special Education and Related Services

##### § 45.30 Free appropriate public education.

(a) Each BIA funded or operated school must ensure that a free appropriate public education is provided to every handicapped Indian child enrolled in the school between the ages of five (5) and twenty-one (21) years.

(b) An appropriate education is one which meets the needs of a handicapped child as set forth in the individual education program in the least restrictive educational setting. An appropriate education involves the provision of regular education, special education and related aids or services and may include pre-school, elementary school, or secondary school education.

(c) The provision of a free education is the provision of educational and related services without cost to the child (or parents), *except* for those fees that are imposed on a non-handicapped child, and may consist of the provision of free services or the payment of the costs of the program. Transportation must be provided in order to assure access of persons to services.

##### § 45.31 Individualized education program (IEP).

If, as a result of the determination of a multi-disciplinary team, a child is diagnosed as being handicapped and in need of special education and related services, schools are required to develop an IEP within thirty (30) days from the date of receipt of the written individual evaluation report. The IEP shall set forth the approach which will be taken to

ensure that the child will be provided a free, appropriate education.

**§ 45.32 Content of individualized education program (IEP).**

At a minimum, the IEP must contain:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular education programs;

(d) The projected dates for initiation of services and the anticipated duration of the services;

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved;

(f) A description of the nature and duration of physical education services to be provided to the child; and

(g) A statement that all services recommended by the multi-disciplinary team are being provided, or if all recommended services are not provided, a justification for the exclusion of the services.

**§ 45.33 Individualized education program (IEP) development.**

(a) Overall responsibility for the development of each IEP rests with the school supervisor.

(b) The IEP shall be developed by a committee which shall hold at least one meeting and includes among its members the following:

(1) The School Supervisor, or designee (who shall chair the committee) other than the child's teacher, who is qualified to provide or supervise the provision of special education;

(2) The child's teacher and/or other relevant instructional staff;

(3) One or both of the child's parents;

(4) The child, where appropriate; and

(5) Other individuals at the discretion of the parent, Agency, or school.

(c) For a handicapped child who has been evaluated for the first time, the Agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the school, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(d) Upon receiving written application from the school, the Agency

Superintendent for Education may allow the school to postpone the development of an initial IEP to the beginning of a new school year, if the written evaluation report is completed within fifteen (15) days of the end of the current school year and, if the Agency Superintendent for Education determines that an IEP need not be implemented during the summer.

(e) Schools must prepare a progress report related to the instructional objectives specified in the IEP for each handicapped child and must include it with, or in lieu of the grading report prepared by the school for all elementary and secondary students.

**§ 45.34 Placement recommendation in the IEP.**

(a) Placement recommendations shall be made by the School Supervisor or designee in concert with the IEP committee and shall be incorporated in the IEP.

(b) The appropriate placement must be selected from the following:

(1) The regular classroom;

(2) The regular classroom with consultation;

(3) The regular classroom with resource teacher;

(4) The regular classroom with itinerant resource teacher;

(5) The regular classroom in conjunction with a resource room;

(6) A self-contained special classroom with part-time instruction in regular class;

(7) A self-contained special class (regular campus);

(8) A self-contained special class in a special day facility;

(9) Homebound instruction; and

(10) Instruction in hospitals and residential facilities.

(c) Schools may not decline to propose placement for a child or recommend to parents that a child be enrolled "voluntarily" in a non-BIA operated/funded school program. In selecting from the continuum of alternative settings, no handicapped child may be proposed for placement in any alternative settings unless it can be demonstrated that the nature or severity of the child's disability is such that education in regular class (in the school the child attends if not handicapped) with the use of supplementary aids and services cannot be achieved satisfactorily. Each school must insure that a continuum of alternative placements which meets the particular needs of each enrolled handicapped child is available.

(d) Placement of a handicapped child in a boarding school operated by the Bureau which concurrently enrolls non-

handicapped children of the same age and grade shall be considered a placement in a regular school campus.

(e) Alternative placements may be provided directly by the school, or through cooperative arrangements with local and state education agencies or, except as provided in paragraph (h) of this section, through contractual arrangements with approved non-public schools, agencies or institutions.

(f) Alternative (9), homebound instruction may be selected only when the handicapped child:

(1) Currently possesses a physical impairment or illness which directly (or because of treatment required)

precludes the movement of the child from a hospital or home environment to the general education environment; or

(2) Has been determined (after an individual evaluation) to require a program of continuous mental health care and treatment which would be seriously disrupted by movement to the general educational environment. The proposed homebound instruction should permit the return of the child to the general education environment at a specified date. The Agency Superintendent for Education must be immediately notified in writing of each homebound placement made by the school.

(g) Alternative placement (10) may be selected only when the health or safety of the child precludes the child's attendance at a nearby school for special education services.

