

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES
Explanation of Proposed Regulatory Changes

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Introduction

This document provides the following information pertaining to the U.S. Department of Education's (USDE) May 13, 2008, proposed regulatory changes for the Individuals with Disabilities Education Act (IDEA):

- ✓ Brief summary of the proposed changes
- ✓ Detailed explanation and pertinent comments by the USDE regarding the background for and intent of the proposed changes. Each area of discussion is followed by the related proposed regulatory language.
- ✓ All of the proposed changes, which are listed at the end of this document.
- ✓ Information for individuals who are considering the submission of comments to USDE.

The Public Consulting Group (PCG) offers this information to its clients and friends to support this important interactive process. Feel free to pass it on to others who may be interested.

To Comment

If you are interested in commenting on these proposed regulatory sections, USDE states that it must receive your comments on or before **July 28, 2008**; the Department requests that the submission include the Docket ID of **ED-2008-OSERS-0005**.

In addition to comments regarding the appropriateness of these proposals, USDE is interested in comments on how to make them easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a number heading; for example, § 300.172, regarding access to instructional materials.)
- What else could we do to make the proposed regulations easier to understand?

You may submit your comments electronically at <http://www.regulations.gov> or mail them to: Tracy R. Justesen, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5107, Potomac Center Plaza, Washington, DC 20202-2600

USDE's proposed regulation that was published in the Federal Register may be accessed at <http://edocket.access.gpo.gov/2008/pdf/E8-10522.pdf>.

Brief Summary

1. Parental revocation of consent after consenting to the initial provision of services

Would permit parents to unilaterally withdraw their children from further receipt of special education/and related services by revoking their consent for such services.

- A public agency (e.g., school district) would not be able to use mediation or a due process hearing to override the parent's decision.
- The agency will not be considered to be in violation of IDEA because of its failure to provide a free appropriate public education (FAPE) for which the parent refuses/fails to provide consent. Further, the agency would no longer be required to provide procedural safeguards to the child during suspensions or expulsion proceedings.
- The agency would no longer be required to develop an IEP for the child.
- If a parent revokes consent, the agency would not be required to amend the child's educational records to remove any references to the receipt of special education/related services because of the parent's revocation of consent.

2. State or local educational agency (LEA) obligation to make positive efforts to employ qualified individuals with disabilities

Would require IDEA recipients to make positive efforts to employ and advance qualified individuals with disabilities in programs assisted under Part B of the Act.

3. Representation of parents by non-attorneys in due process hearings

Would provide parents the right to be represented by non-attorneys at due process hearings as determined under State law

4. State monitoring, technical assistance, and enforcement of the Part B program

- **State determinations.** Would require States to:
 - Make annual determinations about each local educational agency's (LEA's) performance. This requirement is consistent with the requirement that USDE annually review and make determinations concerning the performance of each State.
 - Use the same categories used by USDE to make annual determinations about the performance of each State.
 - Report annually to the public on the performance of each LEA in meeting the targets contained in the relevant State performance plan.
 - Ensure that when the State identifies noncompliance, it is corrected as soon as possible and in no case later than one year after identification.
- **Time frame for public reporting.** No later than 60 days following a State's submission of its annual performance report (APR) to USDE, the State would be required to report to the public on the performance of each LEA with respect to meeting the targets in the State's performance plan.

