

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

DRAFT

COMMENTS ON PROPOSED RULES FOR PART B

OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

34 CFR Part 300

73 Federal Register 27690, May 13, 2008

The Center for Law and Education (CLE) is a national advocacy organization with offices in Boston and Washington, D.C., whose primary mission is to ensure high quality education for all students, in particular those from low-income families, and to help their school communities effectuate change. CLE has preeminent authority to integrate law and education for policy analysis on special education issues. As one of the few national organizations that is firmly rooted in both disability issues and school reform, CLE has focused increasingly on bringing the two together, in order to help ensure that all aspects of special education – for example, specialized instruction and support services provided through individualized education programs, assessment practices, placement decisions, etc. – are aimed at ensuring that students with disabilities meet high standards, rather than being vehicles for lower expectations. For more than 35 years CLE has been a consistent lead voice speaking to the rights of low-income students with disabilities, who are disproportionately racial and ethnic minority students, and who, without financial means to obtain legal counsel and other expertise (e.g., psychologists, psychiatrists), are disproportionately excluded from school, inappropriately referred to juvenile courts, and provided less than the quality education to which they are entitled under the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act.

The NPRM raises issues that are particularly relevant at this time when both Title I of the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act, and the IDEA will soon be before the U.S. Congress for reauthorization. One of the key issues raised by the NPRM will let parents unilaterally revoke their consent to their children's continued receipt of special education with no obligation on the part of the school district for oversight or consideration of the decision. While CLE agrees with the basic statutory right of parents to revoke unilaterally consent to their children's continued receipt of special education, CLE believes that the local educational agency (LEA) has certain ongoing obligations under the statute, including obtaining written revocation of consent from the parents. In addition, the LEA must ensure: that the parents are fully informed in writing of the implications of the revocation (including which services the child may receive under Section 504 and which he/she will not), that information about the child's having been determined eligible as a child with a disability in need of special education will remain in the child's school record, and that the eligible child will be protected by Section 504 and cannot be discriminated against on the basis of his/her disability and shall continue to be eligible for special education and related services under Section 504 regardless of parental consent. Furthermore, as discussed below, CLE recognizes that States have broad authority under section 615 of IDEA to establish and maintain procedures for ensuring that children with disabilities and their parents are guaranteed procedural safeguards

necessary for ensuring the provision of a free appropriate public education. However, with the reauthorization of IDEA pending, CLE believes that the amendment to proposed regulation §300.512 that modifies the Department's long held view allowing lay advocates to represent parents at due process hearings is untimely, potentially disruptive of the state administrative hearing process, and undermines any perception of fair play. This is an issue which, if it is to be re-examined, needs to be taken up through the reauthorization of IDEA.

Parental Revocation of Consent for Special Education Services (§§300.9 and 300.300)

§ 300.9 Consent - no requirement to amend student's education record

Recommendation: CLE supports the Department's proposed amendment to subsection (c) of §300.9 that requires the LEA to maintain documentation of the child's prior receipt of special education and related services in his/her education record.

Rationale: There is no question that, irrespective of the parent's revocation of consent for a child's receipt of special education and related services, documentation of the child's having been identified as an eligible child with a disability in need of special education, the child's IEP(s), and other relevant information, such as progress reports, shall remain in the student's education file. Because Section 504 is a civil rights statute that protects individuals with disabilities from being discriminated against on the basis of disability, the rights under Section 504 and its regulations belong to the child as an eligible child with a disability regardless of whether that child is receiving special education under IDEA. The requirement to maintain the documentation of his/her prior status in the student's education record is a protection that belongs to the child [note 34 C.F.R. §§ 104.3(j), (l)(2)], not his/her parent. Furthermore, to the extent that the parent challenges the determination of the child's eligibility or the accuracy of any other finding in the child's education record, the parent can exercise his/her right to a hearing under the Family Educational Rights and Privacy Act to seek to correct misinformation in the child's education record and, even if unsuccessful, is entitled to include a written explanation of the parent's position.

§300.300 Parental Consent

A new § 300.300(b)(4) is proposed that allows parents to revoke consent and thus unilaterally withdraw their child from receiving special education and related services. If a parent exercises this right, the school district:

- Cannot continue to provide special education and related services to the child
- Cannot use mediation and due process procedures to obtain agreement or a ruling that services must continue to be provided.

Recommendation: CLE supports the right of parents to revoke unilaterally consent for their child's continued receipt of special education services, consistent with the explicit statutory language under current law at §1414(a)(1)(D)(ii)(II).

