

**Michigan Office of Administrative Hearings and Rules
Administrative Rules Division (ARD)**

MOAHR-Rules@michigan.gov

REQUEST FOR RULEMAKING (RFR)

1. Department:

Education

2. Bureau:

Superintendent of Public Instruction

3. Promulgation type:

Full Process

4. Title of proposed rule set:

Special Education Programs and Services

5. Rule numbers or rule set range of numbers:

R 340.1701 - R 340.1873

6. Estimated time frame:

12 months

Name of person filling out RFR:

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7. Describe the general purpose of these rules, including any problems the changes are intended to address.

The primary purpose of the proposed rules is to align them with controlling federal requirements related to special education under the Individuals with Disabilities Education Act (IDEA), 20 USC 1400 et seq, and its implementing regulations, 34 CFR 300.1 et seq. As amended, the rules will support Michigan's assurance, which is required in its annual application for federal funds under Part B of the IDEA, that its policies and procedures are compliant with IDEA requirements or that Michigan has committed to make changes to support such assurances.

The amendments of R 340.1721b will bring the rule into compliance with controlling federal requirements regarding students who are parentally-placed in private schools. Currently, under R 340.1721b, a school district shall provide an offer of free appropriate public education (FAPE) to all students determined to be eligible for special education programs and services. This conflicts with the IDEA and its implementing regulations, 34 CFR 300.130 to 300.144. 34 CFR 300.137(a) provides: “[N]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.” This regulation has been addressed by the United States Education Department, Office of Special Education Programs (USED OSEP), which has advised that, under the IDEA, if a parent makes clear their intention to maintain the enrollment of their child with a disability in a private school where the parent has placed the child, the school district where the child resides is not obligated to make FAPE available to the child or to develop an individualized education program (IEP) for the child. See question A-6, pages 8-9 of “Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools” (OSEP QA 22-01, revised February 2022) at:

https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf

The proposed amendments of R 340.1721b align the rule with the federal law that the offer of FAPE does not apply to students parentally-placed in private schools.

The proposed amendments of R 340.1723c will align the rule with federal requirements related to a parent's request for an independent education evaluation of their child at public expense when they disagree with an evaluation obtained by a public agency. Currently, R 340.1723c requires that such a request be in writing. This conflicts with the controlling federal regulation, 34 CFR 300.502. Under 34 CFR 300.502(e)(2), a public agency may only impose certain conditions related to obtaining an independent evaluation; those conditions do not include that the request be in writing. The proposed amendment of R 340.1723c removes the writing requirement.

The proposed amendment of R 340.1733(d) will support the requirement for students with disabilities to be educated in the least restrictive environment along with their nondisabled peers to the maximum extent appropriate in accordance with 34 CFR 300.114. As the rule is currently written (“The age span for students who are assigned to special education programs...operated in elementary buildings attended by children who are nondisabled, shall not exceed, at any 1 time, a 6-year age span or the age span of the students who are nondisabled in the building, whichever is less”), it limits the access of a student with a disability to their general education peers. Age span should be the same for disabled and non-disabled peers.

Other changes align the rules with current standards of drafting, including proper use of “must” and “shall,” and “that” and “which,” and make other non-substantive changes.

8. Please cite the specific promulgation authority for the rules (i.e. department director, commission, board, etc.).

The superintendent of public instruction has specific promulgation authority for the rules.

A. Please list all applicable statutory references (MCLs, Executive Orders, etc.).

The superintendent of public instruction has promulgation authority for these rules under sections 1701 and 1703 of the revised school code, 1976 PA 451, MCL 380.1701 and 380.1703, and Executive Reorganization Order No. 1996-7, MCL 388.994.

B. Are the rules mandated by any applicable constitutional or statutory provision? If so, please explain.

MCL 380.1701 and 380.1703 mandate rules related to special education programs and services.

9. Please describe the extent to which the rules conflict with or duplicate similar rules, compliance requirements, or other standards adopted at the state, regional, or federal level.

R 340.1721b conflicts with 34 CFR 300.130 to 300.144. R 340.1723c conflicts with 34 CFR 300.502. R 340.1733(d) conflicts with 34 CFR 300.114.

10. Is the subject matter of the rules currently contained in any guideline, handbook, manual, instructional bulletin, form with instructions, or operational memoranda?

