



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

Re: Notice of Proposed Rulemaking, ED-2011-OSERS-0012

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

Dear Ms. Sheehy:

The Consortium for Citizens with Disabilities (CCD) education task force is pleased to have this opportunity to provide comments on the Notice of Proposed Rulemaking (NPRM) on 34 C.F.R. Part 300 governing the Assistance to States for the Education of Children with Disabilities, published in the Federal Register Vol. 76, No. 188, on September 28, 2011 at 76 Fed. Reg. 60310.

The changes announced in this NRPM would entirely eliminate the requirement in current regulations that a school district obtain parental consent each time it seeks to use a family's public insurance benefits. In its place, the NPRM would require a one-time notice to the parents that prior to releasing personally identifiable 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 concerned that the proposed rule goes too far toward saving costs for school districts at the expense of protecting the rights of parents and their children. In fact rather than improving their rights it significantly reduces them. Therefore, we ask that the proposal be significantly modified.

Concerning the administrative and financial burdens associated with the current regulations, it would seem school districts could have obtained parental consent more efficiently and economically than described by many of the stories in the NPRM. First, although the current regulations require school districts to obtain parental consent "each time" they access public

insurance, OSEP clarified that this 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. *Letter to Hill*, 107 LRP 13113 (OSEP 3/8/2007); *OSEP Policy Memorandum 07-10*, May 3, 2007.

Second, instead of school districts trying to track parents down to obtain consent to access public insurance they should seek consent at the IEP meeting. The IEP would identify the services to be provided, and there is no reason why the IEP Team could not ask if the parents had insurance and then ask for consent while the parents are present. For students being identified for the first time the school district would have to obtain consent to services, and as indicated in the NPRM, consent to release personally identifiable information for billing purposes. They would need to obtain the parents' insurance ID number as well. It would seem to be much more efficient to provide notice and obtain all of these consents at the meeting. If the parents had any questions or if they may have reasons why they were concerned about accessing Medicaid these could all be discussed at that time.

Going forward, any changes to the nature or amount of services provided to a student would require a revision to the IEP as well, whether at a meeting or through mutual consent.¹ Why would the school not obtain consent from the parent at the meeting? Therefore, the current regulatory structure did not have to be as burdensome as some districts have made it.

We do, however, recognize the financial crisis facing school districts today and the benefit of accessing public insurance to help pay the costs for special education and related services, especially given the 50% federal reimbursement rate for Medicaid funded services. However, we believe that the proposed resolution of this dilemma is too confusing and too dismissive of parental rights.

Contrary to the claim that this proposal would enhance family rights, as noted above it actually significantly diminishes them. First, as highlighted in the NPRM, it is correct that the 2006 regulations do not explicitly reference the need to obtain parental consent prior to the school district's release of personally identifiable information to bill public insurance. 76 Fed. Reg. 60310. However, the school districts would have been required to comply with the consent to disclose requirements of FERPA and Part B in any event. Therefore, although this proposal would make this requirement explicit, it does not add anything to current parental rights.²

Second, in addition to not adding any protections, the NPRM would significantly reduce them. The requirement to obtain parental consent each time public insurance benefits were to be

¹Revisions to the 2006 regulations allow the IEP to be revised without a meeting, but when the family's public insurance may be accessed, the IEP Team may want to hold a meeting to obtain consent from the family while they are present.

²NPRM would add the requirement that the parents be informed of the "no cost protections." Although the notice requirement is not in the current regulations, the protections are there. *See* 76 Fed. Reg. 60314.

accessed was added in response to comments to the 2006 regulations. The stated purpose was to provide greater protections to families:

We believe obtaining parental consent each time the public agency seeks to use a parent's *public* insurance or other public benefits to provide or pay for a service is important to protect the privacy rights of the parent and to ensure that the parent is fully informed of a public agency's access to his or her public benefits or insurance and the services paid by the public benefits or insurance program. Therefore, we will revise § 300.154(d)(2)(iv) to clarify that parental consent is required each time the public agency seeks to use the parent's *public* insurance or other public benefits. We do not believe that it would be appropriate to include a provision permitting waiver of parental consent in this circumstance, even where a public agency makes reasonable efforts to obtain the required parental consent. 71 Fed. Reg. 46608 (emphasis in original).

Nothing has changed for families since these comments were made in 2006 and the provision at issue in this Notice was added. Additionally, there are "costs" to parents when their public insurance is utilized. There may be out of pocket costs particularly for Tricare, the public insurance program for our military families, but also with Medicaid. For families that have both private insurance and Medicaid, the Medicaid program will require that the private insurance be utilized first. Yet, without having an ongoing dialogue with the families as schools seek to utilize their public insurance over the years, school districts will not even be in a position to know whether their use of the families' public insurance will reduce coverage for services they are seeking outside of the school.

