

Non-Regulatory Guidance on the IDEA Part B Regulations Regarding Parental Consent for the Use of Public Benefits or Insurance to Pay for Services under the IDEA, Issued February 14, 2013, and Effective March 18, 2013

This guidance provides State educational agencies, local educational agencies, parent advocacy organizations, and other interested parties with information on the new regulations related to parental consent for the use of public benefits or insurance to pay for services under Part B of the Individuals with Disabilities Education Act (IDEA). The new regulations were published in the *Federal Register* on February 14, 2013, and are effective on March 18, 2013. The new regulations amend the Department's regulations in 34 CFR §300.154(d)(2)(iv) that were published in the *Federal Register* on August 14, 2006. The prior regulations required the public agency responsible for providing a free appropriate public education to a child with a disability under the IDEA to obtain parental consent each time access to public benefits or insurance (*e.g.*, Medicaid) was sought. The new regulations have two basic requirements. First, the public agency must notify parents in writing of a number of safeguards to protect their rights before the public agency accesses the child's or parent's public benefits or insurance to pay for services under the IDEA for the first time and annually thereafter. 34 CFR §300.154(d)(2)(v). Second, the public agency must obtain a one-time written consent from the parent that meets the requirements of 34 CFR §99.30 and §300.622, and also specifies that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for special education or related services under part 300 (services under the IDEA). 34 CFR §300.154(d)(2)(iv).

Below we describe the new regulations and provide guidance on implementing these new regulations, including requirements pertaining to children with disabilities whose public benefits or insurance have previously been accessed by a public agency and children with disabilities who transfer to a new school within a new public agency or to a new school within the same public agency.

Q1. What are a public agency's obligations under the new regulations with respect to notifying parents of their rights and obtaining consent from a parent to access the child's public benefits or insurance (*e.g.*, Medicaid)?

A1. Under the new regulations, a public agency must obtain parental consent before the public agency accesses a child's or parent's public benefits or insurance for the first time. This is a one-time consent, *i.e.*, the public agency is no longer required to obtain parental consent each time access to public benefits or insurance is sought. The new regulations also require that the public agency provide written notification to the child's parents, consistent with new §300.154(d)(2)(v), before parental consent is obtained (see Q2). 34 CFR §300.154(d)(2)(iv).

Q2. What are the parental notification requirements under the new regulations?

A2. Prior to accessing a child's or parent's public benefits or insurance for the first time, and annually thereafter, a public agency must provide written notification, consistent with §300.503(c), to the child's parents, that includes:

- 1) A statement of the parental consent provisions in §300.154(d)(2)(iv)(A)-(B);
- 2) A statement of the "no cost" provisions in §300.154(d)(2)(i)-(iii);
- 3) A statement that the parents have the right under 34 CFR part 99 and part 300 to withdraw their consent to disclosure of their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.*, Medicaid) at any time; and
- 4) A statement that the withdrawal of consent or refusal to provide consent under 34 CFR part 99 and part 300 to disclose personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.*, Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. 34 CFR §300.154(d)(2)(v).

The notification must be written in language understandable to the general public and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. 34 CFR §300.503(c). The notification also must be provided before parental consent is obtained. 34 CFR §300.154(d)(2)(iv).

While the new regulations require the public agency to provide the first written notification to the parents prior to accessing the child's or parent's public benefits or insurance for the first time, the regulations do not specify when the subsequent annual written notification must be provided to the parents. This is because public agencies need to have the flexibility to determine the timing of the annual written notification (see Q3).

Q3. How should a public agency provide the written notification to parents?

A3. There are a number of ways in which the public agency may provide the required written notification to parents.

The written notification may be:

1. Mailed to the parents, or
2. E-mailed if requested by the parents, and if consistent with State or public agency policies, or
3. Provided at an IEP Team meeting if the meeting occurs prior to the first time a public agency accesses a child's or parent's public benefits or insurance, or

4. Provided through other means determined by the public agency, so long as all of the written notification requirements in these new regulations are met. This includes the requirement that the public agency provide written notification before obtaining parental consent.

Q4. What are the parental consent requirements under the new regulations?