(h) Alternative placements (1)-(8) may not be provided through contractual arrangements with approved non-BIA operated/funded schools, Agencies or institutions if there are a sufficient number of handicapped children with similar educational needs who live within the attendance area served by the school to justify the allocation of one teacher.

(i) Handicapped individuals who do not meet the age requirements of the Bureau may be served by the local school, provided they are not counted for ISEP formula funding, with the approval of the local school board and the Agency Superintendent for Education, and so long as such placement does not dilute the quality and/or quantity of services provided to eligible handicapped students.

(j) If the multi-disciplinary team determines that a residential placement for a child is appropriate they should notify the Agency Special Education Coordinator in writing. Upon receipt of such notice, the Special Education Coordinator, with the approval of the Agency Superintendent for Education,

will consult with the Education Specialist for institutional placement to determine that the placement is in compliance with Federal laws regarding the education of handicapped children.

**§ 45.35 Approval of IEP and placement recommendation.**

(a) The school must attempt to schedule a meeting which includes the school supervisor or designee, the child's parent(s), and the receiving teacher and others as identified in § 45.33.

(b) The parent(s) of the child must be provided full and effective written notice of the meeting and all reasonable efforts must be made by the school supervisor to ensure parental participation. The written notice to parents shall also contain the following information:

(1) A statement that the evaluation has been completed and that the parents have the right to meet with the School Supervisor, the Special Education Coordinator or any member of the IEP committee to discuss and plan the IEP.

(2) A statement that all papers relevant to the evaluation, including the actual written assessments, are available for inspection by the parents or a designated representative of the parents;

(3) A statement that the parent has a right to an independent evaluation as provided in § 45.28;

(4) A statement of the parent's options under paragraph (c) of this section and a form for indicating the option selected by the parent; and

(5) A statement explaining the consequences of the parent's rejection of the proposed IEP under the due process procedures established by § 45.58.

(c) The parent of a child, upon receipt of full and effective notice, may exercise any of the following options (by giving written notice to the school):

(1) To accept or reject a written evaluation finding that the child does not need special education;

(2) To accept or reject the IEP. A parent may accept an IEP in whole or in part and the school shall immediately implement the mutually accepted elements of the IEP;

(3) To accept a modified IEP that has been mutually agreed upon with the School Supervisor or designee following the meeting described in paragraph (a) of this section; or

(4) To postpone a decision on the IEP until the completion of an independent evaluation; and

(5) To obtain an independent evaluation of their child.

(d) This meeting may be the first and only full meeting of the IEP committee.

The meeting must include a thorough discussion of the results of the child's individual evaluation, the child's proposed IEP and the child's proposed educational placement. The school supervisor or designee should take whatever action is necessary to insure that the parents understand the proposed IEP and the proposed educational placement before requesting consent for placement. At the close of the final meeting, each member of the committee shall sign the completed IEP to signify their participation and agreement with the educational plan.

**§ 45.36 Parent participation.**

(a) Each school shall take steps to encourage that one or both of the parents of the handicapped child are present at each meeting including:

(1) Try to schedule the meeting at a mutually agreed upon time and place.

(2) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend.

(b) The notice under paragraph (a)(2) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the school shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the school is unable to convince the parents that they should attend. In this case the school must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The school shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The school shall give the parent a copy of the IEP.

**§ 45.37 IEP implementation and placement.**

(a) For newly identified children, the IEP must be implemented and educational placement must be made:

(1) Within thirty (30) days after the written parental approval of the placement has been received; or

(2) In cases involving due process, placement will be made within thirty (30) days of the final written decision of the hearing officer, unless an appeal is filed by the aggrieved party.

(b) If the school cannot, within thirty (30) days, provide any or all of the services called for in the IEP the School Supervisor must consult the Agency Superintendent for Education on alternate means of providing the services to fully implement the IEP. The Agency Superintendent for Education must make provision for the service within fourteen (14) days of the consultation.

**§ 45.38 IEP revision, review of placement.**

Consistent with the requirements of § 45.37, the IEP must be reviewed and updated annually. The review and revision of the IEP must be completed no later than the first day of school of the next full term. Whenever possible, the review shall be scheduled near the time that there may be a change in the personnel providing the major services to the child under the IEP, as when the child is to move from one grade or school to another. The review shall be conducted as follows:

(a) The school supervisor, the parents, and the person(s) providing the major services to the child under the IEP shall meet and make a careful review of the child's progress based upon the progress reports submitted by the school during the grading period, and the observations of those working with the child.

(b) The School Supervisor shall invite (in writing) the child's parents and, where appropriate, the child, to attend and participate in the review meeting. The School Supervisor or the parents may, at their discretion, invite other person(s) who have worked with, are working with, or will be working with the child to attend the review meeting.

(c) The participants in the review meeting shall determine:

(1) Whether the child has achieved the goals set forth in the IEP;

(2) Whether the child has met the criteria which indicate readiness to enter a less restrictive program;

(3) Whether the program the child is in should be specifically modified to make it more suitable to the child's needs; and

(4) Whether it is desirable to refer the child for an individual re-evaluation.