Medicaid does put limits on the use of Medicaid benefits, so if the school district is using Medicaid for special education services the family will be limited if they desire to access Medicaid for the same services outside of school.³ For example, we are aware of instances where parents have sought a related service for their child such as speech, PT or OT and although the district may agree to provide the service, they were not willing to provide it as frequently as the parents desired. Instead of "fighting" with the school district over this, which could include resort to the adversarial and expensive due process remedy, parents have simply chosen to use Medicaid to fund the added services.

Also, families of children needing mental health services may wish to use Medicaid to obtain those services outside of the school context for personal reasons. Finally, for children needing assistive technology (AT), most often called durable medical equipment (DME) under Medicaid there may be reasons why the parents may want to obtain the equipment themselves through Medicaid rather than going through the school system.

Imagine the predicament for a family that received the initial notice and signed a consent to release their child's records when their child was three and is now eleven years old. Would they

³Although advocates for parents have been successful in overturning Medicaid decisions limiting services, why should parents have to be put in the position of having to seek the services of an outside advocate, assuming they can even obtain such assistance.

even remember that seven years ago they had *implicitly* agreed to allow Medicaid to be billed for services? Just think of the embarrassment if they sought services from Medicaid to supplement what the school was providing and were denied because the school was still using Medicaid and they had forgotten all about it.

For all of these reasons, the proposal in the NPRM for a one-time notice to the parent and one-time consent to the release of information is simply not adequate to protect the families involved. In many instances the school would have no idea how the parents may have planned to use their public insurance benefits or how the family's circumstances may have changed over the years.

Finally, and perhaps most importantly, this proposal would create a dual system of protections under the IDEA—one for poor families that are eligible for Medicaid or families in the military that are covered under Tricare, and the other for wealthier families with private insurance.⁴ That is truly unfortunate. If the Department believed that this proposal provided greater protections for families, then why not make the same proposal for those with private insurance. It is true that private insurance will have deductibles and co-payments, and annual caps⁵ that Medicaid will not have. However, our service members with Tricare will have expenses similar to private insurance, and, as noted above, there are costs and limitations placed on the availability of Medicaid. Why else would the proposed rule still require notice of the “no cost” provisions in Part B Proposed 34 C.F.R. § 300.154(d)(2)(iv)(B)?

Accordingly, we would propose an alternative put forth in the NPRM which would significantly reduce the current burden to school districts but which would also better protect the interests of families. Our proposal would also track the IDEA provisions covering initial consent for services and the built-in notice requirements following IEP meetings.

We propose, that just as there is a requirement to obtain consent for the initial placement in special education, there should be an initial, one-time, informed consent to access a family's public insurance. Since the school district would have to obtain written consent to release records under the proposed regulation anyway, obtaining an additional explicit consent to access Medicaid would not pose any additional burden.

Once that initial consent has been obtained, the school district would have to fully inform the parents of their rights at subsequent annual review meetings. This notice could be included with the notice that school districts are already required to give parents. The notice would include notice (1) of the no cost provisions in 34 C.F.R. § 300.154(d)(2), (2) the right to revoke consent, and (3) that the refusal or withdrawal of consent does not relieve the school district of its obligations to the student. These provisions track the content of the notice to be given one time under the NRPM. The difference would be that it would occur annually. Note the district would not be required to obtain parental consent to bill Medicaid -- they would just be notified of their rights.

⁴We recognize that there are working poor families that will have access to private insurance, but generally, the families with private insurance will have significantly greater financial resources.

⁵Lifetime caps are no longer permissible for children because of the Affordable Care Act.

Similarly, if there is an amendment to the IEP during the course of the school year that will result in a change to the amount being billed to public insurance, the notice following the meeting must include notice of these rights as well. Since there would need to be an IEP amendment to increase or decrease services anyway, with notice to the parents, this would not be a burden on the districts. Again, parental consent would not be required, just notice.

We believe this proposal will ensure that there is an ongoing dialogue between the school district and the parents on the use of their public insurance so that the family and the school district are coordinating the services being provided to the child both inside and outside of school. Finally, this provision would still mean that parents with private insurance would have somewhat greater protections than parents with public insurance. However, the rights of parents with public insurance would be more closely aligned with their more resource rich counterparts.

We appreciate the opportunity to comment on this issue.

Sincerely,

Bazelon Center for Mental Health Law
Easter Seals
National Disability Rights Network
National Down Syndrome Congress
National Down Syndrome Society
National Parent Teacher Association
The Advocacy Institute
The Arc
The National Center for Learning Disabilities
The National Council on Independent Living

The Consortium for Citizens with Disabilities is a coalition of over 100 national consumer, advocacy, provider and professional organizations headquartered in Washington, D.C. Since 1973, the CCD has advocated on behalf of people of all ages with disabilities and their families. CCD works to achieve federal legislation and regulations that assure that the 54 million children and adults with disabilities are fully integrated into the mainstream of society. For more information, please contact:

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