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Part IV

Department of Education

34 CFR Parts 300 and 303

Assistance to States for Education of Handicapped Children and Early Intervention Program for Infants and Toddlers With Handicaps; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 300 and 303

RIN 1820 AA71

Assistance to States for Education of Handicapped Children and Early Intervention Program for Infants and Toddlers With Handicaps

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations at 34 CFR part 300, implementing the Assistance to States for the Education of Handicapped Children program authorized by Part B of the Individuals with Disabilities Education Act (Part B), and the regulations at 34 CFR part 303, implementing the Early Intervention Program for Infants and Toddlers with Disabilities authorized by Part H of the Individuals with Disabilities Education Act (Part H), by removing from their nonsupplanting regulations the provisions that prohibit the use of funds awarded under those programs to displace State and local funds for any "particular cost".

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the Federal Register or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact persons. A document announcing the effective date will be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Thomas B. Irvin or JoLeta Reynolds, U.S. Department of Education, 400 Maryland Avenue, SW., rooms 3092 and 3082, Switzer Building, respectively, Washington, DC 20202-2732. Telephone: (202) 205-8825 and (202) 205-8152, respectively. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-887-8339 (in the Washington, DC, 202 area code, telephone 708-9300) between 8 a.m. and 7 p.m., Eastern time.

SUPPLEMENTARY INFORMATION: Part B authorizes formula grants to States, and through them to local educational agencies, to help provide special education and related services to children with disabilities. To receive these funds from the State, each local educational agency (LEA) is required to submit an application that contains specified assurances regarding use of those funds, including an assurance that the funds will be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of children with disabilities, and in no case to supplant those State and local funds. The statutory requirement prohibiting LEAs from supplanting State and local funds is implemented by 34 CFR 300.230 of the Part B regulations.

Part H authorizes assistance to States to help them plan, develop, and implement a State-wide system of early intervention programs for infants and toddlers with disabilities and their families. Each participating State must make an application to the Secretary for its award. The statute requires this application to contain specified assurances regarding the use of the funds, including an assurance, similar to the assurance in Part B, that Part H funds will be used to supplement, and not supplant, State and local funds expended for early intervention services for infants and toddlers with disabilities. The statutory requirement prohibiting States from supplanting State and local funds is implemented by 34 CFR 303.124 of the Part H regulations.

During the Education Summit held in September 1989, President Bush made a commitment to the State Governors that the Federal Government would give States more flexibility in the use of Federal education program funds while ensuring accountability in the use of those funds by recipients. These regulatory changes, which continue to require that States maintain or increase the total amount of funds spent to meet Part B and Part H requirements, are being made consistent with this commitment. These regulatory changes also are supportive of the goals of the AMERICA 2000 Education Strategy, because they will increase the ability of States and LEAs to develop and implement innovative strategies to meet the needs of children with disabilities more effectively.

The Parts B and H nonsupplanting provisions, which are virtually identical, currently include the following two-pronged test for determining compliance with the nonsupplanting requirements for these programs:

Aggregate Test: The total amount of State and local funds budgeted for expenditures in the current fiscal year for the education of children with disabilities under Part B or for early intervention services for infants and toddlers with disabilities and their families under Part H must be at least equal to the amount of those funds actually expended in the most recent preceding fiscal year for which information is available.

Particular Cost Test: Funds awarded under Parts B and H may not be used to displace State or local funds for any "particular cost."

The particular cost test was included in the Part B regulations, first published in 1977, to assist in ensuring that these funds would be used to increase State and local efforts for the education of children with disabilities. Because the Secretary sought to coordinate the fiscal requirements in Part H with those of Part B as closely as possible, the nonsupplanting provisions in the Part H regulations published in 1989 were modeled after those in the Part B regulations. However, the particular cost test could penalize the agencies to which it applied, even though expenditures of State and local funds for special education or early intervention services increased. For example, If an LEA spends Part B funds to pay for a teacher's salary that was previously paid for with State or local funds, a supplanting violation would occur, even though the total amount of State and local funds spent on special education is greater than the amount spent the previous year.