A4. Consistent with 34 CFR §99.30 of the regulations implementing the Family Educational Rights and Privacy Act (FERPA) and the IDEA Part B consent requirements in 34 CFR §300.622, a public agency must obtain parental consent before releasing a child's personally identifiable information from education records for billing purposes to a public benefits or insurance program (e.g., Medicaid) for the first time. Under new §300.154(d)(2)(iv)(B), this consent must also include a statement specifying that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. Because this consent must be in writing, the public agency would typically use a consent form. This parental consent form must specify:

1. The personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular child),
2. The purpose of the disclosure (e.g., billing for services under part 300),
3. The agency to which the disclosure may be made (e.g., the State's public benefits or insurance program (e.g., Medicaid)). 34 CFR §300.154(d)(2)(iv)(A), and
4. That the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300.

Q5. Must a public agency modify its consent forms to comply with the new parental consent requirement?

A5. No, not necessarily. In implementing the new parental consent requirement, a public agency may choose either to:

1. Modify its existing forms. A public agency may add the statement that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300, to the consent required under 34 CFR §99.30 and §300.622 regarding the release of personally identifiable information to a public benefits or insurance program (e.g., Medicaid) for billing purposes; or
2. Develop a new form. A public agency may develop a new consent form that includes the statement that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300.

Q6. May a public agency accept digital or electronic signatures when obtaining consent under the new parental consent requirements?

A6. A public agency may accept digital or electronic signatures when obtaining the parental consent required under 34 CFR §99.30 and §300.622, as described in new §300.154(d)(2)(iv)(A). Under 34 CFR §99.30(a), the parental consent that must be obtained before disclosure of personally identifiable information must be signed and dated. Under 34 CFR §99.30(d), this consent may include a record and signature in electronic form that:

1. Identifies and authenticates a particular person as the source of the electronic consent; and
2. Indicates such person's approval of the information contained in the electronic consent, *i.e.*, disclosure of the child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.*, Medicaid) for billing purposes to pay for services under part 300.

Additionally, under new §300.154(d)(2)(iv)(B), the electronic consent must include a statement that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300.

Q7. Are there any situations in which a public agency is not required to obtain a new parental consent under the new regulations?

A7. Yes. Under these new regulations, and notwithstanding the annual written notification requirements, a public agency is not required to obtain a new parental consent if the following conditions are present:

1. There is no change in any of the following: the type (*e.g.*, physical therapy or speech therapy) of services to be provided to the child; the amount of services to be provided to the child (frequency or duration); or the cost of the services charged to the public benefits or insurance program (*e.g.*, Medicaid); and
2. A public agency has on file a parental consent that meets the requirements of the prior §300.154(d)(2)(iv)(A) and 34 CFR §99.30 and §300.622. This would include a parental consent on file that has been given directly to another agency, such as the State Medicaid agency.

Q8. For children with disabilities currently served under the IDEA, what must a public agency do to implement the new parental notification and consent requirements?

A8. The first time after the effective date of these regulations that there is a change in the type or amount of the services to be provided to the child or a change in the cost of the services to be charged

to the public benefits or insurance program, the public agency must first provide the parents the written notification described in new §300.154(d)(2)(v) before accessing the child's or parent's public benefits or insurance. The public agency then must obtain parental consent, consistent with new §300.154(d)(2)(iv)(B), stating that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. The public agency must obtain a new parental consent containing this explicit statement from the parent even if the public agency has on file a consent provided to another agency, such as the State Medicaid agency. Once the public agency obtains this one-time consent, the public agency is not required to obtain parental consent before it accesses the child's or parent's public benefits or insurance in the future, regardless of whether there is a change in the type or amount of services to be provided to the child or a change in the cost of the services to be charged to the public benefits or insurance program (*e.g.*, Medicaid). However, the public agency must annually thereafter provide parents with the written notification described in new §300.154(d)(2)(v). This annual written notification will help ensure that parents understand their rights when a public agency uses their or their child's public benefits or insurance to pay for services required under the IDEA.

Q9. What steps may a public agency take under the new regulations if parents have previously declined to consent to the use of public benefits or insurance to pay for services under the IDEA? If a parent continues to refuse to consent or withdraws consent, what are a public agency's obligations?

