

**WWW.WRIGHTSLAW.COM**  
**COMMENTARY - REVISION**  
**34 CFR § 300.154(d)**  
**MEDICAID - CONSENT AND NOTICE**  
**Vol. 78, No. 31, Federal Register February 14, 2013, page 10525**

**Wrightslaw Note:** This document was prepared by Wrightslaw dot com. Formatting, italics, bold references and “Notes” were added by Wrightslaw.

The U. S. Department of Education’s (DOE) Analysis and Commentary about the revision to 34 CFR § 300.154(d) was published on their website as an 87 page double-spaced Word document with the notation “Unofficial Copy” embedded across each page. It is difficult to read. We have stripped the formatting and revised it to make it more readable and formatted key provisions in bold and inserted our own “Wrightslaw” comments as appropriate.

On September 28, 2011, the DOE issued proposed regulations relating to a revision of a school system’s right to access Medicaid and other “or other public benefits or insurance programs” and the Notice that is to be provided to the parent. DOE received over 500 comments about the proposed revisions. On February 14, 2013 the “Final Regulation” was published in the Federal Register and is effective on March 14, 2013. This document includes both the actual revision to the regulations made by DOE and their Comments, Discussion, and Changes, if any, made to the proposed regulation.

For background, the special ed law was originally created in 1975 and was known as the Education for All Handicapped Children Act of 1975. Congress revises it from time to time. The most recent (2004) version is known as the Individuals with Disabilities Education Act and is referred to as “IDEA 2004.” The prior revision, in 1997, is known as “IDEA 97.” When Congress revises the law and it is signed by the President and becomes law, that “Act” is subsequently copied and pasted, word for word, into the United States Code (USC). The section numbers for each provision of the Act differ from that in the USC.

All federal education law is in Title 20 of the United States Code. The special education provision, IDEA 2004, begins at Section 1400, thus is cited as 20 USC § 1400.

The revised regulation is based on a portion of the Act in Section 612, which, in the United States Code is in Section 1412, titled “State Eligibility.” The legal citation for that section is 20 USC § 1412. (The numerical differences at first glance can become confusing, thus the explanation provided here.) The Commentary from the DOE refers to Section 612 of the Act (20 USC § 1412). The DOE revised Section 154(d) of Part 300 in Volume 34 of the Code of Federal Regulations, (34 CFR § 300.154(d)). The DOE cannot revise the USC, but can revise the regulations.

The essence of the revision permits a “first time” “consent” from the parent to access the Medicaid benefits. Thereafter no further consent is needed to access Medicaid benefits, but the parent shall receive an annual notice that benefits are being accessed by the school district. Issues about “Medicaid Fraud” are discussed on pages 13 and 14.

This document is available on Wrightslaw at: [www.wrightslaw.com/idea/law/regs.medicaid.new.pdf](http://www.wrightslaw.com/idea/law/regs.medicaid.new.pdf)

The February 14, 2013 Federal Register (Vol.78, No. 31, page 10525) is posted on Wrightslaw at: [www.wrightslaw.com/idea/law/FR.v78.n31.page10525.medicaid.pdf](http://www.wrightslaw.com/idea/law/FR.v78.n31.page10525.medicaid.pdf)

The DOE issued a guidance memorandum republished on Wrightslaw at: [www.wrightslaw.com/idea/law/usdoe.guidance.medicaid.34cfr154.pdf](http://www.wrightslaw.com/idea/law/usdoe.guidance.medicaid.34cfr154.pdf)

The original regulation 34 CFR § 300.154 has eight subsections from (a) to (h). The revision only affected subsection (d) and just a portion of that, subsection (2). The complete portion of subsection (d) with the noted revisions is at the last page of this article. If you own our book, *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.* please print the last page and insert it into your law book at page 219.

\*\*\*\*\* **End of Wrightslaw Note** \*\*\*\*\*

**Note:** The official version of this document is the document published in the Federal Register. This document has been sent to the Office of the Federal Register and is scheduled to be published on February 14, 2013.

**DEPARTMENT OF EDUCATION**  
**34 CFR Part 300**  
**RIN 1820-AB64**  
**DOCKET ID ED-2011-OSERS-0012**

**Assistance to States for the Education of Children with Disabilities.**

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary of Education (Secretary) amends regulations for Part B of the Individuals with Disabilities Education Act (IDEA or Act). These regulations govern the Assistance to States for the Education of Children with Disabilities program, including the Preschool Grants for Children with Disabilities program. These amendments (i) revise the parental consent requirements a public agency must meet before it may access for the first time a child's or parent's public benefits or insurance (e.g., Medicaid) to pay for services required under the Act; (ii) ensure that parents of children with disabilities are specifically informed of all of their legal protections when public agencies seek to access public benefits or insurance (e.g., Medicaid) to pay for services required under the Act; and (iii) address the concerns expressed by State educational agencies (SEAs) and local educational agencies (LEAs) that requiring parental consent each time access to public benefits or insurance is sought, in addition to the parental consent required by the Family Educational Rights and Privacy Act (FERPA) and section 617(c) of the IDEA, imposes unnecessary costs and administrative burdens.

**DATES:** These regulations are effective on **March 18, 2013**.

**FOR FURTHER INFORMATION CONTACT:** Mary Louise Dirrigl, U.S. Department of Education, 550 12th Street, SW., Potomac Center Plaza, room 5156, Washington, DC 20202-2641. Telephone: (202) 245-7324. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), you may call the Federal Relay System (FRS) at 1-800-877-8339.

Individuals with disabilities can obtain a copy of this document in an alternative format (e.g., braille, large print, audiotape, or compact disk) upon request to the contact person listed in the preceding paragraph.

#### **SUPPLEMENTARY INFORMATION:**

**Background:** Section 300.154 of current regulations, which implements section 612(a)(12)<sup>1</sup> and section 612(e)<sup>2</sup> of the Act, addresses methods for ensuring services to children with disabilities, including the **responsibility of non-educational public agencies to provide or pay for required special education or related services** that are necessary to ensure the provision of a free appropriate public education (FAPE) to children with disabilities in the State. Specifically, §300.154(h), which implements section 612(e) of the Act, provides that Part B of the Act does not alter requirements imposed on States by Titles XIX and XXI of the Social Security Act or other public benefits or insurance programs. Accordingly, §300.154(a) reinforces this important principle and emphasizes each State's obligation to develop interagency agreements or other mechanisms for coordination between educational and non-educational public agencies to ensure that all services necessary to provide FAPE are provided to children with disabilities at no cost to the parent, including services such as assistive technology devices or assistive technology services, related services, supplementary aids and services, and transition services. To that end, §300.154(a), consistent with section 612(a)(12)(A)(i) of the Act, requires States to identify the financial responsibility of non-educational public agencies, including the State Medicaid agency or other public insurers of children with disabilities, for providing services required for FAPE, and specifies that the financial responsibility of Medicaid and

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<sup>1</sup> **Wrightslaw Note:** this is 20 USC § 1412(a)(12) - See *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.*, page 77

<sup>2</sup> **Wrightslaw Note:** this is 20 USC § 1412(e) - See *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.*, page 85

other public insurers of children with disabilities must precede the financial responsibility of the LEA responsible for developing the child's IEP. Further, §300.154(b)(1)(ii), provides that a non-educational public agency may not disqualify a covered service for reimbursement because that service is provided in a school context.

