

July 28, 2008

Mr. Tracy R. Justesen
Assistant Secretary for Special Education and Rehabilitative Services
Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Avenue, SW, Room 5107
Potomac Center Plaza
Washington, DC 20202-2600



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**Re: *Docket ID ED-2008-OSERS-0005
National School Boards Association Comments on Proposed
Amendments to 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***

Office of Advocacy

- *Barbara L. Bolas
President*
- *Anne L. Bryant
Executive Director*
- *Michael A. Resnick
Associate
Executive Director*

Dear Mr. Justesen:

The National School Boards Association (NSBA), representing over 95,000 local school board members through our state school boards associations across the nation, is pleased to offer comments on the Proposed Amendments to 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.

Generally, NSBA believes that the proposed amendments have been responsive to the issues raised by our local school boards across the nation. In our view, the Department has proposed reasonable amendments related to LEA eligibility for grants in the absence of any enrolled students with disabilities, base payment adjustments, allocations and re-allocations of funds, redistribution of funds associated with grants, state authority to reallocate funds, and reporting requirements. Additionally, we are pleased that concerns regarding the administrative burdens that could result from subsequent decisions to redistribute funds have been addressed by establishing a date of the first July 1 following the decision.

However, we have identified several concerns that we believe must be addressed:

1. Parental Revocation of Consent for Special Education Services - § 300.300(b)

The proposed amendments would allow parents to unilaterally withdraw their children from continued receipt of special education services. LEAs would be prohibited to use procedural safeguards and due process procedures to challenge the parent's refusal to consent to further services. In such cases, the LEA would not be considered in violation on FAPE and would not have to remove any references of special services received by the student from the record.

Comment

As drafted, parents could subsequently request that the services be reinstated, and those costs could potentially be far greater to the LEA, since the condition of the student leading to the LEA recommendation for such services may have worsened. The result, unfortunately, is that

the LEA would be faced with even greater operational and fiscal challenges to ensure that the student is afforded FAPE, including the reconvening of IEP Teams.

NSBA understands the rights of parents to make the decision, but is concerned that the parent's unilateral action might not necessarily be in the best interest of the student educationally. Essentially, this proposal could lead to a denial of FAPE for some children who still need special services and put parental preference above the students' right to FAPE. The current system ensures no one person can make a unilateral decision about the students' education and provides for a neutral third party – the hearing officer – to make a ruling when parents and schools disagree. This practice should continue.

In addition, NCLB holds schools accountable for producing positive outcomes for students who in this case might not receive the needed services to achieve desirable results because of the parent's decision to discontinue special education services. What is the implication of the proposed regulations on students and schools in the context of NCLB accountability? NSBA urges the Department to revise the proposed amendments to allow LEAs to challenge a parent's unilateral decision (through mediation, or due process hearing) to discontinue services if the LEA believes further services are needed to help the students achieve positive academic outcomes.

2. Hiring and Advancing of Individuals with Disabilities - § 300.177

The proposed amendments would add a new section requiring states and LEAs receiving IDEA Part B funding to “make positive efforts to employ and advance in employment, qualified individuals with disabilities” in programs funded by the act.

Comment

NSBA is unclear as to why this proposed regulation would be needed and what purpose it would serve. Statutory language already requires the Department to ensure that each recipient of assistance under IDEA to “make positive efforts to employ, and advance in employments, qualified individuals with disabilities.” NSBA does not believe this same language is necessary in the regulations and therefore recommends that it be eliminated.

3. Representation by Non-attorneys in Due Process Hearing - § 300.512

The proposed amendments would change the Department's earlier interpretation regarding representation of parents by non-attorneys in due process hearings to specify that a parent's right to be represented by non-attorneys at due process hearings is determined by state law. The proposed change, however, would not prevent parents from representing themselves in due process hearings or during court proceedings under the IDEA, as allowed by the Supreme Court ruling in *Winkelman v. Parma City School District*.

Comment

NSBA supports the proposed amendments to the extent that it may limit non-attorneys from acting in the capacity of legal representative under the IDEA. Because NSBA continues to believe that allowing non-attorneys to act in a representational capacity under the IDEA does not best serve the interests of public schools or children with disabilities, we also urge the

Department to clarify that nothing in the IDEA authorizes parents to be represented by non-attorneys if state law is silent on the issue.

4. State Determinations about LEA Performance and State Enforcement - § 300.600(e)

The proposed amendments would require states to monitor LEA compliance more closely. When a state identifies noncompliance with the requirements of Part B by its LEAs, the noncompliance is corrected as soon as possible and in no case, later than one year after the state's identification.

Comment

NSBA objects to the proposed one-year timeline to correct noncompliance without any exception. There are noncompliance issues particularly regarding personnel or systemic changes that could take more than a year to correct even with good faith efforts from LEAs and states. We recommend that the Secretary be given the authority to waive the one-year timeline and allow LEAs and states more time to address noncompliance, if warranted.

