



IDEA PART B SUPPLEMENTAL REGULATIONS

**ISSUED DECEMBER 1, 2008
AND EFFECTIVE DECEMBER 31, 2008**

NON-REGULATORY GUIDANCE

March 2009

Office of Special Education Programs
Office of Special Education and Rehabilitative Services
U.S. Department of Education

PURPOSE OF THIS GUIDANCE

This guidance provides State educational agencies (SEAs), local educational agencies (LEAs), parents and advocacy organizations with detailed information, including implementation considerations, concerning the Part B final supplemental regulations published in the Federal Register on December 1, 2008 and effective on December 31, 2008.

The final supplemental regulations clarified and strengthened current regulations in 34 CFR Part 300 governing the Assistance to States for the Education of Children with Disabilities Program and Preschool Grants for Children with Disabilities Program, as published in the Federal Register on August 14, 2006, in the following areas:

- (1) parental revocation of consent for continued special education and related services;
- (2) positive efforts to employ and advance qualified individuals with disabilities;
- (3) non-attorney representation in due process hearings;
- (4) State monitoring and enforcement;
- (5) State use of targets and reporting;
- (6) public attention; and
- (7) subgrants to LEAs, base payment adjustments, and reallocation of LEA funds.

The changes that were made to the regulations were necessary for the effective implementation and administration of the programs. This non-regulatory guidance does not impose any requirements beyond those required under applicable law and regulations. The Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA or Act), its implementing regulations, and other important documents related to the IDEA and the regulations can be found at <http://sites.ed.gov/idea>.

I. Parental Revocation of Consent for Continued Special Education and Related Services (§§300.9 and 300.300)

Sections 300.9 and 300.300 have been amended to permit parents to unilaterally withdraw their children from further receipt of special education and related services by revoking their consent for the continued provision of special education and related services to their children. Under these final supplemental regulations, a public agency is not able, through mediation or a due process hearing, to challenge the parent's decision or seek a ruling that special education and related services must continue to be provided to the child. These provisions require that parental revocation of consent must be **in writing** and upon revocation of consent a public agency must provide the parent with prior written notice in accordance with §300.503 before ceasing the provision of special education and related services. (Authority: 20 U.S.C. 1414(a)(1)(D))

These regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA and those of Section 504 of the Rehabilitation Act of 1973, as amended, and Title II of the Americans with Disabilities Act, as amended.

Implementation considerations:

- **Amendment of records:** Section 300.9(c)(3) (providing that a public agency is not required, because a parent revokes consent for continued services, to amend a child's education records to remove references to the child's receipt of special education and related services) does not affect the rights provided to parents in the confidentiality provisions in §§300.618 through 300.621, including the opportunity to request amendments to information in education records that is inaccurate or misleading, or violates the privacy or other rights of a child.
- **Procedures:** States may choose to establish additional procedures for implementing §300.300(b)(4) (concerning a public agency's response to a parental revocation of consent for continued services), such as requiring a public agency to offer to meet with parents to discuss concerns for their child's education. However, States must ensure that any additional procedures are voluntary for the parents, do not delay or deny the discontinuation of special education and related services, and are otherwise consistent with the requirements under Part B of the Act and its implementing regulations.
- **Age of Majority:** If State law grants a child who has reached the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) all rights previously granted to parents, then the parents' rights are transferred to the child as provided in §300.520(a), enabling that child to revoke consent for special education and related services under §300.300(b)(4). In accordance with section 615(m)(1) of the Act and §300.520(a)(1)(i), the public agency must provide any notice required under Part B of the Act to both the child and the parents. Therefore, the parents would

receive prior written notice, consistent with §300.503, of the public agency's proposal to discontinue special education and related services based on receipt of the written revocation of consent from a child to whom rights transferred under §300.520(a).

- **Revocation of consent for a particular service**: If a parent disagrees with the provision of a particular special education or related service and the parent and public agency agree that the child would be provided with a free appropriate public education (FAPE) if the child did not receive that service, the public agency should remove the service from the child's individualized education program (IEP) and, since it does not disagree with the parents, would not have a basis for using the procedures in Subpart E of the regulations to require the service be provided to the child. If, however, the parent and public agency disagree about whether the child would be provided FAPE if the child did not receive a particular special education or related service, the parent may use the due process procedures in Subpart E of the regulations to obtain a ruling that the service with which the parent disagrees is not appropriate for their child.
- **Subsequent parental request for evaluation**: After revoking consent for his or her child, a parent always maintains the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education and related services. If a parent who revoked consent for special education and related services later requests that his or her child be re-enrolled in special education, an LEA must treat this request as a request for an initial evaluation under §300.301 (rather than a reevaluation under §300.303).
- **Discipline**: When a parent revokes consent for special education and related services under §300.300(b), the parent has refused services as described in §300.534(c)(1)(ii); therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the IDEA's discipline protections.
- **Accommodations**: Nothing in §300.300(b)(4) would prevent a general education teacher from providing a child whose parent has revoked consent for the continued provision of special education and related services with accommodations that are available to non-disabled children under relevant State standards. However, once a parent revokes consent under §300.300(b)(4), a teacher is not required to provide the previously identified IEP accommodations in the general education environment.
- **Accountability**: A child whose parent has revoked consent for special education and related services is considered a general education student who has exited special education for purposes of accountability determinations under the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001.