On **September 28, 2011**, the Department published a notice of proposed rulemaking (**NPRM**) in the Federal Register (76 FR 60310). In the preamble, the Secretary discussed the changes proposed to the regulations that govern the use of a child's or parent's public benefits or insurance to provide or pay for services required under Part B of the IDEA.

### **Major Changes in the Regulations**

The Department has made **several significant changes** to the regulations proposed in the NPRM. Specifically:

**We have added new §300.154(d)(2)(iv)**, which clarifies the **parental consent a public agency must obtain prior to accessing a child's or parent's public benefits or insurance for the first time.**<sup>3</sup> Paragraph (A) of new §300.154(d)(2)(iv) describes the specific **elements of the written parental consent** that a public agency must obtain under FERPA and IDEA before it may release for billing purposes a child's personally identifiable information to a public benefits or insurance program (e.g., Medicaid). Paragraph (B) of new §300.154(d)(2)(iv) requires that the one-time consent described in new §300.154(d)(2)(iv)(A) must specify 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 we have added the parental consent provision in new §300.154(d)(2)(iv), we have moved the provision requiring public agencies to provide written notification to the child's parents in proposed §300.154(d)(2)(iv) to new §300.154(d)(2)(v). This new paragraph incorporates, with some minor modifications from the proposed regulations, the specific information that must be included in this written notification. In addition final §300.154(d)(2)(v) **requires** that the public agency provide this **written notification** to the child's parents **both prior to accessing a child's or parent's public benefits or insurance for the first time, and annually thereafter.**

The Department's rationale for these changes is discussed in the Analysis of Comments and Changes section of this preamble.

### **Analysis of Comments and Changes: Introduction**

In response to the invitation in the NPRM, more than 500 parties submitted comments. An analysis of the comments and of the changes we made to the regulations as a result follows this introduction. The perspectives of parents, individuals with disabilities, State and local education officials, advocacy organizations, and others were useful in helping us identify and formulate these changes.

We discuss substantive issues under the sections of the regulations to which they pertain. The analysis generally does not address--

- (a) Minor changes, including technical changes made to the language published in the NPRM;
- (b) Suggested changes the Secretary is not legally authorized to make under applicable statutory authority; and
- (c) Comments that express concerns of a general nature about the Department or other matters that are not directly relevant to these regulations, including requests for information about the provision of special education and related services and other matters that are within the purview of State and local decision-makers.

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<sup>3</sup> **Wrightslaw Note:** Only the "first time" not subsequent times.

**Methods of ensuring services (§300.154)**  
**Nature of Public Benefits or Insurance Programs**

**Comment:** One commenter requested clarification on the meaning of the phrase “seeking to bill or otherwise access the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under Part B of the Act” in the preamble of the NPRM.

**Discussion:** We interpret the comment as a request to clarify the phrase “other public benefits or insurance programs.” The names of public benefits or insurance programs may vary across States. Generally, **these programs are associated with the State agency that is responsible for the administration of a State’s Medicaid program**, which is a source of funding for medically necessary school-based services that are covered benefits under Medicaid. Another example of a public benefits or insurance program is the Children’s Health Insurance Program (**CHIP**). These final regulations apply to **all public benefits and insurance programs** regardless of whether they are Medicaid programs.

All of these programs provide sources of funding for public agencies to pay for services required under part 300, **provided certain conditions are met**. Specifically, provided the conditions described in new §300.154(d)(2)(iv) and (v) for obtaining parental consent and providing written notification to the child’s parents are met, **public agencies may access benefits from these programs to bill for services provided by the LEA** that are required under Part B of the Act.

We note that in some States, public benefits or insurance programs may also be the provider of services that are required under part 300 and are included in the individualized education programs (IEPs) of children with disabilities. In these situations the public agency would use the public benefits or insurance program to pay for those services. However, the parental consent required under FERPA<sup>4</sup> and §300.622<sup>5</sup> that is described in new §300.154(d)(2)(iv)(A) and the written notification to the child’s parents required in new §300.154(d)(2)(v) would apply only if the public agency seeks to access funds under the public benefits or insurance program for billing purposes to pay for services required under part 300.

**Changes:** None.

**Parental Consent**

**Comment:** Many commenters supported **removing the requirement** in current §300.154(d)(2)(iv)(A) that a public agency obtain parental consent **each time** it seeks access to public benefits or insurance. The commenters stated that eliminating this requirement would reduce paperwork and simplify the process for public agencies to access a child’s or parent’s public benefits or insurance. Other commenters expressed concern that eliminating the parental consent requirement would diminish parental rights. Another commenter requested that the regulations be revised to require consent to access a child’s or parent’s public benefits or insurance once every three years.

**Discussion:** We continue to believe that current §300.154(d)(2)(iv)(A) should be removed. As we discussed in the NPRM, this change will help **alleviate the burden on public agencies to obtain parental consent each time** they seek to access public benefits or insurance, and will result in a more streamlined process for accessing a child’s or parent’s public benefits or insurance to pay for services provided under Part B of the Act. With the changes we are making in these final regulations, we do not believe removing this requirement will result in diminished protections for parents and children. Nor do we believe that requesting periodic consent every three years, as suggested by one commenter, would provide additional protection for parents. A periodic consent would apply only to the services that would be billed to the child’s or parent’s public benefits or insurance at the time that the parent’s consent is sought. Therefore, **if a service** billed to the child’s or parent’s public benefits or insurance **changes** within the three year period, the **consent would not apply to the additional services**.

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<sup>4</sup> **Wrightslaw Note:** See the Family Educational Rights and Privacy Act (FERPA) in Chapter 9, page 307 in *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.*

<sup>5</sup> **Wrightslaw Note:** See 34 CFR § 300.622 at page 273 in *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.*

**Changes:** None.

**Comment:** Some commenters requested clarification about the parental consent requirements in 34 CFR part 99<sup>6</sup> and §300.622 and asked how those requirements would apply to the use of public benefits or insurance to pay for special education and related services. Some commenters recommended that the proposed regulations be revised to require a public agency to obtain an initial, one-time, informed consent to access a child's or parent's public benefits or insurance in addition to the consent already required under 34 CFR part 99 and §300.622 to release personally identifiable information to a public benefits or insurance program. These commenters stated that this one-time, initial consent would offer more protection for families than the consent required under 34 CFR part 99 and §300.622 alone because the one-time consent would ensure that there is an ongoing dialogue between the school district and the parents on the use of their public insurance.

