



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

July 28, 2008

Mr. Tracy R. Justesen
U.S. Department of Education
400 Maryland Avenue S.W.
Room 5107
Potomac Center Plaza
Washington, D.C. 20202-2600

RE: ED-2008-OSERS-0005-0001

Dear Mr. Justesen:

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 nonprofit organization of attorneys, lay advocates, and parents 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 non-disabled peers to the maximum extent possible. The Education Department's regulations must ensure that all of the rights given to children by the IDEA are protected. The regulations must preserve the strong voice and role parents play in their children's lives, including advocating for their children with the assistance of counsel and advocates as necessary. They must preserve the strong procedural safeguards in Section 615. To do this parents need representation and parents need information.

Therefore, as explained in detail below, COPAA strongly urges the Department to withdraw the proposed regulation that would allow states to decide if non-attorneys can represent parents in due process hearings. This proposed regulation not only reverses the Department's long held position but does so without any indication that Congress disapproves that position much less clear and explicit direction from Congress requiring its reversal.

With parental knowledge and participation, COPAA supports the right of parents to choose to withdraw consent for provision of services and therefore supports the Department's proposed changes to 34 C.F.R. § 300.300. However, our support of this change is contingent on the Department issuing regulations that ensure that every parent of every child is fully informed of his or her rights and of all of the consequences of withdrawing consent for services. In addition, the Department must make totally clear that withdrawal of consent to provide services by parents in no way changes public agencies' duties under the "child find" provision of IDEA.

COPAA also supports the Department's proposal regarding preservation of records. However, it is important for the Department to make clear that public agencies are required to maintain those records, subject to any rights parents have under the Family Education Rights and Privacy Act (FERPA) and IDEA.

COPAA strongly opposes what amounts to departmental dictum regarding the effect on withdrawal of consent on the rights of students with disabilities in discipline proceedings. Parental withdrawal of consent does not change the fact that a public agency had knowledge that the child was a child with a disability. If the Department wishes to change the rules in this regard, the Department should propose a rule change, not issue dictum in the preamble to the proposed regulations. And if a regulation is proposed, it must be subject to notice and comment.

COPAA supports the Department's proposals requiring public agencies to hire people with disabilities, but points out this proposal should cover Part C as well as Part B, as well as the proposals to enhance monitoring and enforcement by state education agencies and timelines for and public availability of reports.

Thank you for considering COPAA's comments. Please feel free to contact us if COPAA may be of additional assistance or provide additional information.

Sincerely,

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COPAA Government Relations Committee Chair

Denise Marshall
Executive Director, COPAA

**Council of Parent Attorneys and Advocates, Inc. (COPAA)
Comments on Notice of Proposed Rule Making**

ED-2008-OSERS-0005-0001

34 C.F.R. § 300.9

The proposed regulation would provide that public agencies would not be required to amend a child's education records to remove references to the child's receipt of special education and related services when the child's parent withdraws consent.

Recommendation: The regulation should be mandatory and the word "parents" should be changed to "parent."

Rationale: COPAA agrees with the apparent intent of the proposed regulation but believes the wording may not achieve its purpose. As proposed the regulation would state that 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" (Emphasis added.) As such public agencies would appear to be allowed to amend the child's records or remove information at their sole discretion whether that is in all cases or selectively.

COPAA recommends that the language be changed to require public agencies to maintain these records. This is important because parents may decide to provide consent in the future, in which case, as the Department correctly observes, "a public agency would again have an obligation to make FAPE available to the child," 73 Fed. Reg. at 27692 (Col. 1). At such point, old records may provide useful information which, if not preserved, would have to be obtained again from any number of sources. The time and expense required to find and reproduce these records would not be in the best interests of the child or parent. Where parents lack the means to obtain copies, retrieval and reproduction might not be possible.

In addition, in proposing the change to Section 300.9, the Department notes the interest public agencies have in retaining accurate student records. One reason for such agencies to keep these records is that they provide information about a child that may be relevant to his or her future behavior, including behavior subject to discipline. A public agency's records of a child's receipt of special education and related services evinces the public agency's knowledge of the child's disability; this information is critical to the child's due process protections should the child violate the applicable code of student conduct. Public agencies cannot be allowed to claim ignorance of a disability manifest in their own records or to destroy records containing such evidence and thereby claim ignorance.

COPAA also notes the use of the plural "parents" in the proposed new subsection as compared to the use of the singular parent in the current regulation. To avoid confusion, the singular form should be used. . This is also necessary because the word "parent" has a particular meaning under the IDEA, and because both FERPA and IDEA give rights to each individual parent, which can take on significance in situations when parents are divorced.

