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4000-01-U

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: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend regulations under 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 program. The Secretary seeks public comment on these proposed amendments regarding the use of public benefits or insurance in which a child participates to provide or pay for services required under Part B of IDEA.

Since the Part B regulations were amended in 2006, our experience with implementing the provisions on obtaining parental consent for the use of public benefits or insurance has raised two important issues. First, the current regulations do not require that public agencies inform parents specifically of all of the protections regarding access to public benefits or

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insurance, including their rights under the Family Educational Rights and Privacy Act (FERPA) and IDEA confidentiality provisions. Second, State educational agencies (SEAs) and local educational agencies (LEAs) have expressed concerns about the overall costs and administrative burdens imposed by requiring parental consent to access public benefits or insurance, in addition to the parental consent required by FERPA.

DATES: We must receive your comments on or before (INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER).

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Go to <http://www.regulations.gov> to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket is available on the site under "How To Use This Site."

- Postal Mail, Commercial Delivery, or Hand Delivery.

If you mail or deliver your comments about these proposed regulations, address them to Jennifer Sheehy, U.S. Department of

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Education, 400 Maryland Avenue, SW., room 5103, Potomac Center Plaza, Washington, DC 20202-2600.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing on the Federal eRulemaking Portal at <http://www.regulations.gov>. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

FOR FURTHER INFORMATION CONTACT: Jennifer Sheehy, U.S. Department of Education, 400 Maryland Avenue, SW., room 5103, Potomac Center Plaza, Washington, DC 20202-2600. Telephone: (202) 245-7605.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

Individuals with disabilities can obtain a copy of this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) by contacting Jennifer Sheehy, U.S. Department of Education, 400 Maryland Avenue, SW., room 5103, Potomac Center Plaza, Washington, DC 20202-2600. Telephone: (202) 245-7605.

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SUPPLEMENTARY INFORMATION:

Invitation to Comment

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866; Executive Order 13563; and the Presidential Memorandum on Administrative Flexibility, Lower Costs and Better Results for State, Local, and Tribal Governments and their overall direction to Federal agencies to reduce regulatory burden where possible. Please let us know of any further opportunities we should provide to reduce the potential costs or increase potential benefits while preserving the effective and efficient administration of the IDEA Part B program.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You also may inspect the comments, in person, in room 5104, Potomac Center Plaza, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m.,

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Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

BACKGROUND

34 CFR part 300 (Part B)

The regulations in 34 CFR part 300 implement Part B of IDEA. The Department provides grants to States, outlying areas, and freely associated States, as well as funds to the Department of the Interior, to assist them in providing special education and related services to children with disabilities. There are four key purposes of the Part B regulations: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (2) to ensure that the rights of children

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with disabilities and their parents are protected; (3) to assist States, localities, educational service agencies, and Federal agencies in providing for the education of all children with disabilities; and (4) to assess and ensure the effectiveness of efforts to educate children with disabilities.

The Part B regulations allow public agencies to use public benefits or insurance (e.g., Medicaid) to provide or pay for services required under Part B with the consent of the parent of a child who is enrolled under the public benefits or insurance program. Public insurance is an important source of financial support for services required under Part B. With respect to the use of public insurance, §300.154(d)(2)(iv)(A) specifically provides that a public agency must obtain parental consent, consistent with §300.9, "each time that access to public benefits or insurance is sought."

We included this requirement when we amended the Part B regulations in 2006 in recognition of two principles affecting the rights of parents and children under Part B of IDEA. First, Part B of IDEA requires that public agencies make available FAPE to all children with disabilities. The definition of FAPE includes a requirement that required services must be provided at no cost to the parent or child. However, using public benefits or insurance could, in some cases, result in costs to a parent or child. Accordingly, §300.154(d)(2)(i), (ii), and

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(iii) specify certain limitations on the circumstances in which a public agency may use public benefits or insurance to pay for special education and related services.

Second, in order to access a child's or parent's public benefits or insurance, a public agency must disclose personally identifiable information from the child's education records to the public benefits or insurance program. These disclosures are protected by FERPA, and section 617(c) of IDEA. Under FERPA, section 617(c) of IDEA, and §300.622, a child's education records cannot be released to a public benefits or insurance program without parental consent, except for a few specified exceptions. These exceptions do not include the release of education records for billing purposes.

The "confidentiality" and "no cost" principles of FERPA and IDEA continue to be of paramount importance, and we believe our Part B regulations must continue to protect these important rights in the context of permitting public agencies access to public benefits or insurance in order to pay for services required by Part B. However, since the adoption of §300.154(d)(2)(iv) in 2006, our experience with implementing this provision suggests that we could improve this regulation to protect parents' and children's interests.