**Discussion:** We agree with commenters who suggested that it would be helpful to clarify the parental consent requirements in 34 CFR part 99 and §300.622 in the final regulations. We referenced these requirements in the proposed regulations in §300.154(d)(2)(iv)(A) when we discussed the elements of written notification to be provided to parents, but the reference was very brief. Therefore, we are providing in new §300.154(d)(2)(iv)(A) that the **parental consent must meet the requirements in 34 CFR 99.30 and §300.622 prior to accessing a child's or parent's public benefits or insurance for the first time.** And, to clarify what is required under these provisions, and thereby ensure that the public agency provides the parents all relevant information they need to make an informed decision, we are providing in new §300.154(d)(2)(iv)(A) that such consent must specify the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular child), the purpose of the disclosure (e.g., billing for services under part 300), and the agency to which the disclosure may be made (e.g., the State's public benefits or insurance program (e.g., Medicaid)). We believe these changes will clarify the parental consent that must be obtained under 34 CFR 99.30 and §300.622 before a public agency discloses, for billing purposes, 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) prior to accessing a child's or parent's public benefits or insurance for the first time to pay for services required under part 300.

To ensure that a parent fully understands that the purpose of the consent obtained under 34 CFR part 99 and §300.622 is to enable the public agency to access the child's or parent's public benefits or insurance for the first time and in the future, we are adding new §300.154(d)(2)(iv)(B). This section provides that the consent to access public benefits or insurance must state 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. We note that to comply with the new parental consent requirement in final §300.154(d)(2)(iv)(B), a public agency **may add the specific statement** included in new §300.154(d)(2)(iv)(B) to the consent required under 34 CFR 99.30 and §300.622 to release personally identifiable information to a public benefits or insurance program (e.g., Medicaid) for billing purposes, **or it may choose to obtain this consent statement separately.**

Further, to help ensure that a parent understands his or her rights when a public agency seeks to use or uses their or their child's public benefits or insurance to pay for services under part 300 we are also specifying in §300.154(d)(2)(iv)(A) that the public agency must provide the written notification described in final §300.154(d)(2)(v) (proposed §300.154(d)(2)(iv)) before obtaining parental consent.

**Changes:** We have revised the regulations to add a new §300.154(d)(2)(iv). In final §300.154(d)(2)(iv), we have **clarified that parental consent must be obtained** before a public agency **accesses** a child's or parent's public benefits or insurance for the first time.

We have specified that the public agency must provide written notification to the child's parents consistent with §300.154(d)(2)(v) before parental consent is obtained.

We have added new paragraph (d)(2)(iv)(A) to describe the parental consent required by 34 CFR 99.30 and §300.622 that a public agency must obtain prior to disclosing for billing purposes a child's personally identifiable

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<sup>6</sup> **Wrightslaw Note:** These are the FERPA regulations.

information to a State's public benefits or insurance before accessing a child's or parent's public benefits or insurance for the first time.

We have added new §300.154(d)(2)(iv)(B) to require that the consent must specify 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.

**Comment:** A few commenters asked whether a public agency must obtain a new consent following the publication of the final regulations if the agency already has a parent's consent on file.

**Discussion:** As described below, under these final regulations, a new consent is not necessary provided 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 amount that the public agency charges to the public benefits or insurance program.

Under current regulations, a public agency is required to obtain parental consent to access a child's or parent's public benefits or insurance to bill for specific services. Current §300.154(d)(2)(iv)(A) provides that consistent with the definition of "consent" in §300.9(b), the parent understands and agrees in writing to the carrying out of the activity for which his or her consent was sought. The consent must describe the activity, the records (if any) that were released, and the entity to whom the records were released. Therefore, **a public agency that has on file a parental consent that meets the requirements of current<sup>7</sup> §300.154(d)(2)(iv)(A) and 34 CFR 99.30 and §300.622 will not be required** to obtain a new parental consent following the publication of these final regulations, as long as the type or amount of services that the public agency will bill to public insurance or the amount that the public agency charges to the public benefits or insurance program does not change. By previously consenting, the parent understood and agreed that the public agency was accessing the child's or parent's public benefits or insurance (e.g., Medicaid) to pay for a specified type, amount, and cost of services under part 300.

However, for children for whom the public agency already has consent under current §300.154(d)(2)(iv)(A), the first time after the effective date of these regulations that there is a change in the type or amount of services to be provided, or the amount charged by the public agency or cost of services billed to the public benefits or insurance program, the public agency must provide the parents the written notification described in new §300.154(d)(2)(v). The public agency must also obtain consent, consistent with new §300.154(d)(2)(iv)(B), stating that the parent understands and agrees to the public agency's accessing the child's or parent's public benefits or insurance to pay for services under part 300. Once the public agency obtains this one-time consent, the public agency will not be required to obtain any further parental consent in the future before it accesses the child's or parent's public benefits or insurance, regardless of whether there is any change in the type, amount, or cost of services to be billed to the public benefits or insurance program (e.g., Medicaid). However, the public agency will annually thereafter be required to provide parents with the written notification described in final §300.154(d)(2)(v), to 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 under part 300.

Of course, with respect to children with disabilities who receive special education and related services that were not previously billed to the child's or parent's public benefits or insurance program (e.g., Medicaid), a public agency must provide the child's parents the written notification described in new §300.154(d)(2)(v) and obtain parental consent in accordance with final §300.154(d)(2)(iv)(A) and (B) prior to accessing the child's or parent's public benefits or insurance (e.g., Medicaid) for the first time to pay for services under part 300. This parental consent must meet the requirements in 34 CFR 99.30 and §300.622 that apply prior to the release of the child's personally identifiable information to the public benefits or insurance program (e.g., Medicaid) for billing purposes. The 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.

**Changes:** None.

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<sup>7</sup> Wrightslaw Note: The "current" regulation, i.e., in effect prior to the revision, begins at page 218 of *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.*

**Comment:** Some commenters asked for clarification regarding the Department's position in the March 8, 2007, letter to Mr. John Hill, particularly in situations when parental consent is given directly to another agency, such as the State Medicaid agency.

**Discussion:** Our position has not changed from what it was in the March 8, 2007, letter to Mr. John Hill. - See <http://www2.ed.gov/policy/speced/guid/idea/letters/2007-1/hill030807consent1q2007.pdf> The public agency is not required to independently obtain separate parental consent, so long as the parental consent provided to the other agency meets the requirements of 34 CFR 99.30 and §300.622, and current §300.154(d)(2)(iv)(A) and there is no change in the type, amount, or cost of services to be billed to the public insurance program. However, if the type, amount, or cost of services to be billed to the public benefits or insurance program changes, the public agency must provide to the parent the written notification described in new §300.154(d)(2)(v) (proposed §300.154(d)(2)(iv)) and obtain parental consent on a one-time basis in accordance with new §300.154(d)(2)(iv)(B). This consent must specify 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.

**Changes:** None.

**Comment:** One commenter requested the word "informed" be placed in front of the word "consent" in the final regulations.

**Discussion:** We do not believe this change is necessary for the reasons explained in response to the comments regarding the parental consent provisions and the written notification requirement. **We believe that the consent required by these final regulations is informed consent.** Parents understand that they are consenting to enable the public agency to access their or their child's public benefits or insurance (e.g., Medicaid) to pay for services under part 300.

