

July 28, 2008

Tracy R. Justesen  
U.S. Department of Education  
400 Maryland Ave, SW  
Room 5107  
Potomac Center Plaza  
Washington, DC 20202-2600

RE: Notice of Proposed Rulemaking for Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children with Disabilities: 34 CFR Part 300/Docket ID ED-2008-OSERS-0005

Dear Mr. Justesen:

This document is in response to the May 13, 2008 *Federal Register* announcement requesting public comment on regulations for the Individuals With Disabilities Education Act, as amended by the Individuals With Disabilities Improvement Act of 2004. These comments are on behalf of the Council for Exceptional Children (CEC), the largest professional organization committed to improving educational outcomes for individuals with exceptionalities.

We know that the Office of Special Education and Rehabilitation Services (OSERS) and CEC share the basic belief that a strong IDEA represents an important and necessary component of the education system in this country. It is fundamental to the success of children and youth with disabilities and we appreciate the opportunity to provide these comments.

However, CEC requests that careful consideration be given to whether or not these changes are necessary at this time. CEC had not heard from its members or other national organizations prior to the issuance of the NPRM on the urgency of these matters. In addition, State and local public agencies have just recently completed the enormous and costly task of revising rules and policies and procedures to be consistent with the August 14, 2006 final Part B regulations. Any changes to the Part B regulations will result in additional changes to these State and local policy documents as well as to State and local applications for federal funds, forms, and statements of parent rights. In addition, these changes will also require training of parents, administrators, teachers, related services personnel and other staff. CEC is not convinced these changes provide any enhanced protections for children and their families that could not be addressed under current Federal policy.

CEC sought and received input on the IDEA regulations from its Units, including States and Divisions, and from its individual members. That input has been incorporated into this document.

Thank you for considering CEC's recommendations. If you need additional information please contact Deborah Ziegler, Associate Executive Director for Policy and Advocacy Services at [debz@cec.sped.org](mailto:debz@cec.sped.org) or 703-264-9406.

Sincerely,



Deborah A. Ziegler, Ed.D  
Associate Executive Director  
Policy and Advocacy Services

## **§300.9 Definition of Parental Consent**

**CEC Recommendation:** *Retain the proposed language* at §300.9 which states that if a parent revokes consent for their child's receipt of special education services after the child has been receiving special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

In addition, *add a construction clause* to clarify that nothing in the new language would reduce a parent's rights under the current confidentiality provisions to request amendment of their child's record in accordance with §300.618-621.

**Rationale:** CEC supports this change to clarify school districts' authority to maintain necessary child records. We agree with the Secretary, "Schools need the ability to keep accurate records of a child's school experience, including whether the child received special education and related services."

To ensure that a parent's right to request an amendment to their child's record is not limited in light of this new regulatory provision, CEC requests that a construction clause be included in the final regulations.

CEC notes that although these proposed changes offer clarification to existing requirements, we are concerned about the administrative burden and costs that will result as a consequence of any change in final regulations. State and local public agencies have just recently completed the enormous and costly task of revising rules and policies and procedures to be consistent with the August 14, 2006 final Part B regulations.

## **§300.300 Parental Revocation of Consent for Special Education Services**

**CEC Recommendation:** *Delete the proposed language* at §300.300 that, in instances in which a parent revokes consent after services have been initiated, would:

- Prohibit the public agency from continuing to provide special education and related services;
- Prohibit the public agency from using due process procedures to overturn a parent's revocation of consent;
- Relieve the public agency of the responsibility to provide FAPE; or
- Relieve the public agency of the responsibility to conduct an IEP meeting or develop an IEP.

However, if this proposed language is retained in the final regulations, *provide additional clarification* to address:

- The parent’s responsibility to provide written notification of their decision to revoke consent for special education and related services for their child;
- Continuing eligibility of the child as a “child with a disability under Part B”, particularly with regard to the discipline requirements, despite the fact that the child is not receiving special education and related services;
- Language contained in the Analysis of Comments and Changes to the Final Regulations for 34 CFR Part 300 on March 12, 1999 that states “Under Section 504 of the rehabilitation Act of 1973, children with disabilities may not be disciplined for behavior that is a manifestation of their disability if that disciplinary action constitutes a change of placement;” and
- Provisions for determining the status of the child’s eligibility and previous IEP (i.e. how long do current eligibility and/or IEPs continue to be valid?) if the parent, after revoking previous consent, decides to provide consent for special education at a later time.

**Rationale:** CEC opposes this proposed change to the consent requirements under Part B. An LEA’s responsibility to provide FAPE to an eligible child with a disability is central to IDEA. If an LEA believes a child continues to need special education and related services, regulations should permit the LEA to pursue a due process hearing or mediation to attempt to override a parent’s decision to revoke consent.