(d) The participants in the review meeting shall review the current IEP and revise it as appropriate in accordance with § 45.34. If a re-evaluation of the child is scheduled in accordance with § 45.39, the revision of the new IEP shall be deferred until completion of the re-evaluation. If the parent is unable to

attend the review meeting, the school shall provide the parent with copies of all relevant documents within five (5) days after the review meeting has been completed.

(e) During the annual review, the description of current educational performance in the IEP must be updated and the overall educational needs, long-term educational goals, short-term objectives, and related services modifications made. Schools are required to rewrite sections of the IEP only to the extent necessary to update or modify the plan.

#### § 45.39 Re-evaluation.

Parental approval is not required for the conduct of a re-evaluation if the child has been initially placed and his/her individualized education program has been reviewed following the requirements of this part. Notice of the conduct of the re-evaluation must be provided to the parent prior to re-evaluation. A written summary of the re-evaluation must be provided to the parents within five (5) days of the scheduled review meeting. A child must be re-evaluated at least every three (3) years.

#### § 45.40 Extended school year services.

(a) The IEP may provide for continuous instruction (uninterrupted by the regular summer recess) whenever:

(1) Continuous instruction is likely to be necessary in order to sustain, with only minor regression, current important educational skills and information retention; or

(2) The child lives in a residential facility or institution.

(b) The extension of an IEP for a ten (10) to twelve (12) month instructional program shall not result in a more restrictive change in placement on the continuum of alternative placements nor shall it constitute a basis for any deviation from any other educational placement requirement of § 45.34 of this part. However, the increased isolation of handicapped children which could result from the operation of an instructional program for handicapped children during a period of time when non-handicapped children are not attending school would not violate any requirements of this part.

#### § 45.41 Outcome goals.

IEP's for children over the age of fifteen (15) years may contain, as appropriate, either a description of regular and/or special education instructional services leading to the attainment of a regular high school diploma before the age of twenty-two or a program of regular or special

vocational education leading to participation in a work-experience (or sheltered employment) program and the attainment of an appropriate level of vocational proficiency to permit, whenever possible, the child's entry into competitive employment upon or before reaching the age of twenty-two.

#### § 45.42 Related services.

The school must ensure that each handicapped child has developmental, corrective and other supportive services (to the maximum extent feasible) to benefit from special education.

#### § 45.43 Non-academic and extracurricular services.

(a) Non-academic and extracurricular services and activities must be offered in a way which allows equal opportunity for handicapped children to participate in services and activities.

(b) Non-academic and extracurricular services, meals and recess periods must be provided in the most integrated setting appropriate to the needs of the child.

#### § 45.44 Physical education and athletics.

(a) Handicapped children must be provided an equal opportunity for participation in physical education courses and inter-scholastic, club or intramural athletics sponsored by the school.

(b) Physical education services must be provided to handicapped children in the regular physical education program and may not be different from those provided other children, unless:

(1) The child is enrolled full time in a separate facility or needs specially designed physical education; and  
(2) A separate physical education setting is the least restrictive environment.

#### § 45.45 Expulsion/suspension.

A handicapped child may not be expelled or suspended from school if the behavior for which action is being taken is related to the child's disability. If the child's behavior is so disruptive that the education of others is impaired, a review of the child's IEP and placement as described in § 45.38 of this Part must be undertaken in order to meet the needs of the child.

#### § 45.46 Geographic accessibility.

Consistent with the requirements of the IEP, the educational placement of a child must be as close to the child's home as possible. The placement of a handicapped child in an off-reservation boarding school operated by the Bureau shall not be regarded as inconsistent with this requirement to the extent that similarly situated non-handicapped

students are also placed in such a school.

#### § 45.47 Architectural barriers and program accessibility.

(a) Facilities used by schools, directly, or through contractual arrangement, must be accessible to and usable by handicapped children. The accessibility standards of the American National Standards Institute (ANSI A117.1-1961 (R 1971)) shall be followed. Schools located in isolated locations may make application to the Director for an annual waiver of any standard. Such a request must be based on documented inability to meet the standards. In no event may architectural barriers prevent a handicapped child from being educated in the least restrictive educational environment as defined in § 45.34.

(b) Program accessibility (*i.e.*, where each program or activity, when viewed in its entirety, is readily accessible to handicapped children) must be ensured in all existing facilities.

(c) Program accessibility may be accomplished through the following methods:

- (1) Redesign of equipment;
- (2) Reassignment of classes or other services to accessible building;
- (3) Assignment of aides to children;
- (4) Home visits;
- (5) Alteration of existing facilities; or
- (6) Other methods.

(d) The method for accomplishing program accessibility which offers programs and activities to children in the least restrictive environment.