**Changes:** None.

**Comment:** One commenter questioned the value of the proposed regulatory change if school districts will have to obtain parental consent to be able to provide the child's personally identifiable information prior to submitting that information to Medicaid. Other commenters asked the Department to eliminate any requirements to obtain parental consent for Medicaid reimbursable services. **These commenters asserted that IDEA contains no requirement to obtain consent before a public agency seeks reimbursement for Medicaid-eligible services to Medicaid-eligible children. The commenters also asserted that other non-school Medicaid providers are permitted to seek reimbursement for Medicaid-eligible services to Medicaid-eligible individuals, including school age children, without seeking parental consent.**

**Discussion:** Under these final regulations, educational agencies covered by 34 CFR part 99 and public agencies under the IDEA must continue to adhere to the consent requirements in 34 CFR 99.30 and §300.622, which we describe in new §300.154(d)(2)(iv)(A). Under FERPA and section 617(c)<sup>8</sup> of the Act, a public agency may not release personally identifiable information from a child's education records to a public benefits or insurance program without prior parental consent, except for a few specified exceptions that do not include the release of education records for billing purposes. Therefore, final §300.154(d)(2)(iv)(A) describes the parental consent that is required under 34 CFR 99.30 and §300.622 before a public agency may release personally identifiable information from education records for billing purposes to a public benefits or insurance program prior to accessing a child's or parent's public benefits or insurance for the first time. Additionally, new §300.154(d)(2)(iv)(B) **requires a one-time consent** 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. We believe that these final regulations continue to protect a parent's rights under FERPA and confidentiality rights under IDEA, and they address concerns from public agencies about costs and the administrative burden associated with obtaining parental consent each time access to public benefits insurance is sought.

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<sup>8</sup> **Wrightslaw Note:** This is 20 USC § 1417(c) at page 130 in *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.* and relates to confidentiality of personally identifiable data.

**Changes:** None.

**Comment:** A few commenters recommended that we **retain the current regulations and require parental consent each time** a public agency seeks access to Medicaid or other public benefits or insurance programs in order to hold schools accountable for what they bill to the State Medicaid program and to facilitate better communication between the school and parent.<sup>9</sup>

**Discussion:** We do not believe that it is necessary to retain the current parental consent requirement in order to hold schools accountable for services they bill to public insurance programs (e.g., Medicaid). We believe the parental consent required in 34 CFR 99.30 and §300.622 (now described in new §300.154(d)(2)(iv)(A)) and in new §300.154(d)(2)(iv)(B) will provide sufficient communication with and protection for parents while making it easier for public agencies to access those benefits or insurance to pay for services required under part 300. The former is required before disclosing a child's personally identifiable information to a State's public benefits or insurance program (e.g., Medicaid) for billing purposes. The latter requires that the parent understands and agrees that a public agency may access their or their child's public benefits or insurance to pay for services required under part 300.

In addition to the parental protections provided for in these final regulations, **a State's Medicaid agency or other public benefits or insurance program is already responsible for monitoring schools and LEAs to ensure that children are receiving the services for which the public agency bills the public benefits or insurance program.** Of course, if a public agency that accesses a child's or parent's public benefits or insurance to pay for required services **does not provide those services** at no cost to the parents, an SEA **must**<sup>10</sup> use its general supervisory authority under §300.149<sup>11</sup> to achieve compliance. This authority requires each SEA to ensure that all educational programs for children with disabilities administered within the State meet State education standards and the requirements of the Act and part 300. Pursuant to §§300.149(b) and 300.600, an **SEA must monitor public agencies' implementation** of the Act and Part B regulations **and ensure timely correction of any identified noncompliance.** Also, parents may use IDEA's dispute resolution mechanisms to raise concerns regarding the denial of appropriate services at no cost to the parents. These mechanisms include mediation under §300.506, due process complaint procedures under §§300.507 through 300.516, and State complaint procedures under §§300.151 through 300.153. Further, a parent or an organization or individual other than the child's parents, including one from another State, may file a signed, written complaint alleging a violation of Part B of the Act or the Part B regulations. We believe all of these protections help to ensure public agency accountability under the IDEA.

The Secretary also believes that the changes we are making in these final regulations will improve communication between the school and parents. Requiring written notification to the child's parents, consistent with new §300.154(d)(2)(v), before a public agency obtains consent will provide important information that school districts were not required to provide parents in the past. This includes information about the parental consent requirements in final §300.154(d)(2)(iv) and a **parent's right to withdraw consent at any time.**

**Changes:** None.

**Comment:** One commenter asked whether the public agency may ask a parent for permission to disclose personally identifiable information to the State public benefits or insurance program if the parent previously declined to provide consent for such disclosure.

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<sup>9</sup> **Wrightslaw Note:** This is the key issue of the revised regulation.

<sup>10</sup> **Wrightslaw Note:** Must is a mandatory provision, not discretionary. Query - is the SEA responsible for investigating Medicaid Fraud as a denial of FAPE in addition to the State's Medicaid agency? See the discussion in footnotes 15 and 16 on page 18 of this document.

<sup>11</sup> **Wrightslaw Note:** 34 CFR § 300.149 in *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.* at page 216 is the Regulation that makes it clear that the State is ultimately responsible for ensuring that IDEA 2004 is implemented. See also 20 USC § 1412(a)(11) at page 77 in *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed* noting that the State is responsible for general supervision of IDEA 2004.



**Discussion:** As in the past, a public agency may make reasonable requests to obtain the parental consent required under new §300.154(d)(2)(iv) from a parent who previously declined to provide consent to disclose personally identifiable information to the State's public benefits or insurance program (e.g., Medicaid) for billing purposes to pay for services required under part 300. Prior to seeking to obtain this parental consent, the public agency must provide the parents with written notification consistent with new §300.154(d)(2)(iv).

**Changes:** None.

**Comment:** One commenter recommended that the regulations include guidance on whether new parental consent needs to be obtained prior to disclosing personally identifiable information to access a child's or parent's public benefits or insurance when **consent is obtained in one school district, but the child subsequently relocates to another school district** within the State or to a location outside of the State.

**Discussion:** Under §300.323(e) through (g), States must have policies and procedures in effect to govern IEPs for students who transfer from one public agency to another, and we believe that those policies and procedures could address the parental consent and written notification requirements that apply to accessing public benefits or insurance for billing purposes for services required under part 300 for children who relocate to another public agency or another State. The **responsibility for obtaining parental consent** prior to the disclosure of personally identifiable information for billing purposes 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 (FAPE) to the child, **not with the individual school**. Thus, if a child who had an IEP in effect in a previous public agency transfers to a school in a new public agency in the same school year, whether or not within the same State, the **new public agency would need to obtain a new parental consent** under new §300.154(d)(2)(iv)(A)-(B) before it can access the child's or parent's public benefits or insurance for the first time to pay for services under part 300. This new parental consent is to enable the new public agency to release the child's personally identifiable information for billing purposes to the public benefits or insurance program (e.g., Medicaid). Consistent with new §300.154(d)(2)(iv)(B), the consent also must specify 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. Likewise, in these transfer situations, the new public agency must provide the child's parents with the written notification described in final §300.154(d)(2)(v) prior to obtaining parental consent for that agency to access the child's or parent's public benefits or insurance for the first time. Further, the new public agency must provide this written notification to the child's parents annually thereafter. However, if a child transfers to a different school but remains within the same public agency, any parental consent that the public agency has previously obtained that meets the requirements in new §300.154(d)(2)(iv)(A)-(B) would continue to apply.