CEC notes that although a parent may revoke consent for services, the child continues to be eligible as a child with a disability. Despite the Department’s discussion of the resulting implications for the discipline provisions in the NPRM statement, CEC remains concerned that this does not relieve the LEA’s responsibilities under Section 504. Without further clarification in the Part B discipline procedures themselves, potential vulnerability of school districts and the child may continue under IDEA as well.

Regarding the parent’s right to subsequently provide consent for services after revoking consent, additional clarification is needed to address eligibility and the IEP process, particularly with regard to the length of time the child is without services. The impact on the appropriateness of the IEP and the child’s continuing eligibility will vary depending on the timeframe (e.g. a week, a month, a year) services are not provided and based on an individual child’s needs.

Finally, of equal importance is the impact of this change on a public agency’s responsibility to ensure accountability for student progress toward proficiency under IDEA and ESEA. This new provision will make it more difficult for an LEA to meet its accountability obligation if they are not permitted to provide the special education and related services designed to assist a child in meeting state instructional standards.

### **§300.177 States' Sovereign Immunity and Positive Efforts To Employ and Advance Qualified Individuals With Disabilities**

**CEC Recommendation:** *Retain the proposed language* at §300.177 that requires each recipient of assistance under IDEA Part B to make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B.

**Rationale:** CEC strongly supports this language and notes that it is consistent with the findings and purposes of IDEA 2004, in particular, "... our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." (Sec. 601(c)(1)).

### **§300.512 Representation by Non-Attorneys in Due Process Hearings**

**CEC Recommendation:** *Delete the proposed additional language* in §300.512 that would require States to determine the extent to which parents would have the right to be represented by non-attorneys at due process hearings in accordance with State law.

**Rationale:** CEC opposes this additional language. CEC is not aware of any data to suggest that silence in the current regulation is creating a problem for parents or public agencies. Without available data to support this change, this matter should be addressed in the next reauthorization of IDEA.

Furthermore, some States currently may be silent on this issue. In those instances, this new provision would create an unnecessary burden to amend State law.

CEC disagrees with the Department's position as stated in the NPRM that "We believe alerting parents that State laws affect whether they can be represented in a due process hearing by a non-attorney advocate should reduce future litigation of this issue." CEC is not aware of any data to support this conclusion.

### **§300.600, 300.602, and 300.606 State Monitoring, Technical Assistance, and Enforcement**

**CEC Recommendation:** *Retain the proposed language* at §300.600, §300.602, and §300.606 that:

- Adds language requiring States to make annual determinations about the performance of each LEA;
- Adds a new subsection that requires States to ensure that when it identifies noncompliance by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the noncompliance is identified;
- Adds a required timeline for States to report to the public on the performance of each LEA on the targets in the State's performance plan (SPP) no later than 60 days after the State submits the State's annual performance report (APR) to the Secretary;
- Adds additional language to the public reporting requirement specifying that, in addition to the SPP, the APR and local performance reports must be posted on the State's Web site, distributed to the media, and distributed through public agencies; and
- Adds specific actions a State must take to notify the public of any Federal enforcement actions taken against the State including posting on the State's website, distributing to the media and through public agencies.

**Rationale:** In supporting these changes, CEC notes that these are based on either IDEA 2004 statutory provisions or longstanding OSEP policy currently being implementing by States. Furthermore, timely and adequate public reporting of IDEA accountability measures is good public policy. It parallels such requirements in ESEA. These changes are consistent with the primary focus of monitoring in IDEA – “improving educational results and functional outcomes for all children with disabilities; and ensuring that States meet the program requirements, under this part [Part B], with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.”

### **§300.705, §300.815-817 Allocation of Funds Under Section 611 and 619 of the IDEA to LEAs That Are Not Serving Any Children With Disabilities**

**CEC Recommendation:** *Delete the proposed language* at §300.705, §300.815-817 that would distribute §611 and §619 Part B funds to LEAs, including public charter schools that operate as LEAs, even if they are not currently serving any children with disabilities.

**Rationale:** CEC strongly opposes these provisions. These would result in taking already limited Federal funds from LEAs and public charter schools that are currently serving children with disabilities and give it to LEAs and public charter schools that are not currently serving any children with disabilities. The Department has not provided adequate rationale to support this significant change.

In addition, these changes would place numerous unnecessary administrative burdens on State and local funding systems. For example, States would be required to revise state funding processes including procedures for timely reallocation of funds while ensuring Federal funds do not expire. In addition, any reallocation of funds creates significant accounting burdens at both the State and local level.