



Statewide Parent Advocacy Network

35 Halsey Street, Newark, NJ 07102

(973) 642-8100 x 105

www.spannj.org

Empowered Families: Educated, Engaged, Effective!

PARENT CENTER GUIDE TO MAJOR REVISIONS TO IDEA REGULATIONS January, 2009

© Statewide Parent Advocacy Network 2008

Contact Diana Autin at 973-642-8100 x 105 or Diana.autin@spannj.org for permission to reprint.

Our Mission: To empower families and inform and involve professionals and other individuals interested in the healthy development and educational rights of children, to enable all children to become fully participating and contributing members of our communities and society.

**SUMMARY OF MAJOR REVISIONS TO REGULATIONS OF THE
INDIVIDUALS WITH DISABILITIES EDUCATION ACT
December, 2008**

On December 1, 2008, the U.S. Department of Education issued regulations to supplement the Individuals with Disabilities Education Act (IDEA) final regulations published on August 14, 2006. These supplemental regulations address several issues of major importance to families and to parent centers. This mini-guide provides an overview of the three major areas of change that will most impact families and parent centers; the opportunities and challenges they provide for families; and recommendations regarding parent center roles in the process of implementation of the IDEA regulations. The major areas of change impacting families and parent centers are:

- Parental revocation of consent and withdrawal from special education (300.300(b)(4));
- State authority to govern representation by non-attorneys at due process hearings (300.512(a)(1));
- State accountability (timeline to correct noncompliance (300.600(e) & reporting to the public) (300.602(b)(1)(i)).

Parental revocation of consent & withdrawal from special education (300.300(b)(4))

Overview of the regulatory language on withdrawal from special education

Even prior to these supplemental regulations, IDEA allowed for parental revocation of consent and indicated that such revocation did not nullify any previous district actions taken with parental consent. IDEA did not specify whether parents could revoke consent for their child's participation in special education, nor did it specify whether districts could request a hearing to override a parent's withdrawal of consent. It was the U.S. Department of Education's interpretation that, once a child was receiving special education and related services, parents could not unilaterally withdraw their child from receipt of such services. The Department's previous interpretation held that if parents no longer wanted their child to receive those services to which they had previously consented, yet the district believed the services were necessary to provide a free, appropriate public education (FAPE), the district had the obligation to continue to provide those services. If the parent wanted to withdraw their child from special education, they had to use informal means of dispute resolution or their procedural safeguards such as mediation or a due process hearing.

The revised IDEA regulations now specify that, "If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing 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, but must provide prior written notice in accordance with Section 300.503 before ceasing the provision of special education and related services; (ii) may not use the procedures in subpart E of this part (including the mediation procedures...or the due process procedures...) in order to obtain agreement or a ruling that the services may be provided to the child; (iii) will not be considered to be in violation of the requirement to make FAPE available 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 an IEP team meeting or develop an IEP...for the child for further provision of special education and related services.” The regulations also provide in Section 300.9, Consent, that “(3) If the parent revokes consent in writing for their child’s receipt of special education services after the child is initially provided special education and related services, the public agency¹ 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.”²

In the Analysis of Comments and Changes, the U.S. Department of Education notes that revocation of consent is not retroactive and does not negate an action that occurred after consent was given and before the consent was revoked. While the regulations do not require the district to offer to meet with the parent, the Analysis of Comments and Changes indicate that “a State may choose to establish additional procedures for implementing 300.300(b)(4), such as requiring a public agency to meet with parents to discuss concerns for their child’s education. However, the State must ensure that any additional procedures are voluntary for the parents, do not delay or deny the discontinuation of special education and related services, and are otherwise consistent with the requirements under Part B of the Act and its implementing regulations. For example, while a public agency may inquire as to why a parent is revoking consent for special education and related services, a public agency may not require a parent to provide an explanation, either orally or in writing, prior to ceasing the provision of special education and related services.

