




TO: The Honorable the Members of the Board of Regents
FROM: Ken Slentz 
SUBJECT: Approval of Proposed Amendment to Section 200.5 of the Regulations of the Commissioner of Education Relating to Prior Written Notice and Parental Consent for the Use of Public Benefits or Insurance

DATE: June 10, 2013

AUTHORIZATION(S):



SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt the proposed amendment of section 200.5 of the Regulations of the Commissioner of Education to conform to federal regulations relating to parental consent for the use of public benefits or insurance?

Reason(s) for Consideration

Required by federal regulation.

Proposed Handling

The proposed amendment will be submitted to the Full Board for action at the June 2013 meeting.

Procedural History

The proposed amendment was discussed at the April 2013 Regents meeting. A Notice of Proposed Rule Making was published in the State Register on April 10, 2013. Public hearing sessions were held in Brooklyn on May 13, 2013 and in Albany and Syracuse on May 14, 2013. The Department received two comments on the proposed amendments. A copy of the proposed rule and an Assessment of Public Comment are

attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Effective March 18, 2013, an amendment to the federal regulations implementing Part B of the Individuals with Disabilities Education Act (IDEA) was enacted relating to parental consent to access public benefits or insurance (e.g., Medicaid). The proposed amendment will conform the Regulations of the Commissioner of Education to be consistent with federal regulations.

The proposed amendment would provide relief to school districts who are currently required to obtain parental consent prior to each time access to a parent's public benefits or insurance is sought to pay for special education and related services necessary to provide a free appropriate public education (FAPE) to a student with a disability. This means that districts and municipalities must obtain the written consent of the parent to access public benefits or insurance whenever there is a change in services in a student's individualized education program and at least annually. Districts have reported that obtaining consent at this frequency is an administrative burden and results in a significant loss of revenue when consent can not be obtained.

Consistent with newly amended federal regulations, the proposed amendment will simplify procedures for districts and municipalities to access public benefits while at the same time continue to protect family rights. Specifically, the proposed amendment will require that public agencies:

1. obtain written consent from the parent before accessing the child's or the parent's public benefits or insurance for the first time; and
2. prior to obtaining consent for the first time and annually thereafter, parents must be provided with a written notification that ensures that they are fully informed of their rights before a public agency can access public benefits or insurance to pay for services under IDEA.

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That paragraphs (8) and (9) of subdivision (b) of section 200.5 of the Regulations of the Commissioner of Education be amended, as submitted, effective July 3, 2013.

Timetable for Implementation

If adopted at the June Regents meeting, the proposed amendment will become effective July 3, 2013.

Attachments

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 305, 4402 and 4403.

1. Subparagraph (v) of paragraph (1) of subdivision (b) of section 200.5 of the Regulations of the Commissioner of Education is repealed, effective July 3, 2013.

2. Paragraphs (8) and (9) of subdivision (b) of section 200.5 of the Regulations of the Commissioner of Education are added, effective July 3, 2013, as follows:

8. Students with disabilities who are covered by public benefits or insurance.

(i) Consent. Prior to accessing a student's or parent's public benefits or insurance for the first time, after providing notification to the student's parents consistent with subparagraph (ii) of this paragraph, the school district must obtain the written consent of the parent, consistent with the confidentiality requirements of sections 99.30 and 300.622 of the Code of Federal Regulations (Code of Federal Regulations, 2012 edition, title 34, sections 99.30 and 300.622, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2012 - available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234), which consent must specify the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular student), the purpose of the disclosure (e.g., billing for special education services), and the agency to which the disclosure may be made (e.g., the State's public benefits or insurance program, such as Medicaid or Supplemental Security Insurance); and specify that the parent understands and agrees that the public agency may access the parent's or student's public benefits or insurance to pay for services under this Part.

(ii) Notification. Prior to accessing a student's or parent's public benefits or insurance for the first time, and annually thereafter, the school district must provide the student's parents with written notification, consistent with the requirements of subdivision (a)(4) of this section, that includes:

(a) a statement of the parental consent provisions in subparagraph (i) of this paragraph;

(b) a statement that the parents are not required to sign up for or enroll in public benefits or insurance programs in order for their child to receive a free appropriate public education under Part B of the Individuals with Disabilities Education Act;

(c) a statement that the parents are not required to incur an out-of-pocket expense, such as the payment of a deductible or co-pay amount, incurred in filing a claim for services pursuant to this Part;

(d) a statement that the school district may not use the student's benefits under a public benefits or insurance program if that use would:

(1) decrease available lifetime coverage or any other insured benefit;

(2) result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the student outside of the time the student is in school;

(3) increase premiums or lead to the discontinuation of benefits or insurance; or

(4) risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures;

(e) a statement that the parents have the right, pursuant to Parts 99 and 300 of Title 34 of the Code of Federal Regulations, to withdraw their consent to disclosure of

their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) at any time; and

(f) a statement that the withdrawal of consent or refusal to provide consent under Parts 99 and 300 of Title 34 of the Code of Federal Regulations to disclose personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) does not relieve the school district of its responsibility to ensure that all required services are provided at no cost to the parents.

