

CENTER FOR LAW AND EDUCATION

www.cleweb.org

reply to:

99 Chauncy Street
Suite 402
Boston, MA 02111
617-451-0855

1875 Connecticut Ave., NW
Suite 510
Washington, D.C. 20009
202-986-3000

To: Nat'l IDEA, SwDLegSvc, CAPS
MA SpEd Coalition
MA ELTF
From: Center for Law and Education
Re: IDEA Final Regulations
Date: Dec. 2, 2008

Yesterday, the U.S. Department of Education issued final regulations concerning IDEA at 73 Fed. Reg. 73006. These regulations will take effect on Dec. 31, 2008. As you know, the Center for Law and Education (CLE) submitted comments in response to the proposed regulations. See 73 Fed. 27690 (May 13, 2008). The Department's final regulations and accompanying analysis acknowledge many of our suggestions. Some of the key changes are as follows:

Revocation of Consent for Special Education and Related Services

Consistent with the proposed regulations, the final regulations allow a parent to revoke consent for the continued provision of special education and related services (to be codified at 34 C.F.R. § 300.300(b)(4)). The final regulations further add that the parent's revocation must, as CLE requested, be **in writing** and that the school district must provide the parent with **prior written notice** regarding the change in educational placement and services that will result from the revocation, consistent with 34 C.F.R. § 300.503, before ceasing the provision of services. Although the final regulations require the provision of prior written notice, the Department, unfortunately, did not require that such notice include additional important information such as a summary of the student's strengths, needs, current levels of functioning and performance and a description of the student's continued rights under Section 504 or what services, supports, or accommodations the student might receive under a 504 plan. The Department's comments accompanying the final regulations further point out that a State may choose to adopt additional procedures with respect to the revocation of consent for services (e.g., offering to meet with the parent to discuss educational concerns), provided that such procedures are voluntary on the part of parents and do not delay or deny the cessation of services. Moreover, the Department notes that a school district may not require the parent to provide an explanation (orally or in writing) prior to ceasing the provision of services. 73 Fed. Reg. 73008. It is significant that the Department states that the new regulations are promulgated under IDEA and therefore are silent as to Section 504. The silence in no way suggests that students' rights under Section 504 are terminated by a parent's revocation of consent for special education services under IDEA.

The Department dismisses the concern raised by some commenters that parental revocation of consent to services might be detrimental to a child with a disability, stating that IDEA presumes that a parent acts in the best interest of his/her child. 73 Fed. Reg. 73009. The Department also notes that, consistent with section 615(m)(1) of the Act (20 U.S.C. § 1415(m)(1)), if State law grants a child who has reached the age of majority all rights previously given to the parent, then the parental rights are transferred to the child and the adult child would, therefore, be able to revoke consent for his/her own special education and related services. 73 Fed. Reg. 73010.

Of particular note, and consistent with CLE's comments, the Department acknowledges that the right of parents to revoke consent for the continuation of special education and related services does not diminish the State's continuing obligation with respect to child find, including after parental revocation of consent for special education and related services. 73 Fed. Reg. 73012. Moreover, the Department points out that a parent's right to revoke consent for services is consistent with the parent's right to refuse special education and related services under section 614(a)(1)(D)(i)(II) and (ii)(II) of the Act. 73 Fed. Reg. 73010.

Impact on Discipline

Unfortunately, and contrary to CLE's position, the Department maintains its assertion (originally made in its comments to the proposed regulations) that when a parent revokes consent for services, the school district is not deemed to have prior knowledge that the child is a child with a disability for the purposes of subsequent discipline sanctions, including exclusions in excess of 10 school days. As a result, according to the Department, a school district would be able to discipline the child in the same manner as non-disabled students. Perhaps, giving some recognition that the right to a free appropriate public education, in fact, belongs to the child, the Department notes, "[w]e expect that parents will consider possible consequences of discipline procedures when making the decision to revoke consent for the provision of special education and related services." 73 Fed. Reg. 73013.

Furthermore, in responding to concerns raised by some commenters and CLE's explicit comment that a child whose parent revokes consent to services under IDEA continues to have a right to be free from discrimination under Section 504 and the Fourteenth Amendment, and thus not to be subject to disciplinary sanctions for behavior that is a manifestation of his/her disability, the Department states that the final regulations implement provisions of the IDEA only, and "do not attempt to address any of the overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA." 73 Fed. Reg. 73013.

Hearing Rights

Despite the split in the courts and the states (12 authorizing; 10 prohibiting) as to whether or not Section 615 of the Act authorizes parents to be represented by non-attorney advocates in due process hearings, the Department has determined through its final regulations that State law will dictate whether non-attorneys can provide representation at due process hearings (to be codified at 34 C.F.R. § 300.512(a)(1)). The final regulations clarify, however, that the provision with respect to non-attorney representation applies to both **parties**, not merely parents. The Department did not agree with CLE that such a regulation was premature given the pending reauthorization of the statute, or that research should be conducted concerning State and local special education due process systems prior to making such a change in the regulations. The Department acknowledges, however, that research concerning the availability of legal representation for parties would be helpful for Congress in deciding whether a change in the statute is necessary.

State Monitoring and Enforcement

The final regulations, as the proposed regulations, indicate that correction of noncompliance must be completed as soon as possible and in no case later than one year after the State's identification of noncompliance (to be codified at 34 C.F.R. § 300.600(e)). At the same time, however, the final regulations change the timeframe within which a State is required to report on the performance of each school district. Under the proposed regulations, States would have been required to report on the performance of each district within 60 days of submission of the State's Annual Performance Report (APR). In contrast, the final regulations specify that States must report on district performance **as soon as practicable but no later than 120 days** following submission of the APR (to be codified at 34 C.F.R. §300.602(b)(1)(i)(A)). Finally, the Department rejected CLE's suggestion to revise the proposed regulations to require States to report to the public on corrective actions and other enforcement steps imposed on LEAs; however, in its comments to the final regulations, the Department encourages States, "in the interest of transparency and public accountability," to report to the public, where appropriate, any enforcement actions taken against LEAs.