

Nebraska Department of Education



IDEA FUNDING INCIDENTAL BENEFIT EXEMPTION

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Special Education Office

IDEA Funding Incidental Benefit Exemption

As a general rule, Part B of the Individuals with Disabilities Education Act (IDEA) provides funding to states to pay the excess costs of providing special education and related services to students with disabilities. IDEA Part B funds may not be used for non-special education instruction in the general education classroom, instructional materials for use with non-disabled children, or for professional development of general education teachers not related to meeting the needs of children with disabilities.

The Regulatory Structure

34 C.F.R. §300.202(a): Amounts provided to the Local Education Agency (LEA) under Part B of the IDEA

1. Must be expended in accordance with the applicable provisions of the implementing federal regulations;
2. Must be used only to pay the excess costs of providing special education and related services to children with disabilities; and
3. Must be used to supplement State, local, and other Federal funds and not to supplant those funds.

34 C.F.R. §300.208(a)(1): Funds provided to an LEA under Part B of the IDEA may be used for the costs of special education and related services, and supplementary aids and services, even if one or more nondisabled children benefit from those services. In practice, the benefit received by the nondisabled student is considered incidental benefit under the four following conditions:

1. The special education teacher is funded through Part B or state special education funds.
2. There is no specific ratio of special education student(s) to regular education student(s).
3. Specially Designed Instruction is delivered according to the IEPs of the special education student(s). (Type, amount, duration, etc.)
4. The special education teacher DOES NOT perform any extra duties or responsibilities on behalf of the regular education students. (Grading papers, assigning grades, attending parent-teacher conferences, etc.)

Incidental Benefit Instruction

In order to understand the practical implications and limitations of incidental benefit, it is important to remember the basics:

- Special education is defined, in relevant part, as specially designed instruction delivered in accordance with an Individualized Education Plan (IEP) for a student with an IDEA disability **34 C.F.R. §300.39 – Attachment A**
- The type, amount, frequency and duration of IEP services must be based on an individual student’s educational need as determined through comprehensive evaluation. **34 C.F.R. §300.320 - Attachment B**
- The IEP must be reviewed at least annually by the full IEP team, and must be amended if necessary to address a student’s changing needs. . **34 C.F.R. §300.324 - Attachment C**

Staff availability for service delivery, district use of evidence based models, administrative design, or other circumstances effecting instruction do not alter the fact that special education funds can only be used in conformance with IDEA. In practice, special education teachers funded through Part B or state special education funds must provide special education services to IDEA eligible students consistent with their IEPs. Regular education students may incidentally benefit from this instruction in limited circumstances.

The United States Department of Education, Office of Special Education Programs (OSEP) offers the following guidance on incidental benefit:

Pursuant to 34 C.F.R. §300.208(a), special education teachers fully funded by Part B (non-CEIS) funds may perform duties for children without disabilities **if they would already be performing these same duties** in order to provide special education and related services to children with disabilities. However, if fully funded by Part B IDEA funds, **this teacher may not grade papers, spend time on parent teacher conferences, or perform any functions for the children without disabilities not otherwise required as part of the provision of special education and related services to children with disabilities.** In other words, 34 CFR § 300.208(a) does not permit special education teachers fully funded by Part B (nonCEIS) funds to perform duties other than special education and related services. Letter to Couillard, 61 IDELR 112 (OSEP 2013). (Emphasis added.)

Regular education students may incidentally benefit from special education services individually designed for an IDEA eligible student (as opposed to a pre-set core curriculum or core replacement instructional block of time) and delivered according to a student’s IEP as long as no extra duties are performed on behalf of the regular education students. OSEP has not identified any particular ratio of special education to regular education students, nor has it identified a maximum duration of time incidental benefit may be received.

*When determining if it is permissible for special education personnel funded through Part B or state special education funds to perform an instructional task or assignment with or on behalf of a nondisabled student, the following guiding questions are provided:

1. Is the reason for the special education teacher performing the task related to specific needs of at least one child with a disability as outlined in his or her IEP?

If no, it is not permissible for the special education teacher to perform the task.

If yes, it may be permissible for the special education teacher to perform the task.

2. Will the task require additional time beyond what is required to address the needs of at least one child with a disability as outlined in his or her IEP?

If yes, it is not permissible for the special education teacher to perform the task.

If no, it may be permissible for the special education teacher to perform the task.

3. Will the provision of free appropriate public education (FAPE) or any IEP services be compromised if the special education teacher performs the task?

If yes, it is not permissible for the special education teacher to perform the task.

If no, it may be permissible for the special education teacher to perform the task.

4. Will the task result in a student or students not currently identified as needing special education and related services receiving instruction beyond the scope of incidental benefit by the special education teacher?

If yes, it is not permissible for the special education teacher to perform the task.

If no, it may be permissible for the special education teacher to perform the task.

In summary, if a Part B (or state special education) funded special education teacher will perform duties for regular education students beyond incidental benefit, it will be necessary for the school district to use other funding sources in addition to the special education funds to pay the cost of the teacher.