The Analysis of Comments and Changes notes that, if parents withdraw consent for special education and their child is subsequently involved in disciplinary action, their child’s prior receipt of special education services does not indicate that the district knew or should have known of their child’s special education needs and thus the child is not entitled to IDEA special education protections in the disciplinary process. That is because, “When a parent revokes consent for special education and related services..., the parent has refused services...; therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the Act’s discipline protections.” The Analysis also notes that “these regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA and those of Section 504 and the ADA” (Americans with Disabilities Act). Thus, depending on the circumstances, a child whose parents withdrew consent for special education and related services may still be entitled to disciplinary protections under Section 504.

What are the opportunities and challenges for parents?

Opportunities: Under the prior regulations, in most states, once a parent signed consent for implementation of the initial IEP, districts no longer had to seek parental consent for changes in the IEP as long as they provided prior written notice and an opportunity for the parent to discuss the proposed changes at an IEP meeting. At that point, the only formal way parents could stop the changes from being implemented was by requesting and prevailing at either mediation or a due process hearing.

¹ “Public agency” is a school, school district (Local educational agency), or SEA (state educational agency).

² However, the Analysis of Comments and Changes notes that this provision does not affect the rights of parents to request amendments to information in education records that is inaccurate or misleading, or violates the child’s privacy or other rights. See IDEA Sections 300.618-300.621.

The new regulations change this dynamic. If districts do not agree with the parents' IEP requests, parents now have the right to inform the district that they will withdraw consent for any special education services for their child. This means that districts will still be required to educate the child in general education, will still be held accountable for that child's success or failure on No Child Left Behind tests, and may lose state special education funding for that child as well as the ability to provide any testing accommodations (unless the child is then determined eligible for Section 504 services).³ The district may still be required to provide special services under Section 504 if the child has a disability (a child who was eligible for special education prior to parental revocation of consent likely meets the eligibility criteria for Section 504), but will not receive any additional special education funds to cover those services because Section 504 and the Americans with Disabilities Act (ADA) is not accompanied by extra funding.

This new provision of the IDEA regulations may prove most useful to parents who are seeking to protect their children's rights, increase their involvement in their children's education, and have greater choices in how their children are educated. For example, parents of African-American children and other children of color who are disproportionately likely to be placed in segregated, self-contained settings without access to the general curriculum may want more inclusive placements for their children. Parents in this situation may prefer to have their child in a general education classroom without special education services because their child will have greater access to the general curriculum. This choice can serve as the starting point for parents and districts to negotiate more inclusive placements and the needed services in those settings.⁴

Challenges: There may be children with disabilities that districts would prefer not be classified and not to be receiving special education services that the district may not want to pay for, but the district does not want to be held liable for refusing to provide any special education. In some cases, some districts may choose to encourage parents to withdraw their children from special education so that they will no longer be held liable for that refusal to provide services. In other situations, there may be children with mental health and/or behavioral challenges that districts would prefer to be able to discipline without special education protections, and thus, again, some districts may encourage families to withdraw consent for special education services so that they do not need to follow those protections. Another major concern is whether districts will use parental withdrawal of consent for special education as an excuse to charge parents with educational neglect (which we know already happens in some districts when parents refuse to consent to initial evaluation and/or IEP, even though it is not appropriate to do so. Districts can use a due process hearing to challenge a parent's refusal to consent to an initial evaluation, and mere refusal to consent to an IEP is not in and of itself evidence of educational neglect).

What are the roles for parent centers with individual families and in state level advocacy?

Advocacy with individual families: The roles of parent centers with regard to advocacy and training for individual families include:

³ IDEA funding is no longer solely a per pupil allocation, but most state special education funding formulas provide extra funding to districts based on the number of special education students.

⁴ It will probably not be as useful for parents seeking more restrictive (and often more expensive) out of district settings, because the parent withdrawing their child from special education will likely be less expensive for the district than placing their child in an out of district program.