States may continue to include a child whose parent has revoked consent for special education and related services in the students with disabilities subgroup for purposes of calculating adequate yearly progress for two years following parental revocation of consent under the provisions of 34 CFR §200.20(f)(2)(i).

II. Positive Efforts to Employ and Advance Qualified Individuals with Disabilities (§300.177)

Section 300.177(b) has been amended to require that each recipient of assistance under Part B of the Act make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act. (Authority: 20 U.S.C. 1405)

Implementation considerations:

- This requirement applies to all recipients of Part B funds, including SEAs and LEAs.
- This provision does not replace or contradict protections afforded to individuals with disabilities under other State or Federal laws, including requirements under the General Education Provisions Act (GEPA), Section 504 of the Rehabilitation Act, as amended, Title II of the Americans with Disabilities Act, as amended, and other applicable State and Federal employment laws.
- “Positive efforts” will vary based on the unique and individual needs of a State and public agency, and those needs may change over time. For example, a public agency’s positive efforts might include participating in an employment fair that is targeted at individuals with disabilities, sending vacancy announcements to organizations for individuals with disabilities, and ensuring that employees with disabilities are aware of promotion opportunities.

III. Non-attorney Representation in Due Process Hearings: (§300.512)

Section 300.512(a)(1) has been amended to clarify that a party's right to be represented by non-attorneys at due process hearings is determined by State law. (Authority: 20 U.S.C. 1415(h))

Implementation considerations:

- Parties to a due process hearing may be “accompanied and advised” by counsel and by individuals, such as non-attorney advocates, who have special knowledge or training regarding the problems of children with disabilities.
- The change in the regulation does not prevent parents from representing themselves in due process hearings or during court proceedings under the IDEA.
- The provision only addresses due process hearings; other processes, such as IEP meetings and mediation sessions, are not governed by this provision.
- If State law is silent on the question of whether non-attorney advocates can represent parties in due process hearings, neither the Act nor its implementing regulations prohibit non-attorney advocates from assuming a representational role in due process hearings.

IV. State Monitoring and Enforcement (§300.600)

Section 300.600(a) has been amended to require States to: (1) monitor implementation of Part B of the Act; (2) make determinations annually about the performance of each LEA using categories in Section 300.603(b)(1); (3) enforce Part B of the Act in accordance with the statutory enforcement mechanisms that are appropriate for States to apply to LEAs; and (4) annually report on the performance of the State and of each LEA under Part B of the Act.

These amendments also clarify, in §300.600(e), that a State, in exercising its monitoring responsibilities under §300.600(d), must ensure that when it identifies noncompliance with the requirements of Part B of the Act by its LEAs, the noncompliance will be corrected as soon as possible, and in no case, later than one year after the State's identification of the noncompliance. (Authority: 20 U.S.C. 1416(a))

Implementation considerations:

- States have some discretion in developing a process for making annual determinations on the performance of LEAs.
- However, States' annual determination processes must include consideration of:
 - an LEA's performance on all State Performance Plan (SPP) compliance indicators;
 - whether an LEA submitted valid and reliable data for each indicator;
 - LEA-specific audit findings; and
 - any uncorrected noncompliance from any source.
- States are also advised to consider performance on results indicators, such as an LEA's graduation and dropout rates, or the participation rate of students with disabilities in State assessments when making annual determinations.
- States must use enforcement mechanisms to enforce this part consistent with §300.604.
- If States are unable to correct noncompliance within one year of identification, States may enter into a compliance agreement with the Department under section 457 of GEPA, if the Department deems a Compliance Agreement is appropriate.

V. State Use of Targets and Reporting (§300.602)

Timeframe for Public Reporting About LEA Performance.

Section 300.602(b)(1)(i)(A) has been amended to require States to report annually to the public on the performance of each LEA in the State on the targets in the SPP as soon as practicable but no later than 120 days following a State's submission of its Annual Performance Report (APR) to the Secretary under §300.602(b). (Authority: 20 U.S.C. 1416(b)(2)(C))

Implementation considerations:

- States submit their APRs to the Secretary on February 1 of each year.
- States are not required to post reports on the performance of LEAs that were issued prior to December 1, 2008,
- If a State collects data for specific indicators through monitoring or sampling, it must collect and report LEA performance data on those indicators for each LEA at least once during the period of the SPP.