The Secretary believes that the particular cost test is unnecessary to ensure compliance with the statutory requirements that Federal funds be used to supplement or increase the level of State and local funds expended to meet the special educational needs of children with disabilities and the early intervention needs of infants and toddlers with disabilities and their families. The Secretary also believes that the particular cost provision limits the ability of State and local agencies to make financial adjustments that could assist in improving the quality of services for children with disabilities and for infants and toddlers with disabilities and their families.

Therefore, to give States and LEAs more flexibility in the use of Part B and Part H funds, while still requiring that they maintain or increase the total amount of State and local funds expended to meet Part B and Part H requirements, the Secretary amends the Part B regulations at 34 CFR 300.230 by deleting the particular cost provision at § 300.230(b)(2) and amends the Part H regulations at 34 CFR 303.124 by deleting the particular cost provision at § 303.124(b)(2). Also, the Secretary deletes the comment following § 300.230 of the Part B regulations and the note following § 303.124 of the Part H regulations since this comment and note were intended primarily to distinguish between the aggregate and particular cost tests.

The Secretary believes that these regulatory changes will serve to enhance State and local efforts to meet the special educational needs of children with disabilities and the early intervention needs of infants and toddlers with disabilities and their families and will in no way serve to diminish the rights and protections guaranteed to children with disabilities and their parents by Part B of the Act and the rights and protections guaranteed to infants and toddlers with disabilities and their families by Part H of the Act.

On December 30, 1991, the Secretary published a notice of proposed rulemaking for these amendments in the **Federal Register** (56 FR 67420). There are no differences between the NPRM and these final regulations.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, a total of 75 parties submitted comments on the proposed regulations. Seventy (70) of the commenters addressed the proposed change in the nonsupplanting regulations for Part B, and 68 commenters responded to the proposed change in Part H. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows. Technical and minor changes—and suggested changes the Secretary is not legally authorized to make under applicable statutory authority—are not addressed.

Comments: The majority of commenters supported the proposed deletion of the particular cost requirement from § 300.230(b)(2), and § 303.124(b)(2) because the change would provide necessary flexibility and financial relief to States and LEAs.

The commenters who opposed the deletion for both the Part B and Part H programs expressed the following concerns: One commenter felt that the proposed change would permit Part B and Part H funds to be treated as a block grant and diverted away from use for children with disabilities, thereby lessening substantive protections under these programs. Some commenters opposed deletion of the requirement on the ground that it has been helpful in maintaining certain levels of services in the face of rising costs and increasing budget constraints at the State and local levels. One commenter requested that the particular cost test be maintained in its current form or in a modified form tied to certain categories of expenditures.

One commenter was concerned that removal of the requirement would eliminate the only auditing mechanism that establishes a link between Federal, State, and local funds expended for special education. Another commenter was concerned that, without the particular cost test, funds under Parts B and H would be commingled with funds that are used for purposes other than special education. One commenter asked for guidelines to implement the new system.

Discussion: In the December 30, 1991 NPRM, the Secretary emphasized his commitment to giving States and LEAs more flexibility in the use of funds under Parts B and H while ensuring that the level of total State and local expenditures for requirements under these Parts would not be reduced. The Secretary believes that removal of the particular cost requirement is consistent with this commitment. The aggregate cost provision, which remains, ensures that the total amount of State and local funds budgeted by an LEA for the education of children with disabilities and by a State for early intervention services in the current fiscal year will be at least equal to the amount of these funds actually expended in the most recent fiscal year for which the information is available, even if the LEA or State uses Federal funds under this part to pay for a service that was previously supported with State or local funds.

In addition to the aggregate cost test of the nonsupplanting regulations, several related requirements will continue to ensure that funds available under Parts B and H will be expended for proper program purposes. Those provisions under Part B include (1) the prohibition of commingling (§ 300.145), (2) the excess cost requirement (§§ 300.182–300.186), (3) the provision on comparable services (§ 300.231), and (4) the priorities in the use of funds (§§ 300.321 and 300.323). The requirements remaining in effect under Part H include (1) the prohibition against commingling (§ 303.123), (2) the "payor of last resort" regulation (§ 303.126), and (3) the assurance regarding use of funds (§ 303.127).