#### § 45.48 Handicapped children in private schools placed or referred by Agencies.

Requirements of this section apply to handicapped children who are or have been placed in or referred to a private school or facility by an Agency as a means of providing special education and related services.

(e) Each Agency shall insure that a handicapped child who is placed in or referred to a private school or facility is:

(1) Provided special education and related services in conformance with an IEP which meets the requirements under § 45.30-§ 45.38 at no cost to the parents; and

(2) At a school or facility which meets the standards that apply to the Agencies (including the requirements in this part).

(b) In implementing the requirements of this part the Agency shall:

(1) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(2) Disseminate copies of applicable standards to each private school and

facility to which an Agency has referred or placed a handicapped child;

(3) Provide an opportunity for those private schools and facilities to participate in the development and revision of BIA standards which apply to them; and

(c) Assure that handicapped children have all of the rights of a non-handicapped child.

**§ 45.49 Handicapped children in private schools placed by parents.**

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the Agency is not required by this part to pay for the child's education at the private school or facility.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under § 45.57—  
§ 45.63.

**Subpart D—Procedural Safeguards**

**§ 45.51 Notice to parents.**

(a) Written notice must be given to the parents of a handicapped child a reasonable time before the school:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) The notice described under paragraph (a) of this section must include:

(1) A full explanation of all the procedural safeguards available to the parents including confidentiality requirements;

(2) A description of the proposed (or refused) action, explaining the reasons for such action and describing any options which were considered and rejected;

(3) A description of each evaluation procedure, test, record or report used as a basis for the action and any other relevant factors;

(4) The name(s) of the employee(s) of the school who may be contacted for further information;

(5) Language understandable to the general public, provided in the language of the parent or other mode of communication used by the parent(s) unless clearly not feasible.

(c) The notice must be communicated orally (where necessary) in the primary

language or other mode of communication to insure that the parent understands the content.

(d) If an interpreter is used as part of the procedure for providing full and effective notice, the school must maintain a written statement, signed by the interpreter, to the effect that the parent understood the content of the matter presented.

**§ 45.52 Parental consent.**

(a) Parental consent must be obtained before:

(1) Conducting a preplacement evaluation; and

(2) Initial placement of a handicapped child in a program providing special education and related services.

(b) Parental consent must also be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information consistent with the disclosure provisions of the Privacy Act of 1974, as amended;

(2) Used for any purpose other than meeting a requirement under this part; or

(3) Used for purposes other than those previously specified to the parent.

**§ 45.53 Rights of handicapped children.**

Handicapped children shall have the right to:

(a) Non-discrimination on the basis of being handicapped;

(b) A free appropriate education;

(c) An independent educational evaluation as provided in this part, and careful consideration of the results of an independent evaluation with respect to the provision of a free appropriate education;

(d) Be accompanied and represented by persons of his/her choice at any meeting or conference required or permitted by this part;

(e) Inspect and review all relevant records with respect to the identification, evaluation and placement of the child and the provisions of a free appropriate education;

(f) A hearing on any action for which notice is required with opportunity for direct participation, representation by counsel, and other procedural rights;

(g) Appeal to the Agency Superintendent for Education, or the Area Education Program Administrator, as appropriate, and to the Director relating to identification, evaluation or placement or to the provision of a free, appropriate education;

(h) A surrogate parent, when appropriate;

(i) A copy of the full written explanation and findings of the

individual evaluation as soon as it is completed together with a full oral explanation (effectively communicated) of both the findings and the recommendations;

(j) A personal consultation with the members of the multi-disciplinary team;

(k) Full and effective notice of proposed actions as provided in this part;

(l) Parental approval or disapproval as provided in this part; and

(m) Information concerning any free or low-cost legal and other relevant services available upon request or if a hearing is initiated.

**§ 45.54 Access rights.**

(a) Each school and Agency must permit parents to inspect and review any records directly relating to their children which are collected and maintained by them or by a party acting for the school.

(b) A parental request to inspect and review records must be honored without unnecessary delay and before any meeting regarding an IEP or hearing relating to the identification, evaluation, or placement of the child, and in no case more than fourteen (14) days after the request has been made. The right to inspect and review educational records under this section includes:

(1) The right to a response to reasonable requests for explanations and interpretations of the records;

(2) The right to request that copies of the records containing the information be provided at no cost to the parents;

(3) The right to have a representative of the parent (authorized in writing) inspect and review the records.

(4) The right to place a statement in the records a school maintains on a child. Such statement may comment on any information or set forth any reason for disagreeing with the decisions of the Agency. Any explanation placed in the records must be maintained by the Agency. If the contested portion of the record is disclosed to any party, the parent's explanation must also be disclosed.

(c) The parent shall be presumed to have authority to inspect and review records relating to his or her child unless the school has been advised, in writing, that the parent does not have the authority under applicable tribal or state law governing such matters as guardianship, separation, and divorce.