- ***Additional information to be made available to the public.*** Would require each State to make:
 - Its performance plan available through public means, including by posting it on the State's Web site and distributing it to the media and through public agencies.
 - Each of the following documents available through public means: State performance plan; the APR; and annual reports on the performance of each LEA located in the State.
 - ***Notifying the Public of Federal Enforcement Actions***
 - Would require States to provide public notice of any enforcement action taken by the Secretary pursuant to its review of the State's APR.
 - Each State's public notice of enforcement actions would have to include a posting of the notice on the State's Web site and distribution of the notice to the media and through public agencies.
5. ***Allocation of funds, under sections 611 and 619 of the Act, to LEAs that are not serving any children with disabilities***
- ***Subgrants to LEAs (§ 300.705 & § 300.815).*** Would clarify that States are required to make a subgrant to eligible LEAs, including public charter schools that operate as LEAs, even if an LEA is not serving any children with disabilities, to take effect with funds that become available on the first July 1 following the effective date of the final regulations.)
 - ***Base Payment Adjustments (§ 300.705 & § 300.816)***
 - Would require an LEA that received a base payment of zero in its first year of operation because it was serving no children with disabilities and subsequently provides special education/related services to children with disabilities to receive a base payment adjustment for the fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities.
 - Such an LEA would be entitled to a base payment adjustment 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 would take effect with funds that become available on the first July 1 following the effective date of the final regulations
 - ***Reallocation of Funds (§ 300.705 & § 300.816)*** Would help to ensure that the funds under section 611 of the Act do not lapse, by making it clear that SEAs may redistribute funds that have not been obligated by LEAs that currently are not serving any children with disabilities or retain these funds for State-level activities.

Detailed Description of Proposed Changes & Regulatory Language

1. Parental Revocation of Consent for Special Education Services (§§ 300.9 and 300.300)

- Would permit parents to unilaterally withdraw their children from further receipt of special education and related services by revoking their consent.
- A public agency would not be able to use 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.
- The agency would not be considered to be in violation of IDEA because of the failure to provide the FAPE for which the parent refuses to or fails to provide consent. Further, the district is no longer required to provide procedural safeguards to the child during suspensions or expulsion proceedings.
- The agency would no longer be required to develop an IEP for the child.
- If a parent revokes consent, the public agency would not be required to amend the child's education records to remove any references to the receipt of special education/related services because of the parent's revocation of consent. USDE states that schools need the ability to keep accurate records of a child's school experience, including the child receipt of special education/related services.
- While the current regulation at § 300.300(b) interprets IDEA [614(a)(1)(D)(i)(II)] to require initial consent before the receipt of any special education/related services, it does not specifically address whether parents may revoke their consent and require the cessation of services.
- OSEP shared that its longstanding interpretation has been the following: once a child receives special education/related services, parents could not unilaterally require a public agency to cease service. In the event a parent wanted to stop services but the agency believed they are necessary to ensure the receipt of FAPE, the public agency had an obligation to continue to provide the services. If under a State's law the parent had the right to consent to continued services, the agency was required to take necessary steps to override the parent's refusal to consent to the continuation of services, which could include using informal means and/or requesting a due process hearing.
- USDE has changed this longstanding position and now believes that parents should have the authority to revoke consent and unilaterally end the provision of special education and related services to their child. The department explained that this change is consistent with IDEA's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.

§ 300.9 Consent.

(c)(3) If the parents revoke consent for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

§ 300.300 Parental consent.

(b)(3) If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public

agency—

- (i) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;
 - (ii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and
 - (iii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child.
- (4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent for the continued provision of special education and related services, the public agency—
- (i) May not continue to provide special education and related services to the child;
 - (ii) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;
 - (iii) Will not be considered to be in violation of the requirement to make available FAPE to the child because of the failure to provide the child with further special education and related services; and
 - (iv) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for further provision of special education and related services.

2. *States' Sovereign Immunity and Positive Efforts To Employ and Advance Qualified Individuals With Disabilities*

- Would require IDEA recipients to make positive efforts to employ and advance qualified individuals with disabilities in programs assisted under Part B of the Act.
- Examples of programs include special education programs of an SEA or LEA or the State-wide assessment program of an SEA that is using IDEA funds to develop assessments for children with disabilities.
- This provision reflects section 606 of the Act.

§300.177 States' sovereign immunity and positive efforts to employ and advance qualified individuals with disabilities.

(b) *Positive efforts to employ and advance qualified individuals with disabilities.*

Each recipient of assistance under Part B of the Act must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act.