First, while §300.154(d)(2) identifies the specific parameters for public agencies regarding access to public

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benefits or insurance, the regulations do not require that public agencies inform parents specifically of most of these protections. The regulations also do not require that parents be informed of their rights under FERPA and §300.622 in the context of a public agency's use of public benefits or insurance. Yet information about the circumstances under which public agencies can access public benefits or insurance to provide services required under Part B and about parents' right to consent to, refuse to consent to, or withdraw consent to disclosures of personally identifiable information from their child's education records could be very valuable to parents as they assess how a public agency may be using their child's or their own public benefits or insurance.

Second, public agencies have continuing concerns about the meaning of the phrase "each time" in §300.154(d)(2)(iv)(A). They also have concerns about the overall costs and administrative burdens imposed by requiring parental consent to access public benefits or insurance in addition to the parental consent required by FERPA and the parental consent required by IDEA for the initial evaluation of a child with a disability and the initial provision of special education and related services. On May 3, 2007, in response to several queries about the meaning of the requirement that parental consent be obtained "each time that access to public benefits or insurance is sought," the

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Office of Special Education Programs (OSEP) issued a memorandum to State Directors of Special Education to clarify the parental consent requirement in §300.154(d)(2)(iv)(A). OSEP Memorandum 07-10 (May 3, 2007). In that memorandum, OSEP clarified that obtaining informed written consent from parents for billing a public benefits or insurance program for a specified amount of services for a specified period of time complies with the regulation. However, notwithstanding this flexibility, SEAs and LEAs have continued to express concerns about the significant administrative and financial burdens that they believe §300.154(d)(2)(iv) imposes.

SIGNIFICANT PROPOSED REGULATIONS

Methods of Ensuring Services (§300.154)

We propose to amend current §300.154(d)(2)(iv). Under the proposed change, the public agency responsible for providing special education and related services to a child would be required, before accessing a child's or parent's public benefits or insurance, to provide to the child's parents written notification consistent with current §300.503(c). The notification would include: (1) a statement that parental consent must be obtained under 34 CFR part 99 and §300.622 before the public agency discloses, for billing purposes, their child's personally identifiable information to the agency responsible for the administration of the State's public

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benefits or insurance program (e.g., Medicaid); (2) a statement repeating the no cost provisions in current §300.154(d)(2)(i) through (iii); (3) a statement that the parents have the right under 34 CFR part 99 to withdraw their consent 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) at any time; and (4) a statement that withdrawal of consent or refusal to provide consent under 34 CFR part 99 and §300.622 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.

Thus, under these proposed regulations, the public agency would no longer be required to obtain parental consent each time that it seeks access to public benefits or insurance in order to provide a service to a child. Public agencies would provide the written notification to parents of children who receive special education and related services prior to seeking access to the child's or parent's public benefits or insurance. The exact timing and frequency of a public agency's provision of the one-time written notification to the parent would be at the discretion of the public agency, so long as the public agency

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provides the notification before the public agency seeks access to the child's or parent's public benefits or insurance.

We believe that this proposed amendment is in accordance with the provisions in section 612(a)(12) of the Act, which provide that a State must identify or have a method for defining the financial responsibility of non-educational agencies for services required to provide FAPE to children with disabilities and that the financial responsibility of those agencies, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of LEAs. Thus, the statute contemplates that public agencies should, in appropriate circumstances, be accessing public benefits and insurance programs as a means of paying for services required under Part B.

The constraints on a public agency's use of public benefits or insurance are related to two very important parent protections. First, consistent with the definition of FAPE in section 602(9) of the Act, services must be made available at public expense and without charge to the child or the child's parents. Second, information in a child's education records is protected under FERPA and section 617(c) of the Act. Under FERPA and the regulations in §300.622 implementing section 617(c), a child's education records cannot be released to a State Medicaid agency without parental consent, except for a few

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specified exceptions. These exceptions do not include the release of education records for the purpose of billing a public or private benefits or insurance program.