**Changes:** None.

**Comment:** One commenter recommended that electronic signatures for consent be accepted as valid due to the increasing use of virtual meetings.

**Discussion:** A public agency may accept digital or electronic signatures in obtaining the parental consent required under 34 CFR 99.30 and §300.622, as described in new §300.154(d)(2)(iv)(A), before disclosing, for billing purposes, 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) prior to accessing the child's or parent's public benefits or insurance for the first time. Among other requirements, under 34 CFR 99.30(a), the parental consent that must be obtained before disclosure of personally identifiable information must be signed and dated. Section 99.30(d) provides that 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, 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.

**Changes:** None.

## Parental Notification

**Comment:** Many commenters supported the requirement in proposed §300.154(d)(2)(iv) that prior to accessing a child's or parent's public benefits or insurance, the public agency must provide written notification to parents consistent with current §300.503(c).<sup>12</sup> Several commenters stated that this type of written notification would help to protect children's and parents' rights under IDEA and FERPA. These commenters agreed with the Department's analysis in the NPRM that the proposed written notification requirement would provide parents with important information they need to understand their rights in the special education process. They also stated that the proposed requirement would ensure that all parents of children with disabilities receive full disclosure of their rights on the use of their public benefits or insurance for services under Part B, particularly their rights under FERPA and the IDEA confidentiality requirements.

A few commenters recommended that the written notification in proposed §300.154(d)(2)(iv) be provided at the child's initial IEP Team meeting. Another commenter expressed concern that providing the written notification at the initial IEP Team meeting would overwhelm parents. Some commenters suggested that LEAs be given discretion on when to provide the notification. One commenter asked if the proposed parental written notification may be mailed to the parents.

Several commenters expressed concern about only providing parents with a one-time written notification. They instead recommended that a written notification be provided to parents at each subsequent annual IEP Team meeting and when there is an amendment to the IEP during the course of the school year that would result in a change to the type or amount of services billed to a public benefits or insurance program. These commenters stated that requiring more frequent written notifications would provide parents with greater protections and remind parents that they can reconsider their consent in light of changed circumstances a family may experience over time (e.g., change in the child's disability, change in living situation, change in guardianship, etc.).

**Discussion:** The Department appreciates the commenters' strong support for the written notification provision in proposed §300.154(d)(2)(iv) and has retained this provision in new §300.154(d)(2)(v) with a few minor modifications. We agree with commenters generally that more frequent notifications to the child's parents in addition to the initial written notification to the child's parents would be beneficial. Therefore, **we are amending** new §300.154(d)(2)(v) (proposed §300.154(d)(2)(iv)) **to require that the public agency provide written notification** that meets the requirements of §300.503(c) to the child's parents prior to accessing a child's or parent's public benefits or insurance for **the first time and annually thereafter**. The requirement that the notice 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, will provide additional protections for children and parents. This **annual written notification** will be especially important for parents in families that experience a change in circumstances over time and for children whose parent, as defined in §300.30, changes often (e.g., children in the **foster care** system), children whose **guardianship** changes, or children who live with an individual acting in place of the biological or adoptive parent. Providing an annual written notification to parents also will serve to remind them of important safeguards previously explained. Further, as discussed earlier, we are specifying in final §300.154(d)(2)(iv) that this written notification must be provided to the child's parents **before** the public agency **obtains their consent to access** their or their child's public benefits or insurance for **the first time**.

In those instances where a child has been determined **eligible for Medicaid prior to the IEP Team meeting**, the public agency **could provide** the child's parents with the written **notification** described in final §300.154(d)(2)(v) **at the IEP Team meeting** or at some other meeting, so long as the child's parents receive the written notification **before** the public agency obtains the requisite parental **consent** under final §300.154(d)(2)(iv) to access the parent or child's public benefits or insurance for the first time.

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<sup>12</sup> **Wrightslaw Note:** See page 253 in *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.* This is the "Prior Written Notice" regulation. A comprehensive discussion about the PWN statute (20 USC § 1415(c)(1)) is at page 109 of *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.*

We do not agree with those commenters who recommended requiring the written notification described in proposed §300.154(d)(2)(iv) be provided at the child's initial IEP Team meeting or at subsequent IEP Team meetings. We appreciate the importance of parent participation in the IEP process, and we recognize that an IEP Team meeting could provide a public agency with a meaningful opportunity to explain to the parents the components of the written notification and respond to any questions the parents may have.

As a practical matter, however, eligibility for Medicaid may not necessarily coincide with annual IEP Team meetings. Therefore, requiring written notification at an IEP Team meeting could mean that a public agency would have to convene an additional IEP Team meeting for those children found to be eligible for Medicaid only after the annual IEP Team meeting.

We also do not agree with the commenters who suggested that written notification be provided each time the public agency amends a child's IEP in a manner that would result in a change to the type or amount of services billed to the public benefits or insurance program. We believe that providing parents the annual written notification in accordance with final §300.154(d)(2)(v) is sufficient protection in these situations. Of course, nothing in these regulations would prevent public agencies from providing parents the written notification described in final §300.154(d)(2)(v) more frequently than annually, if they deem it appropriate to do so. Further, nothing in these regulations would prevent public agencies from providing the notification described in final §300.154(d)(2)(v) to all parents of children with disabilities, regardless of whether the public agency is seeking to access the child's or parent's public benefits or insurance.

There are a **number of ways in which the public agency may provide the written notification** to parents. The annual written notification may be mailed to the parents, provided at an IEP Team meeting if it occurs prior to the first time a public agency accesses a child's or parent's public benefits or insurance, or provided through other means determined by the public agency, so long as all of the written notification requirements in these final regulations are met, including the requirement in §300.154(d)(2)(v) that the public agency **provide written notification before**<sup>13</sup> **obtaining parental consent** under new §300.154(d)(2)(iv).

We decline to specify in the regulations when subsequent annual written notifications must be provided to parents because we believe that once the public agency provides the child's parents the written notification described in final §300.154(d)(2)(v) prior to accessing the child's or parent's public benefits or insurance for the first time, public agencies need to have the flexibility to determine the timing of subsequent annual written notifications.

Finally, for those children with IEPs for whom services have previously been billed to Medicaid, when the final regulations become effective, the written notification requirement in final §300.154(d)(2)(v) applies. The written notification, therefore, must be provided before the public agency may access the child's or parent's public benefits or insurance after these final regulations become effective and annually thereafter. As noted previously, no new parental consent would need to be obtained if there is no change in the type, amount, or cost of services to be billed to public benefits or insurance (e.g., Medicaid).

However, in the future, if the type, amount, or cost of services billed to the public benefits or insurance program changes, the public agency must provide to the parent the written notification described in new §300.154(d)(2)(v) (proposed §300.154(d)(2)(iv)) before obtaining one-time parental consent in accordance with new §300.154(d)(2)(iv)(B) 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 in the future.