3. *Representation by Non-Attorneys in Due Process Hearings (§ 300.512)*

- Parents would have the right to be represented by non-attorneys at due process hearings as determined under State law
- USDE stated that the Act and its implementing regulations are silent as to whether individuals who are not attorneys, but have special knowledge or expertise regarding the problems of children with disabilities, may represent parties at IDEA due process hearings.
- In the past, USDE interpreted IDEA to permit attorneys and lay advocates to perform the same functions at due process hearings. (April 8, 1981 letter from Theodore Sky, Acting General Counsel of the Department of Education, to the Honorable Frank B. Brouillet.)
- In the absence of statutory/regulatory language, at least one court concluded that State laws regulating the practice of law and prohibiting representation by lay advocates in due process hearings do not conflict with the IDEA. *In re Arons*, 756 A.2d 867 (Del. 2000), *cert. denied sub nom, Arons v. Office of Disciplinary Counsel*, 532 U.S. 1065 (2001).
- USDE stated that it is now persuaded that deference to state law best reflects an appropriate regard for the principle of Federal-State comity; the regulations should respect the interests that States have in regulating the practice of law so as to protect the public and ensure the appropriate administration of justice. This position is consistent with USDE's general position to provide flexibility to States where the IDEA is silent or where State law does not conflict with the Act. [Note: this general position was not followed in USDE's consideration of parental revocation of consent, which is discussed above; in that case, USDE's proposal is supported by its interpretation and not the actual language of IDEA.]
- USDE also believes the proposed provision would alert parents that State laws affect whether they can be represented in a due process hearing by a non-attorney advocate and that this should reduce future litigation of this issue.
- USDE states that this change would not prevent parents from representing themselves in due process hearings or during court proceedings under the IDEA. In *Winkelman v. Parma City School District*, 550 U.S. 111, 127 S. Ct. 1994 (2007), the Supreme Court held that parents can prosecute IDEA claims on their own behalf without being represented by an attorney. The proposed regulatory change would not affect this holding.

§ 300.512 Hearing rights.

(a) ***General.*** Any party to a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530 through 300.534, or an appeal conducted pursuant to §300.514, 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 children with disabilities, except that whether parents have the right to be represented by non-attorneys at due process hearings is determined under State law;

3. *State Monitoring, Technical Assistance, and Enforcement (§§ 300.600, 300.602, and 300.606)*

a. State Determinations About LEA Performance and State Enforcement

- Would require States to make annual determinations about each LEA's performance. This is consistent with the requirement that USDE annually review and make determinations concerning the performance of each State.

- Would require States to use the following categories to make annual determinations about the performance of each LEA [pursuant to the State’s annual performance plan, information obtained through monitoring visits, and any other public information made available]:
 - Meets the requirements and purposes of Part B of the Act;
 - Needs assistance in implementing the requirements of Part B of the Act;
 - Needs intervention in implementing the requirements of Part B of the Act; or
 - Needs substantial intervention in implementing the requirements of Part B of the Act.
- Clarifies the specific enforcement mechanisms that a State must use:
 - Technical assistance
 - Conditions on funding of an LEA’s grant
 - Corrective action plan or improvement plan
 - Withholding funds, in whole or in part
- Would require States to report annually to the public on the SEA’s and each LEAs’ performance by reporting on the extent to which each LEA met the targets in its State’s performance plan.
- Would require States to ensure that when it identifies noncompliance, it is corrected as soon as possible and in no case later than one year after the State’s identification. USDE explained that based on its monitoring activities, correction of noncompliance does not always occur in a timely manner. It further stated that throughout its 30 years of monitoring experience, it observed that in most cases when a State makes a good faith effort, the needed corrective actions can be accomplished and their effectiveness verified within one year. USDE further stated:

It is important to note that timely correction of noncompliance is critical to ensuring that children with disabilities receive a free appropriate public education. Allowing noncompliance to continue can negatively impact the education of great numbers of children with disabilities.

Correction of noncompliance means that a State requires a public agency to revise any noncompliant policies, procedures and practices, and verifies, through a follow-up review of documentation or interviews, or both, that the noncompliant policies, procedures, and practices are corrected.

...