We are proposing these amendments to advance these critical parent protections and to reduce unnecessary burden on a public agency's ability to access public benefits or insurance in appropriate circumstances. First, we are mindful of the importance of ensuring that parents have sufficient information to make decisions about a public agency's use of their public benefits or insurance and the disclosure of their child's educational records for that purpose. Prior to the publication of the Part B regulations in 2006, there was no requirement, other than the parental consent requirements in FERPA and an earlier version of current §300.622, which required that public agencies obtain parental consent before accessing a child's or parent's public benefits or insurance to pay for services necessary to make FAPE available to a child. To ensure that those services would be made available without cost to the child or the child's family, public agencies were prohibited from requiring parents to (a) sign up for or enroll in a public benefits or insurance program and (b) incur out-of-pocket expenses related to the public agency's use of the public benefits or insurance. In addition, public agencies were prohibited from using a child's benefits under a public benefits

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or insurance program if that use would decrease available lifetime coverage or any other insured benefit, result in the family paying for services that would otherwise be covered and that are required for the child outside of the time the child is in school, increase premiums or lead to the discontinuation of insurance or benefits, or risk loss of eligibility for home and community-based waivers based on aggregate health-related expenditures.

These “no cost” provisions are stated in the current regulations in §300.154(d)(2)(i), (ii), and (iii) (and we are not proposing changes to them in this NPRM). Notwithstanding the importance of these protections, however, the regulations that we issued in 2006 do not require that parents be notified of these restrictions on a public agency’s ability to access public benefits or insurance for services required under Part B. Furthermore, the current regulations do not require that parents be informed of their rights to refuse to provide consent or to withdraw consent for disclosures of personally identifiable information from education records for access to public benefits or insurance.

In reviewing the 2006 regulations, we have determined that amendments are necessary to ensure parents are receiving the information they need regarding their rights with respect to the use of their public benefits or insurance for Part B services.

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We believe it is very important that parents be provided information about the limitations on a public agency's billing of public benefits or insurance programs, as well as their rights under FERPA and section 617(c) of IDEA to consent prior to the disclosure of personally identifiable information from education records, and to withdraw their consent for such disclosures without penalty. This information would help parents make informed decisions about, and monitor public agencies' use of, public benefits and insurance used to provide services for their child. Accordingly, through these proposed regulations, we would specifically require public agencies to provide this information to parents.

Second, these proposed amendments are designed to address the concern expressed to the Department by many SEA personnel and other interested parties that, since the publication of the Part B regulations in 2006, the inability to obtain parental consent has contributed to public agencies' failure to claim all of the Federal financial assistance available for individualized education program (IEP) services covered under Medicaid. In addition, public agencies have expressed concern over using limited resources and the significant administrative burden to obtain parental consent for the use of Medicaid and other public benefits or insurance each time that access to public benefits or insurance is sought. Consequently, many of these parties

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have requested that the Department remove the parental consent requirement in current §300.154(d)(2)(iv).

The results of the National Alliance for Medicaid in Education, Inc. (NAME)'s 2009 Biennial Survey Trends and Data, which collects information from SEAs, LEAs, and State Medicaid agencies on the use of Medicaid in education, support States' concerns. (See: <http://medicaidforeducation.org/>) As part of this 2009 survey, NAME identified the fiscal impact of §300.154(d)(2)(iv) as one of the key factors adversely affecting LEAs' use of public benefits or insurance to help pay for special education and related services. NAME provided summary responses from a few specific school districts surveyed indicating that the regulation requiring parental consent to bill Medicaid each time that access to public benefits or insurance is sought had a direct negative effect on an LEA's ability to bill Medicaid for Part B services on students' IEPs. For example, one LEA reported to NAME that the regulation requiring parental consent to bill Medicaid each time that access to public benefits or insurance is sought precluded the LEA from claiming approximately 70 percent of the Federal Medicaid financial participation available for covered IEP services for about 6,800 of its students. One school district reported foregoing Medicaid reimbursements totaling \$1.5 million in school year 2008-2009 and \$507,000 in school year 2009-2010,

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rather than incur the expense of obtaining parental consent to bill Medicaid. Additionally, in the NAME 2009 survey, one SEA estimated that overall statewide reimbursements were 20 to 23 percent lower than projected due to "parental consent to bill" issues.

School districts also provided to NAME examples of the administrative burden caused by the consent requirement. For example, they pointed out that the process for following up with parents to obtain parental consent is very laborious and time consuming. Staff must first identify those IEPs that lack parental consent, confirm parents' addresses, and conduct home visits in order to obtain consent when necessary. At a cost of \$4,075, one school district reportedly sent out more than 5,200 requests to parents for consent to bill Medicaid. The district received responses from only about 30 percent of those parents. Another school district reported to NAME that, in addition to lost Federal match dollars, the regulation cost the LEA nearly \$15,000 in postage in the previous school year to send out parental consent forms, more than half of which were not completed and returned.