Rationale:

§ 300.300(b)(3)(i) and § 300.300(b)(4)(i), (ii)

CLE supports the interpretation of the Department that is reflected by its proposed change in regulation § 300.300(b) at subparagraph (3)(i) and new subparagraph (4)(i) and (ii) to reject the

current distinction that is made when parents refuse to consent to the initial provision of special education services and when parents revoke consent subsequent to their child being provided special education services. First, the current interpretation that bars school districts from using procedures under Section 1415 (including mediation or due process procedures) when parents refuse to consent to the initial provision of special education services is supported by the language of the statute. What is not supported by statute is the interpretation under current regulations that are construed to prohibit parents who choose to revoke consent after their child is receiving special education from unilaterally withdrawing their child from receipt of special education services. Such interpretation is contrary to the plain language of the statute at §1414(a)(1)(D)(ii)(II) and inconsistent with current regulation § 300.9(c)(1) that interprets the statute as requiring that “consent is voluntary and may be revoked at any time.”

The Department rationalizes that “[j]ust as under section 614(a)(1)(D)(ii)(II), parents have the authority to consent to the initial provision of special education and related services, we believe that parents also should have the authority to revoke that consent, thereby ending the provision of special education and related services to their child. This change is also consistent with the IDEA’s emphasis on the role of parents in protecting their child’s rights and the Department’s goal of enhancing parent involvement and choice in their child’s education.” *Analysis of Significant Proposed Regulations*, 73 Fed. Reg. 27,691 (May 13, 2008).

CLE agrees with the Department’s proposed change that recognizes a parent’s right to withdraw unilaterally his/her child from continued receipt of special education services, because parents *do have* that right to revoke consent based on the statutory language of current §1414(a)(1)(D)(ii)(II). The plain language of subsection (II) cannot be any clearer. The statute expressly states: “If the parent of such child refuses to consent to services..., the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 1415 [615] of this title.”

Consent for evaluation is not consent for receipt of special education (i)(I)

Under current law at §1414(a)(1)(D)(i)(I), the statute expressly requires that any agency proposing to conduct an initial evaluation of a child referred or otherwise being considered for eligibility to receive special education “shall obtain informed consent from the parent of such child before conducting the evaluation.” In the sentence that follows the statute underscores the importance of the second and separate mandate to obtain informed consent prior to the provision of services by expressly clarifying that “[p]arental consent for evaluation shall not be construed as consent for placement for receipt of special education.”¹

Informed parental consent is required prior to providing special education to a child (i)(II)

Subsection (II) of the same subsection [§1414(a)(1)(D)(i)] expressly mandates: “An agency that is responsible for making a free appropriate public education available to a child with a disability *shall* seek to obtain informed consent from the parent of such child *before* providing special education and related services to the child.” *Id.* (emphasis added).

Absent parental consent for services, there can be no services and no override (ii)(II)

¹ Note the use of the term “placement” is unfortunate and inconsistent with the findings at 20 U.S.C. §1400(c)(5) that described effective special education as not a place but specialized instruction with high expectations through access to the general education curriculum aligned to high standards established under Title I/No Child Left Behind Act.

Section §1414(a)(1)(D)(ii)(II), in addressing the absence of consent “for services,” states: “If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 1415 [615] of this title.” There is nothing in the statute to suggest that parents’ revocation of consent *after initiation of such services* should be treated differently than their refusal to give consent initially to the provision of special education services to their child. The statute is silent as to any such distinction in the absence of consent. What is clear is that in the absence of parental consent, the school district cannot provide an eligible child with a disability special education services and cannot seek to override the lack of parental consent by filing a due process complaint or otherwise utilizing the procedures under §1415.

To ensure that implementation of this statutory right does not create chaos and become an impediment to teaching and learning, the Department should require, through regulation, an orderly process for ensuring that the parent revoking consent understands what services will be terminated and the full implications and consequences of his/her action; the revocation must also be in writing (see discussion below).

Effect of Revocation of Consent on Agency Obligation

If a parent exercises this right to revoke consent and unilaterally terminate special education services, the school district:

- Will not be considered in violation of providing a Free Appropriate Public Education (FAPE)
- Will not be required to convene an IEP team meeting or develop an IEP.

Recommendation: CLE urges the Department to clarify that recognition of the right of parents to revoke consent for their child’s receipt of special education services does not relieve the LEA of its continued obligations under child find to identify, locate, and evaluate all children with disabilities. The LEA is similarly not relieved of its obligation to make FAPE available should a parent subsequently seek a referral for evaluation. Moreover, a child whose parent has revoked consent continues to be protected under Section 504 and to have access to services and accommodations under 504 as well as all other facets of the school’s education program, including Title I services and vocational education.

