

Early Intervening Services Preamble Comments and Discussion

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Early Intervening Services (§ 300.226)

Comment: One commenter recommended clarifying that early intervening services should not be used to delay the evaluation of children suspected of having a disability.

Discussion: We believe that § 300.226(c), which states that nothing in § 300.226 will be construed to delay appropriate evaluation of a child suspected of having a disability, makes clear that early intervening services may not delay an appropriate evaluation of a child suspected of having a disability.

Changes: None.

Comment: One commenter expressed concern that the requirements for early intervening services do not adequately protect the child's right to FAPE and recommended that the requirements include provisions regarding notice, consent, and withdrawal of consent, as well as guidelines for referrals for evaluation.

Discussion: Children receiving early intervening services do not have the same rights and protections as children identified as eligible for services under sections 614 and 615 of the Act. Section 300.226(c), consistent with section 613(f)(3) of the Act, is clear that early intervening services neither limit nor create a right to FAPE.

Changes: None.

Comment: Some commenters recommended that the regulations specify how long a child may receive early intervening services before an initial evaluation for special education services under § 300.301 is conducted.

Discussion: We do not believe it is appropriate or necessary to specify how long a child can receive early intervening services before an initial evaluation is conducted. If a child receiving early intervening services is suspected of having a disability, the LEA must conduct a full and individual evaluation in accordance with §§ 300.301, 300.304 and 300.305 to determine if the child is a child with a disability and needs special education and related services.

Changes: None.

Comment: A few commenters suggested clarifying that Part B funds for early intervening services should not be used for any child previously identified as being a child with a disability.

Discussion: A child previously identified as being a child with a disability who currently does not need special education or related services would not be prevented from receiving early intervening services. For example, a child who received special education services in kindergarten and had services discontinued in grade 1 (because the public agency and the parent agreed that the child was no longer a child with a disability), could receive early intervening services in grade 2 if the child was found to be in need of additional academic and behavioral supports to succeed in the general education environment. We believe that language should be added to § 300.226 to clarify that early intervening services are for children who are not currently identified as needing special education or related services.

Changes: We have modified § 300.226(a) to clarify that early intervening services are available to children who currently are not identified as needing special education or related services.

Comment: One commenter recommended specifying that unless LEAs have significant overidentification and over-representation of minority students in special education, LEAs may not

use Federal Part B funds for early intervening services unless they can demonstrate that all eligible children are receiving FAPE. Another commenter suggested prohibiting the use of Part B funds for early intervening services if an LEA is not providing FAPE to all eligible children.

Discussion: The Act does not restrict the use of funds for early intervening services only to LEAs that can demonstrate that all eligible children with disabilities are receiving FAPE. Section 613(f)(1) of the Act generally permits LEAs to use funds for early intervening services for children in kindergarten through grade 12 (with a particular emphasis on children in kindergarten through grade 3) who have not been identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment. No other restrictions on this authority, such as a requirement that the LEA first demonstrate that it is providing FAPE to all eligible children, are specified or appropriate. The authority to use some Part B funds for early intervening

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services has the potential to benefit special education, as well as the education of other children, by reducing academic and behavioral problems in the regular educational environment and reducing the number of referrals to special education that could have been avoided by relatively simple regular education interventions. Therefore, we believe the use of Part B funds for early intervening services should be encouraged, rather than restricted.

In one instance, however, the Act requires the use of funds for early intervening services. Under section 618(d)(2)(B) of the Act, LEAs that are identified as having significant disproportionality based on race and ethnicity with respect to the identification of children with disabilities, the placement of children with disabilities in particular educational settings, and the incidence, duration, and type of disciplinary actions taken against children with disabilities, including suspensions and expulsions, are required to reserve the maximum amount of funds under section 613(f)(1) of the Act to provide early intervening services to children in the LEA, particularly to children in those groups that were significantly over-identified. This requirement is in recognition of the fact that significant disproportionality in special education may be the result of inappropriate regular education responses to academic or behavioral issues.