Since 2006, we have encouraged public agencies to use children's public benefits or insurance to the extent possible to help pay for some of the costs of providing special education and related services. Section 612(a)(12) of IDEA recognizes

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that public benefits or insurance are important resources for LEAs and other public agencies to access, when appropriate, to assist in meeting their obligation to make FAPE available to all children who are eligible to receive services under IDEA. While the examples provided to NAME of decreases in Medicaid reimbursement cannot be directly attributed solely to the parental consent provision in current §300.154(d)(2)(iv), it appears that the parental consent provision has taxed resources and created significant administrative burden on public agencies.

Given the importance of public agencies maximizing the financial resources available in order to make FAPE available, and given the difficulty they are experiencing in obtaining parental consent under current §300.154(d)(2)(iv), we believe replacing this consent requirement with a written notification requirement will assist public agencies by facilitating reimbursement through Medicaid or other public benefits or insurance programs. We also believe that written notification will continue to protect the rights of children with disabilities to receive FAPE and the privacy rights of children and parents. While we believe the proposed regulations will provide administrative and financial relief to some public agencies (SEAs and LEAs), we recognize these benefits may increase costs for public agencies responsible for administering

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public benefits or insurance programs. We invite comments on the impact the proposed regulations may have on public benefits or insurance programs.

The proposed revisions to §300.154(d)(2)(iv) are also consistent with the President's January 18, 2011, Executive Order 13563 entitled "Improving Regulation and Regulatory Review" and February 28, 2011, memorandum to executive departments and agencies entitled "Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments." These documents direct each Federal executive department and agency to periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the department's or agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

These proposed amendments to the Part B regulations would address concerns raised by SEAs and LEAs regarding the burdens imposed by current §300.154(d)(2)(iv)(A), while protecting the rights of parents and children and ensuring that children with disabilities receive FAPE. Accordingly, we believe the proposed revisions in §300.154(d)(2)(iv) further the President's directive to reduce the burden on States and other entities.

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In sum, under the proposed amendments to §300.154(d)(2)(iv), public agencies would no longer be required to obtain separate parental consent prior to 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. Instead, public agencies would be required to provide written notification, consistent with current §300.503(c), to the child's parents that includes: (1) a statement that parental consent must be obtained under 34 CFR part 99 and §300.622 before the public agency discloses, for billing purposes, 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); (2) a description of the no cost provisions in §300.154(d)(2)(i), (ii), and (iii); (3) a statement that the parents have the right under 34 CFR part 99 to withdraw their consent 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) at any time; and (4) a statement that withdrawal of consent or refusal to provide consent under 34 CFR part 99 and §300.622 to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or

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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.

Written notification may be provided to parents when it is most appropriate and convenient for the family, but must be provided before the State seeks to use the child's or parent's public benefits or insurance; as a practical matter this may be at the child's initial IEP meeting, when the parent consents to the initial provision of special education services, at a parent-teacher conference, or at another time when it is most convenient for the parent. We are interested in receiving comments, however, on whether requiring the notification be provided at a specific time or meeting, such as the initial IEP meeting, would be desirable from the parents' or the LEA's perspective.

No other changes are being proposed to §300.154(d). Thus, public agencies will continue to be subject to the requirements in §300.154(d)(2)(i), (ii), and (iii), which states that 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 under Part B, but pursuant to

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current §300.154(g)(2), may pay the cost that the parents otherwise would be required to pay; and (iii) may not use a child's or parent's benefits under a public benefits or insurance program if that use would decrease available lifetime coverage or any other insured benefit; 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; increase premiums or lead to the discontinuation of benefits or insurance; or risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures. Additionally, public agencies would continue to have to comply with the parental consent requirements of FERPA and §300.622 prior to disclosing personally identifiable information in educational records to Medicaid or other public benefits or insurance programs. The following case study illustrates what the different provisions in current regulations and the proposed regulation would mean for the family of a child with a disability:

Case Study for the Use of Public Insurance Under Part B of IDEA

Tommy is evaluated and determined eligible for special education services. The IEP Team, which includes Tommy's parents, meets to develop Tommy's IEP and identify the special education and related services that Tommy needs. The IEP Team

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determines that, in addition to special education services, Tommy needs related services including physical therapy twice a week for 30 minutes and occupational therapy once a week for 30 minutes. If Tommy needs a change in services, the IEP Team, which includes his parents, must revise the IEP. [Note that Tommy's parents and the school can agree not to convene an IEP Team meeting for the purposes of making any changes, and instead, may develop a written document to amend or modify Tommy's current IEP.]