- Developing and providing training on the new consent revocation provisions, what happens if consent is revoked (such as the fact that the district will no longer be liable for providing FAPE or special education discipline protections, as well as the possibility of their child being eligible for Section 504 services), alternatives to revoking consent if you disagree with the district (such as mediation and due process), procedural safeguards (including the fact that parents must provide written revocation of consent and the district must provide prior written notice, including information on the ramifications of withdrawing consent such as the fact that their child will no longer receive special education services, and parental procedural safeguards), and the fact that, at any time after revocation of consent and withdrawal of their child from special education, the parent may request a new evaluation and start the process again (and the district would be required to get consent for the evaluation and for the new IEP which would be an “initial” IEP);
- Developing and providing written resource materials including the information outlined above and dissemination to families through newsletters, the website, and accompanying technical assistance;
- Providing telephone and in-person technical assistance to families; and
- Working directly with families when districts threaten to, or actually contact, the state’s child welfare/ child protection system to report them for educational neglect.

State-level advocacy: The roles of parent centers in state level advocacy include:

- Advocating for state code or statutory provisions requiring that districts offer parents a meeting to discuss their revocation of consent and its consequences (and in the long term, advocating for provisions requiring prior written consent for all IEPs, not just the initial IEP);
- Working with the state Department of Education to develop informational materials for families and professionals on these issues, as well as model prior written notice materials that include all of the components outlined above and model letters for parents to use to withdraw consent and to request a new evaluation, and encouraging the state to disseminate the materials to all districts, professional organizations, and parent advocacy groups and requiring the use of the model prior written notice materials to ensure that they contain all components, including the fact that children with disabilities whose parents withdraw consent for any special education services are likely still eligible for Section 504 services and that withdrawal of consent for special education and related services does not constitute refusal to consent to Section 504 services (please note that Section 504 does not require parental consent and does require districts to identify, evaluate, and serve all eligible children);
- Working with the state Department of Education and the state’s child welfare/child protection system to get them to issue guidance to schools/districts and child welfare/child protection workers and agencies that parental withdrawal of consent for special education (and refusal to consent to initial IEP as well) is not in and of itself evidence of neglect; and
- Collecting and analyzing data from families about how districts are using the new provisions, identifying barriers or inappropriate actions by districts, and working with families to develop and file requests for complaint investigation with the state Department of Education when districts are abusing the process (and possibly raising these concerns with legislators as well).

State authority to govern representation by non-attorneys at due process hearings (300.512)

Overview of the regulatory language on representation by non-attorneys at hearings

Prior to the new regulations, the U.S. Department of Education had long taken the position that parents of children receiving special education services had the right to be represented by non-attorneys in due process/impartial hearings, despite several state court decisions (generally brought as a result of challenges by State Bar associations) that such representation by non-attorneys amounted to practicing law without a license. The new regulations leave it up to each state to govern whether children with disabilities can be represented by a non-attorney in due process proceedings (what constitutes unlawful “practice of law without a license” is generally a state law or State Bar issue and varies from state to state). The regulations do not address how, in the face of already limited affordable, competent legal resources to represent children in due process hearings, parents will be able to access legal resources when they need representation since it is anticipated that more states will limit representation by non-attorneys at due process hearings under the new regulations. The language still provides that parents have 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,” but adds that “whether parties have the right to be represented by non-attorneys at due process hearings is determined under state law.” (Note that whether districts have the right to be represented by non-attorneys at due process hearings will also be based on state law).

What are the opportunities and challenges for parents?

Opportunities: This regulation doesn’t provide much positive opportunity for parents as it potentially limits their access to representation at impartial hearings by allowing states to require that they be represented by attorneys who may in short supply and too expensive for families to afford. Some parents may be able to persuade attorneys to represent them pro bono or on a contingency fee basis by sharing the information on the new requirement if the state chooses to require parents to be represented by attorneys.