For example, if an SEA determines that an LEA is not in compliance with the requirement to make placement decisions consistent with the least restrictive environment requirements of the Act, we would expect the SEA to require corrective actions and verify correction by determining that the LEA corrected any noncompliant policies, procedures, or practices, and that placement teams, subsequent to those changes, were making placement decisions consistent with the requirements of the Act.

§ 300.600 State monitoring and enforcement.

(a) The State must—

- (1) Monitor the implementation of this part;
 - (2) Make determinations annually about the performance of each LEA using the categories in § 300.603(b)(1);
 - (3) Enforce this part, consistent with § 300.604, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in § 300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA), (b)(2)(i) (a corrective action plan or improvement plan), (b)(2)(v) (withholding funds, in whole or in part, by the SEA), and (c)(2) (withholding funds, in whole or in part, by the SEA); and
 - (4) Report annually on the performance of the State and of each LEA under this part, as provided in § 300.602(b)(1)(A) and (b)(2).
- (e) In exercising its monitoring responsibilities under paragraph (d) of this section, the State must ensure that when it identifies noncompliance with the requirements of this part by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification.

b. Timeframe for Public Reporting About LEA Performance

- No later than 60 days following a State's submission of its APR to USDE, the State would be required to report to the public on the performance of each LEA with respect to meeting the targets in the State's performance plan.
- USDE reported that the IDEA is silent on this issue and following the publication of the final regulations it received many informal inquiries from SEA personnel and other interested parties regarding the timeframe for reporting this information.
- USDE believes that this timeframe is reasonable and would not be burdensome to States.

§ 300.602 State use of targets and reporting.

(b) Public reporting and privacy.

(1) ***Public report.*** (i) Subject to paragraph (b)(1)(ii) of this section, the State must—

(A) Report annually to the public on the performance of each LEA located in the State on the targets in the State's performance plan no later than 60 days following the State's submission of its annual performance report to the Secretary under paragraph (b)(2) of this section; and

c. Additional Information To Be Made Available to the Public

- Would require each State to make its performance plan available through public means, including by posting it on the State's Web site and distributing it to the media and through public agencies.
- Would require States to make each of the following documents available through public means: State performance plan; the APR; and annual reports on the performance of each LEA located in the State.

- USDE believes that public accountability is served by requiring States to make these documents available to the public by the same means as their performance plans, and this requirement should not impose significant burden on States, because the documents are already required and could easily be made available to the public.

§ 300.602 State use of targets and reporting.

(b) Public reporting and privacy.

(1) **Public report.** (i) Subject to paragraph (b)(1)(ii) of this section, the State must—

(B) Make each of the following items available through public means: the State’s performance plan, under § 300.601(a); annual performance reports, under paragraph (b)(2) of this section; and the State’s annual reports on the performance of each LEA located in the State, under paragraph (b)(1)(i)(A) of this section. In doing so, the State must, at a minimum, post the plan and reports on the State’s Web site, and distribute the plan and reports to the media and through public agencies.

d. Notifying the Public of Federal Enforcement Actions

- Would require States to provide public notice of any enforcement action taken by the Secretary pursuant to its review of the State’s APR.
- Each State’s public notice of enforcement actions would have to include a posting of the notice on the State’s Web site and distribution of the notice to the media and through public agencies
- The change would clarify that States do not have to provide public notice of the Secretary’s annual determinations.
- USDE believes the clarification will minimize the States’ reporting burden while providing the public with appropriate notice of the enforcement.

§ 300.606 Public attention.

Whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action pursuant to § 300.604, the State must, by means of a public notice, take such actions as may be necessary to notify the public within the State of the pendency of an action pursuant to § 300.604, including, at a minimum, by posting the notice on the State’s Web site and distributing the notice to the media and through public agencies.

5. Allocation of Funds Under Section 611 and 615 (Preschool) to LEAs That Are Not Serving Any Children With Disabilities (§ 300.705, 300.814 – 816)

a. Subgrants to LEAs (§ 300.705 & § 300.815)

- Would clarify that States are required to make a subgrant to eligible LEAs, including public charter schools that operate as LEAs, even if an LEA is not serving any children with

disabilities, to take effect with funds that become available on the first July 1 following the effective date of the final regulations.)