Tommy is eligible for public insurance (i.e., Medicaid), but his parents have not enrolled him in Medicaid. When his parents are asked to give their consent to provide special education and related services to Tommy, a member of the IEP Team may, but is not required to, explain that Medicaid can help the school pay for Tommy's special education and related services - specifically, that the school can be reimbursed by Medicaid for some of the costs of Tommy's physical and occupational therapy. The IEP Team asks Tommy's parents if they would consider enrolling Tommy in Medicaid and makes clear that the parents do not have to enroll Tommy in Medicaid in order to receive services and that the services will be provided at no cost regardless of their choice. Tommy begins receiving special education and related services as outlined in his IEP.

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Under the current Part B regulations: Tommy's parents enroll Tommy in Medicaid and provide their consent for the school to provide Tommy's personal information (e.g., name, birth date, special education eligibility) to Medicaid so that the school can be reimbursed for some of the physical and occupational therapy services it provides to Tommy. Additionally, Tommy's parents provide their consent for the school to bill Medicaid for the services described in Tommy's IEP. The IEP Team explains to Tommy's parents that when they provide consent to bill the Medicaid program, their consent to bill the Medicaid program is only for the services outlined in Tommy's IEP for the period specified in the IEP and that if Tommy's services or the cost of providing those services change, the school would need to obtain their consent each time services are revised or costs change in order to bill Medicaid. [Note that the confidentiality and no-cost protections outlined below are in the current regulations, but there is no requirement that parents be informed of these protections as they relate to the use of public benefits or insurance.]

Under the proposed regulations:

In order for the school to use Medicaid funds to pay for Part B services, the following must occur:

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(1) Tommy's parents must give their consent for the school to provide Medicaid with Tommy's personal information (e.g., name, birth date, special education eligibility).

(2) The school must provide Tommy's parents with a written notice that informs them of the following:

(a) Consent is required and may be withdrawn. Parental consent must be obtained before the school discloses, for billing purposes, a child's personally identifiable information to Medicaid. Parents may withdraw their consent to disclose personally identifiable information to Medicaid at any time and thus prevent the school from billing Medicaid. If the parents do not provide consent or withdraw consent, the school must still provide IDEA services at no cost.

(b) No-cost protections. The school may not require parents to sign up for or enroll in Medicaid. The school may also not require parents to incur an out-of-pocket expense (e.g., deductible or co-pay) incurred in filing a claim for services. Additionally, the school may not use a child's Medicaid benefits if that use would (i) decrease lifetime coverage or any other insured benefit, (ii) result in the family paying for services that would otherwise be covered by Medicaid and that are required for the child outside of the time the child is in school, (iii) increase premiums or lead to discontinuation of benefits or insurance, or (iv) risk loss of

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eligibility for home and community-based waivers. [These are referred to as the “no cost protections” in current §300.154(d) (2) (i), (ii), and (iii).]

(c) Services will continue. If the parent does not enroll in Medicaid under paragraph (b) above, does not provide consent, or withdraws consent under paragraph (a) above, the school must still provide special education and related services at no cost to the child and parents.

The school would no longer be required, as under current §300.154(d) (2) (iv) (A), to obtain parental consent each time that it seeks access to public benefits or insurance programs (which the Department has interpreted to mean each time there is a change in the services or cost of services billed to Medicaid or other public benefits or insurance programs). Note, however, that if there is a change in Tommy’s services, Tommy’s IEP Team, which includes his parents, must revise the IEP. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting or the parents and the school can agree not to convene an IEP Team meeting for the purposes of making any changes, and instead, may develop a written document to amend or modify Tommy’s current IEP.

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Executive Order 12866

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and therefore subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

We have reviewed Executive Order 12866 and determined that this is a significant regulatory action under section 3(f)(4) of Executive Order 12866.

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The Department has also reviewed these regulations pursuant to Executive Order 13563, published on January 21, 2011 (76 FR 3821). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

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We emphasize as well that Executive Order 13563 requires agencies "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." In its February 2, 2011, memorandum (M-11-10) on Executive Order 13563, improving regulation and regulatory review, the Office of Information and Regulatory Affairs has emphasized that such techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these regulations only upon a reasoned determination that their benefits justify their costs and we selected, in choosing among alternative regulatory approaches, those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

1. Potential Costs and Benefits

Section 300.154(d)

Under current regulations, public agencies are required to obtain informed written consent from parents to use a child's or parents' public benefits or insurance to pay for services