The subject matters of the proposed rules are not currently contained in any guideline, handbook, manual, instructional bulletin, form with instructions, or operational memoranda.

11. Are the rules listed on the department's annual regulatory plan as rules to be processed for the current year?

R 340.1721b and R 340.1723c are listed on the department's 2023-2024 annual regulatory plan as under consideration for amendment. R 340.1733 is not listed on the annual regulatory plan.

12. Will the proposed rules be promulgated under Section 44 of the Administrative Procedures Act, 1969 PA 306, MCL 24.244, or under the full rulemaking process?

Full Process

13. Please describe the extent to which the rules exceed similar regulations, compliance requirements, or other standards adopted at the state, regional, or federal level.

R 340.1721b exceeds federal requirements set forth in 34 CFR 300.130 to 300.144 regarding school districts' responsibilities related to the provision of a free appropriate public education (FAPE). Currently, under R 340.1721b, a school district shall provide an offer of FAPE to all students determined to be eligible for special education programs and services. However, 34 CFR 300.137(a) provides: "[N]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." This regulation has been addressed by the United States Education Department, Office of Special Education Programs (USED OSEP), which has advised that, under the IDEA, if a parent makes clear their intention to maintain the enrollment of their child with a disability in a private school where the parent has placed the child, the school district where the child resides is not obligated to make FAPE available to the child or to develop an individualized education program (IEP) for the child. See question A-6, pages 8-9 of "Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" (OSEP QA 22-01, revised February 2022) at:

https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf

The proposed amendments of R 340.1721b remove the excessive requirement that a school district offer FAPE to a student parentally-placed in a private school.

R 340.1723c exceeds 34 CFR 300.502(e)(2) by imposing a requirement on parents that is not required under federal law, i.e., a requirement that parents' requests for independent education evaluations of their children at public expense be in writing. Federal law, including 34 CFR 300.502(e)(2), does not impose that requirement. Under 34 CFR 300.502(b), if a parent requests an independent education evaluation, the public agency shall, without unnecessary delay, either file a due process complaint or grant the parent's request. There is no other option available to public agencies, including delaying the process by requiring parents to put their requests in writing or to explain the reasons for their requests.

R 340.1733 exceeds the requirements of IDEA as there are no provisions in the act that require programs to have specific age spans.

14. Do the rules incorporate the recommendations received from the public regarding any complaints or comments regarding the rules? If yes, please explain.

R 340.1721b was the subject of a state complaint involving a student who was a resident from another state and who enrolled in a private school in Michigan. Although the district of location conducted an evaluation, the resident district in the other state would not develop an initial offer of a free appropriate public education (FAPE) because the parent made clear their intent to keep the student enrolled in the private school. In Michigan, eligibility is tied to the offer of a FAPE and therefore, there was no way to determine eligibility and subsequently provide services if the district in the other state refused to provide FAPE.

School districts have contacted the Michigan Department of Education Office of Special Education information line with concerns regarding R 340.1733 to discuss how the age-span language in R 340.1733(d) limits their ability to provide preschool services in an elementary school, as well as maintaining access for students with disabilities to their nondisabled peers.

15. If amending an existing rule set, please provide the date of the last evaluation of the rules and the degree, if any, to which technology, economic conditions, or other factors have changed the regulatory activity covered by the rules since the last evaluation.

The rule set entitled “Special Education Programs and Services” is evaluated on a continual basis. R 340.1721b was last amended in 2013, R 340.1723c in 2018, and R 340.1733 in 2010. Neither technology, economic conditions, nor other factors have changed the regulatory activity covered by the rules since they were last amended.

16. Are there any changes or developments since implementation that demonstrate there is no continued need for the rules, or any portion of the rules?

There have been no changes or developments since implementation of R 340.1721b, R 340.1723c, and R 340.1733 that demonstrate there is not a continued need for those rules or any portion of them.

17. Is there an applicable decision record (as defined in MCL 24.203(6) and required by MCL 24.239(2))? If so, please attach the decision record.

No

Based on the information provided in this RFR, MOAHR concludes that there are sufficient policy and legal bases for approving the RFR. The RFR satisfies the requirements of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328, and Executive Order No. 2019-6.