34 C.F.R. § 300.300

The proposed regulation would allow parents to withdraw consent to provision of services to their children and hold public agencies harmless for not providing FAPE just as they are held harmless if parents initially withhold consent to provide special education and related services.

Recommendation: COPAA supports the parent's right to withdraw consent. However, the regulation should only become final if (1) regulations are enacted that ensure that all parental decisions are fully informed and voluntary; and (2) parents have the right to mediation. Without such protections the rights of children to FAPE and those of parents to participate in decisions regarding provision of FAPE to children are at risk.

COPAA believes that mediation could be useful and would protect the child's rights to FAPE; mediation should be an option for parents to refuse at their sole discretion. Public agencies that are providing special education and related services to children with disabilities should be able to propose to parents that mediation or some other form of informal, non-binding procedure be used to work through problems that have caused parents to seek to withdraw consent. Public agencies have made the determination that these services are needed and have an interest in serving children as they have previously found necessary. But parents must be able to reject the offer for mediation if that is their choice.

Once parents have provided consent for provision of special education and related services for their children they must be advised of the consequences of their withdrawal of consent. This advice must be given orally, in writing, and in a manner that fully and appropriately accounts for any language, hearing, sight or other circumstances particular to, and/or that might interfere with, the parents' ability to understand.

The proposed regulation should also be amended to include language from the preamble/comments that if parents change their minds, LEAs' duties to provide FAPE recommences.

Moreover, it should be made clear that the regulation allowing parents to withdraw consent does not in any way relieve public agencies of their child find obligations or obligations under Section 504, Title I or other provisions of law.

To accomplish the foregoing proposed section 300.300(b)(4) should be amended to read as follows: (recommended language in bold)

(4)(a) Parents may revoke consent to provision of special education and related services at anytime provided that (i) The public agency first fully informs the parent, orally (in person except where the parent declines to appear) and in writing, in the parent's native language, or other mode of communication, that (A) if the parent withdraws consent for services, his/her child will no longer receive special education and related services, (B) the special education and related services the child will no longer receive are expressly and clearly described to the parent; (C) the parent may provide consent for services at any time in the future and that upon giving such consent the public agency would again have the obligation to provide FAPE; (D) any rights the child has under the Rehabilitation Act, Title I or other statutes will not be affected; (E) all of the student's educational records, including records pertaining to special education and related services shall be retained in school files, subject

to all rights available under the IDEA and Family Education Rights and Privacy Act, including the right to review records and seek removal of certain records; (ii) the public agency first fully informs the parent, orally and in writing, in the parent's native language, or other mode of communication, that the parent has a right to institute a due process hearing and/or mediation; (iii) that notice pursuant to section 300.504 is provided to the parent; (iv) withdrawal of consent is in writing unless the parent cannot provide written withdrawal, in the parent's native language, or other mode of communication; (v) Parents are advised that the school district would like to have an impartial mediator paid for by the school district attempt to resolve the problem that led to the parent's decision to withdraw consent, but that such mediation cannot and will not occur unless the parent gives willing and informed consent to such mediation; (vi) (a) the school district includes in the student's folder contemporaneous notes documenting all of the foregoing as well as the parents' written statement, and a copy is provided to the parent and Superintendent of schools along with certification that all required procedures regarding withdrawal were complied with by school personnel and (b) the Superintendent maintains a file of all such withdrawals; (b) and maintains a written record of such communications to the parent If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent for the continued provision of special education and related services, the public agency —

- (i) May not continue to provide special education and related services to the child;
- (ii) (a) May not use the **due process** procedures ~~in subpart E of this part (including the mediation procedures under S 300.506 or the due process procedures under §§ 300.507 through 300.516~~ in order to obtain agreement or a ruling that the services may be provided to the child; **(b) may seek to use mediation to obtain agreement to continued provision of services if the parents knowingly and voluntarily agree in writing to use of those procedures.**
- (iii) Will not be considered to be in violation of the requirement to make available FAPE to the child because of the failure to provide the child with further special education and related services; and
- (iv) Is not required to convene and IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for further provision of special education and related services.

It is also important that this provision not be misused by school districts to encourage parents to withdraw their children from special education and place them in other programs. Consequently, the regulations should be amended to explicitly state that school district personnel may not encourage parents to remove their children from special education. The regulations should further implement appropriate monitoring mechanisms to require LEAs to track the number of children whose parents withdraw consent in each LEA (including names, identifying information, and school name) and report that information to the SEA each year. The number of children whose parents revoke consent in each LEA each year must be made available to the public and reported to OSEP through the regular monitoring process.