Rationale:

§ 300.300(b)(3)(ii), (iii) and § 300(b)(4)(iii), (iv)

As discussed above, current law requires schools and school districts to obtain written parental consent prior to a child being provided specialized instruction. If a parent declines to provide informed consent for his/her child to receive special education services, or fails to respond to a request to provide such consent, the statute states that “the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local education agency requests such consent.” 20 U.S.C. § 1414(a)(1)(D)(ii)(III)(aa). Nor in this instance is the LEA required “to convene an IEP meeting or develop an IEP...” *Id.* § 1414(a)(1)(D)(ii)(III)(bb). These same provisions are incorporated into renumbered proposed regulations at § 300.300(b)(3)(ii), (iii) and new proposed subparagraphs (4)(iii) and (4)(iv), thus removing any differences in treatment between parents

refusing to consent to an initial evaluation or failing to respond to a request for such consent and the parents who unilaterally withdraw their child from special education after revoking their consent to provision of special education.

As discussed above, on the basis of current statutory language, CLE supports the Department's position that parents may revoke their consent and unilaterally terminate provision of special education services to their child. However, CLE does not believe that § 1414(a)(1)(ii)(II) is inconsistent with the LEA having a continuing obligation to identify, locate and evaluate all *eligible* [not at risk or potentially eligible], school-age children with disabilities, who need specialized instruction to meet their disability related education needs – for example, by continuing to monitor the performance of all children, including those who had previously been determined to be eligible for and had in fact received special education services. The school district has an affirmative obligation with respect to all children to identify and locate those who may be in need of specialized instruction, and there is no basis to exclude children who may be seriously struggling as a result of their disability because they previously had received, but no longer are receiving, special education services. In some instances, a child may be on an IEP for a period of years and then exit from special education and, as his/her needs require, may be evaluated again for receipt of special education and related services. Moreover, while the school district will not be considered to have violated the requirement to provide FAPE under IDEA based on proposed regulation § 300.300(c)(iii) and the language of the statute, the Department should clarify that this does not eliminate the school district's obligation to make FAPE available should a parent subsequently seek or respond to a referral for evaluation, and that the limited exception set forth under IDEA does not apply to the LEA's obligations under Section 504.

Special education is not and, therefore, should not be perceived as a dead-end placement for a child – i.e., once in, there is no exit. Similarly, the child's IEP should not be viewed as synonymous with a low-quality curriculum. Rather, special education should be conceptualized as one component of a fluid and flexible educational system that is tailored to meet the individualized need of the child and characterized by effective instruction and support services, consistent with the statute's findings that special education is to be considered a service “rather than a *place* where children are sent.” 20 U.S. C. § 1400(c)(5)(C) (emphasis added).

On the other hand, it is important to recognize that parents have an established liberty interest in raising their children that is grounded in the Fourteenth Amendment and under IDEA.² A parent can choose to send a child to public school or to a private school,³ or to home school⁴ them. Subsection (d)(4)(i) of current regulation §300.300 recognizes that “[i]f a parent of a child who is home schooled or is placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or re-evaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of this section); and (ii) [t]he public agency is not required to consider the child as eligible for services under §§ 300.132- through 300.144.” Significantly, regulation § 300.131(b)(1) (child find) is not included in list of regulations with which the public agency is *not* required to comply for the purpose of students who are home schooled or placed in a private school by parents at their own expense. Thus, the LEA continues to be responsible for meeting its obligation regarding “child-find for parentally-placed private school children.” 34 C.F.R. § 300.131(b)(1).

² See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007).

³ See *Pierce*, 268 U.S. at 534-35, *supra* note 2.

⁴ See 34 C.F.R. §300.300(d)(4)(i).

Parents of public school children with disabilities determined to be eligible for special education who, nonetheless, choose to refuse special education services or, who revoke their consent and withdraw unilaterally their children from receiving special education services, are entitled to be treated no differently than those parents who privately place or home school their children with disabilities. Their decision to educate their children without receiving specialized instruction should be respected and their children shall have access to all facets of the school's education program, including Title I services (e.g., effective and timely interventions), vocational education, related services and accommodations under Section 504. Their progress will be monitored just as any child who may be struggling to achieve and is failing to meet the district and state standards.

Additional Affirmative Obligations

Recommendation: CLE urges the Department to clarify additional obligations incumbent on LEAs to ensure that a parent's decision to revoke consent is voluntary, and that the parent is provided with full information to inform their decision.