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identified in the child's IEP. Consent must be obtained for a specified type (e.g., physical therapy, speech therapy) and amount of services (e.g., number of hours per week) for a specified period of time (e.g., a year). If the type or amount of service changes, or if the amount charged for services changes, the public agency must obtain parental consent covering the change in services or costs to be charged to the child's or parents' public benefits or insurance. Proposed changes to this section would permit public agencies to use public benefits or insurance programs in which a child participates to provide or pay for services required under Part B of the Act without obtaining parental consent each time it seeks access to those benefits or insurance, provided that parental consent requirements imposed under FERPA and §300.622 are met and written notification has been provided to parents. These changes would allow public agencies to save the administrative and postage costs necessary to obtain written consent from parents, but they would add a requirement that public agencies provide a written notification to parents prior to accessing public insurance funds to inform them of their rights and protections under the Act. We estimate that the proposed changes to §300.154 would result in a net cost savings and provide an economic benefit to a number of LEAs in many States.

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Savings from reduction in current requirements:

Although there are no direct data on the number of children who participate in both IDEA Part B and public benefits or insurance programs, a Congressional Research Service (CRS) report indicates that at least 25 percent of children receiving services under IDEA are eligible for Medicaid services (including children that are eligible but not enrolled in Medicaid).¹ For this analysis, we assume that 20-30 percent of the 6,614,000 students enrolled in the Part B program are also enrolled in public benefits or insurance programs for a total of 1,322,800 to 1,984,200 children enrolled in both programs. Some LEAs do not use public benefits or insurance to pay for services that are eligible for reimbursement; however, there are no direct data on the number of these LEAs or the number of eligible students enrolled in these LEAs. We assume that all LEAs seek parental consent for all students enrolled in both programs. As a result, our analysis likely overestimates the percentage of students enrolled in both programs that would need parental consent.

Under current regulations, we assume that consent must be obtained 1.2 times per year. This results in a total estimate of 1,587,360 to 2,381,040 consent requests per year for

¹U.S. Congressional Research Service. Individuals with Disabilities Education Act (IDEA) and Medicaid (RL31722; Jan. 31, 2003), by Richard Apling and Elicia Herz.

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1,322,800 to 1,984,200 children. If we assume that the forms are no more than 4 pages long and that it takes approximately 5-10 minutes of administrative time to draft and print these forms for each consent request (forms must be tailored to the specific services and duration of services as specified in the child's IEP), the cost would be approximately \$5,386,000 to \$15,683,000 annually.²

We assume that in most cases (50-75 percent), parents respond to a request for consent during a child's IEP meeting (either annual or following a change in the IEP) and that in cases where a response is not obtained during an IEP meeting (25-50 percent) (or the agency and parents agree to make a change in the IEP without convening an IEP meeting as statutorily permitted), public agencies mail forms directly to parents to be completed and returned. In cases where consent is requested during an IEP meeting, we assume that there are 5 participants (one special education teacher, one general education teacher, one psychologist, one school representative, and one parent) with average earnings of \$44.87 per hour in wages and benefits.³ Assuming it takes on average one minute to

² Assumes the cost of administrative time is \$48.90 per hour based on the median wage of a special education teacher in 2009 of \$36.22, as reported in the National Compensation Survey (<http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf>), with benefits valued at approximately 35 percent of the wage.

³ Median wages of participants, excluding the parent, were obtained from the National Compensation Survey (<http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf>).

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obtain a response, the additional estimated cost of obtaining a response during an IEP meeting would be \$2,967,000 to \$6,677,000 annually.

In cases where it is necessary to send consent forms to parents by mail, public agencies would incur additional administrative, postage, and material costs. We assume that 25-50 percent of parents will receive consent forms sent via mail, that only 30-50 percent of those recipients will respond to any particular letter request, and that a maximum of 3 letters are sent to any particular parent for a total 694,470 to 2,607,239 letters sent. We assume that the postage cost of sending each form would be \$0.44, each envelope would be \$0.10, and each 4-page form would be \$0.20. In addition, parents responding to consent requests would need to provide return postage of \$0.44 and \$0.10 for a return envelope. We estimate a total postage and materials cost of \$574,791 to \$2,254,521.⁴ We estimate that it takes approximately 10-15 minutes of administrative time to track the addresses of parents who have not provided a response, mail forms to parents, and process responses, and an additional 5 minutes for parents to respond to a consent request for a

This calculation uses the Federal minimum wage of \$7.50 per hour to account for the cost of a parent's time.

⁴ Amounts shown are the additional postage and material costs of sending forms via mail; the cost of the first form copy is not included.