Challenges: There are many significant challenges in the new regulation, including exacerbation of already limited lawyers to represent families and children with disabilities; more families being forced to mortgage their homes or use their life savings (if they have any) to get lawyers to represent them; and reduction in families challenging district decisions even if they strongly disagree with them because they can’t find or afford competent legal representation, and thus fewer children receiving FAPE in LRE.

What are the roles of parent centers with individual families and in state level advocacy?

Individual families: The roles of parent centers with individual families include:

- Providing families with accurate information through training and technical assistance regarding the rules in their state concerning representation by non-attorneys, resources for free or low-cost attorneys, strategies to persuade attorneys to take their cases pro bono or on

a contingency fee basis, and how to represent themselves and their child in a due process hearing if they can't find or afford legal representation;

- Developing and presenting in-depth knowledge and skills-based workshops for families on representing themselves “pro se;” and
- Accompanying parents to hearings when they represent themselves to provide support and technical assistance (not representation if your state prohibits representation by non-attorneys).

State-level advocacy: The roles of parent centers in state level advocacy include:

- If your state does not already have a clear rule prohibiting non-attorneys from representing families in due process hearings, advocate with your state Department of Education/Board of Education, Bar Association, and legislature to prevent such a rule from being established or to pass a law/rule specifically allowing representation by non-attorneys (and if your state allows representation by non-attorneys, advocacy with these entities to maintain that policy);
- If your state already prohibits, or decides to prohibit, representation by non-attorneys in due process hearings, advocate to limit its provisions (for example, providing that, if the parent contacts the state or county Bar association and a qualified attorney cannot be identified within a relatively short period of time to represent the child/family at a free or low-cost or contingency fee basis, the parent is free to be represented by a non-attorney), or to expand available legal representation (for example, working with the Bar association to train lawyers to provide legal representation at free, low-cost, or contingency fee rates, or to set up paralegal or clinical law programs and to authorize paralegals and/or law students, under the supervision of an attorney, to represent families in due process hearings);
- Seek funding or other support to set up training programs to train parents to represent themselves in due process hearings pro se in partnership with Bar Associations, Bar Foundations, Interest on Lawyer Trust Accounts, clinical law programs, your state Department of Education, etc. and to develop and disseminate materials for parents on pro se representation; and
- Work with your state Department of Education or on your own to develop and disseminate informational materials for families on the policy in your state and how families can maximize access to needed legal resources and/or represent themselves pro se in due process hearings.

State accountability (timeline to correct noncompliance 300.600(e) & reporting to the public 300.602(b)(1)(i))

Overview of the regulatory language on state and local accountability

Even prior to the new regulations, states had to demonstrate through their State Performance Plan (SPP) and Annual Performance Report (APR) that they were correcting identified noncompliance as soon as possible but no later than within a year from their identification of the noncompliance.⁵ This language is now in regulations, and it applies to states and districts.

⁵ The U.S. Department of Education is required by IDEA to make determinations on the status of every state each year. States are determined to be a state that “meets requirements,” “needs assistance,” “needs intervention,” or “needs substantial intervention.” Determinations are based on multiple factors, including whether or not the state has identified and corrected noncompliance within the one year timeline.

Although a year is a long time to achieve compliance when the issues concern individual students, such as failure to implement an IEP (i.e., not providing educational or related services on the IEP for a particular student), in these cases the noncompliance should be corrected “as soon as possible.” Thus, if a parent prevails in a due process hearing, or the state finds in a complaint investigation that a child’s rights have been violated and orders corrective action, that the state may not wait a year for the violations to be addressed but instead must correct the noncompliance as soon as possible.

In terms of more systemic noncompliance, in the Comments and Analysis, the Department noted that “[o]ur experience has been that most states can correct noncompliance, including noncompliance that is spread broadly across a system, in less than one year from identification of the noncompliance. For example, States have required the implementation of short-term correction strategies while they are developing and implementing a plan for long-term change to ensure sustained compliance.” The Department also noted that States may enter into Compliance Agreements with the Department to allow a state to continue to receive its Part B funds while working to achieve compliance on long-standing systemic problems within 3 years from the date of the Compliance Agreement.