Rationale: While CLE believes that parents have a right to revoke consent to their child's receipt of special education services, given the significant implications of this parental decision, we also believe that there are a number of affirmative obligations that are incumbent upon LEAs: First, LEAs must ensure that parental revocation of consent is submitted in writing to the extent that the parent is able to communicate in writing. In addition, LEAs must ensure that the parent's decision is voluntary. Accordingly, the LEA must notify the parent about the opportunity to participate in a *voluntary* meeting with school personnel, at which the parent would be able to discuss the reason for his/her decision, to review any relevant information from the child's IEP, prior evaluation results, teacher input, etc., and to learn about the legal implications of his/her decision. This meeting could take place with the IEP Team, at a facilitated mediation with school personnel, or in some other formal or informal setting; however, the meeting must be discretionary on the part of the parent. The right of a parent to revoke consent would not be contingent on his/her decision to participate in such a process. See also current regulation at § 300.328 (identifying alternative means of meeting participation, including video conferences and conference calls, that the parent and school district may agree to use).

Regardless of the parent's decision to participate in the voluntary process, a parent who revokes consent for his/her child's receipt of special education services must be provided full, written disclosure of the legal ramifications of such revocation, including an explanation of the IDEA protections the parent and child will lose (e.g., the right to receive FAPE under IDEA); a statement about the specific special education services the student will cease to receive; a summary of the student's areas of strengths, needs, current levels of functioning and performance; and a description of the student's continued rights under Section 504 and what services, supports, or accommodations the student might receive under a Section 504 plan.

Implications for Disciplinary Actions

The Department has also suggested in the comments to the proposed NPRM at 73 Fed. Reg. 27,692 that parents and advocates should be aware that if a parent has refused services for their child under IDEA, then based on the proposed rules, the school does NOT recognize the child, regardless of the manifestations of his/her disability, as one deemed to have a disability. According to the Department, even if there were evidence in the child's file of the child being previously evaluated as having a disability with challenging behaviors, under the proposed rule

that child would be treated as if he/she did not have a disability and would face disciplinary action in “the same manner as a non-disabled child.”

Recommendation: CLE believes that the Department’s interpretation that an LEA would not be considered to have knowledge that a child is a child with a disability for the purpose of disciplinary actions if the parent has revoked consent for the receipt of special education services is incorrect and should be clarified and corrected. A child with a documented disability who has been determined to need special education is protected under § 1415.

Rationale: If the proposed change is made in the regulations allowing parents to unilaterally terminate special education, the Department contends that based on current § 300.534(c)(1)(ii), a school/school district “is not deemed to have knowledge that a child is a child with a disability for purposes of disciplinary actions if the parent of the child has refused services under the IDEA” and thus, the school would be able to discipline the child in the same manner as a non-disabled child. 73 Fed. Reg. 27,692. To the contrary, children whose parents revoke consent for the provision of special education have *already* been determined to be eligible for special education. See current § 300.534(a) that, consistent with the language of the law, clearly states that this regulatory provision, as well as subsections (b) and (c), only apply to children *not* determined eligible for special education and related services.

While a school is not liable for not providing FAPE through specialized instruction and related services to a student with a disability whose parents do not consent to the provision or continued provision of special education under IDEA, the Department needs to clarify that there is no basis for suggesting that this otherwise “eligible child in need of special education” is not entitled to the protections of the IDEA and Section 504 that include a right belonging to the child with a disability not to be discriminated against by being sanctioned for behavior that is a manifestation of his/her disability. There is no dispute that the students affected by their parents’ revoking consent for special education services are students who have been determined to be eligible students with disabilities.

And finally, there is little doubt that such students are protected from being discriminated against under Section 504 regardless of whether or not the student is receiving special education services. 34 C.F.R. § 104.4. The Department’s interpretation limiting the protection to be accorded students who have been determined to be eligible children with disabilities in need of special education under IDEA is also inconsistent with the Fourteenth Amendment to the U.S. Constitution, which protect a child with a disability, regardless of whether he/she receives special education, from being punished for his/her disability or discriminated against on the basis of the disability.

§ 300.177 Abrogation and Employment of Qualified Individuals with Disabilities

The language set forth in proposed regulation §300.177(a) restates the language of the statute [20 U.S.C. §1403] abrogating state sovereign immunity, renumbers current regulation 34 C.F.R. §300.177, and adds a new section requiring that recipients of funds under IDEA “must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act.”

Recommendation: CLE supports this proposed regulatory language but believes that because the statutory mandate is not limited to Part B, the proposed regulation must be amended to include Part C of the Act.

Rationale: The new proposed regulatory language that recipients “must make positive efforts” is consistent with the statutory requirement that each recipient of assistance under IDEA “shall ensure” that it “makes positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under this chapter.” There is no reason why the proposed regulation does not also apply to Part C of the Act.