(d) A record of parties obtaining access to education records (except access by parents and authorized employees of the school) must be kept and must include the name of the party, and the date access took place.

(e) Parents, upon request, shall be provided with a list of the types and the purpose of the authorized use of education records of their child.

(f) If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(g) A parent who believes that information in the education records is inaccurate or misleading or violates the privacy or other rights of the child, may request that the information be amended. The school or Agency must decide whether to amend the information as requested within fourteen (14) days of receipt of request. If the school or Agency decides to refuse to amend the information, it must inform the parent of the refusal and advise the parent of the right to a hearing.

#### § 45.55 Confidentiality of information.

(a) The confidentiality of personally identifiable information must be protected at collection, storage, disclosure, and destruction stages.

(b) One person designated by the school must assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the policies and procedures set forth in this subpart.

(d) Schools must maintain, for public inspection, a current listing of the names and positions of the employees who may have access to personally identifiable information.

(e) Schools must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child. The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

#### § 45.56 Surrogate parents.

(a) After documented, repeated and reasonable efforts to identify and locate a parent of a handicapped child, or of a child suspected of being a handicapped child, or whenever a child is a ward of a court, the School Supervisor must institute a proceeding before an appropriate tribunal to determine the need for a surrogate parent and, if need is found, for the appointment of a surrogate parent.

(b) The person appointed as a surrogate parent shall:

(1) Have no interest that conflicts with the interests of the child and shall not be a present employee of the school involved in the education or care of the child or a present employee of Office of Indian Education Programs;

(2) Have knowledge and skills that insure adequate representation of the child; and

(3) Wherever possible, be a member of the child's extended family, or if that is not possible, a member of the same tribe as the child.

(c) The surrogate parent shall represent the child in all matters relating to the identification, individual evaluation and educational placement of the child and the provision of a free appropriate public education.

(d) Surrogate parents may not be appointed for the sole purpose of representing parents at the IEP conference.

(e) Payment of fees for service as a surrogate parent does not, in and of itself, render a person an employee of the BIA.

#### § 45.57 Conciliation/mediation.

(a) The school must make all reasonable efforts consistent with its obligations under this part, to resolve informally any ongoing disputes between the parent and the school.

(b) Prior to the initiation of a due process hearing, the Bureau shall attempt to intervene with the mediation process. The following is a statement which describes this technique.

(1) Mediation is a dispute resolution process which is non-adversarial in nature. It seeks not to declare winners or losers, but to find reconciliation between disputing parties. This process is conducted through the skills of a trained mediator. Its focus is the mutually satisfactory resolution of disputes. No third party acts as judge or jury. The parties themselves arrive at an assessment through the process.

Mediation can be initiated by either a parent or the Bureau in order to resolve informally a disagreement with respect to the identification, evaluation, or educational placement of, or the free appropriate education provided to an Indian child. Mediation shall consist of, but not be limited to, an informal discussion of the differences between the parties in an effort to resolve those differences. The parents and the appropriate school officials may attend mediation sessions between the parties in an effort to resolve those differences.

(2) Mediation must be conducted, attempted, or refused in writing by concerned parties of the handicapped

child whose education is at issue before a request for, or initiation of, a hearing authorized by this part. Any request by the Bureau for a hearing shall state in writing how this requirement has been satisfied. No stigma may be attached to the refusal of the concerned parties to mediate or to an unsuccessful attempt to mediate. Mediation may not be used to deny or delay a parent's right to impartial due process hearing.

#### § 45.58 Initiation of hearings.

(a) If the parent disagrees with any action taken by a school for which full and effective notice to parents is required by this part, a hearing may be initiated by the parent of a handicapped child or a child suspected of being a handicapped child, by sending a written request for hearing to the Agency Superintendent for Education. The Agency Superintendent for Education must acknowledge receipt of the written request within five (5) days of actual receipt.

(b) Hearings may be initiated by a school by providing full and effective notice to parents in any instance where, after reasonable efforts at conciliation, a parent either fails to provide written approval of a proposed action, or provides a formal disapproval.

(c) Whenever a hearing is initiated, full and effective notice of the initiation of the hearing must be provided by the hearing officer to all persons concerned.

(d) The written notice of hearing shall include:

(1) A statement of the date, time, place and nature of the hearing;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) A reference to the particular sections of the statutes or regulations involved; and

(4) A short and plain statement of matters asserted.

#### § 45.59 Hearing officers.

(a) A proposed hearing officer must be selected by the Agency Superintendent for Education within one (1) day of receipt of a request for a hearing, from a list established and maintained by the Agency.

(b) After selecting a proposed hearing officer, the Agency Superintendent for Education must, within three (3) days, give the parent(s) and the school full and effective notice of the name of the proposed hearing officer.

