

N A M E

National Alliance for Medicaid in Education, Inc.

NAME Governmental Affairs & Public Relations Committee

Parental Consent to Access Medicaid 34CFR § 300.154(d)(2)(iv)(A)

Proposed Change in Medicaid Parental Consent Regulation

On September 28, 2011, the Office of Special Education and Rehabilitative Services posted a proposed regulation in the *Federal Register* that will change the IDEA regulation requiring schools to obtain parental consent prior to billing Medicaid for health-related IEP services. The proposed regulation can be found at:

<http://www.gpo.gov/fdsys/pkg/FR-2011-09-28/pdf/2011-22784.pdf>

The 60 day comment began on September 28, 2011 and closes December 12, 2011.

Instructions for submitting comments:

Comments must be received on or before December 12, 2011.

For your convenience you may submit your comments electronically through the Federal eRulemaking Portal or via postal mail (US Postal Service), commercial delivery, or hand delivery. Comments cannot be submitted by fax or by e-mail. Please submit your comments only one time, to avoid duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket are available on the site under "How To Use This Site."
- *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to:

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

The following information will provide you with suggested topic areas to discuss for anyone interested in providing "Official Comments". (**Note:** *This information is not intended as legal advice and is for informational purposes only.*)

Under the 1974 Family Educational Rights and Privacy Act (FERPA) and implementing regulations, LEAs are required to obtain parental consent prior to disclosing personally identifiable student information maintained in a student's education records. Since 1990, LEAs have billed Medicaid for covered services provided pursuant to a Medicaid-eligible student's individualized education program (IEP) prepared in accordance with IDEA. A 1997 advisory letter from DOE clarified that FERPA requires LEAs to obtain written and signed parental consent prior to disclosing personally identifiable student information to a state Medicaid agency for Medicaid billing purposes; however, the frequency of consent was not specified. Subsequent DOE advisory letters confirmed this policy.

OSERS' 2006 regulations to implement the 2004 reauthorization of IDEA included a new requirement, at 34 CFR 300.154(d)(2)(iv)(A), that LEAs must obtain parental consent "each time" access to a student's Medicaid benefits is sought. The new frequency requirement caused confusion and consternation as most LEAs submit student information to their respective state Medicaid agencies for billing purposes at least monthly. A strict interpretation of the new regulation would require LEAs to obtain consent multiple times each year. OSERS subsequently provided, in non-legally binding advisory letters, that "each time" means at least annually and any time during the year that services are increased.

Although helpful, the OSERS clarification still imposed significant administrative and financial burdens on LEAs in attempting to comply with the requirement.

In the Preamble to the proposed amendment to eliminate the "each time" requirement, OSERS acknowledged the deluge of statements of concern it received about the burdens faced by LEAs because of the increased frequency of obtaining consent to bill Medicaid. OSERS particularly acknowledged information presented by the National Alliance for Medicaid in Education (NAME) based on NAME's 2009 Biennial Survey that collected information from education and Medicaid agencies. According to the Preamble, the NAME Survey results effectively demonstrated to OSERS that "the regulation requiring parental consent to bill Medicaid each time that access to public benefits or insurance is sought had a direct negative effect on an LEA's ability to bill Medicaid" for covered services provided to Medicaid-eligible students. OSERS pointed out that IDEA specifically intended that Medicaid payments would be available to LEAs to the extent consistent with Medicaid law.

Although parental consent to bill Medicaid is still required under the proposed amendment to 34 CFR 300.154(d)(2)(iv), the frequency of obtaining consent is not dictated, consistent with FERPA. Under the proposed amendment, the LEA would be required to provide parents with a one-time written notice that includes each of the following assurances:

1. Parental consent must be obtained in accordance with FERPA and IDEA before the LEA can disclose personally identifiable student information to the Medicaid agency for billing purposes.
2. The LEA may not require the parents to enroll in Medicaid, incur out-of-pocket expenses such as deductibles or co-payments, or use the student's Medicaid benefits if that use would negatively impact benefits.
3. Parents have the right under FERPA to withdraw their consent at any time.
4. The withdrawal or refusal of consent does not relieve the LEA of its responsibility to provide required IDEA related services at no cost to the parents.

In the Preamble to the proposed amendment, OSERS states that “Thus, under these proposed regulations, the public agency would no longer be required to obtain parental consent each time that it seeks access to public benefits or insurance...The exact timing and frequency of a public agency's provision of the one-time written notification to the parent would be at the discretion of the public agency, so long as the public agency provides the notification before the public agency seeks access to the child's or parent's public benefits or insurance.”

LEAs, individuals and other concerned parties interested in submitting comments should carefully review the instructions on the first page of Federal Register, Vol. 76, No. 188 at: <http://goo.gl/AK0nV>. In making comments in support of the proposed amendment, you are encouraged to:

- Specify that the comments are in response to OSERS' proposed amendment to 34 CFR § 300.154(d)(2)(iv) as published at FR Vol. 76, No. 188.
- Thank OSERS for addressing the LEA's financial and administrative burdens, as documented by NAME, as well as the burden placed on families in the LEAs efforts to comply with the “each time” requirement in the existing regulation.
- Express support for OSERS' efforts to comply with mandates from the President to reduce regulatory burdens by eliminating the “each time” requirement in its existing regulation.
- Affirm that the proposed amendment would help OSERS to increase the potential benefits under IDEA Part B by supporting Medicaid payments to LEAs for IDEA related services while still preserving the effective and efficient administration of the program.
- Verify that the proposed one-time parent notification would be significantly less burdensome and less costly than the current “each time” requirement while specifically protecting parents' and students' rights and interests under IDEA, FERPA and the Medicaid program.
- Confirm that you understand that the one-time parent notification must be provided before accessing a student's Medicaid benefits and that the notification must contain each of the statements specified in the proposed amendment to protect students' right to a free appropriate public education under IDEA.

- Confirm that you support the protections OSERS afforded to parents in 34 CFR § 300.154(d)(2)(i), (ii), and (iii) and that the LEA understands that those protections would remain in effect under the proposed amendment.
- Express your support of OSERS' proposal to allow the LEA flexibility in determining the most appropriate and convenient method for providing the written notification to families rather than requiring a specific time or meeting.
- Express your appreciation that the proposed amendment is clearly stated and easy to understand which will facilitate implementation.

Details and experiences specific to you should be included in comments as appropriate.

John Hill

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