Changes: None.

Comment: One commenter recommended permitting LEAs to spend funds for early intervening services on literacy instruction programs that target at-risk limited English proficient students.

Discussion: There is nothing in the Act that would preclude LEAs from using Part B funds for early intervening services, including literacy instruction, that target at-risk limited English proficient students who have not been identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.

Changes: None.

Comment: One commenter requested clarification as to whether ESAs or other public institutions or agencies, in addition to LEAs, have the authority to provide early intervening services.

Discussion: We do not believe any clarification is necessary because § 300.226, consistent with section 613(f) of the Act, states that LEAs may use Part B funds to develop and implement coordinated early intervening services.

As defined in § 300.28(b), *local educational agency* or *LEA* includes ESAs and any other public institution or agency having administrative control and direction of a public elementary school or secondary school, including a public nonprofit charter school that is established as an LEA under State law.

Changes: None.

Comment: Some commenters suggested modifying the regulations to permit children age 3 through 21 to receive early intervening services. The commenters stated that this change would allow schools to provide early academic and behavioral supports to preschool children.

Discussion: Early intervening services may not be used for preschool children. Section 300.226(a) tracks the statutory language in section 613(f)(1) of the Act, which states that early intervening services are for children in kindergarten through grade 12, with a particular emphasis on children in kindergarten through grade 3.

Changes: None.

Comment: One commenter recommended clarifying in the regulations that early intervening services are not equivalent to early intervention services.

Discussion: We do not believe any changes are necessary to the regulations to clarify the difference between early intervening services provided under Part B of the Act and early intervention services provided under Part C of the Act. Following is a description of the two types of services:

Early intervening services provided under section 613(f) of the Act are services for children in kindergarten through grade 12 (with a particular emphasis on children in kindergarten through grade 3) who have not been identified as needing special education and related services, but who need additional academic and behavioral support to succeed in a general education environment. Early intervention services, on the other hand, are services for children birth through age two that are designed to meet the developmental needs of infants and toddlers with disabilities under section 632 in Part C of the Act.

Section 632(5)(A) of the Act defines *infant or toddler with a disability* as a child under the age of three years who (a) is experiencing developmental delays in one or more of the areas of cognitive development, physical development, communication development, social or emotional development, and adaptive development, or (b) has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay. In addition, some States also provide early intervention services to infants and toddlers who are at risk of having a developmental delay. The Part C regulations will address, in detail, the early intervention services provided under section 632 of the Act.

Changes: None.

Comment: One commenter asked whether the reference to scientifically based academic and behavioral interventions in § 300.226(b) means that such interventions must be aligned with recommended practices and peer reviewed research.

Discussion: Section 300.226(b) follows the specific language in section 613(f)(2) of the Act and requires that in implementing coordinated, early intervening services, an LEA may provide, among other services, professional development for teachers and other personnel to enable such personnel to deliver scientifically based academic and behavioral interventions.

The use of the term scientifically based in § 300.226(b) is intended to be consistent with the definition of the term *scientifically based research* in section 9101(37) of the ESEA. Because this definition of *scientifically based research* is important to the implementation of Part B of the Act, a reference to section 9101(37) of the ESEA has been added in new § 300.35, and the full definition of the term has been included in the discussion of new § 300.35. Under the definition, scientifically based research must be accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review. We expect that the professional development activities authorized under § 300.226(b)(1) will be derived from scientifically based research. The statute and regulations do not refer to “recommended practices,”

which is a term of art that, generally, refers to practices that the field has adopted as “best practices,” and which may or may not be based on evidence from scientifically based research.
Changes: None.

Comment: Several commenters requested including related services personnel, including speech pathologists and school psychologists, in the development and delivery of educational and behavioral evaluations, services, and supports for teachers and other school staff to enable them to deliver coordinated, early intervening services.