(c) The parent and school, each upon notice of the selection of proposed hearing officer, may request that the Agency/Area determine that the person so proposed is not impartial and may

exercise one automatic disqualification during the appointment process. The Director shall resolve all challenges for cause (i.e., partiality).

(d) If the proposed hearing officer is automatically disqualified or found to be not impartial by the Director, the Agency Superintendent for Education must within three (3) days designate another person.

(e) Final appointment of a hearing officer occurs whenever a proposed hearing officer is selected by the Agency Superintendent for Education and the parent or the school fails to notify the Agency Superintendent for Education of a decision to challenge the impartiality of the proposed hearing officer or of a decision to automatically disqualify the proposed hearing officer (available only once for each party), or when the Director determines that no doubt exists as to the impartiality of a proposed hearing officer.

#### § 45.60 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a school, or of the BIA, who is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the Agency solely because he or she is paid by the Agency to serve as a hearing officer.

#### § 45.61 Hearing reports.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children. The cost for such counsel or expert representatives shall be borne by the party employing them;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing; and

(5) Obtain written findings of fact and decisions.

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

#### § 45.62 Timeliness and convenience of hearings and reviews.

(a) The Agency shall ensure that a final decision is reached by the hearing officer and a copy of the decision is mailed to each of the parties within 45 days after receipt of a request for a hearing.

(b) A copy of the decision made in a review conducted by the Assistant Secretary—Indian Affairs must be mailed to each of the parties within 30 days of the request for a review.

(c) The hearing or reviewing officer may grant specific extensions of time at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

#### § 45.63 Administrative appeal: impartial review.

(a) A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the hearing decision.

(b) A party aggrieved by the findings and decision in the hearing may, within ten (10) days of the decision, appeal to the Assistant Secretary—Indian Affairs who may designate an official to conduct the review.

(c) The Official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing more consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 45.62 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Provide written findings and the decision to the parties.

(d) The Department of the Interior considers the decision made by the reviewing official as final.

#### Subpart E—Personnel

##### § 45.65 In-service training.

(a) Each Agency must provide a written plan which insures that ongoing in-service training programs are made available to all personnel who are engaged in the education of handicapped children. To avoid duplication, Agencies and schools must jointly determine training needs.

(b) Each plan must:

(1) Describe the process used in determining the in-service training

needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (i.e. individualized education programs, non-discriminatory assessment, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (i.e. special education teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (b)(2) of this section;

(5) Describe how the training will be provided in terms of:

(i) Location and scope; and

(ii) Staff training source (i.e. college and university staff, state, school, Agency personnel, and non-Agency personnel);

(6) Specify:

(i) The funding sources to be used;

(ii) The timeframe for providing staff training; and

(iii) Procedures for effective evaluation of the extent to which program objectives are met.

##### § 45.66 Qualifications of staff.

Job qualifications requirements shall be in conformance with 25 CFR 38.4 of the BIA Education Personnel Regulations.

#### Subpart F—School Administration

##### § 45.70 Assurance of compliance.

In connection with each annual application for assistance under this part, each School Supervisor must sign a written assurance that the special education elementary and secondary program operated by the school is currently in compliance with and will, in the future, be operated in compliance with this part and any other applicable Federal law.

##### § 45.71 Annual evaluation.

Each Agency must insure that an annual evaluation of the effectiveness of programs in meeting the educational needs of handicapped children is completed. The annual evaluation will be performed in accordance with the following:

(a) The evaluation will be based on the projections made in each agency/school funding application and must include an evaluation of the individual education programs.



(b) Local School Boards and parents must be given the opportunity to be involved in the evaluation.

(c) The Agency Special Education Coordinator will, through a review and comparison of the report with monitoring findings, certify the validity for the annual report.

(d) The Agency Special Education Coordinator will compile the reports and submit the compilation to the Division of Exceptional Education.

(e) The Division will consolidate the evaluation data into a single report on the BIA special education programs.

#### § 45.72 Comparability of facilities.

Facilities which are identifiable as being for handicapped children and the services and activities provided therein, must meet the same standards and level of quality as do facilities, services and activities provided to non-handicapped children.

#### § 45.73 Non-discrimination.

(a) No Bureau of Indian Affairs operated and/or funded school shall deny admission to any qualified Indian handicapped child on the basis of handicap.

(b) Each school must provide each handicapped Indian child enrolled therein whatever educational support services (including tutoring, access to instructional equipment, auxiliary aids) are necessary to permit the child to fully benefit from the program of special education and related services.

#### Subpart G—Responsibilities of the Division

##### § 45.74 The Division.

(a) The Division of Exceptional Education shall provide staff assistance to the Director, Office of Indian Education Programs to insure conformance with the requirements of this part. The Division shall prepare and submit the annual program plan required by the Education of the Handicapped Act. The Division shall be under the supervision of a Division Chief who reports to the Director.

