

# CENTER FOR LAW AND EDUCATION

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## **Federal Proposed Rules for Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, NPRM 5/13/2008**

The Secretary of Education released proposed regulations for 34 CFR part 300 governing the Assistance to States for the Education of Children with Disabilities Program and Preschool Grants for Children with Disabilities Program on May 13, 2008. The deadline for public comments is July 28, 2008. The proposed rules that are found in the 73 Federal Register 27690 (May 13, 2008) raise a number of key areas of concern for parents and advocates for children with disabilities and their parents. What follows is a series of questions and discussion points for parents and advocates to consider in commenting on the proposed regulations.

### **I. Parents Can Terminate Special Education Services**

A new section 300.300(b)(4) is proposed that allows parents to 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.
- 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.

Furthermore, 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 that child, regardless of the manifestations of his/her disability, as one deemed to have a disability. Consequently, 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."

### **A. Some Questions and Discussion Points for Consideration**

#### **1. Department's Rationale for Proposed Change**

What is the rationale for the Department to move away from the position that it has consistently taken – i.e., that parental consent is required prior to a child receiving special education and a parent's failure to provide consent to the initial delivery of services cannot be overridden by due process, *but once a child receives special education, parents cannot unilaterally withdraw their child from receipt of special education?*

- a. The Department suggests that its proposed change -- allowing parents to unilaterally remove their child from receiving special education -- is consistent with IDEA's emphasis on the role of parents in protecting their child's rights, and increased parental involvement and choice in their child's education. Is this accurate or to the contrary, does the proposed change put parents directly in conflict with their child's substantive right to receive a free appropriate public education, i.e., by being provided specialized instruction and support services necessary for the child to have the opportunity to learn to the standards set for all other students?
  - b. Consider: What if a child with a disability cannot effectively be taught without specialized instruction and related services? What if a child is constructively excluded from his/her education without provision of specialized instruction? What if a parent chose not to comply with compulsory education laws and kept the child at home? Is there a difference?
2. Difference between Right to Consent to Initial Provision of Services and Right to Revoke Consent to End Provision of Services  
 Is the Department correct when it suggests that there is no difference between parents having the authority to consent to the initial provision of special education and related services and parents having the authority to revoke that consent, and thus end the provision of special education?
- a. Remember under current law parents cannot unilaterally refuse to have their child evaluated for special education eligibility. Yes, written parental consent is required prior to a child being evaluated for initial eligibility for special education services. However, if the school or school district disagrees, the school/school district may seek mediation or [unless inconsistent with state law] complain and use the resolution session and due process, if necessary, to try to overturn the parents' refusal to consent.
  - b. In other words, under current law and regulations schools and school districts continue to have responsibility for child-find, identification and evaluation of children who may be in need of special education. By using mediation, a resolution session, or a due process hearing, school personnel have an opportunity to explain the need for evaluation and/or the evaluation findings to help the parent understand the nature of the child's disability related educational needs and how specialized instruction may assist the child in overcoming impediments to learning.
  - c. It is only after the evaluation is complete --when parents have critical information available to them -- that they can unilaterally decide to refuse to consent to have their child receive special education without the possibility of override by the school or school district.
3. Current Options Available to Parents Who Wish to Discontinue their Child's Special Education Services  
 So if no change is made in the current regulation, what recourse is available to parents who want to discontinue their child's special education without going through a time consuming and perhaps costly due process hearing?

- a. What do we know about the scope of this issue? Has data been collected at the federal, state or local district level to indicate the extent to which this is, in fact, a problem?
- b. Also, what data exist to suggest that the vast majority of this kind of disagreements between parents and IEP teams about terminating the delivery of special education are not effectively resolved through mediation or resolution sessions?
- c. Is this issue better left to the IEP team process? Presumably whenever a parent believes that the special education programming and services being provided to their child is inappropriate, ineffective or just unnecessary, the parent may request that the child's IEP team be reconvened. If the members of the IEP team disagree and propose to continue the delivery of special education that the parents want terminated, the parents have the option of using their due process rights and seeking to resolve the issue through mediation, resolution session or an administrative hearing.
- d. If parents object to the possibility of having to incur costs of due process when their desire is to terminate their child's continued receipt of special education, would a viable alternative be to require, at a minimum, participation of the parties in facilitated mediation or a resolution meeting prior to termination of services?

#### 4. Implications for Disciplinary Actions

If the proposed change is made in the regulations allowing parents to unilaterally terminate special education, is the Department correct when it says 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 nondisabled child?

- a. See current §300.534(a) that consistent with the language of the law clearly states that this regulatory provision, including subsections (b) and (c) only apply to children **not** determined eligible for special education and related services. Isn't it true that all children whose parents revoke consent for provision of special education have in fact been determined to be eligible for special education?
- b. Can a child's status as an eligible child with a disability be nullified if the child meets the statutory definition under IDEA [falls within one of the 13 defined categories of disability and is in need of special education] but his/her parent refuses to allow the child to be provided special education?
- c. Doesn't the child who is an individual with a disability *in need of special education* under IDEA retain their eligibility status after his/her parent exercises the right to refuse the special education and related services that the child is otherwise qualified to receive?
- d. While it may be argued that the school is not liable for not providing FAPE through specialized instruction and related services to a student with a disability whose parents object to provision of special education, what is the basis for suggesting that this otherwise “eligible child in need of special education” is not entitled to the protections

of the Act that include a right not to be sanctioned for behavior that is a manifestation of disability?