Discussion: State and local officials are in the best position to make decisions regarding the provision of early intervening services, including the specific personnel to provide the

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services and the instructional materials and approaches to be used. Nothing in the Act or regulations prevents States and LEAs from including related services personnel in the development and delivery of educational and behavioral evaluations, services, and supports for teachers and other school staff to enable them to deliver coordinated, early intervening services.

Changes: None.

Comment: Several commenters recommended revising the regulations to allow public agencies to use Part B funds for early intervening services to purchase supplemental instructional materials to support the activities in § 300.226(b).

Discussion: We agree that supplemental instructional materials may be used, where appropriate, to support early intervening activities. The Conf. Rpt. in note 269 provides that

[E]arly intervening services should make use of supplemental instructional materials, where appropriate, to support student learning. Children targeted for early intervening services under IDEA are the very students who are most likely to need additional reinforcement to the core curriculum used in the regular classroom. These are in fact the additional instructional materials that have been developed to supplement and therefore strengthen the efficacy of comprehensive core curriculum.

We believe the terms “services” and “supports” in § 300.226(b)(2) are broad enough to include the use of supplemental instructional materials.

Accordingly, we believe that it is unnecessary to add further clarification regarding the use of supplemental instructional materials in § 300.226. Of course, use of funds for this purpose is subject to other requirements that apply to any use of funds, such as the limitation on purchase of equipment in section 605 of the Act and applicable requirements in 34 CFR Parts 76 and 80.

Changes: None.

Comment: Several commenters requested requiring LEAs to provide parents with written notice regarding their child’s participation in early intervening services, the goals for such services, and an opportunity to refuse services. Some commenters requested requiring LEAs to inform parents of their child’s progress in early intervening services at reasonable intervals.

Discussion: Section 300.226, consistent with section 613(f) of the Act, gives LEAs flexibility to develop and implement coordinated, early intervening services for children who are not currently receiving special education services, but who require additional academic and behavioral support to succeed in a regular education environment. Early intervening services will benefit both the regular and special education programs by reducing academic and behavioral problems in the regular education program and the number of inappropriate referrals for special education and

related services. It would be overly restrictive and beyond the Department's authority to modify the regulations to include the additional requirements suggested by the commenters.

Changes: None.

Comment: One commenter stated that data should be collected regarding the effectiveness of early intervening services. Several commenters requested requiring LEAs to report to the SEA, and make available to the public, the number of children receiving early intervening services, the length of time the children received the services, the impact of the services, and the amount of Federal Part B funds used for early intervening services.

Discussion: Section 300.226(d), consistent with section 613(f)(4) of the Act, requires LEAs that develop and maintain coordinated, early intervening services to annually report to their SEA on the number of children receiving early intervening services and the number of those children who eventually are identified as children with disabilities and receive special education and related services during the preceding two year period (i.e., the two years after the child has received early intervening services). We believe that these data are sufficient to provide LEAs and SEAs with the information needed to determine the impact of early intervening services on children and to determine if these services reduce the number of referrals for special education and related services. Requiring LEAs to collect and report data on the implementation of early intervening services beyond what is specifically required in section 613(f)(4) of the Act is unnecessary and would place additional paperwork burdens on LEAs and SEAs.

Changes: None.

Comment: Some commenters requested that the meaning of the terms "subsequently" and "preceding two year period" in § 300.226(d)(2) be clarified.

Discussion: Section 300.226(d)(2), consistent with section 613(f)(4)(B) of the Act, requires LEAs to report on the number of children who are provided early intervening services who subsequently receive special education and related services under Part B of the Act during the preceding two years to determine if the provision of these services reduces the number of overall referrals for special education and related services. The Department intends for LEAs to report on children who began receiving special education services no more than two years after they received early intervening services. For the preceding two year period, the LEA would report on the number of children who received both early intervening services and special education services during those two years.

Changes: None.