(b) The Director is responsible for educational programs for handicapped children and has overall responsibility for insuring that every handicapped Indian child enrolled in a Bureau operated or funded school is provided a free appropriate education, and that all requirements of this part are fully complied with by schools, Agencies, and Areas.

##### § 45.75 Monitoring.

(a) The Division of Exceptional Education shall monitor and evaluate the compliance of schools, Agencies,

Areas and other affected public and non-public agencies with the requirements of this part consistent with written procedures. This monitoring will include:

- (1) Data collection;
- (2) On-site visits;
- (3) Review of special education Federal fund utilization;
- (4) Review of IEP implementation; and
- (5) Review of the continued need for residential placements.

(b) Schools, Agencies, Areas, non-public school programs and other affected Agencies shall keep timely, complete and accurate compliance reports. These reports shall contain information to enable the Division to ascertain compliance with the requirements of this part.

(c) Schools, Agencies, Areas, non-public school programs and other affected Agencies must permit the staff of the Division of Exceptional Education access to books, records, accounts, and other pertinent information necessary to ascertain compliance.

(d) The Division of Exceptional Education may conduct inquiries on behalf of an individual child or group of children, regarding failure to comply with any provision of this part.

(e) The Division of Exceptional Education shall monitor implementation of the procedural safeguard requirements of this part.

(f) The Division will provide a written report on the findings and will recommend actions for compliance to the responsible Agency. The Agency has the responsibility of providing this information to the individual school boards and appropriate school officials.

##### § 45.76 Complaint Procedures.

(a) The Director shall receive, review, and resolve complaints and act on any allegations of substance on actions taken by a school or Agency that are contrary to the requirements of this part.

(b) In carrying out the requirements of paragraph (a) of this section the Division will assist Agencies to achieve compliance through:

- (1) Technical assistance;
- (2) Negotiation; and/or
- (3) Third party mediation.

(c) Failure to comply with the requirements of this part (after appropriate action as described in paragraph (b) of this section) shall result in sanctions under existing BIA procedures including the withholding of Pub. L. 94-142 Subpart B funds until the Agency or school achieves compliance with the requirements of this part.

##### § 45.77 Use of available funds.

The Director shall insure that all funds to which schools become entitled because of the enrollment of handicapped children, be used for the identification, evaluation, and the provision of a free, appropriate education to handicapped Indian children.

##### § 45.78 Children for whom the Division of Social Services has accepted financial responsibility.

(a) After the effective date of this part, no handicapped Indian child in the care of the Division of Social Services may be placed in, or referred to any public or private residential facility until the Director is consulted and the education component has been approved.

(b) The Director shall insure that no later than one (1) year from the effective date of this part, every handicapped child currently the responsibility of the Division of Social Services in a public or private residential facility has been evaluated and provided an IEP in full conformance with the requirements of this part. The need of the children for continued residentially-based education services will be carefully accessed during this process.

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

##### § 45.79 Cooperative agreements.

(a) The Director, or designee, is authorized to enter into cooperative agreements with state and local education agencies for the provision of special education and related services to handicapped children enrolled in schools, operated and/or funded by the Bureau.

(b) The Director may not enter into any cooperative agreement for the provision of special education and related services with state or local education agencies which, with respect to any aspect of the cooperative special education program, discriminates or has the effect of discriminating, against any child on the basis of race, creed, national origin, tribal affiliation, religion, sex, handicap or eligibility for services provided by the Bureau.

(c) The Director is responsible for ensuring that every eligible Indian handicapped child participating in a cooperative special education program is provided a free, appropriate education in the least restrictive environment consistent with the procedural safeguards required by § 45.34.

**§ 45.80 Bureau of Indian Affairs Advisory Committee for Exceptional Children.**

(a) The BIA Advisory Committee for Exceptional Children has been chartered under and is subject to the provisions of the Federal Advisory Committee Act, Pub. L. 92-463. The membership of the BIA Advisory Committee for Exceptional Children must be composed of persons involved in or concerned with the education of handicapped Indian children. The membership shall include, but not be limited to:

- (1) Handicapped individuals.
- (2) Teachers of handicapped children.
- (3) Parents of handicapped children.
- (4) Agency and school officials.
- (5) Special education program administrators.

(b) The advisory committee shall:

- (1) Advise the Secretary of Interior, through the Assistant Secretary—Indian Affairs, of unmet special education needs of Indian children;

- (2) Comment publicly on the annual program plan and rules or regulations proposed for issuance by the Assistant Secretary—Indian Affairs regarding the education of handicapped Indian children attending BIA operated or funded schools and the procedures for distribution of funds under this part; and

- (3) Assist the Assistant Secretary—Indian Affairs in developing and reporting such information and evaluation.

(c) The advisory committee shall meet as often as necessary to conduct its business.

(d) By July 1 of each year, the advisory committee shall submit an annual report of panel activities and suggestions to the Director and the Assistant Secretary—Indian Affairs. This report must be made available to the public.