(9) Students with disabilities who are covered by private insurance. With regard to services required to provide a free appropriate public education to an eligible student under this Part, a school district may access the parents' private insurance proceeds only if the parents provide consent consistent with section 200.1(l) of this Part. Each time the school district proposes to access the parents' private insurance proceeds, the school district must obtain such parental consent, and inform the parents that their refusal to permit the school district to access their private insurance does not relieve the school district of its responsibility to ensure that all required services are provided at no cost to the parents.

PROPOSED AMENDMENT OF SECTION 200.5 OF THE REGULATIONS OF THE
COMMISSIONER OF EDUCATION PURSUANT TO SECTIONS 207, 305, 4402 AND
4403 OF THE EDUCATION LAW, RELATING TO PRIOR WRITTEN NOTICE AND
PARENTAL CONSENT FOR THE USE OF PUBLIC BENEFITS OR INSURANCE
ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on April 10, 2013, the State Education Department (SED) received the following comments on the proposed amendment.

1. COMMENT:

Clarify the provisions and protections that will be in place to ensure that the rights of the parents are protected.

DEPARTMENT RESPONSE:

Parents continue to be protected pursuant to the requirements 34 CFR section 99.30 and section 300.622 as the regulatory requirements provide for written parental consent to access public benefits and insurance. Parental consent to bill insurance must be informed parent consent. The regulations also provide for notification of parental rights prior to accessing public benefits for the first time and annually thereafter. In addition to the parental protections provided in the proposed regulations, the State Medicaid agency or other public benefits or insurance is already responsible for monitoring schools and local education agencies to ensure public benefits and insurance billing is consistent with the special education services provided to the student. The State Education Department monitors public agencies' implementation of the Individuals with Disabilities Education Act (IDEA) and Part B regulations and

ensures timely correction of any identified noncompliance. We believe all of these protections help to ensure public agency accountability under IDEA.

2. COMMENT:

The timing of the proposed amendment may require a change to the consent forms and the process has already begun. Many districts will require some time to make the changes. The counties have concerns over how this will be implemented.

DEPARTMENT RESPONSE:

A public agency that has on file a parental consent that meets the requirements prior to the adoption of the new State and federal regulations will not be required to obtain a new parental consent following the publication of the final regulations, as long as the type or amount of services that the public agency will bill to the public insurance or the amount the public agency charges to the public benefits or insurance program does not change. The first time any of the previously stated services or charges change after the effective date of the new regulations the public agency will need to provide a written notification prior to the one time consent consistent with the specifications in the proposed regulation.

3. COMMENT:

The one time written consent will limit the opportunities for families to know when special education services are being billed, the cost of the services and the knowledge of when problems with billing arise.

DEPARTMENT RESPONSE:

The one time consent and annual notification thereafter, does not eliminate the parent's right to inspect and review all education records with respect to the

identification, evaluation, and educational placement of the student and the provision of a free appropriate public education to the student.

4. COMMENT:

During the next five years, NYS is implementing many changes within the system that Medicaid uses to fund services for individuals with developmental disabilities. Any details are not yet known. How do we know that allowing school districts to continually tap into the monies of one set of Medicaid-funded services will not jeopardize another set of funded service?

DEPARTMENT RESPONSE:

Although future changes in the present Medicaid system cannot be predicted, the notification requirements clearly indicate that a school district may not use the student's public benefits if using them will decrease available lifetime coverage, result in the family paying for services that would otherwise be covered by the public benefit and are required for the student outside of the time the student is in school, increase premiums or lead to discontinuation of benefits, or risk eligibility for home and community-based waivers, based on aggregated health-related expenditures.

5. COMMENT:

Require that the school district inform parents, on a monthly basis, as to those special education services provided at school that were billed to Medicaid, paid for by Medicaid and listing the cost of each service; and inform parents within 48 hours of a known billing or administration issue, along with contact information of people who can provide more information and create an online tool parents can access to gain this information.

DEPARTMENT RESPONSE:

We believe that requiring that districts inform parents of the above information on a monthly basis would place an unnecessary and undue burden on the school district. The proposed regulations do not eliminate the parent's right to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a free appropriate public education to the student.

6. COMMENT:

The NYC Department of Education (DOE) uses large volumes of resources each year to obtain a signed consent form, often from the same families year after year. By allowing for a signature to be obtained once will allow for a better and more timely use of DOE resources in regards to serving students. Families will still have the opportunity to opt out with no impact on the services for their children. Annual written notification will provide a family with the choice of continuing to allow consent for the DOE to access a family's public benefits with no additional action needed. If a family has changed their mind, they will be able to contact their child's school to change their consent status. The new regulation has no real de facto impact on Medicaid claiming requirements; consent is still needed, and notification will be provided to a parent prior to accessing benefits. Rather, this new regulation allows for more efficient guidelines in how the consents will be obtained, and eases the administrative burden of these efforts. For example, the DOE currently has over 108,000 signed consent forms; the DOE appreciates that not having to continue obtain this volume of consents annually will allow for more resources to be dedicated to supporting student achievement.

DEPARTMENT RESPONSE:

Comments are supportive and no response is necessary.