With regard to the financial accountability issues raised by the commenters, States and LEAs must follow the financial administration requirements of 34 CFR part 80, including the requirement in § 80.20(a) that "fiscal control and accounting procedures of the State * * * must be sufficient to * * * permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of [Part B and Part H]."

Because the amendments to the nonsupplanting regulations simply remove the particular cost provision and do not add a new requirement, the Secretary does not believe that further guidance is needed.

Based on these considerations and the largely positive response to the proposed changes in these regulations, the Secretary concludes that removal of the particular cost test (1) will not reduce the total amount of State and local funds budgeted for the education of children with disabilities or for the provision of early intervention services for infants and toddlers with disabilities, (2) will not impede the Secretary's ability to identify misuse of Part B and Part H funds, and (3) will enable LEAs to make financial adjustments that could assist in improving the quality of services provided to these children. The Secretary also concludes that these changes will in no way diminish any of the rights and protections guaranteed to infants and toddlers and their families under Part H, or to children with disabilities and their parents under Part B.

Changes: None.

Comments: Two commenters expressed support for deleting the particular cost requirement from the Part B regulations, but opposed its deletion from the regulations for Part H, because the Part H program is still in its formative stage and is not yet in full operation in all States. One of these commenters stated that the Part H program depended heavily on complex interagency involvement, and that the "payor of last resort" requirement under Part H would not be able to be met without some type of particular cost test.

Discussion: The Secretary sees no difference in the applicability of the particular cost provision under Parts B and H and does not believe that it is necessary to delay the implementation of the proposed rule change until Part H is in full operation in all States.

Deletion of the particular cost requirement in 34 CFR § 303.124(b)(2) would not impede implementation of the "payor of last resort" requirements (20 U.S.C. 1481 and 34 CFR § 303.527(a)). The "payor of last resort" provision concerns programs and services an individual child is currently entitled to receive under another program, whether funded from a Federal, State, local, or private source. In contrast, the particular cost requirement compares the source of funding used by the Part H program to fund a particular activity in the previous year with the funding source used for the same activity in the current year. In order to implement the "payor of last resort" provision there is no need to identify whether a particular activity was paid for by Part H or State and local funds in the prior year.

Changes: None.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in this order.

Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Intergovernmental Review

These programs are subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for these programs.

List of Subjects

34 CFR Part 300

Administrative practice and procedures, Education, Education of individuals with disabilities, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

34 CFR Part 303

Education, Education of the handicapped, Grant programs—education, Medical personnel, State educational agencies.

(Catalog of Federal Domestic Assistance Number 84.027; Assistance to States for Education of Handicapped Children and 84.181; Early Intervention program for Infants and Toddlers with Handicaps)

Dated: August 6, 1992.

Lamar Alexander,

Secretary of Education.

The Secretary amends title 34 of the Code of Federal Regulations by amending parts 300 and 303 as follows:

PART 300—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

1. The authority citation for part 300 continues to read as follows:

Authority: 20 U.S.C. 1411–1420, unless otherwise noted.

§ 300.230 [AMENDED]

2. Section 300.230 is amended by removing the colon after the word "section" in paragraph (b) introductory text; removing "(1) The" in paragraph (b)(1) introductory text and adding in its place ", the "; removing paragraph (b)(2), and redesignating paragraphs (b)(1)(i) and (ii) as (b)(1) and (2), respectively; removing "; and " at the end of redesignated paragraph (b)(2), and adding a period in its place; and removing the Comment following the section.

PART 303—EARLY INTERVENTION PROGRAM FOR INFANTS AND TODDLERS WITH HANDICAPS

1. The authority citation for part 303 continues to read as follows:

Authority: 20 U.S.C. 1471–1485, unless otherwise noted.

§ 303.124 [Amended]

2. Section 303.124 is amended by removing the dash after the word "section" in paragraph (b) introducing text; removing "(1) The" in paragraph (b)(1) introductory text and adding in its place ", the"; removing paragraph (b)(2) and redesignating paragraphs (b)(1)(i) and (ii) as (b)(1) and (2), respectively; removing "; and" at the end of redesignated paragraph (b)(2), and adding a period in its place; and removing the Note following the section.

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