- There is no requirement in section 613(a) of the Act that an LEA must be serving children with disabilities for an LEA to be eligible for a subgrant. USDE believes that this requirement would ensure that LEAs have Part B funds available if they are needed to conduct child find activities or to serve children with disabilities who subsequently enroll or are identified during the year.
- Payment made to such an LEA would be based on enrollment and poverty data and any base payment to which the LEA is entitled.
- Under current regulations, a previously-existing LEA not serving any children with disabilities is entitled to the base payment it received in the previous fiscal year. According to USDE, a newly-created LEA is entitled to a base payment that is calculated by dividing the base allocation of LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs, based on the relative numbers of children with disabilities currently provided special education by each of the LEAs. *See* § 300.705(b)(2)(i) below. For a newly-created LEA that is not a public charter school LEA, a State has some flexibility in determining the number of children with disabilities currently provided special education by the newly-created LEA. For example, a State may choose to determine the base payment of a newly-created LEA based on the location of children with disabilities who were included in a previous count or a new count of children served that year. If the SEA determines that the newly-created LEA is not serving any children with disabilities, based on its count, the newly-created LEA would be entitled to a base payment of zero in its first year of operation. USDE states:

In determining the base payment to which a new public charter school LEA would be entitled, States must comply with the requirements in section 5206 of the ESEA and its implementing regulations in subpart H of 34 CFR part 76 of the Education Department General Administrative Regulations (EDGAR). These requirements apply to a public charter school LEA that opens or significantly expands its enrollment. Specifically under 34 CFR 76.791(b), when making a subgrant to a new public charter school LEA, a State cannot rely on enrollment or eligibility data from a prior year when calculating the subgrant of a public charter school LEA opening for the first time.

A State may, but is not required to, allocate funds to, or reserve funds for, an eligible new public charter school LEA based on reasonable estimates of projected enrollment at the public charter school LEA, in accordance with 34 CFR 76.789(b)(2). Once the public charter school LEA is open, the public charter school LEA must provide actual enrollment and eligibility data to the SEA at a time the SEA may reasonably require in accordance with 34 CFR 76.788(b)(2)(i).

A State is not required to provide funds to a new public charter school LEA until the public charter school LEA provides the SEA with the required actual enrollment and eligibility data in accordance with 34 CFR 76.788(b)(2)(ii). If the SEA allocates funds based on estimated enrollment or eligibility data, the SEA must make appropriate adjustments to the amount of funds allocated to a new public charter school LEA, as well as to other LEAs, based on actual enrollment or eligibility data for the public charter school LEA, on or after the date the public charter school LEA first opens, in accordance with 34 CFR 76.796. If, on the date the SEA reasonably requires the new public charter school LEA to provide actual

enrollment and eligibility data, which must be on or after the date the public charter school LEA opens, the new public charter school LEA is not serving any children with disabilities, its base payment in its first year of operation would be zero.

<p>§ 300.705 Subgrants to LEAs.</p> <p><i>a. Subgrants required.</i> Each State that receives a grant under section 611 of the Act for any fiscal year must distribute any funds the State does not reserve under § 300.704 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act for use in accordance with Part B of the Act. Effective with funds that become available on the first July 1 following the effective date of this regulation each State must distribute funds to eligible LEAs, including public charter schools that operate as LEAs, even if the LEA is not serving any children with disabilities.</p>	<p>§ 300.815 Subgrants to LEAs.</p> <p>Each State that receives a grant under section 619 of the Act for any fiscal year must distribute all of the grant funds the State does not reserve under § 300.812 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act. Effective with funds that become available on the first July 1 following the effective date of this regulation, each State must distribute funds to eligible LEAs that are responsible for providing education to children aged three through five years, including public charter schools that operate as LEAs, even if the LEA is not serving any preschool children with disabilities.</p>
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b. Base Payment Adjustments (§ 300.705 & § 300.816)