5. Timeframe for Public Reporting About LEA Performance - § 300.602(b)(2)

The proposed amendments would require states to report to the public on the performance on each LEA on the targets in the state's performance plan no later than 60 days after the state submits its annual performance report to the Secretary.

Comment

While the 60-day reporting requirement may appear reasonable, there may be special circumstances within a particular state that would preclude states from meeting this requirement at various times. Therefore, NSBA recommends that the Secretary be authorized to grant waivers to the 60-day timeframe in situations where LEAs and states are unable to meet this reporting requirement.

6. Allocation of Funds under Section 611 of the IDEA to LEAs That Are Not Serving Any Children with Disabilities

a) Subgrants to LEAs - § 300.705(a)

The proposed amendments would add language to clarify that states are required to make a subgrant under section 611(f) to eligible LEAs, *including public charter schools that operate as LEAs*, even if an LEA is not serving any children with disabilities. This is to ensure that LEAs have funds to conduct Child Find activities or to serve children with disabilities who subsequently enroll or are identified during the year. If the state determines that a newly-created LEA is not serving any children with disabilities, the newly created LEA would not be entitled to a base payment.

Comment

NSBA supports clarification that LEAs including those that do not serve any students with disabilities are entitled to a subgrant. **However, eligibility for public charter schools operating as LEAs should be made based on state law and its regulations governing charter schools, not federal law.** In our view, the current regulation regarding public charter

schools operating as LEAs is not consistent with the current law, and therefore should be eliminated.

Further, it is not clear whether a newly created LEA that does not serve any students with disabilities in the first year would be eligible for some Part B funds. NSBA urges the Department to ensure that a newly created LEA not serving any children with disabilities in the first year would still be eligible for some IDEA funds (e.g., based on enrollments and the number of students in poverty). These funds would allow the new LEA to conduct Child Find activities and serve any students who are indentified for special education later in the year.

b) Base Payment Adjustment - § 300.705(b)(2)

The Department proposed that an LEA, *including a public charter school that operates as an LEA*, that receives a base payment of zero in its first year of operation, would be entitled to a base payment adjustment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities.

Comment

NSBA supports clarification that LEAs, including those that do not serve any students with disabilities are entitled to base pay adjustments. **However, eligibility for public charter schools operating as LEAs should be made based on state law and its regulations governing charter schools, not federal law.** In our view, the current regulation regarding public charter schools operating as LEAs is not consistent with the current law, and therefore should be eliminated.

c) Reallocation of Funds - § 300.705(c)

The proposed amendments would provide that after a state distributes funds under Part B to an eligible LEA that is not serving any children with disabilities, the state must determine within a reasonable time frame prior to the end of the carry over period whether the LEA has obligated the funds. The state may choose to reallocate any of these funds not obligated by the LEA to other LEAs in the state or retain those funds for use at the state level to the extent the state has not reserved the maximum amount of funds it is permitted to reserve for state level activities.

Comment

NSBA is concerned that an LEA currently not serving any children with disabilities might still need the Part B funds to conduct other activities such as Child Find or to serve students who are identified later in the year. We recommend that the state be authorized to reallocate the funds or retain them for state level activities **only after consulting with the LEA** to assess its needs and determining that the funds are not needed by the LEA.

7. Allocation of Funds under Section 619 of IDEA to LEAs That Are Not Serving Any Children with Disabilities - § 300.815

a) Subgrants to LEAs

The proposed amendments would add language to clarify that states are required to make a subgrant under section 619(g) of the Act to eligible LEAs, including public charter schools that operate as LEAs, that are responsible for providing education to children aged three through five (preschool), even if an LEA is not serving any preschool children with disabilities. This is to ensure that LEAs have funds to conduct child find activities or to serve preschool children with

disabilities who subsequently enroll or are identified during the year. If the state determines that a newly-created LEA is not serving any preschool children with disabilities, the newly created LEA would not be entitled to a base payment.

Comment

See NSBA comments under Proposed Regulation § 300.705(a).

b) Base payment adjustments

The Department proposed that an LEA, including a public charter school that operates as an LEA that receives a base payment of zero in its first year of operation, would be entitled to a base payment adjustment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any preschool children with disabilities.

Comment

See NSBA comments under Proposed Regulation § 300.705 (b)(2).

c) Reallocation of funds

The Department proposed that after a state distributes funds under Part B Section 619 to an eligible LEA that is not serving any preschool children with disabilities, the state must determine within a reasonable time frame prior to the end of the carry over period whether the LEA has obligated the funds. The state may choose to reallocate any of these funds not obligated by the LEA to other LEAs in the state or retain those funds for use at the state level to the extent the state has not reserved the maximum amount of funds it is permitted to reserve for state level activities.

Comment

See NSBA comments under Proposed Regulation § 300.705(c).

Thank you for the opportunity to comment. Questions regarding our comments may be directed to Katherine Shek, Legislative Analyst, at 703-535-1627, or by e-mail, kshek@nsba.org.

Sincerely,



Michael A. Resnick
Associate Executive Director

MAR: rf/kc
G:Adv/IDEA/07.28.08CommentsonProposedRegs