- e. Note: a child with a disability regardless whether he/she receives special education has rights under Section 504 and the Fourteenth Amendment to the US Constitution. A child with a disability cannot be punished for his/her disability or discriminated against on the basis of disability.
- f. The proposed regulations also state that if a parent revokes consent for the child's receipt of special education after the child has been receiving such instruction, the school/school district would not be required to change the student's education records for the period prior to the revocation of consent. The Department explains that "[s]chools need the ability to keep accurate records of a child's school experience, including whether the child received special education." Isn't it also true that these records are a critical source of information by schools that "a child is a child with a disability" and is thus, contrary to the Department's commentary, entitled to the substantive and procedural protections of the law?

## **II. Parents Right To Be Represented by Non-Attorneys Is Determined by State Law**

The proposed regulation at §300.512(a)(1) expressly recognizes that parents continue to have the right to be accompanied and advised by individuals with special knowledge or training with respect to the problems of children with disabilities, but adds the following limiting language: **"except that whether parents have a right to be represented by non-attorneys at due process hearings is determined under State law."**

### **A. Some Questions and Discussion Points for Consideration**

1. The Department's justification for the change in its position -- now adding language that leaves to the states the determination of whether parents have a right to be represented at due process hearings by non-attorneys -- is based on its "regard for the principle of Federal-State comity." Where the statute is silent, the Department explains: "We believe that the regulations should respect the interests that States have in regulating the practice of law so as to protect the public and ensure the appropriate administration of justice."
2. Is the Department's position justified? The Department cites a single case from Delaware, finding in 2001 that State law and legal practice determine who is able to represent parents in state administrative due process hearings. Why is it necessary for the Department to modify its longstanding position in support of lay advocates at this time?
3. Does it make more sense given the limited number of free and reduced fee attorneys knowledgeable in education law and available to represent low-income and middle-income families to address and try to resolve some of the concerns that may exist when parents are not represented by legal counsel?
  - a. One of the arguments from the Delaware case and used by the Department to justify its change in position is that State oversight is necessary to protect clients from fraud and

to ensure that parents are represented by persons who were qualified to represent their interests under IDEA.

- b. Instead of assuming that only lawyers can represent parents, should the Department identify the range of alternatives for ensuring that lay advocates are knowledgeable about IDEA and the procedures necessary to represent effectively parents of children with disabilities?
  - c. What other strategies might be considered so as to improve the number and quality of representation available to parents?
  - d. If there are also specific instances when legal counsel are necessary (e.g., appealing due process decisions into court), what steps should the Department have to take to ensure that families have access to free or reduced fee legal services attorneys who are qualified to represent parents of children with disabilities in IDEA related claims?
4. Since low-income and middle-income parents often cannot afford legal representation and there are few resources in states to provide affordable or low cost legal services, what steps can be taken to ensure that parents are not denied due process hearing outcomes for these children?

### **III. New State Monitoring & Enforcement Requirements Strengthen Parents & Children's Rights under IDEA**

The proposed regulations add new language clarifying the State educational agency's responsibility 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. Of particular importance is that the State must under the new proposed regulations ensure that when it identifies noncompliance with the requirements by LEAs, the noncompliance is corrected as soon as possible and in no case later than one year after the State's identification. Also of particular importance to PTIs and CPRCs is the proposed regulation requiring each State to make publicly available, including through posting to the State and LEAs' websites: the State Performance Plan (SPP); annual performance reports for each year designated in the SPP, the State annual reports of each LEA's performance on the annual targets identified in the SPP.

This data is critical for PTIs, CPRCs, parents 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, limited English proficiency.

#### **A. Some Questions and Discussion Points for Consideration**

1. In addition to commenting upon the effects of proposed changes that may adversely affect children with disabilities and their parents, it is important to support positive changes proposed by the Department, e.g., requiring public reporting of non-compliance to be corrected ASAP but in no case later than one year. However, **serious consideration should be given as to**

**whether the proposed changes are sufficient to address longstanding, unresolved complaints and findings of non-compliance, in particular, those that impede students with disabilities being effectively taught and successfully learning to high standards.**

2. 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, shouldn't States and school districts be required 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?
3. It would seem an ideal time to correct a major oversight that limits state accountability to parents of children enrolled in publicly funded education programs and to their advocates –i.e., the U.S. Department of Education's failure to require each State to post publicly at least on the SEA's website the US Department of ED's *Decision Letter* on the State Accountability Plan.

#### **IV. State or Local Educational Agency's (LEAs) obligation to make positive efforts to employ qualified individuals with disabilities.**

The proposed regulations add a new paragraph to provide that any recipient of assistance under Part B must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B such as special education programs of an SEA or LEA or the State-wide assessment program of an SEA that is using IDEA funds to develop assessments for children with disabilities.

#### **V. Allocation of Funds Under Sections 611 and 619 of the Act**

The proposed regulations add new language to ensure that all States treat LEAs, including public charter schools that operate as LEAs, in the same manner when making sub-grants under sections 611(f) and 619(g) of the Act to LEAs, including those LEAs that are not serving any children with disabilities or any preschool children with disabilities, respectively. The Department believes that these provisions will ensure that "LEAs have Part B funds available if they are needed to conduct child find activities or to serve children with disabilities who subsequently enroll or are identified during the year."

#### **Your Feedback**

The Center for Law and Education will be following up these discussion points with more extensive comments to the proposed regulations, which we will disseminate to parents and advocates well in advance of the deadline. To the extent that you have any insight or information you would like to share, we would appreciate your feedback. In addition, if there are any questions or concerns, feel free to contact us at [kboundy@cleweb.org](mailto:kboundy@cleweb.org) or [jkarger@cleweb.org](mailto:jkarger@cleweb.org).