A9. If a parent previously declined to provide consent (or withdrew consent) to disclose personally identifiable information to the State's public benefits or insurance program (*e.g.*, Medicaid) for billing purposes, the public agency may make reasonable requests, after providing the written notification described in new §300.154(d)(2)(v), to obtain the parental consent required under new §300.154(d)(2)(iv). However, a parent's withdrawal of consent or refusal to provide consent under 34 CFR part 99 and §300.622 to disclose personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.*, Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. 34 CFR §300.154(d)(2)(v)(D).

Q10. What are a public agency's obligations to provide parental notification when a child has an IEP but the public agency has not previously sought to access the parent's or child's public benefits or insurance (*e.g.*, Medicaid) to pay for services under the IDEA, and the public agency seeks to access the child's or parent's public benefits or insurance for the first time?

A10. Once the new regulations become effective, if a public agency seeks to access the child's or parent's public benefits or insurance to pay for services under the IDEA for the first time, the public agency must provide the parents the written notification described in new §300.154(d)(2)(v) and then obtain parental consent consistent with new §300.154(d)(2)(iv) before the public agency may access the

child's or parent's public benefits or insurance for the first time. If parental consent is obtained, the public agency must provide the written notification to the parents annually thereafter.

Q11. What are a public agency's obligations to provide parental notification when a child has an IEP and the public agency has previously billed the child's or parent's public benefits or insurance program (e.g., Medicaid) to pay for services under part 300?

A11. Even if there is no change in the type or amount of services to be provided to the child or in the cost of the services to be charged to the public benefits or insurance program (e.g., Medicaid), once the new regulations become effective, the public agency must provide the written notification described in new §300.154(d)(2)(v) to the parents before the public agency may access the child's or parent's public benefits or insurance. The public agency also must provide this written notification to the parents annually thereafter.

Q12. What are a public agency's obligations to provide parental notification and obtain parental consent under the new regulations in situations where a child transfers to a new school within a new school district?

A12. The responsibility for providing written notification and obtaining parental consent prior to the disclosure of personally identifiable information for billing purposes to the State's public benefits or insurance program (e.g., Medicaid) and before accessing a child's or parent's public benefits or insurance for the first time rests with the public agency responsible for providing a free appropriate public education to the child, not with the individual school. Thus, if a child with an IEP who was enrolled in a school within one public agency transfers to a school within a new public agency, the new public agency responsible for educating the child must provide the parents with the written notification described in new §300.154(d)(2)(v) to inform the parents of their rights and protections when access to their or their child's public benefits or insurance is sought. The new public agency then must obtain parental consent, consistent with new §300.154(d)(2)(iv), to disclose personally identifiable information to the public benefits or insurance program (e.g., Medicaid) for billing purposes and prior to accessing the child's or parent's public benefits or insurance for the first time. This new consent must include the statement specifying that the parent understands and agrees that the new public agency may access the child's or parent's public benefits or insurance to pay for services under part 300. Once parental consent has been obtained for the new public agency to access the child's or parent's public benefits or insurance for the first time, no additional parental consent is required for the new public agency to bill the child's or parent's public benefits or insurance program (e.g., Medicaid) in the future, regardless of whether there is a change in the type or amount of services to be provided to the child or in the cost of the services to be charged to the public benefits or insurance program. However, the new public agency must provide the written notification described in new §300.154(d)(2)(v) to the parents annually thereafter.

Q13. What are a public agency's obligations with respect to providing parental notification and obtaining parental consent to access a child's or parent's public benefits or insurance if the child transfers to a new school within the same school district?

A13. If a child transfers to a different school within the same public agency, any parental consent that the public agency previously obtained that meets the requirements in new §300.154(d)(2)(iv) would continue to apply. The public agency would continue to provide the parents the written notification described in new §300.154(d)(2)(v) annually. As noted in Q12, this is because the responsibility for providing written notification and obtaining parental consent prior to the disclosure of personally identifiable information for billing purposes to the State's public benefits or insurance program (*e.g.*, Medicaid) and before accessing a child's or parent's public benefits or insurance for the first time rests with the public agency responsible for providing a free appropriate public education to the child, not with the individual school.