**Changes:** We have revised final §300.154(d)(2)(v) to specify that the written notification must be provided to the child's parents prior to accessing a child's or parent's public benefits or insurance for the first time and annually thereafter. To conform to the changes in new §300.154(d)(2)(iv), we have added a reference in new §300.154(d)(2)(v)(A) to the new regulatory provision regarding parental consent in §300.154(d)(2)(iv).

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<sup>13</sup> **Wrightslaw Note:** This is a critical theme throughout the Commentary. The notification must be provided prior to obtaining the consent and prior to access or submission of invoices to Medicaid. The notification and consent is not a contemporaneous act, but is to be "prior" to obtaining the consent.

We have also revised new §300.154(d)(2)(v)(C) (proposed §300.154(d)(2)(iv)(C)) **to clarify that parents may withdraw their consent** under part 99 and part 300 to the disclosure of their child's personally identifiable information to the agency responsible for the administration of the public benefits or insurance program (e.g., Medicaid). The reference to part 300 was inadvertently left out of proposed §300.154(d)(2)(iv)(C). We also have renumbered paragraphs (B) and (D) of the proposed regulations with no other changes.

**Comment:** One commenter recommended that the written notification provided to parents clearly and prominently provide information to parents about the process of withdrawing consent for disclosure of personally identifiable information necessary to access public insurance.

**Discussion:** Proposed §300.154(d)(2)(v)(C) provided that the written notification to the child's parents had to include a statement that parents have the right under 34 CFR part 99 to withdraw their consent to the 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. This provision has been retained in final §300.154(d)(2)(v)(C), but as noted in the response to comments about the timing of the written notification, this section has been revised to also include a reference to withdrawal of consent under part 300. The parents must be informed of this right in the written notification that the public agency must provide them prior to accessing their or their child's public benefits or insurance for the first time and annually thereafter.

FERPA and IDEA do not include specific provisions regarding the process for withdrawal of consent for the disclosure of a child's personally identifiable information; therefore, we are deferring to LEAs on procedures for withdrawal of this parental consent. However, **once the parent withdraws consent** under 34 CFR part 99 and part 300 to the 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), **the public agency** responsible for providing FAPE to the child with a disability **may no longer bill** the public benefits or insurance program (e.g., Medicaid) to pay for services under part 300. The public agency **must nevertheless continue** to provide the child with **all services required** under part 300 **at no cost** to the parents.

**Changes:** None.

**Comment:** A few commenters asked whether the proposed written notification takes the place of written parental consent for a child to participate in Medicaid-funded related services at school, particularly in a State where the public agency provides the child's IEP to the public benefits program so that the public benefits or insurance program may determine whether the related services are medically necessary and covered under the public benefits or insurance program.

**Discussion:** The final regulations are clear that the written notification requirement in final §300.154(d)(2)(v) is separate and distinct from, and does not replace, the parental consent requirements in FERPA and IDEA that are now described in new §300.154(d)(2)(iv)(A). Further, under new §300.154(d)(2)(iv)(B), this parental consent must specify 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 written notification requirements in final §300.154(d)(2)(v) (proposed §300.154(d)(2)(iv)) continue to underscore the significance of those requirements and now require that this written notification include an explanation of the parental consent requirements contained in new §300.154(d)(2)(iv)(A)-(B).

These requirements continue to apply even in States where the public agency provides the IEP to the public benefits program to verify that the related services in the IEP are medically necessary and covered under the public benefits or insurance program. The consent required in this context must be obtained before the public agency accesses the child's or parent's public benefits or insurance for the first time to bill for services required under part 300 and after the public agency provides the written notification described in new §300.154(d)(2)(v). Further, this consent must specify that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under part 300.

**We remind public agencies that they may not reduce or delay providing the services in a child's IEP solely because the State's public benefits or insurance program determined that the services required in the child's**

**IEP are not medically necessary or not covered under the public benefits or insurance program.** If the services **are not medically necessary** under Medicaid, a public agency **would not receive reimbursement** for them. But the public agency is not relieved of its responsibility under Part B to ensure that all required services in the IEP are provided at no cost to the parents, even if that means using Part B funds or sources of support other than the child's or parent's public benefits or insurance in order to ensure that the child receives all required services at no cost to the parents.

**Changes:** None.

**Comment:** A few commenters requested model language for the written notification requirement.

**Discussion:** Following the publication of these final regulations, the Department intends to issue model language for the written notification requirement described in final §300.154(d)(2)(v).

**Changes:** None.

### Other Matters

**Comment:** A few commenters stated that public agencies should not be permitted to bill Medicaid for educational services because this would deplete medical benefits that should be directed to families. Other commenters, concerned about the **potential for Medicaid fraud**, recommended that parents who consent to the use of Medicaid funds to pay for their child's school-based health services should be provided a quarterly statement of those services. Another commenter asked whether **Medicaid may be billed for services the child does not receive**.

**Discussion:** These final regulations continue to permit public agencies to use Medicaid or other public benefits or insurance to provide or pay for services required under part 300, provided that those agencies comply with the consent requirements in 34 CFR 99.30 and §300.622, now described in final §300.154(d)(2)(iv)(A), including the requirement that parents provide their consent prior to the release of their child's personally identifiable information to the public benefits or insurance program for billing purposes before the public agency may access the parent's or child's public benefits or insurance for the first time. This consent must also specify 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. Public benefits and insurance are important sources of financial support for services required under Part B. Section 612(a)(12) of the Act requires the State to identify or have a method of defining the financial responsibility of **non-educational public agencies** for services required to provide FAPE to children with disabilities and that the financial responsibility of those non-educational public agencies, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of LEAs or the State agency responsible for developing the child's IEP. The statute, therefore, contemplates that public agencies responsible for providing education to children with disabilities under State law, in appropriate circumstances, access funds from public benefits and insurance programs (e.g., Medicaid) as a means of paying for services required under Part B.

We do not believe it is necessary to require public agencies to provide quarterly statements of the dates and times children with disabilities are provided school-based health services. However, under §300.613<sup>14</sup> each participating agency must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the agency to implement Part B of the Act. A parent, therefore, may request to **review any education records** relating to their child that have been **sent to the State public benefits or insurance program**.

If parents believe public agencies are billing Medicaid for services that their child does not receive, they should **file a complaint with the State agency responsible** for the administration of the State's Medicaid program. **The Department<sup>15</sup> has no jurisdiction over complaints alleging Medicaid fraud.**<sup>16</sup> However, if a parent believes that

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<sup>14</sup> **Wrightslaw Note:** See page 272 in *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.* This regulation about the parent's right of access to the child's education records as noted in the discussion above.

