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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: Preliminary Questions & Considerations

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.

http://www.regulations.gov/search/search_results.jsp?css=0&N=0&Ntk=All&Ntx=mode+matchall&Ne=2+8+11+8053+8054+8098+8074+8066+8084+8055&Ntt=Docket%20ID%20ED-2008-OSERS-0005&sid=11A5F8D73F9D

What follows is a series of questions and points for consideration by parents and advocates 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."

Some Points for Discussion and Consideration:

(1) Department's Rationale for Proposed Change

In the past, the Department has consistently said that parental consent is required prior to a child receiving

special education services and a parent's failure to provide that consent cannot be over-ridden by due process. However, once a child receives special education, parents cannot unilaterally withdraw their child from special education. 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.

Questions to Consider:

- Is the Department's rationale in moving away from their current position accurate or, to the contrary, does the proposed change put parents directly in conflict with their child's substantive right to receive a free and appropriate public education (FAPE) by being provided specialized instruction and support services necessary for the child to have the opportunity to learn to the same standards as all other students (without disabilities)?
- 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

Question to Consider:

- 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?
 - 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.
 - 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.
 - It is only after the evaluation is complete and 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

Under current law and regulations 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/or seeking to resolve the issue through mediation, resolution session or an administrative hearing which likely will incur additional costs.

Questions to Consider:

- What do we know about the scope of the issue of parents resorting to due process hearings to challenge the district’s decision not to terminate their child’s special education services? Has data been collected at the federal, state or local district level to indicate the extent to which this is, in fact, a problem?
- 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?
- Is this issue better left to the IEP team process?
- If parents are concerned about having to incur costs of due process when their desire is to terminate their child’s continued receipt of special education, would a more viable alternative to parents’ unilateral removal 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, 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.

Questions to Consider:

- Is the Department’s position correct? Under the law will this child be treated in the same manner as a non-disabled child?
- Isn’t it true that all children whose parents revoke consent for 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.

- 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?
- 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?
- 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 under the law 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?
- Isn’t this proposed change inconsistent with Section 504 and 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?
- 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” who, contrary to the Department’s commentary, is 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 regulations at §300.512 (a) (1) expressly recognize 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.”**

The Department’s justification for the change in its position – expressly 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.

The Department cited a single decision from Delaware (2001) finding that State law and legal practice determines who is able to represent parents in state administrative due process hearings. The Department further cited the case to justify its position 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.

Questions to Consider:

- Is the Department's position justified? Why at this time is the Department modifying its longstanding support for lay advocates by leaving this critical decision to the States to decide whether or not to allow lay advocates to represent parents?
- Does it make more sense given the lack 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 any serious concerns to the extent they exist when parents are not represented by legal counsel?
- Instead of assuming that only lawyers can represent parents, should the Department identify a range of alternatives for ensuring that lay advocates are knowledgeable about IDEA and the procedures necessary to represent effectively parents of children with disabilities?
- To address 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 knowledgeable and otherwise qualified to represent parents of children with disabilities in bringing IDEA related claims?
- 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 by the Department and the States 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 annually review 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; to utilize effective and appropriate enforcement mechanisms, including technical assistance, conditions of funding, corrective action plans, and funding withholding.

Some Points for Discussion and Consideration:

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's and LEAs' websites: State Performance Plan; 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.

In addition to commenting upon the effects of proposed changes that may adversely affect children with disabilities and their parents, note that this is an opportunity to support positive changes proposed by the Department, e.g., requiring public reporting of non-compliance to be corrected as soon as possible but in no case later than one year.

Questions to Consider:

- Are the proposed changes 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?
- 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?
- Should the Department 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 ED's *Decision Letter* on the State's 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 employment for qualified individuals with disabilities within programs assisted under Part B such as special education programs of an SEA or LEA or within 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 or jkarger@cleweb.org.