**Adapted from the Wisconsin Department of Public Instruction 2013 Guidance on Letter to Couillard*

Incidental Benefit Transportation

Transportation is defined as a related service under the Idea (34 CFR §300.34a) and includes; (34 CFR 30d.34(c)(16)).

1. Travel to and from schools and between schools;

2. Travel in and around school buildings, and
3. Specialized equipment (such as special or adapted buses, lifts and ramps), if required to provide special transportation for a child with a disability.

In certain limited situations special education funds, under the permissive use of funds provisions in IDEA section 613(a)(4)(A)(i) and 34 CFR §300.208(a)(1), IDEA Part B funds may be used for “the costs of special education and related services...provided in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child, even if one or more nondisabled children benefit from these services.” It is permissible to use IDEA funds in cases such as this, where an “incidental benefit” is provided to nondisabled children as a result of special education and related services provided under IDEA to children with disabilities. There could be situations where, although buses are purchased for the express purpose of transporting students with disabilities, those buses are not full. Buses should not be purchased with IDEA funds with the expectation that the buses will be used, in whole or in part, to transport children without disabilities. For example, if a school district purchases more buses or larger buses than are necessary to provide transportation to all students with disabilities within their district requiring such transportation, with the purpose of using those buses (or extra seats resulting from those buses) to provide transportation to children without disabilities, it would constitute an improper expenditure of IDEA funds on children without disabilities.

Under circumstances in which buses are purchased exclusively to transport children with disabilities but are not full and are able to pick up nondisabled children along the usual bus routes, and no additional IDEA funds would need to be expended to transport those nondisabled children, buses purchased with IDEA funds may be used to transport nondisabled children under the permissive use of funds provisions because the use of IDEA Part B funds in this situation would confer an incidental benefit on the nondisabled children. Whether the school district can rely on this provision in other situations depends on the specific facts involved. If a school district is seeking to rely on the permissive use of funds provisions in IDEA and to transport disabled and nondisabled children in a vehicle purchased with State or Federal Special Education funds to they must consult with Nebraska Department of Education Special Education Office to confirm whether the particular use of these funds is permissible and whether the benefit conferred on the nondisabled children is considered an incidental benefit. Letter to Bowman, (OSEP 2013).

ATTACHMENT A

34 CFR §300.39 Special education.

(a) General. (1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

- (i)* Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (ii)* Instruction in physical education.

(2) *Special education* includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) *Individual special education terms defined.* The terms in this definition are defined as follows:

(1) *At no cost* means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) *Physical education* means—

(i) The development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

(3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) *Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

ATTACHMENT B

34 CFR §300.320 Definition of Individualized education program.

(a) *General.* As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§300.320 through 300.324, and that must include—

(1) A statement of the child's present levels of academic achievement and functional performance, including—

- (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
- (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
- (2)(i) A statement of measurable annual goals, including academic and functional goals designed to—
- (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- (B) Meet each of the child's other educational needs that result from the child's disability;
- (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
- (3) A description of—
- (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
- (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—
- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
- (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—
- (A) The child cannot participate in the regular assessment; and
- (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.
- (b) *Transition services.* Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include—
- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.
- (c) *Transfer of rights at age of majority.* Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under §300.520.
- (d) *Construction.* Nothing in this section shall be construed to require—

- (1) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act;
- or
- (2) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

ATTACHMENT C

34 CFR §300.324 Development, review, and revision of IEP.

- (a) *Development of IEP—(1) General.* In developing each child's IEP, the IEP Team must consider—
- (i) The strengths of the child;
 - (ii) The concerns of the parents for enhancing the education of their child;
 - (iii) The results of the initial or most recent evaluation of the child; and
 - (iv) The academic, developmental, and functional needs of the child.

(2) Consideration of special factors. The IEP Team must—

(i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child needs assistive technology devices and services.

(3) Requirement with respect to regular education teacher. A regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of—

(i) Appropriate positive behavioral interventions and supports and other strategies for the child; and

(ii) Supplementary aids and services, program modifications, and support for school personnel consistent with §300.320(a)(4).

(4) Agreement. (i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.

(ii) If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.

(5) Consolidation of IEP Team meetings. To the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(6) Amendments. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

(b) Review and revision of IEPs—(1) General. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

(2) Consideration of special factors. In conducting a review of the child's IEP, the IEP Team must consider the special factors described in paragraph (a)(2) of this section.

(3) Requirement with respect to regular education teacher. A regular education teacher of the child, as a member of the IEP Team, must, consistent with paragraph (a)(3) of this section, participate in the review and revision of the IEP of the child.

(c) Failure to meet transition objectives—(1) Participating agency failure. If a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with §300.320(b), the public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(2) Construction. Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency.

(d) Children with disabilities in adult prisons—(1) Requirements that do not apply. The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 612(a)(16) of the Act and §300.320(a)(6) (relating to participation of children with disabilities in general assessments).

(ii) The requirements in §300.320(b) (relating to transition planning and transition services) do not apply with respect to the children whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

(2) Modifications of IEP or placement. (i) Subject to paragraph (d)(2)(ii) of this section, the IEP Team of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(ii) The requirements of §§300.320 (relating to IEPs), and 300.112 (relating to LRE), do not apply with respect to the modifications described in paragraph (d)(2)(i) of this section.