- Would require that an LEA that received a base payment of zero in its first year of operation because it was serving no children with disabilities and subsequently provides special education/related services to children with disabilities must receive a base payment adjustment for the fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities.
- The State would divide the base allocation determined under § 300.705(b)(1) for the LEAs that would have been responsible for serving children with disabilities now being served by the LEA, among the LEA and affected LEAs, based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21, currently provided special education by each of the LEAs.
- Such an LEA would be entitled to a base payment adjustment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities.
- USDE explained that this requirement would take effect with funds that become available on the first July 1 following the effective date of the final regulations because the current regulations do not require a base payment adjustment under these circumstances and it believes that it would be burdensome for States to comply with this requirement after subgrants have been made for a fiscal year.

<p>§ 300.705 Subgrants to LEAs.</p> <p>(b)(2)(iv) 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. The State must divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on the first July 1 following the effective date of this regulation.</p>	<p>§ 300.816 Allocations to LEAs.</p> <p>(b)(4) 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 aged three through five years. The State must divide the base allocation determined under paragraph (a) of this section for the LEAs that would have been responsible for serving children with disabilities aged three through five years now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities aged three through five years currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on the first July 1 following the effective date of this regulation.</p>
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c. Reallocation of Funds (§ 300.705 & § 300.816)

- Would authorize an SEA to reallocate Part B funds not needed by an LEA, if the SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency, with State and local funds
- Would indicate that after an SEA distributes funds to an eligible LEA that is not serving any children with disabilities, the SEA must determine within a reasonable period of time prior to the end of the carryover period whether the LEA has obligated the funds.
- The SEA may if it chooses reallocate any of those 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 the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities.
- According to USDE, given the fact that small amounts of funds distributed late in their period of availability to LEAs would be prone to lapse, these funds may be available to States to increase the chance these funds would be well spent.
- Whether funds are reallocated or retained for use at the State-level, they must be obligated prior to the close of the period of availability.

<p>§ 300.705 Subgrants to LEAs.</p> <p>(c) <i>Reallocation of LEA funds.</i></p> <p>(1) If an SEA determines that an LEA is adequately providing FAPE to all</p>	<p>§300.817 Reallocation of LEA funds.</p> <p>(a) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged three through five years residing in the area served by the LEA</p>
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<p>children with disabilities residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under this part that are not needed by that LEA to provide FAPE, 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 the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704.</p> <p>(2) After an SEA distributes funds under this part to an eligible LEA that is not serving any children with disabilities, as provided in paragraph (a) of this section, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those 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 the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704.</p>	<p>with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years 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 the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.</p> <p>(b)After an SEA distributes section 619 funds to an eligible LEA that is not serving any children with disabilities aged three through five years, as provided in § 300.815, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those 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 aged three through five years residing in the areas served by those other LEAs. The LEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.</p>
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Proposed Regulatory Changes to IDEA (May 13, 2008)

By Sue Gamm
for the Public Consulting Group

§ 300.9 Consent.

- (c)(3) If the parents revoke consent for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

§ 300.300 Parental consent.

- (b)(3) If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency—
- (iii) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;
 - (iv) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and
 - (iii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child.
- (4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent for the continued provision of special education and related services, the public agency—
- (v) May not continue to provide special education and related services to the child;
 - (vi) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;
 - (vii) Will not be considered to be in violation of the requirement to make available FAPE to the child because of the failure to provide the child with further special education and related services; and
 - (viii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for further provision of special education and related services.

§300.177 States' sovereign immunity and positive efforts to employ and advance qualified individuals with disabilities.

(a) *States' sovereign immunity.*

- (1) A State that accepts funds under this part waives its immunity under the 11th amendment of the Constitution of the United States from suit in Federal court for a violation of this part.
- (2) In a suit against a State for a violation of this part, remedies (including remedies both at law and in equity) are available for such a violation in the suit against any public entity other than a State.
- (3) Paragraphs (a)(1) and (a)(2) of this section apply with respect to violations that occur in whole or part after the date of enactment of the Education of the Handicapped Act Amendments of 1990.