Additional Information to be Made Available to the Public.

Section 300.602(b)(1)(i)(B) has been amended to require each State to make the following available to the public: its SPP, APRs, and the State's annual reports of the performance of each LEA located in the State. In doing so, the State must, at a minimum, post these items on the SEA's Web site, and distribute them to the media and through public agencies. (Authority: 20 U.S.C. 1416(b)(2)(C))

Implementation consideration:

- States are not required to distribute paper copies of the SPP and APRs.
- States are not required to make available to the public the State's annual determinations about the performance of each LEA required under §300.600(a). However, the Department encourages States to report to the public on the State's annual determinations.

VI. Public Attention (§300.606)

Section 300.606 has been amended to require any State that has received notice that the Secretary is proposing to take or is taking an enforcement action pursuant to §300.604, to take such actions as may be necessary to notify the public within the State of the pendency of that enforcement action. At a minimum, the State must post a notice on the SEA's Web site and distribute the notice to the media and through public agencies. (Authority: 20 U.S.C. 1416(e)(7))

Implementation considerations:

- “Enforcement actions” are those actions taken by the Secretary based on the Secretary’s determination regarding the State’s performance, as described in §§300.603 and 300.604 – “needs assistance,” “needs intervention,” or “needs substantial intervention.” Enforcement actions are described in §300.604. States are not required to make the Department’s SPP/APR determination letters available to the public, as these letters are already available on the Department’s Web site at: <http://www.ed.gov/policy/speced/guid/idea/monitor/index.html>
- States are not required to publicly report enforcement actions taken against LEAs. However, the Department encourages States, where appropriate, to report to the public on any enforcement actions taken against LEAs.

VII. Subgrants to LEAs under Sections 611 and 619 of the IDEA, Base Payment Adjustments, and Reallocation of LEA Funds (§§300.705, 300.815, 300.816 and 300.817)

Subgrants to LEAs.

Sections 300.705(a) and 300.815 have been amended to require States to make subgrants under sections 611 and 619 of the Act to eligible LEAs, including public charter schools that operate as LEAs in accordance with State charter law, even if the LEA is not serving any children with disabilities. This requirement takes effect with funds that become available on July 1, 2009. (Authority: 20 U.S.C. 1411(f)(1) and 1419(g)(1))

Implementation considerations:

- LEAs are eligible for assistance under Part B of the Act for a fiscal year if the LEA submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in section 613(a) of the Act.
- LEAs may use Part B funds for direct services for children with disabilities, including services for children with disabilities who subsequently enroll or are identified during the school year, or for other permissible activities, such as child find activities, professional development, and coordinated early intervening services in accordance with §300.226.
- States may need to revise their procedures for distributing Part B funds to ensure that subgrants are made to all eligible LEAs, even if the LEA is not serving any children with disabilities.

Base Payment Adjustments.

Sections 300.705(b)(2)(iv) and 300.816(b)(4) provide that if an LEA received a base payment of zero in its first year of operation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities. This requirement takes effect with funds that become available on July 1, 2009. (Authority: 20 U.S.C. 1411(f)(2) and 1419(g)(1))

Implementation consideration:

- States may need to revise their procedures for making base payment adjustments to ensure that the base payment for an LEA that first reports that it is serving any children with disabilities is adjusted as required by §§300.705(b)(2)(iv) and 300.816(b)(4).

Reallocation of LEA Funds.

Sections 300.705(c) and 300.817 have been amended to provide that after an SEA distributes funds under Part B to an eligible LEA that is not serving any children with disabilities, the SEA must determine, within a reasonable time period prior to the end of the carry-over period in 34 CFR §76.709, whether the LEA has obligated the funds.

The SEA may reallocate any funds not obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent that the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities. (Authority: 20 U.S.C. 1411(f)(3) and 1419(g)(2))

Implementation considerations:

- States may need to revise their procedures for monitoring the obligation and expenditure of Part B funds.
- To the extent that a State has not reserved the maximum amount of section 611 funds available for other State-level activities, the State may use section 611 funds not obligated by the LEA for any activities permitted under §300.704(b)(3) and (4) including, but not limited to, support and direct service activities such as technical assistance, professional development and training, and assisting LEAs in providing positive behavioral interventions and supports.
- If a State has opted to finance a high-cost fund under §300.704(c) and has not reserved the maximum amount of section 611 funds available for the fund, the States may use section 611 funds not obligated by the LEA for the LEA high-cost fund consistent with §300.704(c).