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total time cost of \$3,391,521 to \$15,182,363.⁵ Thus, we estimate that the total costs incurred under the current regulations and thus, the gross savings of the proposed changes to this section would be \$15,303,000 to \$41,471,000 annually.

Costs of additional requirements:

The proposed changes to §300.154(d) would permit public agencies to access a child's or parent's public benefits or insurance if the public agency provides written notification to the child's parents prior to accessing public benefits or insurance funds to inform them of their rights and protections under the Act.

Proposed section 300.154(d)(2)(iv) would specify that this written notification must include: (1) A statement that parental consent must be obtained under 34 CFR part 99 and §300.622 before the public agency discloses, for billing purposes, 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); (2) A statement of the "no cost" provisions in §300.154(d)(2)(i) through (iii); (3) A statement that the parents have the right under 34 CFR part 99 to withdraw their consent to disclosure of

⁵ Assumes the cost of administrative time is \$48.90 per hour based on the median wage of a special education teacher in 2009 of \$36.22, as reported in the National Compensation Survey (<http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf>), with benefits valued at approximately 35 percent of the wage. This calculation uses the Federal minimum wage of \$7.50 per hour to account for the cost of a parent's time.

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personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) at any time; and (4) A statement that withdrawal of consent or refusal to provide consent under 34 CFR part 99 and §300.622 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 do not expect the requirements for notification to have a significant cost impact. While the notification must be provided to parents before the public agency may use the public benefits or insurance to pay for Part B services, the timing of the written notification is otherwise left to the discretion of the public agencies. In many instances, public agencies would have an opportunity to provide this notification, either by mail or in person, in conjunction with other required documentation or activities and would incur only the additional cost of photocopying the notification.

Although the specific format and content may vary by State, we estimate that it would take no more than 10 hours per State to draft a written notice that complies with these requirements and that the notice would not exceed 4 pages in length.

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Although the notification requirement rests with LEAs, we assume States will choose to create a standard notice in order to increase efficiency and address any applicable State laws.

According to the National Compensation Survey from the Bureau of Labor Statistics, the median hourly wage for lawyers employed full-time in State or local government is \$38.46.⁶ With benefit costs of approximately 35 percent, we estimate that the cost per State of drafting this notice would be no more than \$520, for a national cost of approximately \$31,000.

Assuming all LEAs need to prepare notifications and that it would take approximately 30 minutes for an administrative assistant to obtain and modify an existing notice for each LEA, the total cost of preparing notifications would be \$196,000.⁷ If the written notification is assumed to be no more than 4 pages long, then the cost of photocopying this document for the estimated 1,322,800 to 1,984,200 children who participate in both Part B and a public benefits or insurance program would be approximately \$265,000 to \$397,000 upon adoption of these changes. Assuming notification is provided once for each child

⁶ <http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf>

⁷ Assumes the cost of administrative time is \$23.96 per hour based on the median wage of secretaries and administrative assistants in 2009 of \$17.75, as reported in the National Compensation Survey (<http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf>), with benefits valued at approximately 35 percent of the wage. The number of LEAs is assumed to be 16,330 as reported by the NCES (Schools and Staffing Survey, "Public School District Data File," 2007-08).

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over the course of his/her K-12 education, the annual cost of providing these notifications would be \$20,000 to \$31,000.

In some instances, public agencies would be unable to provide this written notification in conjunction with other mailings or in person and would need to provide written notification by mail separately. We assume that sending written notification by mail is required for half of the eligible children and that the cost of each notification would be \$0.74.⁸ The resulting additional cost of mailing these notifications would be an estimated \$357,000 to \$536,000 upon adoption of the proposed changes and \$27,000 to \$41,000 annually thereafter. This would result in a total cost of \$849,000 to \$1,159,000 upon adoption of the proposed changes and \$48,000 to \$72,000 annually thereafter.

After accounting for additional notification costs resulting from the proposed changes, the net savings upon adoption of these changes would be \$14,144,000 to \$40,622,000 in the first year after adoption and then \$15,231,000 to \$41,423,000 annually thereafter.

⁸The assumed cost of mailing a notification includes \$0.20 for 4 sheets of paper, \$0.44 in postage, and \$0.10 for an envelope.