(e) Official minutes must be kept on all panel meetings and shall be made available to the public upon request.

(f) All advisory committee meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(g) Interpreters and other necessary services must be provided at committee meetings for committee members or participants.

(h) The advisory panel shall serve without compensation but will be reimbursed for travel and expenses, in compliance with current Federal travel regulations, as published by GSA, for attending meetings and performing duties.

Keuneth Smith,

Assistant Secretary—Indian Affairs.

[FR Doc. 85-20059 Filed 8-22-85; 8:45 am]

BILLING CODE 4310-02-M

**DEPARTMENT OF THE TREASURY**

**Bureau of Alcohol, Tobacco and Firearms**

**27 CFR Parts 170 and 252**

[T.D. ATF-212]

**Distilled Spirits; Increase in Rate of Tax and Floor Stocks Tax**

**AGENCY:** Bureau of Alcohol, Tobacco and Firearms, Treasury.

**ACTION:** Final rule (Treasury decision).

**SUMMARY:** This document implements section 27 of the Deficit Reduction Act of 1984 by (1) amending ATF distilled spirits regulations to conform to the increase in the distilled spirits tax rate, and (2) adding new regulations for the collection of floor stocks tax on certain taxpaid distilled spirits and imported perfumes which are held for sale on October 1, 1985.

**EFFECTIVE DATE:** September 23, 1985.

**FOR FURTHER INFORMATION CONTACT:** Robert G. Hardt or J. R. Whitley, Distilled Spirits and Tobacco Branch, (202) 566-7531. Mailing address: Bureau of Alcohol, Tobacco and Firearms, Distilled Spirits and Tobacco Branch, P.O. Box 385, Washington, DC 20044-0385.

**SUPPLEMENTARY INFORMATION:** Public Law 98-369, entitled "Deficit Reduction Act of 1984", was enacted on July 18, 1984. Section 27 of this Act increases the rate of tax on distilled spirits from \$10.50 to \$12.50 per proof gallon. The rate of tax on imported perfumes is increased from \$10.50 to \$12.50 per wine gallon. All distilled spirits and imported perfumes removed from bonded premises on or after October 1, 1985, will be subject to the higher tax rates.

**Floor Stocks Tax**

The distilled spirits floor stocks tax is a one-time tax, equal to the difference between the old and new tax rates. It is imposed on all Federally taxpaid or tax-determined distilled spirits that are held for sale on the first moment of October 1, 1985, by any person, with the exception of spirits held by wholesale or retail liquor dealers who have 500 wine gallons or less of distilled spirits on hand on that date. However, dealers with more than 500 wine gallons on hand are allowed as a credit against the floor stocks tax an amount equal to \$800 or the amount of tax liability, whichever is smaller. (The credit may not exceed the amount for which the dealer is liable.) The term "dealer" means any wholesale or retail dealer in liquors, as defined by sections 5112(b) and 5122(a) of the Internal Revenue Code of 1954

respectively, and would include importers and taxpaid storage rooms operated by distilled spirits plants.

Manufacturers, importers, wholesalers, and retailers are liable for floor stocks tax irrespective of the location where their distilled spirits are held. The floor stocks tax applies only to distilled spirits held for sale that were taxpaid or tax-determined before October 1, 1985. Distilled spirits that are taxpaid or tax-determined on or after that date are subject to the increased tax rate, but are not subject to the floor stocks tax.

Distilled spirits subject to floor stocks tax are regarded as held by the one who owns them at the first moment of October 1, 1985. Distilled spirits in transit, or in a storeroom or warehouse, must be included in the tax return and inventory of the owner. If ownership does not pass to the consignee until delivery, distilled spirits in transit at the first moment of October 1, 1985, must be regarded as owned or held by the consignor at that time.

A floor stocks tax is also imposed on all Federally taxpaid or tax-determined imported perfumes containing distilled spirits (ethyl alcohol) held for sale by any person. However, all imported perfumes held at retail establishments and any imported perfumes held by other persons who have 500 wine gallons or less on hand as of October 1, 1985, are exempted from this tax. The \$800 credit provision also applies to holders of imported perfume.

The exemption for retail establishments applies only to imported perfumes held at the place where they are intended to be sold at retail. This exemption is broad enough to include imported perfumes in storage facilities that are within or form an integral part of the retail premises at the same physical location. However, the exemption does not apply to imported perfumes held by retail establishments in warehouses or other similar storage facilities located away from the retail premises where retail customers do not have regular access to them. Imported perfumes held by retail establishments in these separate storage facilities are subject to the floor stocks tax in the same manner as imported perfumes held for sale by other industry members.

Liability for the floor stocks tax must be established by a physical inventory, except that a source record inventory may be used by persons holding distilled spirits for sale if the source records from which the inventory is derived conform to certain regulatory standards. The physical or source record inventory will be the basis for