The regulations should also state that the placement of a child in private school when FAPE is an issue, pursuant to 34 C.F.R. §300.148 and 20 U.S.C. 1412(a)(10)(C), does not constitute withdrawal of consent under this provision. The IDEA specifically gives parents the right to place their child in private school when the school district offers an IEP that fails to provide the minimally-required FAPE, and the regulation may not be used to prevent parents from doing so. The regulations should provide that school districts may not--when parents invoke their statutory

rights to a unilateral placement when FAPE is at issue--request that parents withdraw consent for special education under this new regulation.

34 C.F.R. § 300.534(c)

This section currently provides that public agencies are not deemed to have knowledge of student's disabilities when parents refuse initial provision of services. In the preamble to the proposed regulations the Department states that the same would apply if parents withdraw consent previously given after services have begun.

Recommendation: COPAA strongly urges the Department to withdraw this interpretation.

Rationale: Generally a child not yet determined to be eligible for special education is entitled to the same protection in disciplinary proceedings as children with disabilities "if the public agency had knowledge ... that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." 34 CFR § 300.534(a). Subsection (b) explains when a public agency must be deemed to have knowledge but subsection (c) sets out several exceptions. The latter subsection provides in part that the agency is not deemed to have knowledge if "the parent of the child --- has refused services under this part."

There are several reasons why the interpretation set out in the preamble to the current NPRM is incorrect.

First, current section 300.534, consistent with 20 U.S.C. § 1415(k)(5) expressly applies to children not yet determined to be eligible for special education and related services who have engaged in conduct in violation of conduct codes. Clearly the exceptions to the rule can only apply to this same group of children. Therefore, by its terms the rule does not apply to children the LEA has determined to be eligible for special education and related services. The Department therefore is incorrect in stating that these children could be disciplined as any other child and as if the LEA had never determined that the child was a child with a disability.

Second, the withdrawal of consent to provide services does not change the fact that the LEA knew the child had a disability, knew what the disability was, drafted an IEP to address the child's unique needs, which may even have included emotional and/or behavioral goals or plans, and implemented that IEP prior to the parent determining that s/he wished to withdraw consent. Indeed, the Department in the current NPRM wisely proposes to require states to maintain in students' files all information pertaining to special education. Surely if the information is maintained, the LEA knows about the disability.

Moreover, consent may be withdrawn for any number of reasons, including the parents' dissatisfaction with the way the IEP is being implemented and/or the inadequacy of the IEP. Parents lacking resources may not be able to exercise their right to due process and, unable to exercise that right, withdraw their children from special education because they feel their child is worse off in special education than they believe is inadequate than they are in regular education. But this does not mean that the LEA was without knowledge of the underlying disability or certain behaviors that are manifestations of that disability.

If the Department continues to take the position articulated in the preamble, notice provided to parents regarding the effects of their decision to withdraw consent must state clearly and emphasize that withdrawal of consent means that if their child is disciplined he or she will be treated as if the LEA never knew or suspected that the child had a disability, and that discipline rules applicable to children who do not have disabilities will apply.

Moreover, it is important to not that Section 504 of the Rehabilitation Act continues to protect children with disabilities from discrimination on the basis of their disability.

§300.177 States' sovereign immunity and positive efforts to employ and advance qualified individuals with disabilities.

The new regulation would require public agencies to take positive steps to hire and advance in employment qualified persons with disabilities.

Recommendation: COPAA enthusiastically supports this rule.

Rationale: While COPAA supports the proposed regulation, we recommend that it be amended to apply to Part C as well as Part B.

The citation of authority notes that the proposed rule is based, in part, on 20 U.S.C § 1405. Section 1405 was added by the 2004 amendments and contains language similar to that of the proposed regulation. However, the statutory requires the Secretary to “ensure that each recipient of assistance under this chapter makes positive efforts to employ and advance in employment qualified individuals with disabilities in programs assisted under this chapter.”

The “chapter” referenced is Chapter 33 of the Act which includes subchapters covering Part C children as well as Part B children. Therefore, Part C programs must also be held to the requirements of Section 1405.

Further, COPAA urges the Department to clarify the term “positive efforts.” In order for the 2004 amendment to have the desired effect in ensuring that people with disabilities are employed and promoted, it is important for public agencies to be provided guidance.

34 C.F.R. § 300.512 Hearing rights.

The Department proposes to add a new provision to current Section 300.512 that would allow states to decide whether parents have the right to be represented by non-attorneys at due process hearings.”

Recommendation: COPAA strongly opposes this regulation and urges that it be withdrawn.

Rationale: The new provision is unauthorized by law, unnecessarily changes longstanding Departmental policy and will inflict grievous harm on parents.