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2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a number heading; for example, §300.154, regarding methods of ensuring services.)
- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

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To send any comments that concern how the Department could make these proposed regulations easier to understand see the instructions in the ADDRESSES section of the preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed amendments to the regulations governing the Assistance to States for the Education of Children with Disabilities program, if finalized, would not place unnecessary burdens on small businesses and organizations. In fact, small entities such as small LEAs would benefit from the proposed changes to the Assistance to States for the Education of Children with Disabilities program, because these entities would experience less burden when accessing Medicaid or other public benefits or insurance programs to appropriately pay for services under Part B of the Act.

Paperwork Reduction Act of 1995

These proposed regulations contain information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). A description of the information collection is given below with an estimate of the annual record keeping burden.

The proposed regulations include one information collection requirement associated with proposed §300.154. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507d), the Department has submitted a copy of this section to OMB for its

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review. Interested persons are requested to send comments regarding the information collection to the Department of Education within 30 days after publication of these proposed regulations. This comment period does not affect the deadline for public comments associated with this proposed regulation.

Collection of Information: State and Local Educational Agency Record Keeping, Notification, and Reporting Requirements under Part B of the Individuals with Disabilities Education Act (Information Collection 1820-0600). Proposed §300.154(d)(2)(iv) will be added to this currently approved collection. The Act requires SEAs and LEAs to gather, maintain, report, and disclose various information and data, but the Act does not require this information and data to be submitted to the Department.

Under proposed §300.154(d)(2)(iv), each LEA must provide a written notification to parents prior to accessing a child's or parent's public benefits or insurance. We assume that each SEA will develop a model notice that its LEAs can use and that it will take an average of about 10 hours to draft the notice for each of the 60 grantees funded under Part B of IDEA, representing a total burden of 600 hours. We further estimate that as an uppermost bound it will take an additional 8,165 hours for LEA staff to obtain and modify an existing model notification, based on not more than 30 minutes for each of the 16,330 LEAs. However, we would expect that most LEAs will

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simply use the model from its SEA. Therefore, we estimate the one-time burden for the first year of implementation of this notification requirement to be not more than 8,765 hours. With the addition of the burden to SEAs and LEAs associated with proposed §300.154, the total annual record keeping and notification burden for this collection of information is estimated to be approximately 521,491 hours for the 104,038 separate responses from SEAs and LEAs.

Consistent with the earlier discussion, the following chart describes the sections of the proposed regulations involving information collections, the information being collected, and the collections the Department will submit to OMB for approval and public comment under the Paperwork Reduction Act.

Regulatory Section	Collection Information	Collection
§300.154(d)	Requires that parents receive a written notification prior to LEAs accessing a child's or parent's public benefits or insurance.	Information collection 1820-0600 "State and Local Educational Agency Record Keeping, Notification, and Reporting Requirements under Part B of the Individuals with Disabilities Education Act."

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for U.S. Department of Education. Send these comments

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by e-mail to OIRA_Submission@omb.eop.gov or by fax to (202) 395-6974. Commenters need only submit comments via one submission medium. You may also send a copy of these comments to the Department contact named in the ADDRESSES section of this preamble.

We consider your comments on this proposed collection of information in--

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collection, including the validity of our methodology and assumptions; Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the Federal Register. Therefore, to ensure that OMB

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gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

Requests for copies of the submission for OMB review may be accessed from <http://edicsweb.ed.gov> by selecting the "Browse Pending Collections" link. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, room 2W115, Washington, DC 20202-4537. Requests may also be electronically mailed to the Internet address ICDocketMgr@ed.gov or faxed to (202) 401-0920.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives 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.

This document provides early notification of the Department's specific plans and actions for this program.

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Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e-4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number 84.027, Assistance to States for Education of Children with Disabilities)

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List of Subjects

34 CFR Part 300

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

Dated:

Arne Duncan,
Secretary of Education.

Pre-publication version

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

PART 300--ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN
WITH DISABILITIES

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

Authority: 20 U.S.C. 1221e-3, 1406, 1411-1419, unless otherwise noted.

2. Section 300.154 is amended by revising paragraph (d) (2) (iv).

The revision reads as follows:

§300.154 Methods of ensuring services.

* * * * *

(d) * * *

(2) * * *

(iv) Prior to accessing a child's or parent's public benefits or insurance, must provide written notification, consistent with §300.503(c), to the child's parents. The notification must include--

(A) A statement that parental consent must be obtained under 34 CFR part 99 and §300.622 before the public agency discloses, for billing purposes, their child's personally identifiable information to the agency responsible for the

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administration of the State's public benefits or insurance o
program (e.g., Medicaid);

(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 to withdraw their consent 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) at any time; and

(D) A statement that withdrawal of consent or refusal to
provide consent under 34 CFR part 99 and §300.622 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.

* * * * *