<sup>15</sup> **Wrightslaw Note:** The US DOE is explaining that they do not have jurisdiction over Medicaid fraud and most likely the State Department of Education's position will be the same. A complaint of "Medicaid Fraud" should be

a public agency has not provided his or her child all required services at no cost to the parents, this could constitute a denial of FAPE under the Act and these regulations, and the parent could use IDEA's dispute resolution mechanisms to seek redress. These mechanisms include mediation under §300.506, the due process complaint procedures in §§300.507 through 300.516, or the State complaint procedures in §§300.151 through 300.153. Note also that under the State complaint procedures in §§300.151 through 300.153, any organization or individual other than the child's parent, including one from another State, may file a signed, written complaint alleging that a public agency has violated a requirement of Part B of the Act or the Part B regulations.

**Changes:** None.

**Comment:** A few commenters recommended that LEAs be included in the consent language on the Medicaid application form used in most States. The commenters stated that like hospitals and clinics, schools are providers of Medicaid services and do not need a separate consent form. One commenter requested that the written notice include a warning to parents that once in receipt of public benefits or insurance, the subsequent refusal to share such information with the Medicaid program is a violation of the terms of eligibility and is in many States considered a crime.

**Discussion:** The Department does not administer Medicaid or other State public benefits or insurance programs and, therefore, cannot dictate what States choose to include on applications or how State programs choose to address parties that do not share required information with them. Under new §300.154(d)(2)(iv), if parents refuse to consent to release personally identifiable information to a public benefits or insurance program for billing purposes under 34 CFR 99.30 and §300.622, the public agency may not access the child's or parents public benefits or insurance to pay for those services, and the child with a disability must continue to receive all special education and related services necessary for the provision of FAPE at no cost to the parents.

**Changes:** None.

**Comment:** A few commenters asked the Department to clarify whether the proposed regulations **apply to the use of private insurance** to pay for services to children with disabilities. One commenter expressed concern that under the proposed regulations, a family's right to privacy is linked to its economic status. Other commenters expressed concern that the regulations establish a dual standard for consent based on whether the child or parent is enrolled in a private insurance program or a public benefits or insurance program.

**Discussion:** Final §300.154(d)(2)(iv)-(v) **applies only to public benefits** and insurance programs and **does not apply to private insurance programs**. The requirements for children with disabilities covered by **private insurance are found in §300.154(e)**. For services required to provide FAPE to an eligible child under Part B of the Act, a public agency may access the parents' private insurance proceeds **only if** the parents provide consent consistent with §300.9. **Each time the public agency proposes to access the parents' private insurance, the agency must obtain parental consent** and inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

We disagree with the comments that the proposed regulations set a dual standard based on economic status and enrollment in private versus public insurance. The Act places no financial obligations on private insurers; however,

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filed with the state agency that administers Medicaid. At the same time, billing Medicaid for services that are on the IEP and were not provided to the child has a dual impact - Medicaid Fraud and failure to provide FAPE. The parent in this instance should file a complaint with each state department so that neither agency is in the dark about the issue.

<sup>16</sup> **Wrightslaw Note:** Medicaid Fraud has stiff penalties for the wrongdoer and potentially lucrative benefits for the "whistleblower". In October, 2012 a case alleging Medicaid Fraud against the New York City Dept of Education was widely reported on the internet. The United States intervened in the case on behalf of the whistleblower. It was alleged that NYC Dept of Ed engaged in "false billing practices" regarding the number of psychological counseling sessions. It was reported that under the "False Claims Act" the whistleblower could recover a percentage of any final judgment or settlement. See the Qui Tam Plaintiff provisions of that Act. 31 USC § 3730.

section 612(a)(12) of the Act places financial obligations on non-educational public agencies by requiring States to identify or have a method of defining the financial responsibility of non-educational public agencies, including the State Medicaid agency and other public insurers of children with disabilities, for services provided by the LEA that are necessary to provide FAPE to children with disabilities. No similar statutory provision exists regarding the use of private insurance. In addition, section 612(a)(12) of the Act requires that the financial responsibility of those non-educational public agencies, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of an LEA or the State agency responsible for developing the child's IEP. This statutory provision also requires non-educational public agencies, such as a State Medicaid agency, to fulfill their obligations or responsibilities under State or Federal law to pay for services provided by LEAs required under Part B, if permitted under the public benefits or insurance program. To the extent that the final regulations treat people who have public and private insurance differently, the regulations merely reflect the operation of the Act.

These final regulations are consistent with the Act and strengthen the privacy and confidentiality protections afforded to parents and children enrolled in public benefits or insurance programs who are eligible to receive special education and related services under Part B of the Act. For example, new §300.154(d)(2)(iv)(A) requires a public agency to obtain the parental consent required in §300.622 and 34 CFR 99.30 before the agency accesses a child's or parent's public benefits or insurance for the first time. Additionally, final §300.154(d)(2)(iv)(B) provides that this consent must specify that the parent understands and agrees that the public agency may access a child's or parent's public benefits or insurance to pay for services under part 300. Further, in accordance with final §300.154(d)(2)(v), the public agency must provide the child's parents with written notification consistent with §300.503(c) prior to obtaining parental consent to access a child's or parent's public benefits or insurance for the first time. A public agency must also provide this written notification annually thereafter. This **written notification must inform the child's parents** in language understandable to the general public and in the parent's native language or other mode of communication used by the parent, unless it is clearly not feasible to do so, **of the following**:

- (a) A statement of the parental **consent** provisions in §300.154(d)(2)(iv)(A)-(B).
- (b) A statement of the "**no cost**" provisions under §300.154(d)(2)(i)-(iii).
- (c) A statement that 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.
- (d) A statement that **withdrawal of consent** or refusal to provide consent under 34 CFR part 99 and part 300 to disclosure of 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.

We believe these parental consent and written notification requirements will strengthen the protections afforded to parents and children enrolled in public benefits or insurance programs by specifically including the parent's right to withdraw their consent under 34 CFR part 99 and part 300 at any time.

If a parent chooses to withdraw this consent, the public agency responsible for providing FAPE to the child with a disability **may no longer bill** the public benefits or insurance program (e.g., **Medicaid**) to pay for services required under part 300 and must ensure that the child receives all required services necessary to receive FAPE at no cost to the parents.

**Changes:** None.

**Comment:** One commenter stated that the proposed regulations would diminish the protections of FERPA and violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The commenter also asserted that the proposed regulations would violate the Equal Protection Clause because **individuals without disabilities are not spending down their Medicaid resources**<sup>17</sup> and that the notice provision would violate due process.

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<sup>17</sup> **Wrightslaw Note:** The commenter is concerned that the child's Medicaid resources may be "spent down" by permitting the school district to bill Medicaid for services. This concern is not addressed in the discussion by the DOE. It will be important to determine whether the child may be adversely impacted from a financial perspective by

**Discussion:** HIPAA is administered by the U.S. Department of Health and Human Services and not by the Department of Education. HIPAA excludes from its definition of “protected health information” individually identifiable health information contained in education records covered by FERPA and records described under FERPA’s medical treatment records provision (34 CFR 99.3, defining “education records”). See 45 CFR 160.103. **Thus, the term “protected health information” in the HIPAA Privacy regulations does not cover records protected by FERPA.** The reason for this **exception** is that Congress, through FERPA, specifically addressed how education records and student treatment records should be protected.