(b) *Positive efforts to employ and advance qualified individuals with disabilities.*

Each recipient of assistance under Part B of the Act must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act.

§ 300.512 Hearing rights.

(a) **General.** Any party to a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530 through 300.534, or an appeal conducted pursuant to §300.514, 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 children with disabilities, except that whether parents have the right to be represented by non-attorneys at due process hearings is determined under State law;

§ 300.600 State monitoring and enforcement.

(a) The State must—

- (5) Monitor the implementation of this part;
- (6) Make determinations annually about the performance of each LEA using the categories in § 300.603(b)(1);
- (7) Enforce this part, consistent with § 300.604, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in § 300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA), (b)(2)(i) (a corrective action plan or improvement plan), (b)(2)(v) (withholding funds, in whole or in part, by the SEA), and (c)(2) (withholding funds, in whole or in part, by the SEA); and
- (8) Report annually on the performance of the State and of each LEA under this part, as provided in § 300.602(b)(1)(A) and (b)(2).

(e) In exercising its monitoring responsibilities under paragraph (d) of this section, the State must ensure that when it identifies noncompliance with the requirements of this part by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification.

§ 300.602 State use of targets and reporting.

(b) **Public reporting and privacy.**

(1) **Public report.** (i) Subject to paragraph (b)(1)(ii) of this section, the State must—

- (A) Report annually to the public on the performance of each LEA located in the State on the targets in the State's performance plan no later than 60 days following the State's submission of its annual performance report to the Secretary under paragraph (b)(2) of this section; and
- (B) Make each of the following items available through public means: the State's performance plan, under § 300.601(a); annual performance reports, under paragraph (b)(2) of this section; and the State's annual reports on the performance of each LEA located in the State, under paragraph (b)(1)(i)(A) of this section. In doing so, the State must, at a minimum, post the plan and reports on the State's Web site, and distribute the plan and reports to the media and through public agencies.

§ 300.606 Public attention.

Whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action pursuant to § 300.604, the State must, by means of a public notice, take such actions as may be necessary to notify the public within the State of the pendency of an action pursuant to § 300.604, including, at a minimum, by posting the notice on the State's Web site and distributing the notice to the media and through public agencies.

§ 300.705 Subgrants to LEAs.

(a) **Subgrants required.** Each State that receives a grant under section 611 of the Act for any fiscal year must distribute any funds the State does not reserve under § 300.704 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act for use in accordance with Part B of the Act. Effective with funds that become available on the first July 1 following the effective date of this regulation each State must distribute funds to eligible LEAs, including public charter schools that operate as LEAs, even if the LEA is not serving any children with disabilities.

(b)(2)(iv) 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. The State must divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on the first July 1 following the effective date of this regulation.

(c) ***Reallocation of LEA funds.***

- (1) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under this part that are not needed by that LEA to provide FAPE, 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 the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704.
- (2) After an SEA distributes funds under this part to an eligible LEA that is not serving any children with disabilities, as provided in paragraph (a) of this section, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those 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 the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704.

§ 300.815 Subgrants to LEAs.

Each State that receives a grant under section 619 of the Act for any fiscal year must distribute all of the grant funds the State does not reserve under § 300.812 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act. Effective with funds that become available on the first July 1 following the effective date of this regulation, each State must distribute funds to eligible LEAs that are responsible for providing education to children aged three through five years, including public charter schools that operate as LEAs, even if the LEA is not serving any preschool children with disabilities.

§ 300.816 Allocations to LEAs.

- (b)(4) 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 aged three through five years. The State must divide the base allocation determined under paragraph (a) of this section for the LEAs that would have been responsible for serving children with disabilities aged three through five years now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities aged three through five years currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on the first July 1 following the effective date of this regulation.

§300.817 Reallocation of LEA funds.

- (a) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged three through five years residing in the area served by the LEA with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years 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 the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.

- (b) After an SEA distributes section 619 funds to an eligible LEA that is not serving any children with disabilities aged three through five years, as provided in § 300.815, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those 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 aged three through five years residing in the areas served by those other LEAs. The LEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.