COPAA strongly opposes the proposed regulation for the following reasons:

First, the Department’s longstanding policy allowing non-attorney representation of parents in

due process hearings should not be changed because it advances parental participation in the IDEA process. It has been noted on more than one occasion that many parents cannot exercise the due process rights set out in the IDEA because they cannot afford lawyers. E.g., “Back to School on Civil Rights” (National Council on Disability, January 2001), 7, 12. There simply are not enough lawyers who practice in this area who represent parents or represent parents at rates they can afford. In contrast, school districts use taxpayer dollars to hire in house and outside counsel, expending millions of dollars yearly, to hire lawyers to oppose parents in due process hearings. Non-attorney advocates provide parents with an alternative that is more affordable.

Second, 20 U.S.C. § 1406(a) limits the Secretary to issuing “regulations under this chapter only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter.” There is no specific requirement of the IDEA prohibiting representation at hearings by persons with special knowledge or training regarding the needs of children with disabilities who are not attorneys, as the Department notes. Instead, the only relevant provision of the Act treats attorneys and non-attorneys equally, giving “any party to a hearing” under IDEA a number of rights, including but not limited to, “the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.” Under this provision, it can hardly be suggested that the Department has the power to delegate to states the authority to prevent attorney representation. Since the same provision covers non-attorneys, the Department similarly lacks authority to delegate to states any right or authority to limit non-attorney representation.

Third, the proposed regulation would discriminate against parents by treating them differently from public agencies. Under the proposal, states could prohibit non-attorneys from representing parents in due process hearings but continue to allow public agencies to use non-attorneys to represent their interests, as is done in at least two jurisdictions. Such discrimination is unfair to parents.

Fourth, the Department notes that its longstanding policy of allowing parents to be represented by non-attorneys was first articulated by its General Counsel in 1981. Since then, the IDEA has been amended at least four times, in 1986, 1990, 1997, and 2004. In fact, the amendments finalized in 2004 were discussed for several years after the *Arons* decision. In none of those amendments did Congress take the opportunity to reverse the Department’s longstanding policy, including in the 2004 amendments made after the *Arons* decision. Had Congress disagreed with the Department’s longstanding policy it surely would have used one of these four occasions to reverse it. Had Congress wished to codify *Arons* nationally, it would have done so in 2004. Congressional inaction under these circumstances for this long a period suggests Congress’ acquiescence to the Department’s policy. The Department has no authority to change the will of Congress, much less to delegate this decision to every state.

Finally, this proposed rule is inconsistent with the Department’s desire to improve monitoring of LEAs. This improved monitoring is needed because LEAs do not always comply with the law. For the same reason, parents need access to representation in individual cases.

34 C.F.R. § 300.600 State monitoring and enforcement

The proposed amendment would clarify and emphasize the monitoring and corrective actions states are required to take to ensure that local educational agencies comply with the IDEA. It would also mandate that LEAs correct and states verify correction of non-complying policies, procedures, and practices within one year.

Recommendation: COPAA agrees with the Department's assertion "that timely correction of noncompliance is critical to ensuring that children with disabilities receive a free appropriate education" and that "[a]llowing noncompliance to continue can negatively impact the education of great numbers of children with disabilities." COPAA also agrees that one year is more than enough time for LEAs to correct, and for SEAs to verify correction of, deficiencies.

In amending this regulation, the Department recognizes at once that LEAs do not always comply with the law and that stronger enforcement rules are needed, while emphasizing that "allowing noncompliance to continue can negatively impact the education of great numbers of children with disabilities." Although the Department is optimistic that needed changes can be accomplished in a year's time, history and current reality show that this is not always possible. When it is not possible, when state enforcement fails, children are negatively impacted, indeed, the negative impact is ongoing. In those situations parents are, as the National Council on Disability recognized in 2000, the primary enforcers of the law. While it is important to strengthen section 300.600, it is inconsistent for the Department to simultaneously propose to weaken the ability of parents to enforce the law for their children by allowing states to decide if parents may bring non-attorney advocates to represent them at hearings. To the contrary, as we said earlier, states must be required to allow non-attorney advocates at these hearings.

34 C.F.R. §300.602 State use of targets and reporting

The proposed amendment would specify reports that must be made available to the public and require that states make the reports available within 60 days of filing its annual performance report with the Department.

Recommendation and Rationale:

COPAA supports the proposed change.

We note that the proposed regulation refers to the State's website as opposed to the SEA's website noted in the current regulation. Where SEAs have websites separate from State government websites, the public would be expected to look to the SEA site for IDEA information. COPAA therefore recommends that this be clarified.

COPAA agrees that it is in the interest of "transparency and public accountability" for SEAs to report to the public on enforcement actions. 73 Fed. Reg. at 27694. For that reason we urge the Department to require SEAs to report to the public regarding any enforcement actions taken under Section 300.604 against LEAs. Doing so would be consistent with publication of enforcement actions against the State by the Secretary of Education.