The regulations also increased the information on local districts that states must report on, but gave states a longer period to report the information. Prior to the new regulations, states had to make information available to the public within 60 days from its submission of the APR to the U.S. Department of Education; the new regulations give states up to 120 days to do so. (Currently the APRs are due on February 1st.) The new regulations add the state’s APR to the list of documents that a state must make available through public means, and specify that the state must make its SPP/APR and its annual reports on the performance of each district on the SPP/APR indicators available to the public by posting the documents on its website and distributing the documents to the media and through public agencies. (States were already required to report to the U.S. Department of Education on the annual performance of the state as a whole in the APR, and to analyze the performance of each district on the SPP/APR targets, and to report annually to the public on the performance of each district in meeting the targets. The new regulations merely add specificity to the means of public reporting.)

What are the opportunities and challenges for parents?

Opportunities: The new regulations put a specific, regulatory timeline on the correction of noncompliance (as soon as possible and in no case later than one year after the State’s identification of the noncompliance), which parents could use to advocate for shorter timelines to correct noncompliance in individual cases. The new regulations could also strengthen the capacity of parents to be aware of the performance of the state and of each district, including their own district, a district to which they are considering moving, etc. by having the APR materials posted on the website and disseminated to the media and through public agencies.

Challenges: The regulatory language allowing states up to a year to correct noncompliance once identified, even for an individual child-specific issue, could be used as an excuse to delay correction of noncompliance in situations where it should be possible for correction to occur much more quickly.

What are the roles of parent centers with individual families and in state level advocacy?

Individual families: The roles of parent centers with individual families include:

- Ensuring that your training and technical assistance staff understand the new regulations and can communicate them effectively to families through staff training and written materials;
- Developing and disseminating information (via newsletters, websites, trainings, publications, technical assistance, press releases, teleconferences, etc.) to families and professionals on:
 - The revised regulations regarding correction of noncompliance and how it should not limit the right of children and parents to have their issues resolved “as soon as possible,” and does not give the state or districts a full year to resolve noncompliance in every instance; and
 - The revised regulations regarding posting of information on the state’s performance and the performance of individual districts so that parents can use that information in advocacy around their own child (including in mediation, due process, and/or complaint investigation), or to make decisions on where to – or not to – move.

State-level advocacy: The roles of parent centers in state level advocacy on this issue include:

- Advocating that your state specify shorter timelines for correction of noncompliance for individual student-specific noncompliance as opposed to the vague “as soon as possible” and the overly long year timeline, and to include in written materials and training for parents and professionals (hopefully developed in collaboration with the parent center or at least reviewed and revised by the parent center prior to finalization and dissemination) clarification that the one-year timeline for correction of noncompliance is the outside timeline and that noncompliance must be corrected “as soon as possible;” and
- Requesting that the state include their parent center as one of the organizations that they will use to disseminate the information on state and individual district performance;
- Reviewing the data posted on the state’s web page, analyzing it, summarizing it in parent-friendly, easy to understand format, and disseminating this information to parents, advocates, policymakers including legislators, etc. to use in policy advocacy campaigns to improve services and supports for children with disabilities and their families; and
- Posting information regarding state performance data on your website with a discussion of why this information is important to children and families, and including a direct link to state performance data.

Conclusion

Parent centers are the most valuable resource for families as they seek to understand, negotiate, and ensure that their child benefits from, IDEA and state special education provisions. If you have any additional ideas regarding how to strengthen the opportunities and address the challenges of the new IDEA regulations, please share them with us so that all parent centers – and the families we serve – will benefit. For more information or to share suggestions, please contact Diana Autin, Executive Co-Director of the Statewide Parent Advocacy Network, at 973-642-8100 x 105 or Diana.autin@spannj.org.