FERPA provides ample protections for these records, which include requiring public agencies to obtain prior consent from parents before a child’s personally identifiable information is disclosed to the agency responsible for the administration of the State’s public benefits or insurance program (e.g., Medicaid) for billing purposes. There is no exception under FERPA or under these final regulations that would permit the nonconsensual disclosure of personally identifiable information in education records to a public benefits or insurance program (e.g., Medicaid) for billing purposes. Likewise, the IDEA’s confidentiality of information provisions in section 617(c) of the Act and §300.622 also require parental consent before personally identifiable information can be disclosed to a State’s public benefits or insurance program for billing purposes (e.g., Medicaid). Therefore, nothing in these final regulations violates or is in any way inconsistent with either HIPAA or FERPA. In fact, the final regulations support FERPA in that they require written notification to inform parents of certain protections under FERPA.

Further, neither the proposed nor final regulations violate the U.S. Constitution’s Equal Protection Clause. On the contrary, they help to ensure that children, regardless of disability status, have equal access to education. The regulations facilitate access to FAPE by removing the requirement in current regulations for a public agency to obtain consent from the parent each time access to public benefits or insurance is sought, while continuing to require that the parental consent required by FERPA and section 617(c) of the IDEA prior to disclosure of personally identifiable information for billing purposes to a State’s public benefits or insurance program, now described in final §300.154(d)(2)(iv)(A), be obtained before a public agency can access a child’s or parent’s public benefits or insurance for the first time.

These final regulations also require that, in accordance with new §300.154(d)(2)(iv)(B), the consent must specify 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. Additionally, an important new protection is provided to parents through the written notification provision in new §300.154(d)(2)(v), which must be provided to the child’s parents prior to accessing the child’s or parent’s public benefits or insurance for the first time and annually thereafter.

As in the past, these final regulations will continue to require, as specified in §300.154(d)(2)(i) through (d)(2)(iii), that the children of parents who consent to share their children’s personally identifiable information with a State’s public benefits or insurance program (e.g., Medicaid) for billing purposes continue to receive all required services under this part at no cost.

Finally, we do not agree with the commenter’s assertion that the notice would deny due process. Rather, the written notification required in new §300.154(d)(2)(v) would enhance due process protections for parents by providing them crucial information about when public agencies seek to access their or their child’s public benefits or insurance.

**Changes:** None.

**Comment:** One commenter requested clarification on the example provided in the NPRM discussing “Tommy” and asked whether a related services provider is required to attend the IEP Team meeting when the team discusses the related service.

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a school district billing Medicaid for services, assuming that the services are required regardless as to whether the parent does or does not consent. However, subsection (d)(2)(iii) appears to protect against that issue. See the last page of this document for all of subsection (d) of the revised regulation.



**Discussion:** The IDEA does not expressly require that related services personnel attend IEP Team meetings. However, if a child with a disability has an identified need for a related service, it would be appropriate for the related services provider to attend the meeting. Additionally, if the public agency designates the related services provider as a required IEP Team member, the public agency must ensure that the individual attends the child’s IEP Team meeting, unless the excusal provisions in §300.321(e) are met.

**Changes:** None.

**Rest of text is deleted.**<sup>18</sup>

**Commentary continues here.**

For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations as follows:

- 2. Section 300.154 is amended by:
  - a. Revising paragraph (d)(2)(iv)
  - b. Adding new paragraph (d)(2)(v)

The revision and addition read as follows:

§300.154(d)(2)

(iv) Prior to accessing a child’s or parent’s public benefits or insurance for the first time, and after providing notification to the child’s parents consistent with §300.154(d)(2)(v), must obtain written, parental consent that--

(A) Meets the requirements of §99.30 of this title and §300.622, which consent must specify the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular child), the purpose of the disclosure (e.g., billing for services under part 300), and the agency to which the disclosure may be made (e.g., the State’s public benefits or insurance program (e.g., Medicaid)); and

(B) Specifies that the parent understands and agrees that the public agency may access the parent’s or child’s public benefits or insurance to pay for services under part 300.

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

(A) A statement of the parental consent provisions in §300.154(d)(2)(iv)(A)-(B);

(B) A statement of the “no cost” provisions in §300.154(d)(2)(i)-(iii);

(C) 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

(D) 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.

\* \* \* \* \* **End of Commentary** \* \* \* \* \*

**Wrightslaw Note:** The next page is subsection (d) of the regulation, 34 CFR § 300.154, as revised with the deleted portions ~~struck through~~ and the new additions *in italics*. Within subsection (d) other critical portions were not changed and are emphasized in bold.

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<sup>18</sup> **Wrightslaw Note:** The deleted pages related to issues such as the Regulatory Impact Analysis, the Paperwork Reduction Act, Economic Costs and Savings created by a revision to the regulation. The Commentary continues with the specific revisions.

**34 CFR § 300.154(d)**  
**Revision effective March 14, 2013**  
**Insert at page 219 in *Wrightslaw: Special Education Law, 2<sup>nd</sup> Ed.***

- (d) Children with disabilities who are covered by public benefits or insurance.
- (1) A public agency **may use the Medicaid** or other public benefits or insurance programs in which a child participates to provide or pay for services required under this part, as permitted under the public benefits or insurance program, except as provided in paragraph (d)(2) of this section.
- (2) With regard to services required to provide FAPE to an eligible child under this part, the public agency—
- (i) **May not require parents to sign up for or enroll in public benefits** or insurance programs in order for their child **to receive FAPE** under Part B of the Act;
- (ii) **May not require parents to incur an out-of-pocket expense** such as the payment of a **deductible or co-pay** amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2) of this section, may pay the cost that the parents otherwise would be required to pay;
- (iii) **May not use a child's benefits** under a public benefits or insurance program **if that use would—**
- (A) **Decrease available lifetime coverage** or any other insured benefit;
- (B) Result in the **family paying for services** that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school;
- (C) **Increase premiums** or lead to the discontinuation of benefits or insurance; or
- (D) **Risk loss of eligibility** for home and community-based waivers, based on aggregate health-related expenditures; and
- (iv) *Prior to accessing a child's or parent's public benefits or insurance for the first time, and after providing notification to the child's parents consistent with §300.154(d)(2)(v), must obtain written, parental consent that--*
- ~~(A) Must obtain parental consent, consistent with §300.9, each time that access to public benefits or insurance is sought; and~~
- ~~(A) Meets the requirements of §99.30 of this title and §300.622, which consent must specify the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular child), the purpose of the disclosure (e.g., billing for services under part 300), and the agency to which the disclosure may be made (e.g., the State's public benefits or insurance program (e.g., Medicaid)); and~~
- ~~(B) Notify parents that the parents' refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.~~
- ~~(B) Specifies that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under part 300.~~
- (v) *Prior to accessing a child's or parent's public benefits or insurance for the first time, and annually thereafter, must provide written notification, consistent with §300.503(c), to the child's parents, that includes--*
- (A) *A statement of the parental consent provisions in §300.154(d)(2)(iv)(A)-(B);*
- (B) *A statement of the "no cost" provisions in §300.154(d)(2)(i)-(iii);*
- (C) *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*
- (D) *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.*