§ 300.512 Hearing Rights

Recommendation: Given the pending reauthorization of the IDEA as well as the dearth of research concerning process and outcomes for administrative due process hearings, in particular, in conjunction with resolution sessions, CLE believes that it is premature for the Department to propose through regulation a change in its prior position allowing use of lay advocates at due process hearings.

Rationale: CLE recognizes that States have broad authority under section 615 of IDEA to establish and maintain procedures for ensuring that children with disabilities and their parents are guaranteed procedural safeguards necessary for ensuring the provision of a free appropriate public education. That system includes, among other things, an opportunity to present complaints before an impartial due process hearing officer and to be represented by an attorney or accompanied and advised by individuals with special knowledge or training in the needs of children with disabilities. Whether the latter are authorized to represent parents and their children at due process hearings has been a matter of some controversy with different states having different approaches. Some states (10) bar lay advocates while other states (12) permit them to represent parents at due process hearings. Apparently most states do not have a policy *per se*. To date, minimal research has been conducted on data and outcomes concerning the special education administrative due process systems of states and districts. Particularly in light of the resolution session introduced by IDEA 2004, the manner in which this intervening process has been implemented (e.g., with or without attorneys or lay advocates accompanying parents) as well as the extent to which the process has had any impact on subsequent due process hearings has yet to be considered and shared with the public. Consequently, CLE thinks it is premature for the Department, without adequate review and consideration of available research data, to propose, through regulatory amendment, such a potentially disruptive change.

The reauthorization of IDEA is imminent and will allow for a process of full consideration and review of data on this issue. The proposed regulation represents a significant modification in the Department’s position from allowing use of lay advocates at due process hearings to saying it is a matter of State law as set forth in proposed regulation § 300.512(a)(1) whether non-attorney advocates may take on the role of counsel for parents before administrative due process hearings. As such, it is potentially disruptive of the State system of administrative due process hearings especially when there is substantial evidence of the current dearth of attorneys and lay advocates available to represent parents.

§ 300.600, §300.602, § 300.606 State Monitoring and Enforcement

The proposed regulations add new language clarifying the State educational agency’s responsibility under § 1416 of IDEA to require the State to review annually each LEA’s performance based on meeting the targets in the State’s performance plan; to report publicly on such determinations within 60 days of the State’s submission to the Secretary of Education; and to utilize effective and appropriate enforcement mechanisms, including technical assistance, conditions of funding, corrective action plans, and funding withholding. 73 Fed. Reg. 27,699 (proposing 34 C.F.R. §300.600) (May 13, 2008).

Recommendation: CLE is pleased that the Department has targeted the need for improved State monitoring and enforcement, in particular, of areas of substantive non-compliance by LEAs. CLE supports the proposed changes. CLE further urges the Department to require States and districts to post publicly on their websites any corrective actions and other enforcement steps being implemented. Moreover, CLE urges the Department to require each State to post on its website the US Department of Education's *Decision Letter* on the State's Accountability Plan.

Rationale: CLE supports new subsection (e) of §300.600 that holds States accountable for meeting a specific timeframe after determining in the course of its monitoring and oversight obligations that LEAs are not in compliance with IDEA requirements. The proposed regulation, which mandates that noncompliance must be corrected as soon as possible and, in no case, later than one year after the State's identification, is warranted based on the number of determination letters issued by the Office for Special Education Programs (OSEP) citing State laxity in ensuring timely and effective corrective action. CLE is especially concerned about the failure of States to enforce timely and effectively, through corrective action, substantive areas of non-compliance that impede students with disabilities from being effectively taught and successfully learning to high standards.

CLE supports the Department's proposed regulation requiring each State to make publicly available, including through posting to the State's and LEAs' websites: the State Performance Plan; annual performance reports for each year designated in the SPP; and the State annual reports of each LEA's performance on the annual targets identified in the SPP. This data is critical for parents, parent and student advocates, and other members of school communities to hold their schools and school districts accountable and to improve the educational outcomes for all students with disabilities, including those who fall within additional subgroups based on race, national origin, or limited English proficiency.

Given continued evidence of serious non-compliance, including the failure to correct identified instances of non-compliance at the school, district and state levels in a timely manner, CLE urges the Department to amend the regulations to require States and school districts to post publicly and otherwise make available to the public not only reported findings of non-compliance but the corrective actions required and other enforcement steps being implemented so as to make schools, school districts, and states more accountable to parents and other members of the school community.

CLE urges the Department to use this opportunity to correct a major oversight that limits State accountability to parents of children with disabilities enrolled in publicly funded education programs and to their advocates by mandating that each State post publicly on its SEA website the US Department of Education's *Decision Letter* on the State's Accountability Plan.