



The Council of Parent Attorneys and Advocates, Inc.
A national voice for special education rights and advocacy

December 12, 2011

Jennifer Sheehy
U.S. Department of Education
400 Maryland Avenue, SW.
Room 5103
Potomac Center Plaza
Washington, DC 20202-2600

RE: NPRM - 34 CFR Part 300 [Docket ID ED-2011-OSERS-0012] IDEA Part B

Dear Ms. Sheehy

We sincerely appreciate the opportunity to submit comments on the Department of Education's Notice of Proposed Rule Making regarding regulations in 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.

The Council of Parent Attorneys and Advocates (COPAA) is a national nonprofit organization of attorneys, lay advocates, parents, and other professionals who work to secure appropriate educational services for children with disabilities. Some lawyers and lay advocates are in private practice; others work for nonprofit public interest groups and organizations. COPAA members see the successes and failures of special education and the Individuals with Disabilities Education Act (IDEA) through thousands of eyes, every day of every year. Some of us are new to the system and work to improve the life of a single child. Others have years or decades of experience working for and with hundreds of children.

For more than 30 years, the IDEA has been the main law protecting the civil rights of children with disabilities, including the rights to a free appropriate public education (FAPE) and to be educated with their peers without disabilities to the maximum extent possible. The Education Department's regulations must first and foremost ensure that all of the rights given to children and families by the IDEA are protected. The regulations must preserve the strong voice and role parents play in their children's lives, including the right to make informed and meaningful decisions regarding their children's education.

The Part B regulations allow public agencies to use public benefits or insurance (*e.g.*, Medicaid) to provide or pay for services required under Part B with the consent of the parent of a child who is enrolled under the public benefits or insurance program. Public insurance is an important source of financial support for services required under Part B. Currently, with respect to the use of public insurance, § 300.154(d)(2)(iv)(A) specifically provides that a public agency must obtain parental consent, consistent with § 300.9, "each time that access to public benefits or insurance is sought."

The proposal would entirely eliminate the requirement in current regulations that a school district must obtain parental consent each time it seeks to use a family's public insurance benefits. In its place, the proposal would require a one-time notice to the parents that prior to releasing personally information for billing purposes the school district must obtain parental consent. The notice would also inform the parents (1) of the IDEA's "no cost" protections when accessing insurance benefits, (2) that they may revoke their consent at any time and (3) that their refusal to grant consent does not relieve the school district of its responsibility to provide a FAPE to the student. Proposed 34 C.F.R. § 300.154(d)(2)(iv) and 76 Fed. Reg. 60311.

The stated purposes for this proposal are school district's concerns about the administrative and financial burdens associated with the current requirement and a belief "that we could improve this regulation to protect parents' and children's interests." 76 Fed. Reg. 60311.

We are very concerned that the proposed rule serves to weaken and reduce the rights of parents and their children.

The current letter of the law, including accompanying OSEP Policy Memorandum *Letter to Hill, 107 LRP 13113 (OSEP 3/8/2007); OSEP Policy Memorandum 07-10, May 3, 2007.* should remain unchanged. The IEP team meeting is the appropriate vehicle to secure authorization for accessing public or private insurance and OSEP already clarified that this rule only applied when there was a change in the services being billed to Medicaid--the consent may be obtained one time for the specific services and duration of services identified in the IEP.

It is critical that consent be obtained each time an IEP is developed or changed. Such consent must contain stipulations as to amount and time of the consent, in no case lasting longer than the life of the IEP. Given complexities and possible ramification of such consent, due to co-pays, deductibles and limits schools should not have the ability to access without specific authority each time insurance is accessed.

While 300.154 (e)(2) specifies that there would be no change in the "Free" in FAPE, allowing the SEA unlimited access to Medicaid benefits could "cost" a family access to needed services through Medicaid that would not otherwise be available from the LEA. Parents need to be given sufficient information to understand the ramifications of granting consent each time services are changed or agreed upon. The following sampling of situations illustrates such need:

- Children in the foster care system are at times denied psychological evaluations for reunification or other purposes because their Medicaid has been tapped for school-related psychological services. Additionally, the proposed rule does not take into account the fact that foster children may experience a series of educational guardians or surrogate parents in their educational lives; a one-time notice is insufficient to protect the rights of foster children who do not have a consistent parent or educational decision maker in their lives.
- IDEA requires but a basic floor of services. Many times in order to get a heightened level of intense services to a child, families supplement services provided through the LEA with Medicaid services. Allowing the LEA unfettered access to a child's coverage through Medicaid could result in the family's loss of the ability to supplement LEA services because of policy limits or otherwise. A family should have the opportunity in each instance to give informed consent to the LEA's use of Medicaid funds. Informed consent must include in each instance

notice of the impact that LEA access to a child's Medicaid benefits would have on their benefit limits.

We believe it is critical to assure that parents retain control of consent to the services provided to the child both inside and outside of school using their insurance. Notice is not sufficient.

We appreciate the opportunity to comment on this issue.

Sincerely,

Denise Marshall
Executive Director

Robert I. Berlow, Esq.
Co-Chair COPAA Government Relations Committee

Dawn R. Smith, Esq.
Co-Chair COPAA Government Relations Committee