

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES

GUIDANCE DOCUMENT
ON THE
IMPLEMENTATION OF THE
IDEA FEDERAL REGULATIONS – PART B
ADDITIONAL REQUIREMENTS, 2008

*Assistance to States for the Education of Children With Disabilities
and Preschool Grants for Children with Disabilities: Final Rule
December 1, 2008*

Implementation Date: December 31, 2008



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INTRODUCTION

On December 1, 2008, the U.S. Department of Education (U.S. DOE) issued additional Part B regulations in order to clarify and strengthen current federal regulations implementing the *Individuals with Disabilities Education Improvement Act*, 2004, P. L. 108-466 (IDEA 2004). Attached is a copy of the new regulations and U.S. DOE's *Analysis of Comments and Changes (Analysis)*. (Federal Register, Vol. 73, No. 231, December 1, 2008, Rules and Regulations, p. 73006 *et seq.* The web site for the regulations may be found at:

<http://www.ed.gov/legislation/FedRegister/finrule/2008-4/120108a.pdf>

These new regulations take effect December 31, 2008. This Guidance Document serves as a summary of the new federal provisions.

Questions related to this Guidance document or these regulations should be directed to:

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2008 PART B REGULATIONS

34 CFR § 300.9 Definition of Consent

A parent may revoke consent for continuing special education and related services at any time. The revocation of consent must be in writing. The LEA is not required to amend the child's educational record to remove any reference to the child's receipt of special education and related services because of the consent revocation.

34 CFR § 300.300 Parental Consent

If the parent fails to respond to a request for, or refuses to consent to the initial provision of special education and related services, OR

If the parent revokes consent for continuing special education and related services,

The LEA:

- must provide written prior notice before ceasing the provision of special education and related services.
- may not use mediation or due process to attempt to obtain an agreement or a ruling that services be provided the child.
- will not be in violation of the FAPE requirements.
- is not required to convene an IEP meeting or develop an IEP for the child.

Additional U.S. DOE Guidance

- The revocation consent rule is consistent with the IDEA's emphasis on the role of parents in protecting their child's rights and the U.S. DOE's goal of enhancing parent involvement and choice in their child's education. [Analysis, p. 73015]
- The federal requirements for written prior notice specify that the LEA is to provide this notice within a reasonable time before the LEA discontinues services. (§ 300.503). We are reminded that services may not be discontinued until the parents are provided this notice. [Analysis, p. 73008]
- The LEA may not require a parent to provide an explanation, either orally or in writing, prior to ceasing the provision of special education and related services. [Analysis, p. 73008]

- The revocation consent rule applies to revocation for all special education and related services. Disagreements with a provision of a particular service would still be addressed by the IEP team. Mediation and due process are available options to resolve disputes regarding particular services. [Analysis, p. 73011]
- **The revocation consent rule for continuing special education and related services eliminates Virginia’s current requirement for LEAs at 8 VAC 20-80-58 B.3 to evaluate the child and determine eligibility before terminating services.** If a parent revokes consent for continuing special education and related services for his/her child, the LEA is not determining that the child is no longer a child with a disability. Instead, the LEA is discontinuing the provision of special education and related services pursuant to the decision of the parent and there is no obligation for the LEA to evaluate the child. [Analysis, p. 73015]
- If a parent revokes consent and later requests that his/her child be evaluated for special education and related services, the LEA must treat this as a request for an initial evaluation, rather than re-evaluation. [Analysis, p. 73015]
- Children who have been previously IDEA-eligible should not be treated any differently for child find purposes. A parent, however, may refuse to provide consent for an initial evaluation. [Analysis, p. 73012]
- U.S. DOE declines to impose additional data collection requirements to track the number of children whose parents revoke consent. The SEA may choose to collect such data. [Analysis, p. 73014]
- After revocation of consent goes into effect:
 - ✓ the student is treated the same as any other non-disabled student, along with access to accommodations, if any, that are available to non-disabled students.
 - ✓ the student’s IEP is no longer in effect. The LEA is not required to provide FAPE, conduct a triennial re-evaluation, or hold annual IEP meetings.
 - ✓ regular discipline rules apply. Unless intervening facts show otherwise, the LEA would not be considered to “have knowledge” of the student’s disability and is not required to conduct a manifestation review.

[Analysis, pp. 73012, 73013, 73014]

- What about Section 504?

U.S. DOE addresses this issue by saying only that these regulations apply to IDEA and do not address application of §504 and the Americans with Disabilities Act. [Analysis, p. 73013] Recall, however, that the Office for Civil Rights has stated that refusal of IDEA services counts as refusal of 504 services. (*Letter to McKethan*, 25 IDELR 295, OCR

1996. “...by rejecting the services developed under the IDEA, the parent would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504...”).

- What about NCLB?

If the parent revokes consent after the school year begins but before administration of the annual State assessment required under the Elementary and Secondary Education Act, the child is considered a general education student who has exited special education for accountability purposes. [*Analysis*, p. 73011]

A State may continue to include a child whose parent revokes consent for special education and related services in the students with disabilities subgroup for purposes of calculating AYP for two years following that revocation, although the child will not have an IEP or access to any of the accommodations previously provided in the IEP, unless the accommodations are provided all students. (Title I, § 200.20(f)). [*Analysis*, p. 73011]

34 CFR § 300.512 Hearing Rights

The IDEA 2004 says that either side in a due process hearing may be accompanied by counsel, or by people with expertise in special education. The statute does not say, however, whether these experts can actually represent parents if the experts are non-lawyers. This new regulation defers to State law for this determination. The *Code of Virginia* settles this issue for Virginia. Section 22.1-214 C provides both parents and school divisions with the right to be “represented by legal counsel or other representative before a hearing officer without being in violation of the provisions of §54.1-3904” (unauthorized practice of law).

34 CFR § 300.600 State Monitoring and Enforcement

If the State determines that a school division is in noncompliance with any of the provisions of the IDEA, the State must ensure that the noncompliance is corrected as soon as possible, and in no case later than one year from when the State identifies the issue. VDOE has followed this standard for some time now relative to its federal monitoring system, as well as corrections needed to noncompliances identified in complaint investigations or due process hearing orders. This standard is also part of the State Performance Plan/Annual Performance Report Indicator 15.

Additional U.S. DOE Guidance

- The U.S. DOE recognizes that some noncompliances are more difficult to correct than others and may take the full year to correct. In those instances, however, SEAs may require the implementation of short-term correction strategies while the LEA works on the long-term requirements. [*Analysis*, p. 73020]

34 CFR § 300.602 State Use of Targets and Reporting

The timeline regarding the State’s public reporting on the performance of each LEA has been changed from 60 days to 120 days following the State’s submission of the annual performance report to the Secretary of Education.

34 CFR § 300.177 State’s Sovereign Immunity and Positive Efforts to Employ and Advance Qualified Individuals with Disabilities

This provision incorporates new language requiring “positive efforts to employ and advance qualified individuals with disabilities”. This section further clarifies that the requirement regarding employing and advancing qualified individuals with disabilities applies to each recipient of Part B funds, including both SEAs and the LEAs.

- 34 CFR § 300.606 Public Attention**
- 34 CFR § 300.705 Subgrants to LEAs**
- 34 CFR § 300.815 Subgrants to LEAs**
- 34 CFR § 300.816 Allocations to LEAs**
- 34 CFR § 300.817 Reallocation of LEA funds**

There were no major, substantive changes to these sections as they impact LEAs. To discuss a particular provision, please contact Paul Raskopf, Financial and Data Services, at 804-225-2080.

Initial Distribution List:

- VDOE Staff
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